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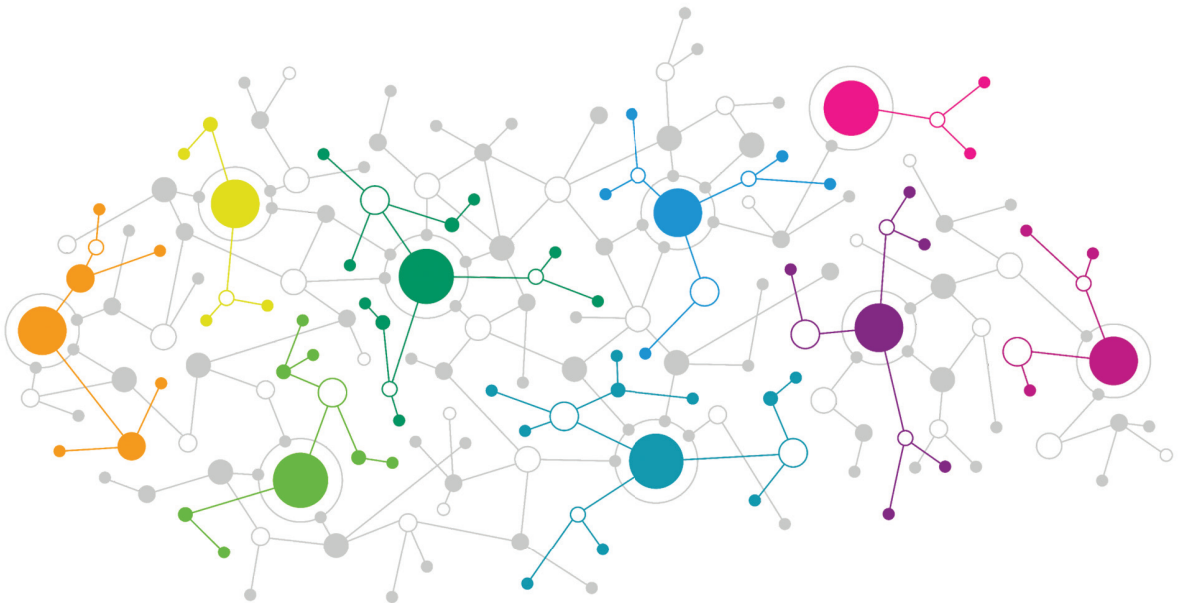
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COLLECTIVE REDRESS MECHANISMS IN CONSUMER PROTECTION IN THE EUROPEAN UNION AND SOUTH EAST EUROPE -COMPARATIVE STUDY -





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Imprint

Published by the

Deutsche Gesellschaft für
Internationale Zusammenarbeit (GIZ) GmbH

Registered offices

Bonn and Eschborn, Germany

‘Open Regional Fund for South East Europe-Legal Reform’

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Design and printing

Print house Evropa 92 Dooel

Skopje

Circulation

100 copies

The content of this Book reflects personal opinion, experience and viewpoints of the authors and it does not correlate to the standpoint and the editing policy of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

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On behalf of the

German Federal Ministry for Economic Cooperation and Development (BMZ)

CIP - Каталогизација во публикација

Национална и универзитетска библиотека “Св. Климент Охридски”, Скопје

366.5(4-12:4-672.EУ)

COLLECTIVE redress mechanisms in consumer protection in the European union and South East Europe : comparative study / [authors Duncan Fairgrieve ... [и др.] ; editor Veronika Efremova]. - Skopje : GIZ, 2018. - 432 стр. : илустр. ; 30 см

Фусноти кон текстот. - Библиографија кон трудовите

ISBN 978-608-4536-20-8

а) Потрошувачи - Заштита - Европска унија б) Потрошувачи - Заштита
-Југоисточна Европа
COBISS.MK-ID 106874890



Published by



In cooperation with



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SKOPJE, MARCH 2018

TABLE OF CONTENTS

FOREWORD	17
PART ONE - COLLECTIVE REDRESS MECHANISMS IN THE EU: A COMPARATIVE STUDY OF SELECTED EUROPEAN MEMBER STATES	20
Introduction	22
Scope of the Report	22
Methodology	22
1. EU Approach to Collective Redress	23
Green Paper on Consumer Collective Redress 2008	23
Directive on Injunctions	24
ADR Directive	24
Further Consultations	24
Commission Recommendation	25
Commission Communication	26
Antitrust Damages Directive	26
2. Approach of EU Member States to Collective Redress	27
Belgium	27
England&Wales	33
France	43
Germany	51
The Netherlands	61
Sweden	73
3. Concluding comments	84
4. Bibliography	85
PART TWO - COLLECTIVE REDRESS IN CONSUMER PROTECTION IN SOUTH EAST EUROPE: COUNTRY REPORTS	89
Collective redress in consumer protection in Albania	90
Executive summary	91
1. National compliance with the relevant EU acquis	93
1.1 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests	94
1.2 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes	95
Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union	96
1.4 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law	97
2. Legal framework for collective redress	98

2.1 General description	98
2.2 Applicable areas for collective redress	99
2.3 Applicable procedure(s) for collective redress according to the national legislation	99
2.4 Available remedies for collective redress according to the national legislation	105
2.5 Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organizations to initiate the procedure	108
2.6 Sectoral collective redress mechanisms	109
a. The Law on the rights of the patient	109
b. Food safety	111
c. Safety of products	112
2.7 Legislative consultations and reform proposals	114
a. Legislative proposals	114
3. Institutional framework for collective redress	115
3.1 Overview of legal provisions determining stakeholders in implementing collective redress	115
3.2 Stakeholders responsible for putting collective redress into practice	116
3.3 Mapping the cooperation among stakeholders	116
4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress	122
4.1 The role and competences	122
4.2 Case law and best practices in collective redress	125
5. The role of consumer organizations in collective redress	128
5.1 Legal precondition for consumer organisations' activities to represent consumer rights in collective redress	128
5.2 Assessment of the environment for consumer organisations to deal with collective redress	128
5.3 Prerequisites for awareness raising toward consumers in collective redress	130
6. Recommendations and conclusions	131
7. Bibliography	135
Collective redress in consumer protection in Bosnia and Herzegovina	139
Executive summary	140
1. National compliance with the relevant EU acquis	145
1.1 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests	145
1.2 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes	147
1.3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing action for damages under national law for infringement of the competition law provisions of the Member States	148
1.4 Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union Law	149

2. Legal framework for collective redress	152
2.1 General description	152
2.2 Applicable areas for collective redress	154
2.3 Applicable procedure(s) for collective redress according to the national legislation	155
2.4 Available remedies for collective redress according to the national legislation	157
2.5 Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organizations to initiate the procedure	159
2.6 Sectoral collective redress mechanisms	161
a. Consumer law	161
b. Competition law	165
c. Capital market law	167
d. Patients' rights	172
e. Food safety	175
f. Product safety	176
g. Environmental protection law	179
h. Other areas	182
h.a. Antidiscrimination law	182
h.b. Combating late payment in commercial transactions	185
2.7 Legislative consultations and reform proposals	185
a. Legislative proposals	185
3. Institutional framework for collective redress	185
3.1 Overview of legal provisions determining stakeholders in implementing collective redress	185
3.2 Stakeholders responsible for putting collective redress into practice	187
3.3 Mapping the cooperation among stakeholders	190
4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress	190
4.1 The role and competences	190
4.2 Case law and best practices in collective redress	194
5. The role of consumer organizations in collective redress	196
5.1 Legal precondition for consumer organisations' activities to represent consumer rights in collective redress	196
5.2 Assessment of the environment for consumer organisations to deal with collective redress	199
5.3 Prerequisites for awareness raising toward consumers in collective redress	202
6. Recommendations and conclusions	203
7. Bibliography	209
Collective redress in consumer protection in Kosovo	213
Executive summary	214
1. National compliance with the relevant EU acquis	215
1.1 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests	215

1.2 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes	216
1.3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing action for damages under national law for infringement of the competition law provisions of the Member States	216
1.4 Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union Law	217
2. Legal framework for collective redress	218
2.1 General description	218
2.2 Applicable areas for collective redress	219
2.3 Applicable procedure(s) for collective redress according to the national legislation	220
2.4 Available remedies for collective redress according to the national legislation	221
2.5 Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organizations to initiate the procedure	223
2.6 Sectoral collective redress mechanisms	224
a. Consumer law	224
b. Competition law	224
c. Financial market law	225
d. Patients' rights	225
e. Food safety	226
f. Product safety	226
g. Law on protection of environment	227
h. Other areas	228
h.a. Law on protection from discrimination	228
2.7. Legislative consultations and reform proposals	229
a. Legislative proposals	229
3. Institutional framework for collective redress	229
3.1 Overview of legal provisions determining stakeholders in implementing collective redress	229
3.2 Stakeholders responsible for putting collective redress into practice	230
3.3 Mapping the cooperation among stakeholders	231
4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress	232
4.1 The role and competences	232
4.2 Case law and best practices in collective redress	233
5. The role of consumer organizations in collective redress	233
5.1 Legal precondition for consumer organisations' activities to represent consumer rights in collective redress	233
5.2 Assessment of the environment for consumer organisations to deal with collective redress	234
5.3 Prerequisites for awareness raising toward consumers in collective redress	235

6. Recommendations and conclusions	235
7. Bibliography	237
Collective redress in consumer protection in Macedonia	239
Executive summary	240
1. National compliance with the relevant EU acquis	243
1.1 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests	243
1.2 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes	245
1.3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing action for damages under national law for infringement of the competition law provisions of the Member States	246
1.4 Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under Union Law	247
2. Legal framework for collective redress	248
2.1 General description	248
2.2 Applicable areas for collective redress	250
2.3 Applicable procedures for collective redress according to the national legislation	250
2.4 Available remedies for collective redress according to the national legislation	255
2.5 Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organizations to initiate the procedure	255
2.6 Sectoral collective redress mechanisms	256
a. Consumer law	256
b. Competition law	263
c. Financial market law	267
d. Patients' rights	267
e. Food safety	268
f. Product safety	268
g. Right to environmental protection	268
h. Other areas	270
2.7. Legislative consultations and reform proposals	271
a. Legislative proposals	271
3. Institutional framework for collective redress	271
3.1 Overview of legal provisions determining stakeholders in implementing collective redress	271
3.2 Stakeholders responsible for putting collective redress into practice	274
3.3 Mapping the cooperation among stakeholders	276
4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress	277
4.1 The role and competences	277
4.2 Case law and best practices in collective redress	281
5. The role of consumer organizations in collective redress	283

5.1 Legal precondition for consumer organisations' activities to represent consumer rights in collective redress	283
5.2 Assessment of the environment for consumer organisations to deal with collective redress	285
5.3 Prerequisites for awareness raising toward consumers in collective redress	286
6. Recommendations and conclusions	288
7. Bibliography	291
Collective redress in consumer protection in Montenegro	295
Executive summary	296
1. National compliance with the relevant EU acquis	299
1.1 Introduction	299
1.2 Directive 2009/22/EC of the European Parliament and of the Council of 26 April 2009 on injunctions for the protection of consumers' interests	299
1.3 Directive 2013/11/EC of the European Parliament and of the Council of 21 May 2013 on alternative dispute settlement	300
1.4 Directive 2014/104/EC of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union	301
1.5 Commission Recommendation 2013/396/EC of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law	302
2. Legal framework for collective redress	304
2.1 General description	304
2.2 From the principle in dubio contra proferentem to the action for the protection of the collective interests of consumers - a review of the development of the system of consumer protection in Montenegro since independence in 2006	305
2.3 Applicable areas for collective redress	306
2.3.1 In general	306
2.3.2 Special rules of procedure for lawsuits for the protection of collective interests of consumers	307
2.4 Available remedies for collective redress according to the national legislation	311
2.5 Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organisations to initiate the procedure	312
2.6. Other areas of application of the collective protection system in Montenegro - Collective complaint for protection against discrimination	315
2.7 Legislative consultations and reform proposals	317
3. Institutional framework for collective redress	318
3.1 Overview of legal provisions determining stakeholders in implementing collective redress	318
3.2 Stakeholders responsible for putting collective redress into practice	320
3.3 Mapping the cooperation among stakeholders	321
4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress	323

4.1 The role and competencies	323
4.2 Case law and best practices in collective redress	327
5. The role of consumer organisations in collective redress	327
5.1 Legal precondition for consumer organisations' activities to represent consumer rights in collective redress	327
5.2 Assessment of the environment for consumer organisations to deal with collective redress	330
5.3 Prerequisites for awareness raising toward consumers in collective redress	331
6. Recommendations and conclusions	333
7. Bibliography	336
Collective redress in consumer protection in Serbia	339
Executive Summary	340
1. National compliance with the relevant EU acquis	342
1.1 Directive 2009/22/EC of the European Parliament and of the Council of the 23rd April 2009 on injunctions for the protection of the consumers' interests	342
1.2 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes	343
1.3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union	344
1.4 Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law	345
2. Legal framework for collective redress	347
2.1 General description	347
2.2 Applicable areas for collective redress	349
2.3 Applicable procedure(s) for collective redress according to the national legislation	350
2.4 Available remedies for collective redress according to the national legislation	351
2.5 Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organisations to initiate the procedure	353
2.6 Sectoral collective redress mechanisms	354
a. Consumer protection act	354
b. Law on protection of competition	355
c. Law on the capital market	355
d. Law on patients' rights	355
e. Food safety law	356
f. General product safety act	356
g. Law on environmental protection	357
2.7 Legislative consultations and reform proposals	357
a. Legislative proposals	357
3. Institutional framework for collective redress	358
3.1 Overview of legal provisions determining stakeholders in implementing	

collective redress	358
3.2 Stakeholders responsible for putting collective redress into practice	360
3.3 Mapping the cooperation among stakeholders	362
4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress	362
4.1 The role and competencies	362
4.2 Case law and best practices in collective redress	367
5. The role of consumers organisations in collective redress	370
5.1 Legal precondition for consumer organisations' activities to represent consumer rights in collective redress	370
5.2 Assessment of the environment for consumer organisations to deal with collective redress	371
5.3 Prerequisites for awareness raising toward consumers in collective redress	372
6. Recommendations and conclusions	372
7. Bibliography	375

PART THREE – COMPARATIVE OVERVIEW OF COLLECTIVEREDRESS IN CONSUMER PROTECTION IN SOUTH EAST EUROPE: CROSS-NATIONAL COMPARISONS, ISSUES OF COMMONALITY AND DIFFERENCE

Executive Summary	380
1. National compliance with the relevant EU acquis	384
1.1 Directive 2009/22/EC of the European Parliament and of the Council of the 23rd April 2009 on injunctions for the protection of the consumers' interests	384
1.2 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes	386
1.3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union	387
1.4 Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law	388
2. Legal framework for collective redress	390
2.1 Applicable areas for collective redress	391
2.2 Applicable procedures for collective redress	391
2.3 Available remedies for collective redress	393
2.4 Costs and financing of the procedure for collective redress	396
2.5 Sectoral collective redress mechanisms	398
2.6 Legislative consultations and reform proposals	401
3. Institutional framework for collective redress	402
3.1 Overview of stakeholders responsible for putting collective redress into practice	402
3.2 Mapping the cooperation among stakeholders	405
4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress	408

4.1 The role and competencies	408
4.2 Case law and best practices in collective redress	411
5. The role of consumers organisations in collective redress	413
5.1 Legal precondition for consumer organisations' activities to represent consumer rights in collective redress	414
5.2 Assessment of the environment for consumer organisations to deal with collective redress	416
5.3 Prerequisites for awareness raising toward consumers in collective redress	418
6. Recommendations and conclusions	420
7. Bibliography	425
PART FOUR – CONCLUSIONS AND RECOMENDATIONS	430
Conslusions and recommendations	431

FOREWORD

In recent years the European Union made substantial progress in the field of collective redress through adoption of numerous measures for defending consumers' collective rights. Collective redress entails several areas of consumer protection: consumer rights, consumer credit, package travel, unfair commercial practice, unfair terms in consumer contracts, sale of consumer goods and associated guarantees.

South East European (SEE) countries, in line with EU accession priorities and duties under Stabilisation and Association Agreements, have harmonized their national laws with the relevant EU *acquis* for consumer protection (Chapter 28: Health and Consumer) and have transposed Directive 2009/22/EC on injunctions for the protection of consumers' interests into their national legal systems.

With regards to the collective redress mechanisms for consumer protection, SEE countries have introduced rudimentary instruments with modest enforcement of collective redress and case law. Existing collective redress mechanisms do not provide sufficient or effective access to justice for a wide range of citizens, particularly but not exclusively consumers, small businesses and employees wishing to bring collective claims. Furthermore, the applicable collective redress mechanisms are precluded by lack of appropriate legal basis, insufficient awareness of the responsible stakeholders, lack of expertise, knowledge and skills to deal with collective redress procedure, insufficient information of citizens and consumers and lack of financial sources of consumer protection organizations.

The respective institutions and consumer protection organizations in SEE countries need skills and knowledge for conducting a systematic legal reform of national legislation in the domain of collective redress and its efficient enforcement. In this regards the EU legislation and best practices for collective redress mechanisms will support SEE countries to move forward and achieve their national priorities to improve legal and institutional frameworks in order to provide efficient protection of collective consumer interests.

Aiming to facilitate the process of better enforcement of collective redress in consumer protection in SEE countries, the regional sub project "Development of collective redress for consumers in South East Europe" was launched in January 2017 with a duration until October 2018. The project is implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, under the umbrella of the Open Regional Fund for South East Europe - Legal Reform and has as key partners the South East European Law School Network (SEELS), Consumer Organisations Network for South East Europe (ConWeB) and the British Institute of International and Comparative Law (BIICL). The overall objective of the sub project is to strengthen regional cooperation in the field of collective redress for consumer protection in South East Europe.

In the framework of the project, comparative research on "Collective redress mechanisms in light of the European Commission Recommendation (2013/396/EU) on common principles for injunctive and compensatory collective redress mechanisms, emphasizing cross-national comparisons, underlining issues of commonality and difference (focus on damage claims)" was conducted in six EU countries (Belgium, France, Germany, the Netherlands, Sweden and England/Wales) and six SEE countries

(Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia). The research was carried out by twelve national experts (nine professors in law from the SEELS Network, one independent expert, one representative from an international organisation and one NGO representative from the ConWeb Network) and two international experts and eleven national rapporteurs from BIICL. The focus of the research was on the EU approach to collective redress, EU Member States' approach to collective redress, national compliance of SEE countries with the relevant EU consumer acquis, national legal and institutional framework for collective redress, the role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress, the role of consumer organisations in collective redress, cross-national comparisons and issues of commonality and difference.

On the base of deficiencies for collective redress enforcement in SEE countries that were detected within the research and established professional exchange between policy makers and relevant stakeholders, a Regional Action Plan for strengthening capacities of the responsible institutions and organisations for better application of collective redress and handling collective claims is prepared. The Regional Action Plan focuses on development and delivery of three training modules: 1. Management of proceedings (case management) regarding how to handle collective redress cases; 2. Collective redress procedures through injunctions; and 3. Collective redress best practices and Alternative Dispute Resolution (ADR).

The papers compiled in this book present the expert's results and findings from the implemented comprehensive research and comparative overview of collective redress mechanisms in the European Union and in South East Europe. The book is structured into four parts: 1. Collective redress mechanisms in the EU: a comparative study of selected European Member States; 2. Collective redress in consumer protection in South East Europe: country reports; 3. Comparative overview of collective redress in consumer protection in South East Europe: cross-national comparisons, issues of commonality and difference; and 4. Conclusions and recommendations.

The book reflects the actual situation and progress made in the field and shall serve as a basis to improve the active role and responsibility of key national institutions for enforcement of collective redress for consumer protection in SEE countries and to strengthen regional cooperation between all relevant stakeholders aiming to improve institutional capacities to handle and increase case law in the field.

Last but not least, we express our gratitude to the researchers and to the distinguished legal experts for their contributions in setting up this compilation of legal analysis. We strongly believe this book will contribute to further academic research, will support the process of national legislation reform, will increase the knowledge of all stakeholders about collective redress and will support developing a functional system of collective redress on the national level in all SEE countries.

Skopje, March 2018.

Dr. Veronika Efremova
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Open Regional Fund for South East Europe-Legal Reform
Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

PART ONE
COLLECTIVE REDRESS MECHANISMS IN THE
EUROPEAN UNION:
A COMPARATIVE STUDY OF SELECTED
EUROPEAN MEMBER STATES



**COLLECTIVE REDRESS MECHANISMS IN THE
EUROPEAN UNION:
A COMPARATIVE STUDY OF SELECTED
EUROPEAN MEMBER STATES**

**Prepared by:
British Institute of International and Comparative Law**

Introduction

About the British Institute of International and Comparative Law

The British Institute of International and Comparative Law (BIICL) is a leading independent research centre and charity whose remit is to develop and advance the understanding of international and comparative law in the UK and around the world, and to promote the rule of law in national and international affairs. BIICL is unique in the UK and one of the foremost bodies of its kind around the world. The Institute is renowned for its applied research, events, training and publications.

Scope of the Report

BIICL has been commissioned to undertake comparative law research in relation to a selection of six key European Member States on the topic of Collective redress mechanisms in light of the European Commission Recommendation (2013/396/EU), with a focus principally on damage claims. The study will present comparative overview of collective redress in consumer protection in terms of legislative and institutional framework and legal practice in selected EU member states, with an emphasis on damages claims (Belgium, France, Germany, the Netherlands, Sweden and England / Wales). The findings and recommendations from the comparative legal analysis will provide the relevant institutions and organisations involved in the project a basis for exchange, which should lead to the development of a regional action plan for capacity building in collective redress proceedings for SEE countries. The BIICL team undertaking this project is made up of Duncan Fairgrieve, Eva Lein, Rhonson Salim, and Vincent Smith.

Methodology

This Report examines the issue of Collective Redress in six key European Member States. These jurisdictions were selected, within the relevant time constraints and availability of information, to ensure the representation of common and civil law jurisdictions and to illustrate a range of different approaches. The research work was undertaken on the basis of a desk-based exercise, drawing upon existing BIICL research on Collective Redress, as well as working with local experts so as to include updated information on Collective Redress legislation, reform initiatives and relevant case law.

In undertaking the study, the comparative law position is based on the findings of reports prepared by national rapporteurs, both internal to BIICL as well as external experts chosen for specific expertise in the field. Rapporteurs were as follows: Rhonson Salim (**European Union**); Olivier Vanhulst, Freshfields, Bruckhaus Deringer LLP, Brussels (**Belgium**); Vincent Smith and Mahdis Moeiri-Farsi (**England & Wales**); Duncan Fairgrieve and Constance Bonzé (**France**); Eva Lein (**Germany**); Ianika Tzankova, Eric Tjong Tjin Tai, Karlijn van Doorn and Charles Dybus (**the Netherlands**); Laura Ervo/Annina H. Persson (**Sweden**).

In a first section, we will examine the position at an EU level, tracing the development of Collective Redress within Europe, leading up to the adoption of the European Commission Recommendation 2013/396. We will then turn to the Member States and examine the position at a domestic level by analyzing the current regime for

Collective Redress in a series of EU countries, namely Belgium, the United Kingdom (with a focus on England & Wales), France, Germany, the Netherlands and Sweden.

1. EU Approach to Collective Redress

A variety of initiatives have been undertaken over the years at a European level regarding Collective Redress. An EU approach towards Collective Redress was first commenced in two areas of law, consumer protection and competition law. In the sphere of consumer protection, the Commission's Consumer Policy Strategy for 2007-2013 underlined the importance of consumer redress, indicating that it would consider "action on collective redress mechanisms for consumers both for infringements of consumer protection rules and for breaches of EU anti-trust rules."¹ A variety of reports and data-gathering exercises took place during this period.²

Green Paper on Consumer Collective Redress 2008

In response to these reports, the Commission published a Green Paper on Consumer Collective Redress in 2008.³ The purpose of this Green Paper was to assess the current state of redress mechanisms. Citing the goal to have effective mechanisms that work for both traders and consumers, the Commission presented 4 potential options:

1. Do nothing
2. Cooperation between MS whereby Member States having a collective redress mechanism open up their respective mechanisms to consumers from other Member States and that Member States who do not have a collective redress mechanism establish one and this is achieved through either a Recommendation or a Directive
3. Mix of binding and non-binding policy instruments such as Directives and/or Recommendations
4. An EU judicial collective redress procedure

Notwithstanding the Green Paper, European initiatives aimed at providing for collective actions in consumer claims have been pursued through the mechanism of EU Directives at a sectoral level. In this respect, two Directives are of note: the Directive on Injunctions and ADR Directive.⁴

1 EU Consumer Policy Strategy for 2007- 2013, COM (2007) 99 Final (13.3.2007) available at: http://ec.europa.eu/consumers/archive/overview/cons_policy/doc/EN_99.pdf (19.5.2017).

2 See for example, University of Leuven study on alternative means of consumer redress, including an overview of the national legal provisions on collective redress; Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union and Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems. See also an event on collective redress in Leuven on 29 June 2007 and a conference on collective redress organised by the Portuguese Presidency in November 2007. All items available at: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm (19.5.2017).

3 Green Paper on Consumer Collective Redress COM (2008) 794 final (27.11.2008) available at: http://ec.europa.eu/consumers/archive/redress_cons/greenpaper_en.pdf (19.5.2017).

4 Council Directive 2009/22/EC (23.4.2009) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009L0022> (19.5.17) and Council Directive 2013/11/EU (21.5.2013) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011> (19.5.2017).

Directive on Injunctions

The Directive on Injunctions⁵ is designed to promote the **defence of collective interests of consumers** in the internal market by providing that all Member States have in place injunction procedures **for stopping infringements of EU consumer rights**. The Directive allows consumer protection authorities and consumer organisations to act as the official representative of the collective interests of consumers. These entities can petition a court (or an administrative authority) and seek injunctive relief, that is, ‘an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement.’⁶ Injunctive relief can be sought to prohibit practices that infringe national and EU consumer protection rules, particularly those found in measures listed in Annex 1 of the Directive. One of such interests is the pursuance of ADR to resolve consumer disputes. This interest was inserted into the Directive on Injunctions by the ADR Directive. Pursuant to this latter Directive, EU consumers, on a voluntary basis, should be able to submit complaints against traders to entities offering independent, impartial, effective and fair alternative dispute resolution procedures.

ADR Directive⁷

The ADR Directive requires Member States to ensure that EU consumers can submit contractual disputes with an EU trader over a product or service to an alternative dispute resolution (ADR) entity, which is a recognised body whose role is to resolve disputes by means of ADR procedures. The Directive sets out binding quality requirements for ADR entities and compliance is ensured by national authorities. Traders are required to inform consumers about ADR when they cannot bilaterally resolve a dispute with the consumer and the trader has committed or is otherwise obliged to use ADR to resolve disputes. It is notable that this use of ADR is in line with Option 3 proposed in the Green Paper on Consumer Collective Redress.

However, the implementation of both Directives has not been uniform throughout Member States with successful outcomes limited in number. Whilst the importance of injunctive relief for the enforcement of the collective rights of consumers is not to be undervalued, measures to provide compensatory relief in collective consumer claims were sparse. Further consultations were subsequently undertaken.

Further Consultations

The Commission launched a further consultation in 2011 entitled ‘Towards a Coherent European Approach to Collective Redress’. The Commission noted that while many Member States had introduced collective redress procedures for compensatory relief, these varied widely across different jurisdictions. Divergences on issues such as the scope of the mechanism (sector specific/general), standing, opt-in or opt out

⁵ Council Directive 2009/22/EC (23.4.2009) on injunctions for the protection of consumers’ interests available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009L0022> (19.5.17).

⁶ Directive 2009/22/EC (23.4.2009), Arts 2-3.

⁷ Council Directive 2013/11/EU (21.5.2013) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011>

were noticeable⁸. In the light of the responses received during that consultation, the Commission published a Recommendation on 11 June 2013.⁹ The Recommendation seeks to achieve a coherent approach to Collective Redress across the EU without harmonising Member States' systems or creating binding obligations.

Commission Recommendation¹⁰

The overall objective of the Recommendation is to ensure that collective redress mechanisms are available where EU law grants rights to citizens and companies. Central to the design of the Recommendation is the need to ensure access to justice, while at the same time ensuring that appropriate safeguards are put in place to avoid abusive litigation. Whilst it does not stipulate a specific model of collective redress, the Recommendation sets out a number of principles on injunctive and compensatory collective redress to be applied in national collective redress systems. It contains principles that are applicable to both compensatory and injunctive collective redress as well as principles that are specific to each type of collective redress. Whilst it is intended that the principles apply horizontally in all areas where collective claims are made, the Commission singles out, in particular, the areas of consumer protection, competition, environment protection, protection of personal data, financial services and investor protection.

Some key principles of the Recommendation are:

'opt-in' principle to be used in compensatory collective redress claims. Under this principle, potential claimants who have not directly expressed their consent are not members of the group.

- There should be procedural safeguards to avoid abuse of collective redress systems. These include:
 - a ban on punitive damages;
 - entities representing claimants should not be profit-making;
 - conditions for standing of representative entities should be clear.
 - restrictions on the availability of funding by means of contingency fees and through third party funders.
- The losing party is required to pay the winning party's legal costs.
- Removal of national restrictions on admissibility and standing of foreign parties to collective actions.
- The use of collective ADR and settlements should be encouraged.
- Creation of a national registry of collective actions.

Member States are asked to implement the principles in their national legal systems by 26 July 2015. The Commission will review the implementation of the Recommendation's principles by July 2017.

⁸ EU Commission Consultation, 'Towards a Coherent European Approach to Collective Redress' SEC(2011)173 final (4.2.2011), available at: http://ec.europa.eu/justice/news/consulting_public/0054/sec_2011_173_en.pdf, (19.5.2017), para. 9.

⁹ Commission Recommendation 2013/396/EU (11.6.2013), available at: <http://eur-lex.europa.eu/eli/reco/2013/396/oj> (21.5.2017), p. 60–65.

¹⁰ Commission Recommendation 2013/396/EU (11.6.2013), available at: <http://eur-lex.europa.eu/eli/reco/2013/396/oj> (21.5.2017), p. 60–65.

Commission Communication

At the time of publication of the Recommendation, the Commission published an accompanying Communication.¹¹ The Communication engages with the opinions of stakeholders arising from the 2011 consultation and of the European Parliament. It also presents the Commission's position on a variety of policy areas underpinning or affecting the use of collective redress mechanisms within the EU. These include, the choice of opt in/opt out, standing, the effective provision of information to potential claimants and funding.

1. One notable issue addressed in the Communication was whether specific rules on jurisdiction and choice of law in collective redress actions were required. In light of the divergence of Member State opinions,¹² the Commission rejected the creation of uniform binding rules arguing that "existing rules [on jurisdiction, recognition and enforcement]... should be exploited."¹³ The Commission was not persuaded that it would be appropriate to introduce a choice of law rule for collective claims.¹⁴
2. The Commission's view of the US Class Action procedure influenced its conservative design of the Recommendation and Communication. In particular, the Commission was of the opinion that the availability of punitive damages, use of contingency fees, extensive discovery procedure and 'opt-out' nature of class action procedures in the US, encouraged defendants to settle claims without merit,¹⁵ thereby perpetuating abusive litigation. This was a consequence which the Commission wished to avoid in Europe.
3. Despite the conservative scope, the principles contained in the Recommendation (once implemented) provides support to other EU initiatives on compensatory redress in competition law. One such initiative is the Antitrust Damages Directive.¹⁶

Antitrust Damages Directive

Whilst the Antitrust Damages Directive does not expressly create a collective

11 Commission Communication: 'Towards a European Horizontal Framework for Collective Redress' (COM(2013) 401 final (11.6.2013) available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013DC0401> (21.5.2017).

12 For example, some Member States supported the idea of binding rules only in certain legal areas such as competition law (Sweden and the UK) or for cross-border claims only (Denmark).

13 Commission Communication: 'Towards a European Horizontal Framework for Collective Redress' (COM(2013) 401 final (11.6.2013), para. 3.7.

14 Commission Communication: 'Towards a European Horizontal Framework for Collective Redress' (COM(2013) 401 final (11.6.2013), para. 3.7.

15 Commission Communication: 'Towards a European Horizontal Framework for Collective Redress' (COM(2013) 401 final (11.6.2013), p. 7.

16 Council Directive 2014/104/EU (26.11.2014) governing actions for damages under national law for infringements of the competition law provisions, available at: <http://data.europa.eu/eli/dir/2014/104/oj> (22.5.2017).

redress mechanism,¹⁷ it optimises the interrelationship between public and private enforcement of EU competition law. Its objective is to facilitate private actions for antitrust damages while protecting the rights of the defendants and avoiding interference with the public enforcement of competition rules. The Directive aims to make it easier for victims of anti-competitive behaviour to seek compensation from infringing parties before national courts in all EU Member States, by introducing minimum rules for antitrust damages actions. It also seeks to make leniency programmes more efficient.

Key rules in the Directive include a requirement that Member States introduce a disclosure regime and a requirement that limitation periods should be at least five years.¹⁸ It stipulates that a national competition authority's final decision on an infringement automatically constitutes proof of that infringement before the courts of the EU country in which the infringement took place. These final national decisions can also be presented as evidence before another EU country's national court. The Directive also changes the burden of proof, creating a rebuttable presumption that cartels cause harm. As for liability, where several firms infringe the competition rules together, they are held jointly and severally liable for the entire damage.

Member States are required to transpose the Damages Directive into national law by 27 December 2016.

2. Approach of EU Member States to Collective Redress

Belgium

I. General Collective Redress Mechanism

1.1. General description

The Law of 28 March 2014 introduces a new section in the Economic Law Code (hereafter, the ELC) entitled 'actions for collective redress', also known as class actions (hereafter, the Law of 28 March 2014).¹⁹

These class actions allow for an aggregate of individual consumer claims to be brought in a single court proceeding. The introduction of this particular area of law has been discussed in Belgium for several years. It must be noted that this is the first time in Belgian law that a class action may be filed to obtain compensation for loss.

The most important objective of this new piece of legislation is the strengthening of the position of consumers. Prior to the Law of 28 March 2014, consumers were forced

¹⁷ In competition law, several prior initiatives were undertaken to develop compensatory collective redress. The Commission adopted a Green Paper on antitrust actions (Commission Green Paper, COM(2005) 672 (19.12.2005)) and a White Paper which included policy suggestions on antitrust specific collective redress (Commission White Paper on damages actions for breach of the EC antitrust rules., COM (2008) 165 (2.4.2008), available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0165> (22.5.2017).

¹⁸ (starting from the cessation of the infringement and when the claimant knows or can reasonably be expected to know of the infringement, harm and the identity of the infringer.) The Directive also introduces a requirement that the limitation period be suspended for the duration of the investigation.

¹⁹ The law of 28 March 2014 introducing a title 2 'Claim for collective redress' in Book XVII 'Particular judicial proceedings' in the Code of Economic Law and inserting definitions of Book XVII in Book of said Code (*Loi du 28 mars 2014 Loi portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique / Wet van 28 maart 2014 tot invoering van titel 2 "Rechtsvordering tot collectief herstel" in boek XVII "Bijzondere rechtsprocedures" van het Wetboek van economisch recht en houdende invoering van de definities eigen aan boek XVII in boek I van het Wetboek van economisch recht.*

to file individual actions or rely on alternative dispute mechanisms in order to resolve disputes. In practice, there were large impediments to the effective use of individual actions: consumers did not have sufficient knowledge of their rights and the costs relating to a single procedure were often too high for the individual to bear. The Law of 28 March 2014 does not amend either the provisions of the Civil Code dealing with civil liability (i.e. no punitive damages) or the rules of evidence (i.e. no procedure of discovery).

Prior to the Law of 28 March 2014, Belgian law did not have a mechanism allowing a large number of claimants having suffered damages due to a common fault to bring a claim collectively. Each claimant had to file a claim separately. It is obvious that in a case involving several hundreds of claimants this entails a very heavy (administrative) burden not only for the claimants, but also for the defendants and the court.

The Law of 28 March 2014 aims to provide a solution for cases with a common cause (and necessarily involving a large number of claimants).

1.2. Scope

The Law of 28 March 2014 has a limited scope.²⁰ It aims to enhance and enforce the rights of consumers.

Only consumers can rely on the law to bring a claim and provided they allege that the defendant, i.e. a legal or natural person pursuing long-term economic aims (hereinafter, an enterprise), has infringed a contractual obligation or one of the 31 regulations or laws listed in the Law of 28 March 2014²¹.

Hence, a claim cannot be brought by a consumer against government or public authorities, nor against non-profit organisations.

In addition, legal entities, (independents), employees or investors cannot rely on the Law of 28 March 2014 either to bring a claim in any of the aforementioned capacities.

20 See generally S. Voet (2012-13) "Een Belgische vertegenwoordigende collectieve rechtsvordering: vier bouwstenen voor een Belgische class action", in: *Rechtskundig Weekblad*, pp. 682-697; W. Eyskens, N. Kaluma (2008) "La class action et le droit belge – Va-et-vient de part et d'autre de l'Atlantique", in: *Journal des Tribunaux*, pp. 481-488; B. Allemeersch, M. Piers (2008) "Class action - Eenvoudiger rechtstoegang voor de consument?", in: *Droit de la Consommation*, p. 3-56; F. Danis, E. Falla, F. Lefèvre (2014) "Introduction aux principes de la Loi relative à l'action en réparation collective et premiers commentaires critiques", in: *Revue de Droit Commercial*, pp. 563 et seq; E. Falla (2014) "Le recours collectif en droit de la consommation. Présentation du loi belge", in: A. Puttemans (ed.), *Le droit de la consommation dans le nouveau Code de droit économique*, Brussels: Bruylant, p.128; H. Boularbah, C. Van Themsche (2015) "De rechtsvordering tot collectief herstel of de Belgische class action. Beknopt overzicht van de wet van 28 maart 2014" in: *In Foro*, 10; S. Voet en B. Allemeersch (2014-15) "De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten", in: *Rechtskundig Weekblad*, p. 646; E. De Baere, A.-S. Maertens en K. Willems (2015) "Belgische class action. Tien pijnpunten", in: *Nieuw Juridisch Weekblad*, p.525; S. Voet (2015) "De rechtsvordering tot collectief herstel" in: J. Rozie, S. Rutten en A. Van Oevelen (eds.), *Class Actions*, Antwerpen: Intersentia, p. 40, nr. 19; A. Mahy en C. Verdure (2015) "L'émergence de l'action en réparation collective: vers un nouveau risque (pour le secteur) alimentaire?", in: J. Englebort en J.-L. Fagnart, *L'action en réparation collective*, Limal: Anthémis, p.235; Belgium/Cour Constitutionnelle, 41/2016 (17.03.2016); Belgium/ Nederlandstalige Rechtbank van eerste aanleg te Brussel/2015/4019/A (10.10.2016).

21 Actions for collective redress can only be brought if an Enterprise has infringed obligations deriving from competition law, market practices and consumer protection, payment and credit services, intellectual property, energy, telecom, transport, pharmaceuticals, food, or insurance.

1.3. Procedure

a. Standing

The group of consumers who wish to initiate proceedings must consist of consumers who have suffered damage in their personal capacity due to a common cause. However, they are not capable of initiating the proceedings themselves. Collective redress proceedings can only be initiated by a ‘group representative’. The legislator has opted for an ‘ideological plaintiff’, i.e. a claimant who defends the rights of the consumers, but does not aim to make profits. The group representative cannot be a lawyer and will not be able to make profits from his job. He will only receive the reimbursement of his proven expenses.

The Law of 28 March 2014 recognises three categories of possible group representatives: (i) a consumer organisation with legal personality which is also represented in the ‘Conseil de la Consommation / Raad voor Verbruik’ (an advisory body within the Federal Public Service Economy) or is recognised by the Minister of Economic Affairs, (ii) an association which has had legal personality for over three years, which has a corporate purpose directly related to collective damages, which does not pursue an economic purpose in a sustainable manner, and which is recognised by the Minister, or (iii) the Federal Ombudsman.

Only one group representative can be appointed per proceeding.

Finally, it must be stressed that an action for collective redress can only be declared admissible if the Court takes the view that such proceedings are more effective than ordinary proceedings.

b. Opt-in; opt- out procedure

The Law of 28 March 2014 allows the judge to choose between an opt-in (*système d’option d’inclusion / optiesysteem met inclusie*) or an opt-out system (*système d’option d’exclusion / optiesysteem met exclusie*). If the proceedings aim to obtain compensation for physical or moral harm, then the opt-in procedure is compulsory. If the parties reached an agreement before filing the proceedings, then the parties will propose either the opt-in or the opt-out system in their joint petition. The choice is irrevocable.

c. Competent Court

The Courts of First Instance or Commercial Courts of Brussels and, in appeal, the Court of Appeal of Brussels, have exclusive jurisdiction to hear collective redress proceedings.

d. Participation of foreign plaintiffs

Foreign claimants may take part in collective redress proceedings. According to the Law of 28 March 2014 foreign plaintiffs must opt-in to the proceedings.²²

²² Article XVII.38, §1, 2° of the ELC.

e. Certification criteria

No certification criteria as such exists, except the aforementioned requirements for standing.

f. Main procedural rules

If no agreement can be reached and provided the Court has declared the proceedings admissible, then the case will be treated in accordance with the provisions of the Belgian Judicial Code applicable to the ‘ordinary’ proceedings.

g. Evidence / discovery

The Law of 28 March 2014 does not amend the existing rules of evidence. The onus of proof rests (primarily) upon the claimants, i.e. the group representative.

h. Multi stage process

The Law of 28 March 2014 provides for a two-stage procedure if no agreement was reached before the filing of the petition.

If a settlement is reached prior to the filing of the petition or in the course of the proceedings, the parties can request the Court to approve the settlement reached. The Court will refuse to approve the settlement if: (i) the compensation for the group or subgroup is manifestly unreasonable, (ii) the delay during which the victims can decide to opt in or opt out is manifestly unreasonable, (iii) the additional publicity measures are manifestly unreasonable or (iv) the indemnity to be paid to the group representative exceeds his real costs.

We will now address the procedural steps of the proceedings if no settlement has been reached.

Phase 1: admissibility of the petition

After the representative has filed the petition, the Court must first determine - within, in principle, a period of 2 months²³ - whether the claim is admissible. The Court may ask for further details from the claimant, which should be submitted within 8 days. If the details are not submitted or submitted out of time or incomplete, the action is deemed not to have been filed.

Phase 2: negotiation

If the Court declares the claim admissible, it will determine whether the case will be governed by an opt-in or an opt-out system. In addition, the Court will grant the parties a period of time ranging between 3 and 6 months during which the parties are mandated to try to negotiate an agreement for collective redress. This period may be extended once on the joint request of the parties for no longer than 6 months. If an

²³ The Dutch speaking Court of First Instance of Brussels has ruled in a judgment dated 10 October 2016 that the 2 months period laid down in the ELC was not a binding time-period. If the safeguarding of the rights of defence of the parties so require, then the aforementioned time-period to hand down a decision on the admissibility of a class action can be extended.

settlement is reached, it may then be approved by the Court, which retains a margin of appreciation in evaluating the settlement. Although such a judicial decision will have the same legal consequences as a judgement, it should be noted that the settlement is not an admission of guilt or liability and cannot be used in this way in subsequent proceedings.

If no settlement has been reached, the judicial proceedings will be continued in accordance with the provisions of the Judicial Code applicable to ‘ordinary’ proceedings.

In the event that if, at the end of the investigation, a final decision is made in favour of the consumers, the Court will appoint a loss administrator (*liquidateur / schadeafwikkelaar*) to oversee the execution of the decision. He is obliged to create a provisional list of members of the group who have explicitly identified themselves to be members of the group or subcategory. He may exclude certain persons who have identified themselves as members if he is of the opinion that they do not meet the description of the group or subcategory, though he must give reasons for his decision.

The list is filed with the registry of the Court and is publicly available. At this point in time, the loss administrator notifies the members of the group he wishes to exclude. For the next 30 days, extendable by the Court if necessary, the representative and the enterprise may challenge the inclusion or exclusion of members on the list. After this period, the registrar has 14 days to notify both the loss administrator and the relevant member of the Court’s decision, who then have 14 days to notify the registrar of their point of view. After this, the Court will decide on the final list of members who are to receive compensation.

The judgment has *res judicata* for all members of the group (save for the consumer who is part of the group but who can evidence that he could not reasonably have become aware of the admissibility decision). Since the Law of 28 March 2014 provides that the decision is binding upon all the members of the group, the consumers who opted-out are neither bound, nor can they rely on the decision.

1.4. Available remedies

The Law of 28 March 2014 aims to grant consumers who have suffered damages full compensation for their loss. The Law of 28 March 2014 does not amend the existing civil liability regime, neither does it introduce punitive damages into Belgian law.

The Court can order compensation to be paid either in kind or by equivalent.

It is worth noting that if compensation by equivalent is to be paid and the loss administrator has not been able to pay the entire amount to the consumers, then the Court will decide to whom the balance has to be paid. In the preparatory works of the legislation, it is stated that the Court has full discretion in determining the destination. Hence, the Court has no obligation to order the loss administrator to pay the monies back to the company.

1.5. Costs & funding

The 28 March 2014 Law is silent on the funding of the class action proceedings. Hence, third party funding of action for collective redress is not prohibited. However, this type of funding is of limited interest since the group representative is not entitled to make profits from his job as he will only receive the reimbursement of his expenses.

Under Belgian law, the losing party has to bear the costs of the (collective) proceedings. There is no limit on costs except for the (capped) legal proceedings' costs, i.e. a lump sum the losing party has to pay to the winning party to cover the lawyers' fees of the winning party. The amount of the legal proceedings' costs is set by law and varies according to the amount at stake. Under certain circumstances, the base amounts set by law may be increased or decreased by the court.

1.6. Number of claims

To the best of our knowledge, Belgian consumer organisation *Test Aankoop / Test Achat* has initiated five class actions. The first class action aimed at obtaining compensation from the Belgian National Railway Company (*Société nationale des chemins de fer belges/Nationale Maatschappij der Belgische Spoorwegen – SNCB/NBMS*) for the interruption and the suspension of the train service during eight days of strikes in 2014 and 2015. According to the publicly available information *Test Aankoop / Test Achat* has withdrawn its claim.

The second class action aimed at obtaining compensation from the travel company Thomas Cook following a major delay of a flight from Tenerife to Brussels. The Dutch speaking court of Brussels declared the claim admissible and ruled that the proceedings would be governed by an opt-in mechanism. The case is still pending but is likely to be declared devoid of purpose since Thomas Cook claims to have paid the compensation due by virtue of Regulation 261/2004 to all passengers.

The third class action has been brought against the Volkswagen group companies within the framework of the so-called emission scandal. The case is still pending and the Dutch speaking court of Brussels will hear the parties at the oral hearings of 30 and 31 October 2017.

The fourth class action has been initiated against the largest Belgian telecommunications company Proximus (formerly known as Belgacom) after it introduced a renting formula of its new decoders. The Dutch speaking court of Brussels has declared the claim admissible and chosen an opt-out mechanism.

The fifth class action has been brought against eight websites involved in the resale of concert tickets at exorbitant prices. We have not found any information as to the current status of these proceedings.

1.7. Particularities/Problems if mechanism is used in cross-border cases

The only difference regarding the timing of collective actions compared to non-collective litigation is the fact that the class action proceedings are twofold, i.e. an admissibility phase and a phase on the merits. The judgment declaring a class action admissible can be appealed and, given the backlog of the Court of Appeal of Brussels, there is a risk that a final judgment on the merits of the class action might be delayed should an admissibility judgment be appealed. In non-collective litigation, the Court will in principle hand down a decision ruling on both the admissibility and the merits of the claim. Although this judgment can of course also be appealed the winning party can – at its own risks – enforce it pending the appeal proceedings.

The Law of 28 March 2014 can be used in cross border cases. Foreign defendants can be sued to appear in collective redress proceedings before the Belgian Courts. Foreign claimants may take part in collective redress proceedings, but they must opt-in

to the proceedings.²⁴

1.8. Critiques

As set out above, the scope of the Law of 28 March 2014 is limited. The legislator estimated that more or less two class actions per year would be brought before the Courts of Brussels. The fact that the Law of 28 March 2014 enumerates exhaustively the infringement of the provisions which can give rise to a class action and thus limits the scope of class actions proceedings. The aim of the legislator is to evaluate the Law of 28 March 2014 in 2017 and will then consider whether its scope must be amended.

England and Wales

I. Overview

Collective redress, and the need for its reform, has received significant legislative and regulatory attention in the UK in the past few years.²⁵

The UK currently has a number of procedural mechanisms available to claimant groups wishing to obtain compensation. Some of these are generally applicable to all kinds of claims and all of these operate on an opt-in basis - that is, claimants must elect to join the proceedings in order to be considered as a member of the class and to be entitled to any damages awarded.²⁶ In contrast, the sectoral collective redress mechanism for competition claims - introduced under the Consumer Rights Act 2015 - adopts the opt-out system as one of the possible means of achieving a more effective system of collective redress.

The main general collective redress mechanisms are Group Litigation Orders (GLOs), representative actions and test cases (including those using a declaration). GLOs were introduced under the Civil Procedure Rules (CPR) in 1999, as part of the ‘Woolf’ reforms of English civil procedure. A GLO is made under CPR 19.10-19.15 for claims which ‘give rise to common or related issues of fact or law.’

Test cases are also feasible, as the CPR provides the courts with powers to manage group litigation in cases where there are a large number of claims raising the same common factual or legal issues.

Representative actions (CPR 19.6) may be brought by or against one or more persons who have the ‘same interest’ in a claim.

There have been several initiatives in the UK to promote reform in collective litigation mechanisms for specific sectors.²⁷ In particular, the UK has reformed collective redress for claims for both damages and injunctions for breach of competition law. The Consumer Rights Act 2015 (Sch 8) amended the Competition Act 1998 to allow ‘collective proceedings’ to be brought by a proposed representative claimant in the

²⁴ Article XVII.38, §1, 2° of the ELC.

²⁵ This report focusses solely upon the legal system in England & Wales, but it should be noted that there is currently legislation before the Scottish Parliament which, if enacted, would result in changes to collective redress procedures in Scotland : see Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

²⁶ See generally R Mulheron (2004), *The Class Action in Common Law Legal Systems*, Oxford : Hart Publishing; J Sorabji (2009), ‘The Hidden Class Action in English Civil Procedure’ 28(4) *Civil Justice Quarterly* 498.

²⁷ See generally R Mulheron (2008), ‘Reform of Collective Redress in England and Wales: A Perspective of Need’ (2008).

specialist Competition Appeal Tribunal (CAT). The Tribunal can order that collective proceedings continue either on an opt-in basis or on an opt-out basis. A judgment or approved settlement in opt-out collective proceedings will bind all members of the class resident in the UK unless they have opted out.

These mechanisms are the current outcome of a long line of earlier proposals to improve collective redress in the UK. Earlier proposals both generally and in specific sectors (for example financial services) included in particular:

1. the Civil Justice Council Report in December 2008 on collective redress, including a draft revision to the CPR and a Draft Collective Proceedings Act.²⁸ These reforms were intended to be general in application;
2. the Finance Bill in 2010 proposed the introduction of opt-in and opt-out collective actions in particular in claims under financial services legislation. However this initiative was dropped in light of the 2010 General Election.

To sum up, in the UK not only are there several existing procedural tools providing general collective redress mechanisms but - in the competition field - the UK now has one of Europe's most advanced 'class action' systems, even if limited in its subject scope.

II. Collective Redress Mechanisms

1. General description

The main existing general collective redress mechanisms are Group Litigation Orders (GLOs), representative actions and test cases (including those using a declaration).

2. Scope

a. Group litigation orders

Group litigation orders (GLO) are made under CPR 19.11. A GLO may be made where there are a 'number' of claims 'giving rise to common or related' issues of law or fact. It follows that:

- no claimant or body has the right to commence a GLO proceeding: whether the order should be granted will be in the court's discretion;
- the minimum number of parties to a GLO appears to be two, although in practice a greater number is likely to be needed to justify the use of the procedure; and
- the degree of similarity of the issues to be tried under the GLO is fairly flexible – 'related' issues may be sufficient.

b. Representative actions

A representative action is a claim brought by one or more claimants, on their own behalf and on behalf of others under CPR 19.6. A representative claim may be begun in cases where more than one person has the same interest in the claim as the claimant. This means that a representative has the right to bring a collective claim but the court may

²⁸ Civil Justice Council (2008), 'Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions' - Final Report, available at https://www.ucl.ac.uk/laws/judicial-institute/files/Improving_Access_to_Justice_through_Collective_Actions_-_final_report.pdf (13.06.2017).

order that the representative element be discontinued or that another representative be appointed and the representative must have the *same* interest in the claim as each person represented. This has been restrictively interpreted - it is not enough that the claims be similar or related.

c. Test cases

Apart from the use of the test case mechanism in GLOs (see below), the English CPR does not make express provisions for the bringing of test cases on a general basis. However, test cases have been brought by agreement between claimants and defendants (as in the Office of Fair Trading's case on overdraft charges against major clearing banks) and/or by way of an application for a declaration by a typical claimant or a representative or government body.

d. Collective proceedings order for competition claims

In addition to the above general mechanisms for obtaining collective redress, the Consumer Rights Act (CRA) 2015 enacted a new procedure for competition claims available to the Competition Appeals Tribunal by way of a Collective Proceedings Order (see further below).

3. Standing

There are no special rules on standing to bring a collective redress action under general collective redress mechanisms in England - normal legal capacity is sufficient.

4. Procedure

a. Group litigation orders (GLOs)²⁹

The procedure for group litigation orders is contained in CPR 19.11. Two or more claims will already have been commenced using the normal rules for commencing actions contained in the CPR7. A GLO may be applied for at any time, either before or after the relevant claims have been issued and the application may be made by any claimant or defendant. The court may also make a GLO of its own motion in certain circumstances.

The GLO must:

- include a description of the GLO issues which will be managed together as a group under the order;
- establish a group register of the parties to be bound by the findings made under the GLO;
- nominate a management court.

The GLO may also include an order that all existing claims, which give rise to GLO issues, should be transferred to the management court and be managed under the GLO (and therefore be entered on the GLO register).

Before a claim can be entered on the group register it must be issued as an

²⁹ For a list of all group litigation orders, see : <https://www.gov.uk/guidance/group-litigation-orders>.

individual claim (and the appropriate individual issuing fee paid).

The effect of entry on the group register is that judgment given in respect of any of the group issues will be binding (*res iudicata*) for all claims on the register for that issue at the time the judgment is given. It is however possible for a claim which raises both group issues (e.g. as to liability) and individual issues (e.g. as to quantification) to be entered on the group register for the group issues only and for the individual issues to be tried separately (usually after the finding on the group issues). The court may provide for one or more of the claims entered on the group register to be used as test claims which are treated as typical of the claims relating to each GLO issue.

The GLO issues will all be tried in the management court designated in the order and (although individual issues may be tried elsewhere) the management court may designate the solicitor to one of the claimants to manage the group for the purposes of the common issues.

b. Representative actions

There are no special rules for bringing a representative action and any claimant may commence an action on his own behalf and on behalf of all others having the same interest in the claim (who will not, however, become parties to the action). It is however, open to the court, either on its own motion or on the application of any person with an interest, to direct either that the claim should not be continued as a representative claim at all, or that the representative should be replaced with an alternative.

In practice, the court has interpreted the requirement that the interest be ‘the same’ strictly. One of the reasons for this is that an order or judgment in a representative action is binding on all persons represented, even if they were not parties to the proceedings and even if they were unaware that the proceedings were underway. However, the permission of the court is required before a judgment in a representative claim can be enforced by or against any persons who was represented but did not appear as a party to the action.

5. Available remedies

Three types of remedy are available in collective redress cases in the English courts.

a. Damages

Damages are the most frequently claimed remedy under GLO proceedings and are a common remedy for many other collective redress claims (e.g. representative actions). The claimant must show both that the defendant caused the group loss and the amount of that loss. Exemplary (punitive) damages in addition to compensatory damages are a possibility, but an award of exemplary damages is very rare.

Under the GLO procedure, it is open to individual claimants in the group to assert additional claims outside the group issues on the basis of facts which are specific to them: additional claims need not be heard by the GLO management court. Claimants therefore have the ability to establish the liability of the defendant using the GLO procedure and to claim additional damages in a related but separate action if so desired. In practice, a similar outcome applies to test cases for damages - a claimant may or may not choose to bring his own separate claim.

In a representative action by contrast, those represented, who have the ‘same’ interest in the claim as the representative claimant are bound fully by the judgment. However, if they were not parties the action (i.e. they did no ‘opt-in’ to it) the judgment may only be enforced against them with the permission of the court. Enforcement of an award of damages against the defendant will be carried out by the representative claimant, not the non-parties.

b. Injunctions

Injunctive relief on behalf of a group or a general interest are well-established in certain areas of collective redress in England - especially consumer law (see below) where designated bodies have standing to make/apply for ‘stop now’ orders under specific legislation.

Since injunctions normally prohibit specific actions by the respondent they will also normally provide a remedy for other potential applicants in a similar situation to the main applicant - akin to a ‘test’ case approach. An order of a mandatory (positive) injunction - requiring the respondent to do something - is rare.

c. Declarations

The High Court may make a declaration of the law as it applies in a particular novel factual situation - for example, whether ‘administrative’ overdraft charges by clearing banks operate as an unlawful penalty. A declaration will be binding in relation to those facts not only on the High Court itself but also on all other first instance courts and tribunals.

As with injunctions, a declaration can affect the legal position of non-parties, although that effect will be confined to those in a sufficiently similar factual position as the original defendant.

III. Sectoral Collective Redress

A. Consumer Law

1. Scope

The general methods of collective redress described above have been used extensively in a consumer law context - with the exception of the general representative action (CPR 19.6), which is not suitable for this kind of claim due to the narrowness of its scope of application.

In addition, Part 8 of the Enterprise Act 2002 gives designated enforcers the power to apply to the court for orders preventing breaches of both domestic and Community consumer legislation in the UK. The scope of the order that the court may make is not defined, although it must relate to the ‘conduct’ of the business. Orders appear generally to be limited to requiring the business against whom the order is made to cease the unlawful conduct described in the order.

The Consumer Rights Act came into force on 1 October 2015. All consumer purchases from this date will be governed by this new legislation. It amends the powers of some consumer enforcement bodies to broaden the scope of redress available to enforcers to include compensation and not solely injunctive relief. These ‘enhanced

consumer measures’ are designed to allow enforcers to achieve better outcomes for consumers.

2. Standing

Only those public bodies either set out in the Enterprise Act itself (the CMA, Trading Standards Offices - run by local authorities - and certain public consumer protection or regulatory bodies) or a private body designated by the minister, may apply for a Part 8 order. To date the only non-public body to be designated is the Consumers’ Association (Which?).

There are also ‘Community Enforcers’ including the OFT (now the Competition and Markets Authority or ‘CMA’), Civil Aviation Authority, FSA and the Office of Communications, known as Consumer Protection Cooperation Enforcers (CPC), which are able to handle infringements of EU law in their sectors.

While both public and private bodies are able to bring a claim under Part 8 EA 2002, individual consumers are not able to do so. They must refer their complaints to one of the above bodies.

3. Procedure

Under the Consumer Rights Act 2015 claimants (i.e. designated enforcers) are now able to claim compensation under part 8 (new s219A) with regards to ‘enhanced consumer measures’ dealt with below.

- *Injunctions*

Part 8 sets out the steps to be followed before an application for an injunction may be made: the enforcer must first consult both the business thought to be infringing consumer law and the CMA.

The business has the opportunity to offer undertakings to address the enforcer’s concerns. If an undertaking is given, an application for an order may not then be made, but breach of the undertaking will allow an enforcer to make a court application for an order punishing the breach.

In urgent cases, than enforcer may apply to the court for an interim order under part 8 even without giving notice to the business concerned - although the business may apply to the court to have the interim order set aside once it has been brought to its attention.

An application under Part 8 must be brought in the High Court.

- *Compensation orders*

The Consumer Rights Act introduced a possibility for enforcement orders under part 8 to include orders to compensate consumers (redress) using ‘enhanced consumer measures.’ Enhanced consumer measures in the redress category can only be used in a “loss case” and only if the court (and enforcer) is satisfied that the costs of enforcement are unlikely to be more than the sum of losses suffered by consumers as a result of the conduct.

A ‘loss case’ is defined (s219B Enterprise Act 2002, para 9 and 10) as conduct which constitutes an infringement of consumer law where consumers have suffered a

loss as a result of that conduct.

The above ‘enhanced measures’ are automatically available to public enforcers. However s219C(3)-(5) makes enhanced measures available to designated private enforcers subject to two conditions:

- the enforcer is specified by order made by the Secretary of State; and
- the redress measures do not benefit the private enforcer or an associated undertaking.

Prior to the amendments made by the 2015 Act the only actions that could be taken against infringers were criminal prosecution or civil action to stop the infringing behaviour (injunction). Neither of these actions provided enough positive action for consumers i.e. getting refunds. However, whether new enhanced consumer measures will be used is the sole decision of the enforcer. There is no minimum or maximum level of consumer loss that triggers the use of the measures. They can also be used in conjunction with either a criminal or civil action.

The procedure by which enhanced consumer measures are enforced is first, to seek an agreement with the infringer. A binding undertaking is sought from the trader that the agreed compensation and other measures will be put in place. However, if the infringer refuses to implement the measures, then the case will go to court as a civil action for the courts to decide if the measures are just, reasonable and proportionate. If so, the court may make an order requiring compliance.

Enhanced consumer measure can also be used to require measures in the ‘collective interest of consumers.’ This is a situation where the business has caused loss but is unable to identify some or all of the consumers affected. Enforcers in these circumstances can require that the business pay the equivalent of the loss suffered to a consumer charity, for example Citizens Advice Service.

B. Competition Law

1. Scope

The Competition Act 1998 section 47B-E provides an alternative means of collective redress (in addition to the general procedures - above) for claimants (including individuals) to bring collective claims in competition cases. These provisions were inserted in the Competition Act by Schedule 8 of the Consumer Rights Act 2015 and came into force on 1 October 2015.³⁰

The ‘collective proceedings’ mechanism permits a proposed representative claimant to make an application to the UK Competition Appeal Tribunal (CAT) for a collective proceedings order to be made. The representative’s claim must allege a breach of either EU competition law or of the UK equivalents.

The Tribunal has discretion to grant a collective proceedings order: if it does so, the order must:

- authorise the person who brought the proceedings to act as the representative;
- describe the class of person whose claims are eligible for inclusion in the proceedings;
- indicate if the proceedings are opt-in collective proceedings or opt-out collective

³⁰ Ref SI 2015/1630.

proceedings.

Under the Tribunal rules [paragraph 80(1)(a)-(j)] the order must also contain certain information: for example

- identify the claims certified for inclusion in the collective proceedings;
- state the remedies sought (damages, injunction or declaration);
- specify the time and the manner by which
 - » in the case of opt-in collective proceedings, a class member may opt in;
 - » in the case of opt-out collective proceedings, a class member who is domiciled in the United Kingdom may opt out; and
 - » in the case of opt-out collective proceedings, a class member who is not domiciled in the United Kingdom may opt in.

In addition to allowing the CAT to make a collective proceedings order, the CAT also has the power to make a collective settlement order,³¹ both where there are on-going collective proceedings but also where collective proceedings have yet to be begun but a settlement has already been reached.

In addition to the requirements for making for a collective proceedings order, the CAT must also consider that the terms of the settlement are just and reasonable before approving the proposed settlement. An approved settlement is binding on all members of the class described in the order unless they opt-out within the time limit set by the CAT.

2. Standing

For competition collective proceedings and settlements, there are a number of requirements regarding the standing of the class representative.³²

In summary:

- the class representative need not be a class member;
- it must be just and reasonable for the applicant to act as the class representative;
- the representative should act fairly and adequately in the interests of the class as well as ensuring there are no material conflicts of interest with class members.

The CAT will take into consideration the suitability of the representative to manage the proceedings (including its available financial resources to meet any adverse costs claims) and whether the proposed representative has a plan for the collective proceedings.

If the represented persons include a sub-class (whose claims raise common issues that are not shared with all represented person) then CAT may authorise a representative that satisfies the above criteria to represent the sub-class separately from the main class.³³

The CAT also has the new power to make an ‘aggregate’ award of damages for the class as a whole rather than requiring the calculation of each class member’s entitlement individually. Where it is not appropriate to make an aggregate award of damages for the entire class, it may be possible to determine the entitlement of the sub-class on a group basis. If this is not possible the CAT is entitled to direct that the quantification of damages should proceed as individual issues (Rule 88(2)(c)).

³¹ Sections 49A-B of the Competition Act 1998.

³² Section 47B(5) Competition Act 1998 and paragraph 78 of the CAT Rules 2015.

³³ Rule 78 para (1)-(4) CAT Rules 2015.

3. Procedure

a. Opt-in or opt-out procedure

The collective proceedings order made by the CAT must state whether the proceedings are ‘opt-in’ or ‘opt-out’. Opt-in proceedings are brought on behalf of all claimants who notify the representative that their claim should be included in the proceedings within the time limit set by the CAT. Opt-out proceedings are brought on behalf of all UK residents within the class described unless they notify the representative within the set time limit that they do not wish to be included in the claim.

The CAT will consider two criteria in determining whether the proceedings should be opt-in or opt-out. Rule 79(3) lists two specific factors the Tribunal will consider:

- *Strength of the claims (Rule 79(3)(a)):*

The CAT will require the strength of an opt-out claim to be more immediately perceptible than an opt-in case. This does not though require the CAT to conduct a full merits assessment nor does the CAT expect parties to make detailed submissions of their claim.

- *Practicality of the proceedings being brought as opt-in proceedings (Rule 79(3)(b)):*

In determining the practicalities of an opt-in or opt-out proceeding, the Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover. The Tribunal has a general preference for proceedings to be opt-in where practicable, since the class is usually smaller and the members are easier to identify and contact.

b. Competent Court

Collective proceedings under s 47B-E may only be brought in the UK’s specialist competition court, the Competition Appeal Tribunal. The general courts have no jurisdiction to make a collective proceedings order or to hear a collective proceeding claim under the Competition Act.

c. Participation of Foreign Claimants

Where an opt-out collective proceedings order or a collective settlement order has been made, those claimants who are not resident in the UK will not be bound by it unless they choose to ‘opt-in’ to the proceedings or settlement. Non-domiciled claimants may opt in within a time period set by the CAT for them to do so.

d. Certification Criteria

A representative may bring a collective proceedings application where the class comprises two or more competition claims raising the same, similar or related issues of fact or law and which are suitable for inclusion in collective proceedings.

Where a representative makes an application to the CAT for a collective

proceedings order, the CAT must consider whether the proposed representative should be authorised (see above). The CAT Rules require that CAT must also satisfy itself that the claims for which collective treatment is requested are eligible for inclusion in collective proceedings.

The Tribunal will also consider if the claims are ‘suitable’ to be brought in collective proceedings (Rule 79(2)) including:

- the costs and the benefits of continuing the collective proceedings;
- if any similar claims by class members have already been commenced;
- the size and composition of the class;
- how easy it is to decide who is and is not in the class;
- if the class claims can be compensated by an aggregate award of damages.

4. Available remedies

Collective proceedings may include any claims over which the CAT has jurisdiction under section 47A Competition Act 1998. The remedies available to claimants in the CAT are damages under s 47C (or any other money claim, for example an account of profits). The CAT cannot however award exemplary (punitive) damages. An injunction can also be granted under s 47D.

5. Costs

The CAT is not required to follow the general CPR rules on costs and its own rules give it a wide discretion as to how the costs of an action, or of any interim applications, should be dealt with. In practice, the CAT tends to apply the usual English ‘costs follow the event’ (loser pays) rule. Section 47C of the Act does however make some special provision for costs of collective proceedings.

Any unclaimed part of aggregated damages in opt-out collective proceedings may be used by the class representative to pay legal costs or expenses. However - and as an exception to the current general rule in English civil litigation - ‘damages based agreements’ (contingency fees) for legal representatives are not available in collective proceedings.

Costs may be awarded to or against the class representative, but may not be awarded to or against a represented person except in relation to individual issues resolved alongside the collective proceedings (Rule 98).

6. Number of claims

As of mid 2017, two applications for competition collective proceedings orders had been made to the CAT: one has subsequently been withdrawn and no order has yet been made in the other application. The claim withdrawn was brought on behalf of a class of purchasers of mobility scooters following on from an OFT decision finding that a number of suppliers had engaged in a cartel. The continuing claim is on behalf of UK users (consumers) of *Mastercard* credit cards - partly following on from the European Commission decision in relation to excessive charging for credit card interchange fees.

7. Critique

Given the relative novelty of (in particular) opt-out collective proceedings in UK civil procedure - and the low number of applications so far commenced - it is probably too early to give a critique of the system. Although there would appear to be a case for extending the opt-out proceedings order mechanism to other fields - in particular to breaches of consumer law currently covered by consumer injunctive powers - it is too early to tell if the specialist competition tribunal in the UK will encounter significant difficulties in supervising opt-out proceedings. It may be that, after using competition law as a ‘pilot’ area for opt-out collective redress mechanisms, it is extended to other areas. Much will depend on the political climate as well as the success (or otherwise) of the device in the CAT.

France

I. Overview

Class actions as such did not exist under French law until 2014. Collective redress mechanisms principally relied on two separate proceedings, known as the collective interest action (*action d'intérêt collectif*) and the joint representative action (*action en représentation conjointe*). Due to procedural pitfalls, these mechanisms were however rarely used by litigants. Since the 1980s, the introduction of class action proceedings into the French legal system has been proposed on many occasions but has proved controversial. Until 2014, the various attempts were in vain.

In 2014, the class action was included in the Act reforming consumer law (Loi n°2014-344 du 17 mars 2014 sur la consommation, also known as *Loi Hamon*). After the *Loi Hamon* for consumer and competition class actions, the group action mechanism was subsequently extended to health law (Law n° 2016-41 of 26 January 2016), and to discrimination, environment and data protection (Law n° 2016-1547 of 18 November 2016). This new procedure provides for compensatory and injunctive relief (solely injunctive against data protection violations).

There are however two pre-existing mechanisms which should briefly be mentioned: collective interest actions (*action d'intérêt collectif*) and joint representative actions (*action en représentation conjointe*). Collective interest actions allow for certain consumer associations to bring claims where there has been an infringement of the so-called “collective consumer interest.”³⁴ Use of this procedure has however been rare. Any claim to recover damages for loss caused to the “collective interest of consumers” is open solely to *accredited* consumer associations and any damages awarded will be made to the consumer association itself for the loss caused to the “collective consumer interest.”³⁵ This latter notion is distinct from the loss caused to individuals, and generally represents only a modest sum awarded by the courts. The other procedure, known as a joint representative action, could have had a broader impact. Similarly to the previous action, the claim is restricted to “accredited associations”, and is available in consumer-

³⁴ See Article 421-1(1) of the Code de la consommation.

³⁵ See also the parallel action available to approved associations of shareholders or investors in respect of wrongful acts harming the “collective interest of investors” (Article L. 452-1 of the Monetary and Financial Code).

related matters.³⁶ However, unlike the previous procedure, the joint representative action is taken in the *individual interest* of consumers: the action can be brought where ‘several identified individuals have suffered individual harm, caused by the same professional person or body and which have a common origin.’ Individual loss must also be shown on the part of all claimants. The utility of this action has been strictly circumscribed by the need to receive individual written instructions from the claimants for all procedural steps.³⁷

II. General Collective Redress Mechanism

Collective redress mechanisms are applied on a sectoral basis in France; there is not over-arching, generic, procedure applying to all sectors. Instead, over a period of time, legislation has been enacted in an ad-hoc manner so as to allow for collective redress mechanisms in different sectors : first in consumer law, then in the health sphere, and now also in data privacy, environment, and discrimination. It is however to be noted that under recently enacted legislation, a common set of procedural rules have been adopted under the Law on the modernisation of 21st Century Justice of 12 October 2016, which establishes a common set of rules applying to the various sectoral-based collective redress mechanism, except for the consumer cases, which remain subject to specific rules deriving from the 2014 Hamon Law. Even under those cases falling under the 2016 Law are subject to certain different rules : for instance, in case of the collective redress mechanism for breach of data protection rules, only injunctive remedy is available and not damages (see below). The Collective Redress mechanism in France still remains a sectoral-based asymmetrical procedure.

III. Sectoral Collective Redress Mechanisms

1. Group Actions in Consumer Law

A collective redress procedure for consumer claims was duly introduced in 2014 by virtue of the Act reforming consumer law (Loi n°2014-344 du 17 mars 2014 sur la consommation, also known as Loi Hamon). Class action proceedings in consumer law are now governed by Articles L.423-1 to L.423-16 and R. 423-1 to R.423-23 of Consumer Code (*Code de la consommation*).

1.1. Scope

Pursuant to Article L.423-1 of Consumer Code, an accredited consumer association which is representative at the national level can claim compensation before a civil court for individual damage suffered by consumers placed in similar or identical situations. The loss must result from a breach of statutory or contractual obligations by the defendant(s). Collective redress in consumer law only allows for claims to recover “material” damage affecting consumers, and cannot be used to gain damages for physical

³⁶ See also the parallel action available in the financial services sphere : Article L. 452-2 of the Monetary and Financial Code).

³⁷ French law also places limitations on the way in which the mandate to act can be solicited (by the association), and there is a prohibition on solicitation by means of public appeal on the radio or television or by means of the posting of information, tracts or personalised letters: Article L 422-1 of French Consumer Code.

or moral harm (see also below ‘available remedies’).

The *action de groupe* is available where several consumers placed in similar or identical situations claim compensation for material damage resulting from a breach of statutory or contractual obligations committed by the defendants. Injunctive or Compensatory remedies are available.

1.2. Procedural Framework

a. Standing

Associations are the only entities to have legal standing to bring collective proceedings. Associations must be representative at a national level and must comply with the following conditions set down in Article R.411-1 and seq. of Consumer Code: at least one year of existence, evidence of effective and public activity with a view to the protection of consumer interests, and a threshold of individually paid-up members. To date, 15 associations satisfy these criteria and are entitled to file class action proceedings.

b. Opt-In / Opt-Out procedure

According to the French group action regime, which follows a multi-stage approach (see below), a group is constituted ostensibly via an opt-in system after the decision on liability has been reached. Under the French class action regime, the group as such is only constituted after the decision on liability has been handed down, which determines the shape and the scope of the group. Since individual claimants can join the group only after this first phase, the likely success of their claims is clearer and they are ultimately less exposed to the risk associated with the litigation. Claimants are therefore incentivised to take part in the action.

c. Competent Court

The *tribunal de grande instance* (first instance court) has exclusive jurisdiction over collective proceedings. In accordance with French civil procedure rules, the competent court is the court of the place where the defendant lives. If this location is outside France, the *Tribunal de grande instance de Paris* is exclusively competent.

d. Participation of foreign plaintiffs

Currently no collective action involves foreign plaintiffs.

e. Certification criteria

Even though there is no certification procedure as such, judges play the key role of gatekeepers and must verify at an initial stage that the requirements to commence the class action proceedings are fulfilled: the action must be filed by an accredited and representative association, consumers must be in a similar or identical situations and their losses must result from a breach of statutory or contractual obligations borne by the defendant(s).

f. Main procedural rules

The normal civil procedure rules are applicable to group action proceedings. This includes the mandatory requirement of representation by a lawyer and the case management by a specific judge (*juge de la mise en état*).

A ‘simplified collective action’ (*action de groupe simplifiée*) is possible if claimants are identified and their damage is identical (Art. L623-14 Consumer Code). In these circumstances, the court can oblige the defendant to compensate claimants immediately and individually within a fixed period of time.

g. Evidence/ discovery

There is no discovery procedure under French law and the ordinary rules of French civil procedure apply. The judge in charge (*juge de la mise en état*) oversees disclosure of evidence and can order the production and timely exchanges of documents between parties and the court.³⁸ The court is empowered to order the preservation of evidence and the production of documents, including those held by the defendant.³⁹

h. Single or multi stage process

The group action mechanism follows a three-step approach.

- (1) *First phase*: the court decides on liability issues on the basis of test cases brought by the association(s). The court then circumscribes the scope of defendant(s) liability and clarifies the damage to be compensated. If liability is established, judges shape the collective action: they determine the criteria that claimants must meet to be included in the group, specify the damage to be compensated and the available remedies, they fix cut-off dates to join the group, and set the conditions for its announcement via mass media. The decision on liability can be appealed.
- (2) *Second phase*: the group is constituted via an opt-in system. Claimants must fulfil the criteria set out by the court. The judge may intervene should difficulties occur.
- (3) *Third phase*: a final ruling from the court terminates the proceedings. If needed, the court may deal with remaining issues or obstacles linked to the distribution of compensation.

1.3. Available Remedies

Both injunctive and compensatory relief is available. Under art. L621-9 of the Consumer Code, the association can intervene and ask the Court to apply, where necessary, the measures provided for in art. L. 621-2, i.e. injunctive relief: if the Court recognises a violation, it can order a cessation of the breach, if necessary under penalty in the case of non-compliance. Compensation is limited to material damage suffered by consumers. Physical or moral harm is not recoverable. Punitive damages are currently prohibited under French law.

³⁸ Arts. 763 and seq. Code of Civil Procedure.

³⁹ Art. R623-9 Consumer Code.

The court has a key role in determining the nature of the compensation awarded. The ruling on liability sets out the nature of compensation and the conditions of its distribution. Compensation can be in kind or in money. Art. L. 623-6 of Consumer Code provides that whenever the court considers compensation in kind to be more appropriate, the court must specify its conditions.

Under the standard procedure, each consumer of the class is individually compensated: they must provide evidence that they suffered the damage defined by the judge, who will then individually set the amount to be recovered. Under the simplified procedure, the individuals will have suffered identical losses and therefore receive the same amount of damages. Associations can settle the case on behalf of the claimants (Art. L623-22 and L623-23). Judicial approval is required for any out of court settlement agreement.

1.4. Costs & Funding

Legal costs are usually borne by the losing party (Arts. 695 and 696 of Code of Civil Procedure) unless the judge, by a reasoned decision, imposes the whole or part of it on another party. The court may also order the losing party to pay the winning party's lawyer's and/or expert's fees. In these circumstances, the judge may take into consideration the rules of equity and the financial condition of the party ordered to pay (Art. 700 of Code of Civil Procedure).

The court can direct the defendant to provide the claimant association(s) with advance payments in respect of costs and expenses arising out of constitution of the group (Art. L. 623-12 of Consumer Code). The exact amount is left to the court's discretion, but should reflect the nature and the complexity of the diligences borne by the association. The current regime does provide for public support of group action proceedings. There is no specific provision relating to third party funding. To date, the associations bringing the claims have been funding the actions.

1.5. Number and types of cases brought/pending

Between October 2014 and December 2016, nine claims have been brought by associations. Eight of them are currently pending, and one was settled:

- Three relating to housing (one settlement);⁴⁰

⁴⁰ Association UFC Que Choisir v. Foncia (October 2014): Filed on 1 October 2014, this case was the first group action lawsuit. It was filed before the Nanterre court and regards undue fees paid by 318, 000 tenants. The filing association has estimated the annual average loss to be around 27.60 Euros per claimant. Association Confédération Syndicale des Familles v. Paris Habitat-OPH (October 2014). This group action was filed before the Paris court, and regards undue fees paid by tenants. Even though the individual harm would be relatively small, the aggregated loss is estimated to be 3 Million Euros. In May 2015, the parties reached a settlement agreement, and Paris Habitat agreed to pay 2 Million Euros to compensate 100,000 tenants. Association Confédération Nationale du Logement (CNL) v. Immobilière 3F (November 2014) : The group action concerns unfair contract terms contained in property lease contracts with the company Immobilière 3F. In January 2016, the Paris TGI dismissed the claim, pointing out CNL's failure to provide adequate proof of the lack of reimbursement. The Tribunal also did not recognize the unfair nature of the clause. An appeal has been lodged by the association (CNL).

- Three relating to financial investment;⁴¹
- One relating to electronic communications;⁴²
- One relating to tourism;⁴³
- One relating to the consumer issues.⁴⁴

1.6. Critique

There has been a variety of criticism of this procedure. One recurring criticism is the complexity of the procedure.⁴⁵ Another is that it places a very heavy administrative and financial burden on consumer associations, which often do not have extensive resources. There has also been an impact on the court system as the management of information flows about the collective proceedings requires the court to consider publicity and dissemination of information. This has as a side-effect resulted in various initiatives encouraging the launch of web platforms aiming at informing individuals and at collecting complaints against companies (see for instance the site: www.actioncivile.com).

2. Group Actions in Competition Law

2.1. Differences with consumer law group action

In competition law claims, Arts. L.623-24 to L.623-26 of Consumer Code specify two additional requirements to the procedure outlined above under III:

- (1) Competition group actions are exclusively follow-on actions: they are authorised only after a final decision from the National Competition Authority, the European Commission or a court which has identified anticompetitive behaviour. The court does not decide on liability issues, but focusses on the determination of the group, on the fixing of membership criteria, on the evaluation of recoverable loss per claimants, and on the publicity process.
- (2) Limitation: Group actions can only be commenced within a period of 5 years after the final decision establishing the infringement to competition rules has been made.

41 Association CLCV v. Axia and AGIPI (October 2014): This group action was filed before the Nanterre court, and targets Axia and AGIPI for breach of their contractual obligations with regards to contracts signed before 1995 which guaranteed a 4.5% minimum remuneration rate. According to CLCV, the aggregate loss reached between 300 and 500 Million Euros, and the loss per individual claimant would be estimated to be 1,500-4,000 Euros. UFC-Que Choisir v. BNP Paribas (July 2016): BNP Paribas allegedly breached its contractual duties, promising an increase of the capital contributed to an investment fund. CLCV v. BNP Paribas Personal Finance (BNP PPF) (November 2016): This subsidiary of BNP Paribas marketed a mortgage that proved highly detrimental to the individuals who subscribed to it.

42 Association Familles Rurales v. SFR (May 2015): This group action concerns alleged misleading information displayed telecoms company SFR on its 4G internet coverage.

43 Familles rurales v. Manoir de Ker an Poul (August 2015): A camp site allegedly included an unfair clause in its lease contracts, to expel all mobile homes after a certain time.

44 CLCV v. BMW Motorrad France (December 2015): Consumers were allegedly unfairly compensated by BMW Motorrad, a motorbike manufacturer, following defects in the conception of a vehicle.

45 See N. Molfessis, "L'exorbitance de l'action de groupe à la française", *Recueil Dalloz*, 2014, p. 947.

3. Group Actions in Health Law

3.1. Procedural Framework

Law No. 2016-41 of 26 January 2016 and Arts. L.1143-1 and seq. of the French Code of Public Health introduced rules for group actions in the health sector. Accredited users' or patients' associations can file for compensation in respect of individual damage suffered by users of the health system who are placed in similar or identical situations. The loss must result from a breach of statutory or contractual obligations committed by the manufacturers or suppliers of health products. The group action covers damages claims arising out of personal injuries suffered by users of the health system.

3.2. Single or multi stage process

Proceedings follow the three-step procedure outlined under III. However, mediation may be ordered upon party request. Mediators are appointed by the court and selected from a list of established by the Ministry of Health. The mediator can be assisted by a mediation committee. Together, they are in charge of proposing a settlement agreement to parties. In the absence of mediation, the court rules on liability, the constitution of the group, recoverable harm and remedies. The court may set down cut-off dates for joining the group. The period given to claimants to join the group may extend between 6 months and 5 years. The decree implementing the Act of November 2016 allows claims for damages which are predating the entry into force of the Act.

3.3. Cases

The first case is that of a drug developed by Sanofi which allegedly caused malformations to the new-borns of drug users. (*Association d'aide aux parents d'enfants souffrant du syndrome de l'anti-convulsivant (APESAC) v Sanofi*).

3.4. Impact of the Recommendation/Problems and Critiques

One potential problems is the length of proceedings as these have increased since claimants may have up to five years to join the group. There is also the complexity of the procedure, with the impact of diverse losses and the approach to the allocation of damages within the group yet to be determined. Finally is the increased administrative burden: the burden of proof for healthcare professionals increases as they must now take into account retrospective scope of claims and keep a flawless traceability of their activity.

4. Group Actions in Discrimination Cases

4.1. Procedural Framework

Group actions in this area were established pursuant to the Law of November 2016 (Loi n° 2016-1547 du 18 novembre 2016).

a. Competent Court

The claim may be brought before the *Tribunal de Grande Instance* or the administrative court.

b. Standing

Associations which have the objective of fighting discrimination (as well as trade unions) may bring proceedings to claim compensation for the losses suffered by persons placed in similar or identical situations due to direct or indirect discrimination.

c. Main procedural rules

Proceedings follow the three-step procedure outlined under III. During the first phase of the procedure, the association/trade union must provide evidence of discriminatory practices before the court. On the basis of the test cases brought by the plaintiff, the court will decide on the defendant's liability.

The legislation also provides for a simplified group action (*action de groupe simplifiée*) in situations where individuals are known and have suffered identical losses. Mediation is also possible and any settlement agreement must receive judicial approval. Individuals must voluntarily step forward to benefit from the terms and conditions of the settlement agreement.

4.2. Available Remedies

The court can order injunctive relief and may also order the defendant to pay a fixed sum in advance to cover the claimant's expenses.

5. Group Actions in Environmental Law

Environmental class actions are now incorporated in the French Environment Code, and aim at compensating the losses caused by a damage in the areas mentioned in Article L. 142-2 of the French Environment Code (amongst them: nature, environment, improvement in the living environment, water protection, urbanism, contamination, nuclear safety, or radiation protection).

5.1. Procedural Framework

Group actions are available pursuant to the Act of November 18th, 2016. The procedural framework is similar to the one described in 'Discrimination'. Only a violation of environmental law committed after the entry into force of the law can be subject to a group action.

As provided by Article L. 142-3-1, the organizations allowed to initiate such actions must be duly registered with for statutory aim to protect the environment, or to defend victims suffering physical injuries, or to defend the financial interests of their members.

5.2. Available Remedies

Both injunctive and compensatory relief is available. In all sectors except data protection, the class action enables to obtain both cessation of the breach and compensation for the bodily injuries and material losses resulting from the damage.

Regarding specifically environmental damage, only the losses sustained by individuals or legal entities that result from the damage caused to the environment are compensable.

6. Group Actions in Data Protection Law

6.1. Procedural Framework

Group actions are available pursuant the Act of November 2016. Since, data privacy class actions are incorporated in the French Data Protection Act (Art. 43 ter of Law no. 78-17 of 6 January 1978 on information technology, data files and liberties (Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés)).

The procedural framework is similar to the one described in 'Discrimination'. In this procedure, there is no formation of a group of victims, thus the mechanism is different from the group action procedure as described above.

The action can only be brought by organizations on behalf of individuals who are in a similar situation, all suffering a loss caused by a violation of the French Data Protection Act. The organization representing the individuals must have at least five years of existence, with a purpose to protect privacy and personal data.

6.2. Available Remedies

Injunctive relief only.

Germany

I. Introduction

There is no general collective redress mechanism in the German legal system. The German Code of Civil Procedure (ZPO)⁴⁶ only contains the 'traditional' rules on joinder of parties and consolidation and stay of proceedings which are not tailored to actions involving large groups of plaintiffs.

However, German law provides sectoral collective redress mechanisms in consumer law, competition law and for investor claims.⁴⁷

Listed associations can bring representative actions to claim injunctive relief, eg. preventing the future use of unfair commercial terms or other practices infringing consumer law. A specific act transposing directive 2009/22/EC widened the options for

46 Code of Civil Procedure (Zivilprozessordnung (ZPO)) in its version of 5. December 2005 (BGBl. I p. 3202; 2006 I p. 431; 2007 I S. 1781), last amendment 10 October 2013 (BGBl. I p. 3786).

47 For detailed information see: Halfmeier A. /Feess E., „The German Capital Markets Model Case Act (KapMuG) - A European Role Model For Increasing the Efficiency of Capital Markets? Analysis and Suggestions for Reform”, (2012); Halfmeier, A /Rott, P.W./ Feess, E 2010, Kollektiver Rechtsschutz im Kapitalmarktrecht: Evaluation des Kapitalanleger-Musterverfahrensgesetzes . Frankfurt School Verlag; Halfmeier, A. ‚Zur Neufassung des KapMuG und zur Verjährungshemmung bei Prospekthaftungsansprüchen‘, Der Betrieb [DB] (2012) p. 2145 ff.; Hess, B. ‚Der Regierungsentwurf für ein Kapitalanlegermusterverfahrensgesetz - eine kritische Bestandsaufnahme‘, Wertpapier-Mitteilungen [WM] (2004) p. 2329 ff.; Höland, A., Kollektiver Rechtsschutz im Arbeitsrecht und im Verbraucher- und Wettbewerbsrecht - Vergleichende Überlegungen, Arbeitsgerichtsbarkeit und Wissenschaft 2012, 221-240; Möllers, T. M. J./Pregler, Bernhard, Zivilrechtliche Rechtsdurchsetzung und kollektiver Rechtsschutz im Wirtschaftsrecht - Ein Vergleich der kollektiven Rechtsdurchsetzung im Wettbewerbs-, Kartell-, Gesellschafts- und Kapitalmarktrecht, ZHR 176, 144-183 (2012); Schaumburg, E., Die Verbandsklage im Verbraucherschutz- und Wettbewerbsrecht (2006); Smid, S./Mohr, N., Die Novelle des KapMuG, DZWIR 2013, 343-352; Söhner, M., Das neue Kapitalanleger-Musterverfahrensgesetz, ZIP 2013, 7-14; Stadler A./Klöpfer M., Drittwirkung von Urteilen aufgrund von Verbands-Unterlassungsklagen nach §§ 1, 2 UKlaG, VuR (Verbraucher und Recht), 2012, S. 343-350; Stadler A., Der Gewinnabschöpfungsanspruch: eine Variante des "private enforcement"? S. 17-40, in: Augenhöfer, Susanne (Hrsg.): Die Europäisierung des Kartell- und Lauterkeitsrechts, Mohr-Siebeck 2009; Weitbrecht, A., Schadensersatzansprüche der Unternehmer und Verbraucher wegen Kartellverstößen, NJW 2012, 881-886.

injunctions to protect consumers' interests (UKlaG).⁴⁸ The ADR Directive (2013/11/EU) has also been implemented in Germany and various conciliation bodies and ombudsman assist consumers across different areas.⁴⁹

Injunctions or the skimming off of profits can be sought against acts of unfair competition. On March 10, 2017, the German Antitrust Act⁵⁰ was amended to implement the damages directive 2014/104/EU. Some changes such as a new disclosure regime will make Germany a more attractive for cartel damage claims, but the directive has brought no changes to the area of collective redress.

In the financial market sector, the Capital Market Model Claims Act (KapMuG)⁵¹ establishes the only "proper" collective redress regime. Test case proceedings enable a more effective treatment of mass investor claims involving identical issues of law or fact (eg wrong statements in a prospectus). The findings of the test case have binding effect on the other claims while cases are still kept separate. Whilst ultimately aimed at compensation of damages, proceedings under the KapMuG are in itself limited to a declaratory judgment on certain preliminary questions relating to the potential liability of the issuer of a financial product, which is binding for all claimants. The amount of damages is then to be determined in each individual case, once the test case has been successfully heard.

Currently, there are ongoing plans to introduce a general collective redress mechanism based on the KapMuG model. These plans have been welcomed by a very large percentage of consumer associations and associations promoting professional interests but remain yet without concrete results.⁵²

II. General Collective Redress Mechanisms

1. Joinder, consolidation, stay of proceedings

A joinder of parties (Sec. 59 ff ZPO, *Streitgenossenschaft*) can be used to bring claims based on same or similar issues of law and fact or to bring jointly owned claims. The rules are not ideal for mass claims as a 'normal' joinder cannot achieve uniform treatment of all claimants. Actions of one joined party cannot benefit the others (Sec. 61 ZPO) and actions remain de facto individual with their own chances of success or failure. Only exceptionally, a link between joined litigants can be created in a way in which absent parties are deemed to be represented by co-litigants and bound by their declarations (necessary joinder/*notwendige Streitgenossenschaft*, Sec. 62). This presupposes that the legal relationship at the centre of the litigation can only be established uniformly vis-à-vis all joined parties (joint tenants, or heir and administrator). Hence, sec. 62 ZPO is

48 Act on Injunctive Relief for consumer rights and other violations (Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz - UKlaG)) of 27 August 2002 (BGBl. I p. 3422, 4346), last amendment (BGBl. I p. 3714).

49 https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Verbraucherschutz/Liste_Verbraucherschlichtungsstellen.pdf?__blob=publicationFile&v=40.

50 Cf. Antitrust Act (Gesetz gegen Wettbewerbsbeschränkungen - GWB), in its version of 26 June 2013 (BGBl. I p. 1750, 3245), last amendment 7 August 2013 (BGBl. I p. 3154).

51 Capital Markets Model Claims Act (Kapitalanleger-Musterverfahrensgesetz (KapMuG) in its version of 19 October 2012 (BGBl. I p. 2182), last amendment 4 July 2013 (BGBl. I p. 1981).

52 In June 2017, news report suggested that German governing coalition's lawmakers ultimately could not find a common position on the collective action mechanism proposed by the German Ministry of Justice.

not envisaging the typical mass claims case. Similar considerations apply to third party intervention in support of litigants (Sec. 66 ff.– *Nebenintervention*).

A court can also join claims on its own initiative if several connected cases are pending at the same court and the latter has jurisdiction over all of them (Sec. 147 ZPO). Such concentration of claims is difficult to achieve (except for claims under the Environmental Liability Act (UmweltHG) and capital market claims for which exclusive jurisdiction rules apply).

The general provision on stay of proceedings (Sec. 148 ZPO) is also not tailored to mass claims and not sufficient to respond to the particular needs of mass claims.

2. Assignment of Claims

In practice, a method to concentrate claims tested for high value antitrust claims is by founding an association or company/SPV to which claims of a plurality of parties are assigned and which is acting in court on their behalf. This enables a suit to be brought by a single body, assignee of all claims. Under German law, the assignment model needs to comply with various requirements of the Legal Services Act⁵³, the Code of Civil Procedure as well as with company law.

Cartel Damage Claims S.A. (CDC) has brought such actions in a selection of jurisdictions, including in Germany, as assignee of antitrust damages claims from a variety of businesses which had contracted with cement producers forming a cartel. The action failed: The court refused to grant CDC standing considering the assignments invalid due to a lack of authorisation under the Legal Services Act. Despite subsequently repeating the assignments observing all requirements, another court⁵⁴ dismissed the claim due to a lack of upfront guarantee to cover procedural costs. Despite the procedural and economic advantages of this model for collective proceedings, it has not (yet) been successful in Germany.⁵⁵

III. Sectoral Collective Redress Mechanisms

1. Consumer Law

Consumer law contains sectoral collective redress mechanisms in form of representative actions brought by associations, mainly seeking injunctions on behalf of consumers: the Act on Unfair Competition (UWG),⁵⁶ the Act on Injunctive Relief for consumer rights and other violations (UKlaG)⁵⁷ and Sec. 79 (2) Nr. 3 ZPO.⁵⁸

⁵³ Act on Legal Services (Rechtsdienstleistungsgesetz (RDG)) of 12. December 2007 (BGBl. I p. 2840), last amendment 1 October 2013 (BGBl. I p. 3714).

⁵⁴ OLG Düsseldorf 18. Februar 2015 (Az. VI U 3/14), LG Düsseldorf, 17. Dezember 2013 (Az. 37 O 200/09).

⁵⁵ See LG Düsseldorf, 9.3.2006, 34 O 147/05, BB 2007, 847 ff. and the subsequent decisions LG Düsseldorf, 21.02.2007 - 34 O (Kart) 147/05; LG Düsseldorf, 21.02.2007 - 34 O 147/05; LG Düsseldorf, 21.02.2007 - 34 O Kart 147/05; OLG Düsseldorf, 14.05.2008 - U (Kart) 14/07; OLG Düsseldorf, 14.05.2008 - VI U Kart 14/07; BGH, 07.04.2009 - KZR 42/08.

⁵⁶ Act on Unfair Competition (Gesetz gegen den Unlauteren Wettbewerb (UWG)) in its version of 3 March 2010 (BGBl. I p. 254), last amendment 1 October 2013 (BGBl. I p. 3714).

⁵⁷ Act on Injunctive Relief for consumer rights and other violations (Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz - UKlaG)).

⁵⁸ Code of Civil Procedure (*Zivilprozessordnung* (ZPO)).

a. Representative Actions under the Act on Injunctive Relief (UKlaG)

Claims under the UKlaG are, together with suits under Sec. 8 UWG (below), frequent actions.

Scope

Representative actions under the UKlaG aim at injunctive relief and can be brought against businesses using unfair commercial terms (Sec. 1 UKlaG) or against businesses using other practices that violate consumer protection law, e.g. the provisions on distance selling or consumer sales (Sec. 2 UKlaG).

Standing

These actions are representative actions, the consumers themselves are not parties to the proceedings. They can only be brought by:

- (1) associations representing interests of businesses which need to ‘promote commercial or independent professional interests’. Among its members must be a considerable number of entrepreneurs active in the same market, they need to effectively promote commercial or independent professional interests and the contravention needs to affect the interests of their members.
- (2) by qualified listed entities (Sec. 4 UKlaG; qualified entities comprise established consumer associations which have to fulfil certain criteria as to the seriousness with which they pursue consumer interests; it is presumed that consumer advice centres and publicly funded consumer associations fulfil these criteria); and
- (3) by Chambers of Industry and Commerce.

Procedure

Competent for UKlaG proceedings is the Regional Court (*Landgericht*) in which the defendant has his place of business/ place of residence. If such court cannot be determined, local competence lies with the court in the district of which unfair standard terms have been used or in which a violation of consumer laws has taken place. To facilitate redress, Sec. 6(2) UKlaG enables under certain circumstances a concentration of claims in one Regional Court.

There are no specific certification criteria. The only prerequisite for representative actions under the UKlaG is that the association representing consumers fulfils specific criteria (Sec. 3-4 UKlaG).

Under the UKlaG, procedural rules follow Sec. 12 of the Act on Unfair Competition (UWG) and the general procedural rules in the Code of Civil Procedure (ZPO). Parties entitled to injunctive relief should notify the debtor prior to initiating court proceedings and give him the opportunity to resolve the dispute by making a cease and desist declaration under a penalty. Provisional injunctions can be granted under simplified conditions.

If it has been established that a business used unfair commercial (Sec. 1 UKlaG), the relevant clause in the business standard terms is also deemed to be invalid in relation

to consumers bringing individual actions against this business, provided they invoke the injunction of the court.

Participation of Foreign Plaintiffs

The UKlaG extends to intra-EU violations of consumer rights (Sec. 4a UKlaG) and does not hinder the participation of foreign associations.

Available Remedies

UKlaG proceedings are limited to injunctive relief.

Costs and Funding

The loser pays rule applies. However, costs need to be paid in advance. According to Sec. 12 (4) the pecuniary value of the claims for injunctive relief pursuant to Sec. 8 (1) can be reduced under certain circumstances to limit total costs.

b. Actions on Behalf of the Consumers (*Sammelklagen*)

Those actions can be used by associations to either bring a single consumer case to the court or to pool claims of consumers by collecting their claim. Whilst the former occurs in practice, the latter is not frequent due to administrative hurdles and costs. Consumer law is to be understood more broadly than in UKlaG cases and can eg. comprise product liability incidents.

Standing

Sec. 79 (2) Nr. 3 of the Code of Civil Procedure (ZPO) allows consumer advice centres and other publicly funded consumer associations to represent consumers in legal proceedings by collecting claims of consumers. Only consumer advice centres and other publicly funded consumer associations have standing to act on behalf of harmed consumers.

Procedure

Such proceedings are only viable for smaller groups of identifiable consumers. Proceedings are based on an opt-in principle and follow general procedural rules. As the association bears the litigation costs, such actions can be a financial risk if a plurality of claims is brought.

Remedies

The actions can either aim at the recovery of damages, which, in case of success, are distributed amongst the affected consumers; or at specific performance.

2. Competition Law

a. Representative Actions under the Unfair Competition Act (UWG)

Scope

Sec. 8-10 of the Unfair Competition Act (UWG) allows for injunctive relief, damages and skimming off actions in cases of unfair competition and inappropriate business tactics. These actions can be brought by associations representing interests of businesses or consumers to control the behaviour of market actors. Sec. 4 ff UWG lists and defines unfair commercial practices (e.g. practices suited to impairing the freedom of decision of consumers or other market participants through applying pressure; or practices suited to exploitation of a consumers mental or physical infirmity, age, commercial inexperience, credulity or fear; or the constraint to which the consumer is subject.)

Remedies are: injunctive relief according to Sec. 8 UWG against businesses using illegal commercial practices; damages (sec. 9); and skimming off profits of businesses intentionally violating the UWG (sec. 10). The profits then go to the Treasury.

Standing

Standing depends on the specific type of action requested under the UWG. Injunctive relief under Sec. 8 can be sought by (a) associations representing interests of businesses provided that they fulfil certain criteria; by (b) qualified listed entities (see associations having standing under Art. 4(3) Dir 2009/22/EC); (c) by Chambers of Industry and Commerce; and, importantly, (d) by competitors.

Damages (Sec. 9 UWG) can only be claimed by competitors. A Sec. 10 suit can be brought by all those having standing in injunctive relief cases, except for competitors.

Procedure

Actions under Art. 8 and 10 are representative actions that do not aim at compensating the victims of unfair competition but at skimming off the profits from the unfair trader. Initiated by a consumer or business association to prevent abuse, such action cannot be classified in the categories of opt-in or -out.

Regional Courts (*Landgerichte*) have exclusive jurisdiction. Local jurisdiction lies with the court in whose district the defendant has his place of business/ place of residence, or, under certain circumstances, with the court in whose district the act was committed (Sec. 14 UWG).

The general rules in the Code of Civil Procedure apply. Sec. 12 UWG contains further specific procedural rules. Parties entitled to injunctive relief should notify the debtor prior to initiating court proceedings and give him the opportunity to resolve the dispute by making a cease and desist declaration under a penalty. Provisional injunctions can be granted under simplified conditions.

Participation of Foreign Plaintiffs

Participation of foreign consumer associations in a representative action brought

in Germany is not excluded, see Sec. 8(3) UWG.

Available Remedies

Available remedies depend on the type of action brought (Sec. 8 UWG: injunctive relief; Sec. 9 UWG: damages; or Sec. 10 UWG: skimming off profits).

Costs and Funding

The loser pays rule applies. According to Sec. 12 (4) UWG, the pecuniary value of the claims for injunctive relief pursuant to Sec. 8 (1) UWG can be reduced under certain circumstances to limit total costs. As to Sec. 10 UWG claims⁵⁹, there have been suggestions to amend the current regime. Due to the risk of losing the action and bearing the costs, and due to the fact that illegal profits go to the Treasury in case of a successful action, this type of redress is rarely sought.⁶⁰

b. Actions under the Antitrust Act (*Gesetz gegen Wettbewerbsbeschränkungen - GWB*)

Scope

The Antitrust Act permits private actions (injunctive relief and damages claims) in Art. 101 or 102 TFEU infringement cases (Sec. 33 GWB). Sec. 34 and 34a GWB allow skimming off the defendant's profits, which go to the Treasury. Although no special legislative mechanism is provided for antitrust collective redress, a collective action (brought by competitors or other market participants) is not excluded: Sec. 88 allows a consolidation of actions between actions if they have a legal or direct economic link, even where the former court has exclusive jurisdiction. Sec. 33 (4) GWB secures a common basis for a plurality of claims - a final decision of a cartel authority or the European Commission shall be binding for private follow-on actions brought under the GWB.

Standing

Actions can be brought by the victims of antitrust infringements (competitors/ other market participants); by associations promoting commercial or of independent professional interests; or by consumer advice centres and publicly funded consumer organisations. Recently, collective antitrust damages actions have (unsuccessfully) been brought by CDC, to whom claims have been assigned.⁶¹ The assignment model was considered a more viable option for damages claims but failed for rather formal reasons (see above).

⁵⁹ Actions under Sec. 8 UWG are frequent. On the contrary, only one case seems to have been brought under Sec. 10 as it is difficult to determine the amount of profits made through the use of unfair commercial practices. See eg. OLG Frankfurt, 20.5.2010, 6 U 33/09. MMR 2010, 614 ff.

⁶⁰ It has therefore been suggested to grant a pro rata participation in the skimmed-off profits limited by an absolute cap (e.g. a 50 % participation with a cap of 10 Million Euro). See Wagner, G, Neue Perspektiven im Schadensersatzrecht - Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A für den 66. Deutschen Juristentag (Munich 2006), p. 112; Möllers, T./ Pregler, B., Civil Law Enforcement, Unfair Commercial Practices Directive and Collective Redress in Economic Law, Jus Civile 2013, p. 374, 375.

⁶¹ See the Cement Cartel Case in which CDC lead the proceedings for 28 victims of a cement cartel: LG Düsseldorf, 9.3.2006, 34 O 147/05, BB 2007, 847 ff. and the subsequent decisions LG Düsseldorf, 21.02.2007 - 34 O (Kart) 147/05; LG Düsseldorf, 21.02.2007 - 34 O 147/05; LG Düsseldorf, 21.02.2007 - 34 O Kart 147/05; OLG Düsseldorf, 14.05.2008 - U (Kart) 14/07; OLG Düsseldorf, 14.05.2008 - VI U Kart 14/07; BGH, 07.04.2009 - KZR 42/08.

Procedure

Where associations bring claims on behalf of the competitors or other market participants the latter have to actively agree to the case being brought to court. Competent courts are the Regional Courts (*Landgerichte*), they have exclusive jurisdiction (Sec. 87 GWB).

3. Financial market law

Scope

Due to the *Telekom* investor case⁶² in which 17000 investors were bringing claims against the Deutsche Telekom, the Capital Markets Model Claims Act (*Kapitalanleger-Musterverfahrensgesetz*, KapMuG) has been created in 2005 and was reviewed in 2012. Proceedings can be brought in particular for wrong, deceptive or omitted public capital market information or for the use of such information.⁶³ Proceedings aim at a declaratory judgment establishing liability of the defendant. It is clarified in the request for test case proceedings which issues of law and fact shall be the object of the declaratory proceedings (Sec. 2), but the scope of proceedings can be extended on request of one of the parties, provided that a few conditions are met.⁶⁴ The result is binding on all claimants and will be the basis of their individual damages claims.

Standing

Each affected investor and the defendant can request test case proceedings, but it needs a minimum of ten plaintiffs to initiate them. If the sufficient number of ten investors is reached, individual lawsuits are stayed until the test case is decided. Once the proceedings are initiated, the court selects a lead plaintiff in its discretion (Sec. 9 (2) KapMuG). In doing so, it takes various issues into account such as the plaintiff's suitability and the value of his claim. The lead plaintiff is not representing the other claimants. The latter are interested parties in his test case proceedings and can intervene in the proceedings, eg to submit evidence to the court.

Procedure

Competent Court

In (single) investor cases, the Code of Civil procedure provides for exclusive jurisdiction of the courts at the registered seat of the concerned issuer, of the offer or of other capital investments, or of the targeted company, except where their seat is abroad (Sec. 32b ZPO). It will be that court referring the case to the higher Regional Court in view of starting and managing the test case proceedings (Sec. 6 KapMuG). Either investors or the defendant can make a request for test case proceedings to clarify specific questions of law and fact. The court seized publishes the request. If within four months a minimum of 9 similar claims are filed, the first court seized refers the matter to the Higher

62 The trial has been decided by the Higher Regional Court (OLG) Frankfurt on 16 May 2012 and is currently pending at the Federal Court of Justice (BGH), XI ZB 12/12; see also ZIP 2012, 1236.

63 See Sec. 1 (2) KapMuG.

64 See Sec. 15.

Regional Court (*Oberlandesgericht*), which starts and leads the test case proceedings. During the latter, all individual proceedings are stayed and their success depends on the declaratory judgment made in the test case proceedings - whether or not these parties have requested test case proceedings (sec. 8 KapMuG).

Main Procedural Rules

The court determines which plaintiff is the lead plaintiff in the test case. All other parties will be intervening parties (Sec 9 (3) KapMuG). They have to accept the litigation in whatever situation it may be in at the time they intervene but are entitled to submit evidence, file motions and to effectively take all actions in the proceedings, if this does not run counter to those taken by the lead plaintiff (sec. 14 KapMuG).

Sec. 10 (2) KapMuG allows investors to join test case proceedings without filing an individual suit. They have to file a claim with the Higher Regional Court where the test case proceedings are pending within a period of six months after information on the test case proceedings has been published. The limitation period is interrupted once investors have filed a claim with the Higher Regional Court, provided that the test case proceedings concern the same facts, and that an individual suit is filed three months after the test case proceedings have been terminated.⁶⁵ This allows potential claimants to await the outcome of the test case proceedings before bringing an individual action.

The proceedings either end with a judgment (sec. 16) or a settlement (Sec. 17 ff KapMuG). In a second step, this result becomes the basis for the individual damages actions brought by the plaintiffs.

Certification

There is no general certification process. However, a minimum of 10 claimants is required to get test case proceedings started.

Opt-in/ Opt-out Procedure

KapMuG proceedings are more similar to opt-in proceedings, as a request needs to be made for test case proceedings to be initiated. Once the number of 10 claimants is achieved and proceedings commence, claimants who file a suit are, however, automatically included in the test case proceedings, but their identity is known from the outset. Their individual suits are stayed until a result of the test case proceedings is achieved which is binding on them.

The KapMuG settlement procedure is an opt-out procedure. A settlement is agreed upon between the lead plaintiff and the defendant. The involved parties can declare an opt-out if they do not wish to be bound by the settlement. The settlement requires consent by 70 % of the claimants. It binds all parties except those who have declared to opt-out. The court has to approve the settlement. The consequences of an opt-out system are less disputed in this scenario as all claimants have been known to the court from the first stage.

⁶⁵ Sec. 204 (1) Nr. 6a of the Civil Code (BGB).

Multi-Stage Process

KapMuG proceedings are three-step proceedings: The first instance court needs to decide upon requests for test case proceedings. If approved, the original damages actions of the plaintiffs are stayed for the duration of the test case proceedings. The latter have binding effect on the individual actions, which are continued once the test case has been decided.

Participation of Foreign Plaintiffs

Participation of foreign plaintiffs is not per se excluded by the KapMuG, provided that there is jurisdiction to hear their cases.

Res Judicata

The decision taken in the test case proceedings is binding all courts that had to stay with respect to the questions subject to the test case proceedings (Sec. 22 KapMuG). In case of a settlement, it is binding all parties who have not opted-out, once the court has declared it valid (Sec. 23 KapMuG).

Costs and Funding

The loser pays principle applies. The three-step procedure renders the distribution of costs more complicated but also cheaper for each involved litigant: there is a pro rata distribution of costs for test case proceedings. They are considered as a part of the costs for the subsequent individual lawsuits and depend on their value (Sec. 24 KapMuG). In addition, costs for the individual proceedings (court fee and legal advice) have to be assumed.

Number of claims

Data on the number of claims suggests that since its creation, various cases have been brought under the KapMuG. From 2005 to 2009 studies refer to 24 cases.⁶⁶ Official statistics that include KapMuG cases since 2010 refer to 56 cases in 2010. (In 2011: 8 cases, in 2012: 18 cases, in 2013: 89 cases). In 2014 the number rose to 124. In 2015, 22 were pending before the Higher Regional Court.⁶⁷

4. Other areas

In other areas, for instance environmental law, a proper mechanism is not available. However, exclusive jurisdiction for civil liability in mass environmental damage cases (Sec. 32a ZPO) enables a concentration of jurisdiction. Suits against the operator of a facility in view of compensating damages to the environment⁶⁸ have to be brought in the jurisdiction in which the facility causing the event giving rise to the damage is situated, except if the facility is situated abroad.

Furthermore, representative actions exist in the telecommunications sector,⁶⁹

⁶⁶ Halfmeier/Rott/Feess, Ministry of Justice, KapMuG evaluation 2010.

⁶⁷ Statistisches Bundesamt, Fachserie 10, Reihe 2.1, 2010-2015 on proceedings under Sec. 6 KapMuG.

⁶⁸ See Annex 1 of the Act on Environmental Liability (*Umwelthaftungsgesetz* – UmweltHG).

⁶⁹ Sec. 44 of the Telecommunications Act (*Telekommunikationsgesetz* - TKG).

where standing is granted to qualified entities and associations to claim injunctive relief. Representative actions also allow to secure equality for the disabled.⁷⁰

In contrast, there is no broader rule for mass torts that guarantees a concentration of jurisdiction. Jurisdiction can lie with the courts at the place where the damage arises or where the event giving rise to the damage occurred or at the domicile of the defendant. There is no specific mechanism for collective mass tort claims, e.g. in the area of product liability.

Mass tort cases have either been regulated out of court, for example, by the tortfeasor through social insurance, or in some cases by the legislator. The latter can intervene to create specific legislation, e.g. aiming at the creation of a compensation fund (see e.g. *Contergan* case). Each individual case is dealt with in a different way, the effectiveness of which depends on the circumstances and largely also on the public and media interest. This approach might be effective in the individual case, but does not guarantee legal certainty. Whilst the provisions on social insurance⁷¹ assure that claims of the victims for physical injury are satisfied by the insurance who then acts against the tortfeasor on the basis of subrogated claims, there is still a need for a proper collective redress mechanism covering economic losses and compensation for immaterial damage which are not covered by the insurance.

The Netherlands

I. Introduction

The Netherlands has two specific regimes that were drafted with the goal of collective redress: the collective settlements procedure and the collective action procedure. Under a third procedure, claims can be bundled together and assigned to a legal entity, a so-called special purpose vehicle.⁷² If the assignment is contractual, the entity will claim damages on behalf of the claimants. If the assignment is ‘real’ or ‘full’: the entity acquires the claim and starts the action on its own behalf. All Dutch collective redress mechanisms are applicable to all substantive areas of law. A new legislative proposal on collective actions, including damages actions, has been proposed as of November 16, 2016.

II. General Collective Redress Mechanisms

Under Dutch law, three different Collective Redress mechanisms can be distinguished:⁷³

- The Collective Settlements of Mass Claims Acts (hereafter: WCAM).
- Collective action, on the basis of articles 3:305a-305d of the Dutch Civil Code.
- Action on the basis of mandate/power of attorney and/or transfer/assignment of claims to a special purpose vehicle.

In the Netherlands, only non-profit entities, either ad hoc or pre-existing, that

⁷⁰ Sec. 13 of the Act on Equality for the Disabled (*Behindertengleichstellungsgesetz – BGG*).

⁷¹ Sec. 116 SGB X, Sec. 67 VVG.

⁷² This can be a pre-existing entity or ad hoc established foundation, an association, but also a limited company.

⁷³ Note that these procedural options can be combined.

meet certain criteria can act in collective actions or conclude collective settlements under the WCAM.⁷⁴ The articles of association of these collective redress entities should identify its goals, one of which may be claiming damages for the benefit or on behalf of certain individuals for a specific case. Other goals could be the obtaining of a declaratory judgement or injunctive relief. Pre-existing entities are not created specifically for an individual case, but rather exist for promoting a general group of interests, which formally encompass the specific case or claim. An example is the *Vereniging van Effectenbezitters* (Association of Investors), which has acted for the benefit of investors in securities litigations. Another notable example is the *Consumentenbond*. This is the most prominent Dutch consumer organisation. The most often used legal form for *ad hoc* special purpose vehicles is the foundation or as called in Dutch: *stichting*. We will use the term *special purpose vehicle* when we refer to this type of ad hoc legal entities.

2.1. General description

The Collective Settlement procedure under the Collective Settlements of Mass Claims Acts (hereafter: WCAM), was adopted in 2005 by virtue of the *Wet Collectieve Afwikkeling Massaschade*.⁷⁵ The WCAM underwent minor improvements in 2013.⁷⁶ The Collective actions legislation was adopted in 1994.⁷⁷ A collective action can be initiated on the basis of articles 3:305a-3:305d Dutch Civil Code for the protection of a group of similar interests. The interests can be of an altruistic nature, such as environmental, animal protection, protection of heritage, artistic goals or financial, such as investment losses. The non-profit entity can't seek monetary damages through the collective action of 3:305a of the Dutch Civil Code. Such damages claims can only be made through mandates and/or transfer of claims to a special purpose vehicle (as explained above).

2.2. Scope

The 305a-collective actions and the WCAM procedure can be invoked in all substantive areas of law. Furthermore, an agreement based on the WCAM is also possible with an insolvent party.⁷⁸ The scope of actions based on mandate and/or the transfer of claims follow the common rules on mandate and transfer, and therefore do not have any restrictions either on their substantive scope. There is a general rule that the assignments should not be against public policy.

2.3a. Procedure – standing

Under the WCAM settlement procedure, a settlement agreement is concluded between the party or parties compensating the damages or contributing to the settlement

⁷⁴ Note however that the entities under the third category (action on basis of an assignment of claims) do not need to be not for profit.

⁷⁵ WCAM, Dutch Act on Collective Settlements, Law of 23 June 2005, Stb. 340. See articles 7:907-910 Dutch Civil Code, articles 1013-1018a Dutch Code of Civil Procedure. The legislation has been incorporated into the Dutch Civil Code with respect to the material requirements that a collective settlement should address in order to be found fair and reasonable and declared binding by the Amsterdam Court of Appeal and the Dutch Code of Civil Procedure that provides for the procedural rules to follow in order to declare a collective settlement binding.

⁷⁶ Act of 26 June 2013), Staatsblad 2013, 255, entered into force 1 July 2013, Staatsblad 2013, 256.

⁷⁷ Law of 6 April 1994, Stb. 269).

⁷⁸ art. 110 (3) Dutch Insolvency Act.

fund and an entity representing the victims. All the contracting parties must then jointly request the court for a declaration that the settlement is binding for all victims that fall within the scope of the agreement.⁷⁹ The representative organisation acting for victims must have full legal capacity to act in court, and the interests of the group that the organization is seeking to protect must be covered by its articles of association.

The proceedings for a collective action can only be started by an organisation that has the statutory goal of promoting the interests concerned.⁸⁰ Furthermore, the interests must be sufficiently alike, in order to be grouped together. The interests of the claimants must be sufficiently protected and the organization must have tried to reach an agreement out of court before initiating the action. The court does not materially check whether the claim protects the interests of the persons concerned.⁸¹ Representativeness is not required.⁸² The requirement is met if the interests that are bundled by the claim lend themselves to bundling to ensure an efficient and effective legal proceeding.⁸³ An act cannot form the basis for a collective action, if the individuals who are affected by the act contest using that act as the basis for the collective action.⁸⁴

Finally, standing for actions on the basis of mandate and/or transfer of claims derives from the standing of the respective claimants. This means that (a) the claimant itself must previously have had standing directly harmed, and (b) the claimant must be properly represented, i.e. the entity must have a valid mandate to act in the name of the claimant, or the claim must have been transferred to the entity in a valid fashion. Furthermore, the defendant may request a detailed specification of the individuals represented or the individuals whose claims are being claimed in the procedure.⁸⁵

2.3b. Opt-in; opt-out procedure

The WCAM settlement must describe the group(s) of claimants that will benefit from the settlement as well as the grounds for the claim.⁸⁶ After court approval, the settlement has a binding effect on all victims included in the terms of the settlement, except for those who have declared their desire to opt-out. The opt-out declaration must be made within the time set by the court.⁸⁷ The individuals who have opted-out are not bound by the settlement terms and the judge who decides on their case in subsequent individual proceedings is free to ignore the settlement.⁸⁸

In a collective action, the procedure binds only the parties to the proceedings e.g. the organization and the defendant. However, the judgment can have consequences for those whose interests are affected by the decision. They may opt-out from the effect

79 art. 1013(1) Dutch Code of Civil Procedure.

80 art. 3:305b Dutch Civil Code.

81 art. 3:305a (2) Dutch Civil Code.

82 This was demonstrated in the Plazacasa case of 2010. The defendant argued that the foundation should be declared inadmissible since a majority of the foundations constituency opposed the litigation. The Supreme Court denied the request. The collective action does not exist for the sole benefit of litigating on behalf of a confirmed majority, but is also available for a minority, who wishes to litigate on behalf of infringed rights r.o. 4.2 ECLI:NL:PHR:2010:BK5756.

83 r.o. 4.2 ECLI:NL:PHR:2010:BK5756.

84 art. 3:305a(4) Dutch Civil Code.

85 HR 27 November 2009, LJN BH2162 (VEB/World Online).

86 art. 7:907 (2) a-c Dutch Civil Code..

87 art. 7:908(2) Dutch Civil Code. and art. 1017(3) Dutch Code of Civil Procedure.

88 Aandelenlease cases, HR 5 June 2009, LJN BH2815, BH2811, BH2822, Nederlandse Jurisprudentie 2012/182-184).

of the judgment by simply (without formal requirements) contesting that effect.⁸⁹ Given the fact that a judgement in a collective action doesn't have a binding effect on the group members and is binding only on the organization one may wonder about the utility of that provision. We are not aware of examples where this provision has been invoked.

Actions through mandate and/or the transfer of claims follow the normal rules on *res judicata*. Therefore, the outcome only applies to those who have joined the proceedings through mandate or on those who got the claims assigned. However, the judgment may have a 'soft' form of *res judicata*,⁹⁰ meaning that in subsequent individual proceedings claimants can use it to argue in favour of their case.

2.3c. Competent Court

The WCAM procedure can only be brought before The Amsterdam Court of Appeal.⁹¹ Collective actions and actions based on mandates and/or transfer of claims follow the regular European and national rules on jurisdiction.

2.3d. Participation of foreign plaintiffs

Assuming jurisdiction of the Dutch Court, a foreign representative organisation can participate in the WCAM procedure, as long as it has full legal capacity to act in court. Every victim who is included in one of the categories of the settlement and does not opt-out in time is bound by that settlement, including foreign parties.⁹²

In collective actions, there is no limitation regarding nationality; foreign plaintiffs can make use of the Dutch collective action as long as the articles of association of the respective organization cover the scope of the action and include the interests of the foreign parties. Also, an action regarding consumer protection can be instigated by a foreign organisation for protecting consumer interests as intended under art. 4(3) Directive 98/27/EC.⁹³

Foreign plaintiffs can participate on the same basis as Dutch plaintiffs in actions on the basis of mandate and/or transfer of claims if the law governing the mandate or transfer allows that and the mandate or transfer is legally valid according to that law. In specific cases rules of Private International Law may stand in the way of competence of the Dutch court, if the 'foreign' claim can only be brought before a non-Dutch court. This may apply in particular where the defendant is not located in The Netherlands.

2.3e. Certification criteria

The request in a WCAM procedure will be denied if the representative organisations together are not sufficiently representative of the whole group.⁹⁴ Hence, it is unnecessary for each individual organisation to be representative for the whole group, it is sufficient if it is representative for a subgroup. Furthermore, the Court assesses whether

⁸⁹ art. 3:305a(5) BW). See in particular HR 26 februari 2010, LJN BK5756, NJ 2011/473 (Stichting Baas in Eigen Huis/Plazacasa BV).

⁹⁰ HR 27 November 2009, LJN BH2162 (VEB/World Online).

⁹¹ art. 1013(3) Dutch Code of Civil Procedure.

⁹² see e.g. Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium).

⁹³ see art. 3:305c Dutch Civil Code. For an example see Rb Breda 9 July 2008, LJN BD6815

⁹⁴ art. 7:907(3)f Dutch Civil Code.

the agreement protects the interests of the group members concerned (art. 7:907 (3) e BW). There are no certification requirements in either the context of WCAM settlements, nor in relation to 305a collective actions. No certification criteria as such exist for collective actions, except the aforementioned (in b above) requirements for standing, that the organisation must according to its statutory description promote interests concerned in the action. Soft law exists in the form of a non-binding ‘Claimcode’⁹⁵ with respect to the governance of claim organizations involved in 305a-collective actions. The code prescribes the composition and remuneration of Board and Supervisory Board members, financial reporting, communication with group members etc. It was established in view of potential conflict of interests by fraudulent *special purpose vehicles* and is an example of self-regulation. Note that despite the non-binding status of this document, a lower court accepted in a recent decision the argument from the defence that the claimant had no legal standing since the organization didn’t follow the Claim Code.⁹⁶ The Claim Code was deemed as an important instrument for the court to analyse if the *special purpose vehicle* sufficiently covered the interests of its constituency.⁹⁷ Note that the Claim Code doesn’t cover actions initiated by spv’s based on mandates or assignment of claims.

2.3f. Main procedural rules

The WCAM proceedings⁹⁸ start with a joint petition by the settling parties to the Amsterdam Court of Appeal to declare the settlement binding on everyone falling within the scope of the settlement.⁹⁹ The parties for whose benefit the settlement was concluded, are notified of the settlement and of the oral hearing. A notice will be published in one or more newspapers.¹⁰⁰ It is possible for a foundation or association that promotes the interests of the group of claimants covered by the settlement to make objections against the settlement.¹⁰¹ Any other ongoing proceedings regarding claims covered by the settlement are suspended during the WCAM proceedings.¹⁰² The court may order additional expert evidence.¹⁰³ The court can further hold oral hearings to discuss the way in which the trial is to be conducted.¹⁰⁴ The decision should among other things, state whether the agreement is declared binding, and if so, the period during which an opt-out declaration must be made and the way in which it should be made, the period during, and the manner in which, a claim for compensation under the settlement can be filed.¹⁰⁵ The court can suggest modifications to the agreement.¹⁰⁶ In a recent WCAM-ruling, the Amsterdam Court of Appeal ruled that the parties should consider renegotiating certain parts of the

95 :http://www.consumentenbond.nl/over/wie_zijn_wie_claimcode/.

96 ECLI:NL:RBOBR:2016:3383.

97 ECLI:NL:RBOBR:2016:3383 r.o. 5.19.

98 WCAM proceedings are available only for parties who come to a settlement agreement. When one of the parties is unwilling to settle, one or more of them may request that the competent court holds a pre-trial meeting: art. 1018a Dutch Code of Civil Procedure.

99 art. 1013 Dutch Code of Civil Procedure.

100 art. 1013 (5) Dutch Code of Civil Procedure.

101 art. 1014 Dutch Code of Civil Procedure.

102 art. 1015 Dutch Code of Civil Procedure.

103 art. 1016 Dutch Code of Civil Procedure.

104 art. 1013 (8) Dutch Code of Civil Procedure.

105 art. 1017 Dutch Code of Civil Procedure.

106 art. 7:907 (4) Dutch Civil Code.

settlement.¹⁰⁷ Appeal to the Supreme Court is open only to the original petitioning parties jointly and only if the court has rejected the request to make the agreement binding.¹⁰⁸

A 305a-collective action cannot be initiated if the organisation hasn't tried to resolve the matter out of court first.¹⁰⁹ The court can decide to refer the case to another court or combine it with another related cases.¹¹⁰ Actions on the basis of mandate and/or transfer of claims follow the general rules of civil procedure. Regarding representation, the *special purpose vehicle* may start the procedure in its own name as formal plaintiff, and does not have to stipulate that it represents the material plaintiffs. If it is questioned whether the plaintiff is entitled to claim the requested award, the formal plaintiff must stipulate that it is mandated and if required offer proof of its mandate.¹¹¹ The procedure can, and often is, combined with a collective action on the basis of art. 3:305a BW.¹¹²

2.3g. Res judicata effect

The WCAM settlement accords binding effect on all victims included in the terms of the settlement, except for the individuals who have declared their wish to opt-out of the settlement. The opt-out declaration has to be made within the appointed time set by the court.¹¹³ The settlement itself does not constitute an admission of fault. The individuals who have opted-out are not bound, and the judge who decides on their case is free to deviate from the settlement.¹¹⁴

The judgment in collective actions and in actions on the basis of mandate and/or transfer of claims has res judicata only between the parties to the proceedings (and/or the claims adjudicated therein). Furthermore, the Supreme Court has held that a declaratory relief in a collective action may serve as a starting point in similar proceedings started by other claimants.¹¹⁵ Hence a collective action may be useful as a step towards an individual award of damages.

2.3h. Evidence/ discovery

In a WCAM-procedure the court may order expert evidence.¹¹⁶ Other evidentiary rules for petition proceedings do apply in principle, but in general no further evidence will be required in light of the nature of the proceedings (determining whether the settlement may be declared binding, which does not involve a decision on the actual facts of the case). The court does check whether the amount of compensation is reasonable considering, inter alia, the extent of the damages and other factors. Evidence may only be necessary where another representative body contests the settlement.¹¹⁷ The general rules regarding evidence and discovery apply to collective actions and actions on the

107 Gerechtshof Amsterdam 200.127.525/1, May 13, 2014, downloadable through: <https://www.rechtspraak.nl/SiteCollectionDocuments/tussenbeschikking%20d.d.%20%2013%20mei%202014.pdf>.

108 art 1018 (1) Dutch Code of Civil Procedure.

109 art. 3:305a (2) Dutch Civil Code.

110 art. 3:305a (6) Dutch Civil Code.

111 HR 26 November 2004, LJN AP9665, NJ 2005/41, HR 26 February 2010, LJN BK4995, NJ 2011/474.

112 e.g. HR 2 December 1994, NJ 1996/246, also HR 2009 VEB/World Online.

113 art. 7:908(2) BW and art. 1017(3) Dutch Code of Civil Procedure.

114 Aandelenlease cases, HR 5 June 2009.

115 HR 27 November 2009, LJN BH2162 (VEB/World Online), r.o. 4.8.2.

116 art. 1016 Dutch Code of Civil Procedure.

117 art. 1014 Dutch Code of Civil Procedure.

basis of mandate and/or the transfer of claims. No particular evidentiary/discovery rules apply. The general discovery mechanism is art. 834a Rv, which allows any party to request (a copy of) materials to which it has a legitimate interest. This article has had a wide application.¹¹⁸

2.3i. Single or Multi stage process

The WCAM consists of a single-stage process. However, the court can hold pre-trial meetings or a case management conference to discuss the way in which the fairness hearing is to be conducted.¹¹⁹ Furthermore, parties may also request a pre-trial case management conference.¹²⁰ Collective actions and actions on the basis of mandate and or/transfer of follow a single process procedure. The court may decide to adjudicate part of the dispute first, but there is no statutory bi-furcation of the process.

2.4. Available remedies

The remedies in the WCAM procedure are the remedies that may be part of a settlement agreement. These include, primarily, monetary damages¹²¹, but may include also other obligations that require specific performance, as these are compensation of damage in kind.¹²² It also may involve other types of remedies, such as declaring contracts null and void.¹²³ Dutch law does allow penalty clauses to aid in enforcement of the obligations of the agreement. In theory cy pres distribution is an option as well, but it has been applied to date only in out of court collective settlements (and not WCAM settlements that require a court approval).

Through collective actions only an injunction for example to rectify certain statements or declaratory judgment that a company has violated the law can be obtained. Damages in money cannot be obtained in a collective action. The procedure for actions on the basis of mandate and/or transfer of claims allows a variety of remedies, including financial relief.

2.5. Costs & funding

In the Netherlands, the loser pays rule applies. Also in a WCAM-procedure the court may declare that the costs are to be paid by one or more of the petitioners,¹²⁴ but typically each party bears its own costs.

In collective actions the organization and not the group members is liable for potential adverse cost orders. In collective actions, victims have to start subsequent individual actions to establish causation, liability and damages, there they have to fully bear their own costs. In collective actions, funding is often obtained via contributions from individuals whose interests are at stake or who have an idealistic purpose in supporting the organisation. 305a organizations initiating collective actions do not

118 I.N. Tzankova, I van Maanen, M Rijnhart, 'a Dutch view on discovery: Short and sweet', *Defense Counsel Journal*, 91(3) 2014, p. 234.

119 art. 1013 (8) BRv.

120 art. 1018a BRv, see 5.6 above.

121 see art. 7:907(1) Dutch Civil Code.

122 'schadevergoeding in natura', art. 6:103 Dutch Civil Code.

123 art. 7:907 (7) Dutch Civil Code.

124 art. 1016 lid 2 Dutch Code of Civil Procedure.

qualify for Legal Aid.

Actions on the basis of mandate and or/transfer of claims are typically financed via individual contracts by the claimants with the *special purpose vehicle*. The contract often stipulates that claimants will receive the award minus a percentage. Increasingly, ad hoc entities receive third party funding from commercial litigation funders or legal expense insurers. However, many legal expense insurers have excluded full coverage or have limited coverage of mass claim disputes or collective actions. They might cover the individual contributions of the client to an spv or to a collective action.¹²⁵ Third party funding is allowed and currently unregulated.

2.6. Number of claims

The WCAM procedure has been used eight times since its inception,¹²⁶ with a ninth ruling on the way.¹²⁷ The reason for this low number of cases appears to be that there are not very many claims that can fall under the WCAM procedure (as they should involve a significant number of individuals), while those that could, may also be settled via an out of court collective settlement agreement, without recourse to the specific WCAM procedure (in particular where there are not too many individuals involved). Furthermore, the WCAM is voluntary in nature and only applies when a defendant wants to settle.

The exact number of collective actions that has been initiated after the introduction of the provisions in 1994 is unknown. Research conducted on commercial incentives in collective redress in the Netherlands was performed on 400 case studies, from which 334 were considered unique.¹²⁸ There is no centralised register or account of collective actions in the Netherlands. There is no data on the number of actions launched on the basis of mandate and/or transfer of claims.

2.7. Particularities/ Problems if mechanism is used in cross-border cases

The WCAM procedure is available in cross-border cases, as long as the representative organisations are also sufficiently representative for foreign claimants.¹²⁹ The WCAM can also be used in cases where only a minority of claimants are Dutch and where the liable party has no ties to The Netherlands, as long as the Court of Appeal is competent to decide all claims under the settlement (Converium). The Converium case provided criteria in which the Court of Appeal could accept jurisdiction. For instance, the special purpose vehicle finds its statutory home in the Netherlands, the execution of the settlement will take place in the Netherlands and the funds will be transferred

125 I.N. Tzankova, Funding of Mass Disputes – lessons from the Netherlands, George Mason University School of Law 2012 volume 8, number 3, p. 581.

126 Ilja Tillema, 'Tien jaar WCAM: een overzicht, MvO 2016 3&4, p. 90.

127 Currently the VEB is involved in the WCAM-procedure against Ageas/Fortis, this is to be believed to be the ninth WCAM-settlement.

128 Ilja Tillema, 'Commerciële motieven in privaatrechtelijke collectieve acties: olie op het vuur van de claimcultuur, Aers Aequi mei 2016, p. 341.

129 Cf. Rechtbank 's-Gravenhage 30 January 2013, ECLI:NL:RBDHA:2013:BY9850 (Shell), Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium).

from a bank account in the Netherlands.¹³⁰ Foreign parties need to be notified of the proceedings, given the requirements of art. 6 ECHR (Converium case). In itself this makes the WCAM a useful instrument in reaching binding settlements in cross-border cases. However, it has been untested so far whether the WCAM operated on an opt out basis would be recognised and enforced in jurisdictions that view the opt out device as problematic.

In theory, there are no issues when using the collective action in cross-border cases. In practice, that might be difficult to organize if there is no organization willing to take on the case and finance it.

The same is said for actions on the basis of mandate and/or transfer of claims: in theory there are no issues and said collective redress mechanism can be used in cross border setting, but differing applicable laws on the assignments and on the claims, and large numbers make litigating burdensome and potentially unmanageable.

2.8. Critiques

With respect to cross-border cases, the versatility of WCAM has been criticised as it means that a Dutch court can bind a large number of parties without their explicit consent, except if the parties enter the proceedings or, within the appointed period, send an opt-out declaration.¹³¹ This appears to apply even where the national system of the claimant and/or liable party does not allow for a loss of claim without an individual court procedure. WCAM negotiations and procedures are started by representative organisations.

Collective action is to be initiated by non-profit entities that meet certain criteria but a representativity is not a requirement. Also, multiple collective actions about the same event can take place and it can be confusing for group members and the defendant to choose ‘the right’ one. Finally, multiple actions might also lead to an ‘adverse auction’ by the defendant.

Actions on the basis of mandate and or/transfer of claim has faced two criticisms. First of all, the system is cumbersome insofar as the *special purpose vehicle* has (if asked for proof) to provide the identity of all specific claimants and claims in order to prove its mandate and/or the transfer of valid claims. This is an administrative hassle, while individuals also fear being subjected to undue pressure if their identities are known. Secondly, *special purpose vehicles* are not supervised and may therefore attract unscrupulous individuals who use the *special purpose vehicle* primarily as a means to collect money, while reaching suboptimal results and not providing proper services.¹³² A weakness is the possibility of free riders: a positive judgment reached by the *special purpose vehicle* may be used by non-participating claimants in order to start their own procedure and/or reach a cheaper settlement with the defendant. Although the judgment does not have formal *res judicata* for non-participants, it may in fact serve as a material guidepost for new procedures regarding the same event,¹³³ albeit the defendant may offer

¹³⁰ Paragraph 2.9 of the decision by the Amsterdam Court of Appeal in case no. 200.070.039/01 on November 12th 2010, official sworn English translation is downloadable through:

http://www.converiumsettlements.com/EN/Judgment_12_November_2010.pdf.

¹³¹ Hof Amsterdam 12 November 2010, NJ 2010/683, LJN: BO3908 (Converium).

¹³² cf. Van Boom 2009, par. 3.5.

¹³³ See HR 27 November 2009, LJN BH2162 (VEB/World Online).

further counter-arguments.¹³⁴ In the literature, it is suggested that in general some *special purpose vehicles* may actually not provide proper service for their clients, even if they are representative.

3. Legislative proposal of November 16th, 2016

On 16 November 2016, the Dutch Ministry of Justice presented a new Bill for collective damages actions. The proposal aims to make collective settlements more attractive for all parties involved by improving the quality of representative organizations, coordinating the collective (damages) procedures and offering more finality. It is unclear when or whether the Bill will be passed in its current form, but below are first impressions and a selection of some noteworthy features of the Bill.

1. The proposed regime covers all substantive areas of law, which is a continuation of the status quo. What is new, is that now damages can also be claimed collectively and not only declaratory and injunctive relief. The same requirements apply to all types of actions: injunctive, declaratory or damages. More specifically, under the new regime it will be harder for claimants to file actions for injunctive and declaratory relief (more under 6. and further).
2. Exclusive jurisdiction in the first instance would be with the Amsterdam District Court, but it would be possible to transfer the collective action to another district court if that would be more appropriate in a given situation.
3. There would be a registry for class actions so the public is notified once a class action has been initiated.
4. A system of ‘lead representative organizations’ would be introduced to streamline the process if there are multiple candidates for the position. There could also be co-lead representative organizations, consisting of two or more organizations if that is appropriate for a specific action. Under the current regime it is possible to have multiple competing collective actions, a situation that is perceived as confusing for consumers and burdensome for defendants.
5. Only non-profit entities would be allowed to file the collective action, as under current law. Those could also be ad hoc foundations, but heavy governance requirements would be put in place for their Board and Supervisory Board structure, which would require D&O insurance, guarantees for non-profit background of the Board and Supervisory Board members, a website and communication strategy for the group, the preparation of financial statements etc. This would require a significant financial investment beforehand in the logistical infrastructure of the organization, and it is unclear how this could be funded on a non-commercial basis. There is an exception for matters with an idealistic public policy background. Those ad hoc foundations might be exempted from some of the requirements, but in fact the Bill puts the ad hoc foundations in a disadvantageous position in comparison to pre-existing non-profit organizations.
6. Moreover, the lead representative candidates would need to demonstrate

¹³⁴ Cf. B.T.M. van der Wiel, ‘Derdenwerking van rechterlijke uitspraken’, *Nederlands Juristenblad* 2011/671, p. 792-796.

- expertise and track record in class actions, have a sufficient number of claimants supporting them in relation to the specific action, and have sufficient financial means. The parliamentary notes specify that the court might ask a neutral third party to review the agreement, which would not need to be shared with the defendant.
7. Opt out seems to be the main rule under the new regime, but this is somehow mitigated. Under the selection test for lead representative organization (see under 6 above), the candidate has to demonstrate that it has a large enough group of claimant supporters. The organization can't operate as an empty shell. This assumes at least some book-building effort beforehand and is therefore at least in part an opt-in. After the lead representative organization is appointed, the whole group will be represented on an opt-out basis.
 8. The lead representative organization would need to demonstrate the superiority of the collective action in comparison to individual law suits.
 9. The lead representative organization would need to demonstrate a sufficient link with the Netherlands. The Dutch legislator has consulted the Dutch State Commission for Private International Law and the Advisory Commission on Civil Procedure in relation to that requirement. According to the legislature, the test for a sufficient link with the Netherlands is compatible with the Brussels I Regulation, because it does not concern the jurisdictional test but the certification of a civil action, which is a matter of national civil procedure. It aims to exclude situations where the defendant is not based in the Netherlands, the harmful events did not take place in the Netherlands or the majority of the claimants are not domiciled in the Netherlands. In those situations the claimants will still have the option of starting an individual action. This requirement seems to aim to address the recent *VEB v BP* type of collective actions, where the Dutch Investors' Association VEB initiated a collective action for declaratory relief for all investors who had their BP shares in bank accounts in the Netherlands, following the ECJ's criteria formulated in the *Kolassa* ruling (C-375/13). The Amsterdam District Court declared on 28 September of this year that it lacked jurisdiction to hear the action, which is questionable in view of the *Kolassa* ruling. The current proposal aims to eliminate the use of the new Dutch collective actions regime in situations where Dutch courts under Brussels I and ECJ case law would have jurisdiction to hear individual cases for the 'Kolassa type' of claimant, but those would not be able to use the Dutch collective action regime to effectuate their rights.
 10. Group members could opt out at the beginning of the certified class action and start an individual proceeding, but those individual proceedings could be stayed at the request of the defendant, at least for one year after the parties opted out. The court would have discretion to allow the stay of the proceedings. This departs somewhat from the systems existing in other jurisdictions (e.g. US and Canada) where claimants who opt out can resume their individual actions with no delays.
 11. The collective action tolls the statute of limitation for the whole group represented by the lead representative organization. Parties who choose to

opt out need to preserve their individual rights within 6 months after they have opted out. Under Dutch law it is not necessary to start a civil action to preserve one's rights. It is sufficient to send a letter to that effect to the defendant.

12. Under current Dutch law, adverse cost orders are fixed. Under the proposal it would be possible for the lead representative organization to recover the real costs of litigation if parties reach a settlement. The lead representative organization would be liable for any adverse costs if it loses the action.
13. Any settlement reached under the new collective action regime would need to be approved by the District Court. It is unclear whether the new regime aims to limit the extra-territorial application of the WCAM: the Dutch act on collective settlements that has already been used twice for global settlement purposes. Presumably not, if globally settling parties choose to invoke the WCAM directly and not via the Dutch collective action regime. Furthermore there are the specific *Claimstichtingen* (see general part) that instigate proceedings. No specific sector collective redress mechanisms exist in the area of competition or financial market law.

Sectoral Collective Redress Mechanisms

A. Consumer law

The general mechanisms for collective redress apply also for consumer collective redress. However, there are a few specific rules for certain elements of consumer law. The general mechanisms apply to the whole of consumer case law. The scope isn't limited within consumer law. For specific interests, there are specific material provisions. Furthermore, there are specific rules for specific parts of consumer law. The procedure follows the same general rules. Art. 6:240 BW specifies (inter alia) that a representative organisation for consumers can start a procedure against unfair general conditions. There are no diverging procedural rules on opt-in; opt-out procedures. As for the competent court. The general rules apply. For a procedure against unfair general conditions on the basis of art. 6:240 BW, the Court of Appeal at The Hague has sole competence.¹³⁵ A provision is included that allows foreign representative consumer organisations or consumer authorities to start proceedings against unfair general conditions.¹³⁶ Furthermore, art. 3:305c BW (see above) allows foreign organisations on the list of the European Commission to instigate a collective action, see above. In cases regarding unfair contract terms, there are specific rules regarding the court summons for an association representing companies using certain general contract terms.¹³⁷ The proceedings regarding unfair general conditions are not admissible if the representative consumer organisation did not, prior to the proceedings, give the user of the general conditions the opportunity to change the conditions.¹³⁸ The *Consumentenbond* (Dutch association of consumers) is fairly active, with multiple court procedures each year,

135 art. 6:241(1) Dutch Civil Code.

136 art. 6:240(6) Dutch Civil Code.

137 art. 1003-1007 Dutch Code of Civil Procedure, see further art. 6:240-243 Dutch Civil Code.

138 art. 6:240(4) Dutch Civil Code.

which mostly involve general consumer protection on the basis of art. 3:305a BW.¹³⁹ Furthermore there are the specific *special purpose vehicles* (see general part) that instigate proceedings. No specific sector collective redress mechanisms exist in the area of competition or financial market law.

Sweden

I. General Collective Redress Mechanism

1.1. General description

On January 1st, 2003, the Group Proceedings Act (2002:599)(GRL) came into force in Sweden, making it the first country outside the Anglo-American legal sphere to introduce legislation in the field of collective redress.¹⁴⁰ Introduced spontaneously, the legislation was not in response to a need that had crystallized in special court cases. Further, there are other types of collective redress mechanism in Swedish domestic law.

The GRL provides the possibility of binding together a plurality of claims against the same defendant into one group action, which are based on the same or similar circumstances (commonality) and when the claims cannot be equally well pursued through other procedural forms (superiority). It provides three ways in which group actions can be instituted: 1. an individual member of a group who is a natural person or a legal entity (private group action); 2. by an association of consumers or wage-earners (organisational group action), or; 3. by a designated public authority (public group action). With regard to consumer disputes, the Government has designated the Consumer Ombudsman (KO) as the appropriate public authority.

1.2. Scope

The possibility of class actions covers civil cases, which belong to the competence of general courts as well as the cases concerning environmental damages in environmental courts¹⁴¹ and cases concerning competition damages in the Patent and Market Court.

¹³⁹ For a more complete overview, visit the active case page on <https://www.consumentenbond.nl/acties/overzicht>.
¹⁴⁰ Per Henrik Lindblom, *Lagen om grupprättegång - bakgrund och framtid*, SvJT 2005 p.183, Per Henrik Lindblom, *Grupptalan i Sverige. Bakgrund och kommentarer till lagen om grupprättegång*, Iustus 2008. Persson, A.H., *Evaluations of the effectiveness and efficiency of collective redress mechanism in the European Union - country report Sweden*, 2008, Annina H Persson, *Collective enforcement: European prospects in light of Swedish experience*, In *Collective Actions. Enhancing access to justice and reconciling multilayer interest* (Red: Wrba, S & Van Uytsel, S. & Siems, M.) Cambridge University Press, 2012, p. 341-363. Ervo, L. & Persson, A. (2015). *The Finnish and Swedish legislation in the light of the ARD-directive: boards and ombudsmen*

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¹⁴¹ Class Action Act, Section 2 and Code of *Environmental matters, Chapter 32, Section 13*.

1.3. Procedure

a. Standing

The possible class actions in Sweden can be individual group actions, governmental (public) class actions, as well as suits by organizations.¹⁴² One individual, who is a member in the group concerned, can bring a suit against a defendant in the case of individual group action. Physical or legal persons can pursue the individual group action.¹⁴³ In suits by organizations, the plaintiff is a non-profit-making-association for consumers or employees.¹⁴⁴ In environmental cases, the non-profit associations can bring class actions if they work for the interests of nature- or environmental conservation. Also the associations for fishermen, farmers, reindeer management and forest societies can bring the organizational suit on environmental issues.¹⁴⁵ The public class action is possible in the cases where a suit has not brought as an individual class action or by the organization named above.¹⁴⁶ The possible authorities, who can bring the public suit, are a consumer ombudsman and conservation authorities in environmental cases.¹⁴⁷

b. Opt-in; opt-out procedure

The Swedish system is based on the opt-in method.¹⁴⁸

c. Competent court

Selected ordinary district courts designated by the Government are competent to try cases under the Class Action Act. There shall be at least one such designated court in each county.¹⁴⁹ The Government has decided to designate the district courts that are competent to hear real estate disputes. The reason for those particular courts being selected to handle a group action is that they often have considerable resources for and experience of handling complex and complicated disputes with many persons involved. They are also geographically spread across the country.¹⁵⁰

d. Participation of foreign plaintiffs

There is no specific regulation on international class actions. Normal rules, which cover international procedural law, are valid. The same forum must be competent to cover the case with all plaintiffs.

e. Certification criteria

According to the Section 8 in Class Action Act, A group action may only be considered if: 1. the action is founded on circumstances that are common or of a similar

¹⁴² Class Action Act, Sections 1, 4, 5 and 6.

¹⁴³ Class Action Act, Section 4.

¹⁴⁴ Class Action Act, Section 5.

¹⁴⁵ Code of Environmental matters, Chapter 32, Sections 13 and 14.

¹⁴⁶ Government bill 2001/02:107, p. 54.

¹⁴⁷ Class Action Act, Section 6.

¹⁴⁸ Class Action Act, Section 14.

¹⁴⁹ Class Action Act, Section 3.

¹⁵⁰ Per Henrik Lindblom, Gruppptalan i Sverige. Bakgrund och kommentarer till lagen om grupprättegång, Iustus 2008, p. 300.

nature for the claims of the members of the group; 2. group proceedings do not appear to be inappropriate owing to some claims of the members of the group, as regards grounds, differing substantially from other claims; 3. the larger part of the claims to which the action relates cannot equally well be pursued by personal actions by the members of the group; 4. the group, taking into consideration its size and ambit, is otherwise appropriately defined, and; 5. taking into consideration the plaintiff's interest in the substantive matter, the plaintiff's financial capacity to bring a group action and the circumstances generally, is appropriate to represent the members of the group in the case.

f. Main procedural rules

Once the lawsuit is initiated, members of the group must affirmatively opt-in via a communication to the judge if they wish to be part of the action or they will otherwise be left out of it. Group members are not party to the action and customarily do not appear at the trial. However, they may intervene in the proceedings and appeal the judgment, in which case they are treated as parties. The ruling takes legal force both for and against all who have opted-in as if they had personally sued.

g. Evidence/ discovery

According to the Chapter 35, Section 6 of the Swedish Code of Judicial Procedure, the presentation of evidence is the responsibility of the parties. If it is found necessary, the court may also arrange for presentation of evidence on its own motion. In cases amenable to out of court settlement or in criminal cases concerning offences not within the domain of public prosecution, however, the court may neither hear a witness unless a party requests that the witness be heard or the witness was previously heard on request of a party, nor, except on request of a party, direct the production of documentary evidence. Therefore, in most cases the initiative of parties is needed in order to expand the pieces of evidence.

In Sweden, the concept of full discovery is as yet unknown, but many other rules can be found, which cover the same area and will help in organizing the testimony and in finding out the facts beforehand or during the trial including the pre-trial stage. The parties in Swedish civil litigation and their representatives may not lie during the proceedings. However, they are under no obligation to disclose facts that they consider unfavourable to them voluntarily. It is for each party to detect and identify the facts which s/he wishes to rely on. If s/he suspects, that relevant facts are being withheld s/he may try to induce or force the other side to disclose those facts using the following methods. Firstly s/he can put questions to the opposite party. Then s/he can ask the discovery of documents and even the pre-trial examination of witnesses is possible in extraordinary circumstances.¹⁵¹

The parties are free to put questions to each other during the pre-trial proceedings and in the main hearing. However, there is no general sanction available to force an answer. Swedish law does not know the concept of contempt of court. Thus, if a party to whom a question is directed does not wish to answer, s/he may refuse to do so. It is for

¹⁵¹ Lundblad, Claes: Sweden. In *Pre-Trial and Pre-Hearing Procedures Worldwide*. Ed. by Charles Platto. Graham & Trotman and International Bar Association 1990, pp. 151 - 152.

the court to draw its own conclusions from the fact that no answer is given. A party is, however, under the duty to state what evidence s/he/her/himself relies upon. In respect of written evidence, s/he is also required, at the request of her/his opponent, to state what further evidence s/he possesses. This rule is rarely used and it is not properly sanctioned. Moreover, its scope of application is unclear.¹⁵²

Swedish law permits the discovery of written evidence to a fairly large extent. Not only is a party obliged to produce written evidence in her/his possession, but discovery may also be ordered against any holder of a document which may be presumed to have evidentiary value. This obligation applies also to persons who are not parties to the dispute. The difficulty is, however, that to obtain a court order the applicant will have to identify the document with such clarity that, if need be, the order can be enforced by a bailiff. The courts tend to uphold the identification requirement to prevent fishing expeditions. The result is that disclosure of unknown documents becomes difficult. One of way in which the identification problem may be resolved is for the requesting party to ask the court for permission in the course of the pre-trial proceeding to call witnesses who may be privy to the existence and the contents of relevant documents. This approach has gained increasing popularity in recent years. It tends to make the documentary discovery rules more efficient.¹⁵³

Before the trial, a witness cannot be compelled to disclose what his testimony will be. The principle is that the witness is heard at the trial and may be forced to give testimony only at the trial. The only exception is where the court grants a request that for special reasons a witness should give testimony before the trial. Such special reasons include witnesses who for good cause are unable to attend the trial or where the cost of bringing the witness to appear at the trial would be exorbitant relative to the value of the testimony. This possibility is infrequently used as the courts are reluctant to deviate from the basic procedural rule that the trial should be confined to one hearing and that the judgment should be based solely on what transpires in the course of the trial.¹⁵⁴

It is typical for the Scandinavian procedural systems that we do not have discovery and disclosure systems. Because of this omission, the parties may have difficulties in estimating their possibilities of winning a case. The other problem can be that the parties will meet problems in collecting evidence and organizing the testimony. However, this ‘problem’ has not been found as a problem in Scandinavia and there has not been any discussion on that topic lately. In spite of the very many and very wide procedural reforms in Scandinavian countries, the rules on ‘disclosure’ have not been amended. The obligation to produce a document or an object has been found enough and even this possibility is not used very often in practice.

h. Multi-stage process

There is no multi-stage process but the court decides according to normal procedural rules if the class action is admissible or not.

¹⁵² Lundblad 1990, p. 151.

¹⁵³ Chapter 42, Section 8, Paragraph 1 in the Code of Judicial Procedure and Lundblad 1990, pp. 151 - 152.

¹⁵⁴ Lundblad 1990, p. 152.

1.4. Available remedies

There are several remedies available like injunctions and damages. Ordinary procedural rules apply. An appeal of the decision is possible under the general rules of civil procedure.¹⁵⁵ The Class Action Act allows a member of the group to appeal against a judgment or final decision on behalf of a group and also a decision on approval of a risk agreement. A member of the group is also entitled to appeal, on its own behalf, against a judgment or a decision that concerns its rights.¹⁵⁶

1.5. Costs & funding

For group proceedings, the ordinary rules on litigation costs (namely the losing party pays) apply in principle. The plaintiff in a group action thus bears the litigation costs (including those of the defendant) if he or she loses the case.¹⁵⁷ The rules on litigation costs represent a compromise. They try to create a balance between providing sufficient stimulus for bringing group proceedings, on the one hand, and eliminating or at least minimizing possible abuse of such proceedings for unfair profit purposes.¹⁵⁸

Members of the groups are in principle not liable for litigation costs. They can be held liable to bear only part of the litigation costs corresponding to their benefit from the proceedings and only if the defendant has been ordered to pay and cannot pay, or if they with their conduct have incurred additional litigation costs.¹⁵⁹ The same applies to additional costs in connection with risk agreements that the defendant has not been ordered to pay.¹⁶⁰

The Class Action Act envisages a possibility for entering what has been termed a ‘risk agreement’ between the plaintiff in a group action and an attorney, whereby they agree that the attorney gets reduced compensation if the case is lost and increased compensation if the case is won.¹⁶¹ There are several mechanisms by which the members of the group and the court can control the fairness of such agreements (approval by the court; possibility for notice of dissatisfaction; and appeal of court decision to approve a risk agreement by members of the group). The idea of ‘risk agreements’ provides no excessive incentives for conducting group proceedings but may overcome the reluctance of some attorneys to engage in this complicated procedure. The Swedish lawmaker categorically rejected any schemes of compensation building on the American ‘contingency fee’ idea. It should be noted that insurance companies in their litigation insurance are inclined to exclude or limit their litigation insurances in respect of group proceedings. This has been considered to be an impediment to the use of the scheme.¹⁶²

The law does not envisage that the class representative in a private group action should receive any additional compensation for his or her participation. If winning the case, his or her litigation costs will be paid by the losing party. If losing the case, the representative in principle will be solely responsible for his or her litigation expenses.

¹⁵⁵ Class Action Act, Sections 42 - 48.

¹⁵⁶ Class Action Act, Section 47.

¹⁵⁷ The Code of Judicial Procedure, Chapter 18.

¹⁵⁸ Class Action Act, Sections 33 - 36.

¹⁵⁹ Class Action Act, Sections 33 - 36.

¹⁶⁰ Class Action Act, Section 41.

¹⁶¹ Class Action Act, Sections 38 - 41.

¹⁶² See Lindblom, P H., *Lagen om grupprättegång - bakgrund och framtid*, SvJT 2005 p.183.

However, the representative is in most case expected to receive financial support from outside sources, i.e. by the means of the Legal Aid Act, from the insurance for legal expenses of the group members, or through a ‘risk agreement’ with an attorney.¹⁶³ The only provisions that provide for relief of the burden of litigation costs are the ones mentioned above, i.e. concerning the liability of group members for the litigation costs if the losing defendant is not in a position to compensate the plaintiff for the litigation costs, in the case of a risk agreement, or for litigation costs incurred through the group members’ own negligent conduct, minimizing possible abuse of such proceedings for unfair profit purposes.¹⁶⁴

A special situation is regulated in Sections 30-32 of Class Action Act. If in the course of group proceedings the group representative is found no longer appropriate to represent the group and the court appoints someone else who is entitled to bring an action in accordance with the Sections 4 - 6 in Class Action Act to conduct the group’s action as plaintiff, this person is entitled to compensation for litigation costs and for their own work and time expenditure from public funds.¹⁶⁵

1.6. Number of claims

In Sweden, we have the longest tradition of class actions in the Nordic countries and there have also been some successful class action cases until now.¹⁶⁶ Some cases have been dismissed by the courts¹⁶⁷ or the case has been terminated as the action have been retained by the plaintiff.¹⁶⁸ Some cases have ended with a friendly settlement.¹⁶⁹ Even in the latter cases, the possibility to continue with the help of class action may have played a significant role in negotiations. Most of the class actions have been individual class actions, however, most were sued by associations which are established just for the purpose to start the class action.¹⁷⁰ The first public class action against the electricity company was successful and the company had to pay damages to its clients.¹⁷¹ The total amount of all cases is under 25. The cases concern mainly claims regarding contracts law, public law and environmental law.

1.7. Particularities/Problems if mechanism is used in cross-border cases

There is no specific regulation on international class actions. Normal rules which cover international procedural law are therefore valid.

163 Government bill 2001/02:107, p. 47.

164 Class Action Act, Sections 33 - 36.

165 Class Action Act, Section 30.

166 For instance, so called SLU -case, RH 2009:90.

167 Stockholm district court, T 17333-04 (and10992-04). The court decided that the Aftonbladet case did not fulfill the requirements to be litigated as class action. The same covers Nacka district court T 855-12 which covered the case against the children-home. The case on private alcohol import was partly cancelled and partly dismissed, Nacka tingsrätt, 29.4.2011, T 1286-07. See also Stockholm district Court 2016-04-29 case T 14917-14 and Court of Appeal Göta Hovrätt Court 2013-06-03, Case Ö 3152-12.

168 Skandia case, Stockholm district court T 97-04. Instead of class actions the case was resolved by arbitration and the plaintiffs got their compensation. Therefore the case was anyways successful.

169 For instance Stockholm district court T 3515-03/ Nacka district court, T 1281-07 and Gothenburg district court T 7247-05.

170 The first 12 cases are commented in Lindblom Per Henrik: Grupp-talan i Sverige. Norstedts Juridik 2008, pp. 209.

171 The Court of Appeal in Övre Norrland 2011-11-04, T 154-10.

1.8. Critiques

The Swedish legislator has not yet taken any steps in promulgating the conditions of the Commission Recommendation from the 11 June 2013 on common principles for injunctive and compensatory collective redress mechanism in the Member states concerning violations rights granted under the Union Law (2013/396/EU). However, this is not surprising as most of the points raised in the Recommendation are already fulfilled by the present legislation. The legislation is considered to work well but there are some critiques against the existing law.

The system is based on the opt in-system only, which is not very effective or simple from the consumers' perspective. The opt out-system could be better to cover the interests of consumers. As long as procedures (regardless of whether they are individual or collective proceedings) are too complicated and time consuming¹⁷², the access to justice does not come to fruition.

Based on the existing Nordic experiences, building up a group to start the class action seems to take approximately two years. It is considered to be too complicated and time-consuming especially if the single interest in the case is low.¹⁷³ Even if the aim of class action acts were to help the situation of single consumers to get access to court, the same problem still exists. In addition, there is no case-law at all or at least very little case law. Therefore there are many questions which are still open in legislation and doctrine.

Res judicata is limited to the members of the group who have opted-in. The systems are totally based on the opt-in method¹⁷⁴ and the *secundum eventum litis*-phenomenon¹⁷⁵ does not exist. In addition, there are no differences between *res judicata* in different types of claims but the usual *res judicata*-effect covers all kinds of judgments in the similar way and there is no difference depending on the fact if the judgment is favourable or not. Even if the class action is facing a public body or administration, there are no specialties in relation to *res judicata* but the normal doctrine is followed.

Covering the enforcement, there are no special rules for class action judgment enforcement but the usual enforcement system applies. Therefore, in the enforcement, the group members have a role as a full party even if during the proceedings it is the representative of the group who represents the members and the latter have only restricted a party role.¹⁷⁶ This can be criticised from the access to justice point of view. This kind of individual enforcement system is also very bureaucratic. Some kind of system of group enforcement should exist in order to minimize bureaucracy and maximize access to justice. In addition, the class 'members' who did not opt-in are outsiders and they have no rights based on the class action judgment. Still, the judgment has no *res judicata*-effect to them. Therefore they can start a new procedure if they like and if they need the execution title for themselves.

¹⁷² About the length of the Nordic class actions, please, see Viitanen, Klaus: Nordic Group Actions: First Experiences and Future Challenges, JFT 3-4/2009 pp. 599-613.

¹⁷³ Similar thoughts and experiences in the Nordic report: TemaNord 2006:583 "Consumers' right of action in antitrust cases - Current problems and future solutions". Available on the web: <http://www.norden.org/ft/julkaisut/julkaisut/2006-583>

, last visited on 24 November 2012.

¹⁷⁴ Class Action Act, Section 29 and the Finnish Act on Class Action, Section 11.

¹⁷⁵ *Res secundum eventum litis* means that the decision is binding only if it benefits but not if it is prejudicial to the represented group members.

¹⁷⁶ Class Action Act, Sections 15 and 29.

The above described lack in enforcement has been criticised and it has been suggested that the system should be changed in the future in order to make class actions more powerful. In the *travaux préparatoires*¹⁷⁷ the group enforcement in the name of the representative of a group was suggested but the proposal did not go through.¹⁷⁸

II. Sectoral Collective Redress Mechanisms

1. Consumer Law

General description: group action at the National Board for Consumer Disputes

The main scheme for settlement of disputes between individual consumers and individual business operators in Sweden is through the Swedish National Board for Consumer Disputes (*Allmänna reklamationsnämnden*, ARN). This is a public body for out-of-court dispute settlement specialising in business-to-consumer matters.

The legal basis for group proceedings at the National Board for Consumer Disputes is Section 9 of the Standing Instruction for this board (Förordning 2015:739 med Instruktion för Allmänna reklamationsnämnden, c.f. lag (2015:671) om alternativ tvistelösning i konsumentförhållanden, directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and EU regulation 524/2013 of the 21 of May 2013 on alternative dispute resolution online for consumer disputes, c.f. Förordning 2009:607, updated 2015:122 med Instruktion för Konsumentverket (Standing instruction of the Swedish Consumer Agency).

The National Board of Consumer Disputes, ARN, may consider consumer disputes between a group of consumers and an individual business operator if: there are several consumers who are likely to have a claim against the trader on substantially similar grounds; the disputes concerns conditions that may be considered by the Board and; an examination of the disputes is justified in view of the public interest.

The ARN is competent to give recommendations in disputes concerning goods and services that have been provided by the tradesman to the consumer. However, the following types of disputes are inter alia outside the scope of competence of the ARN: disputes between individuals or between business operators, disputes concerning health care, disputes concerning the purchase or rent of real estate, tenant-ownership, or leasehold, rental disputes that concerns another issue than money. A dispute cannot be decided by the Board if it is pending before, or is already decided by, an ordinary court; or if the dispute can be tried, or has been tried, by a public authority; or by a board that has been approved as a board for alternative disputes resolution or if an ARN recommendation has already been issued in the same matter.

Additional limitations have been set by the Board. There are limitations in terms of the time. A complaint must be lodged no later than a year after the consumer has made a complaint to the trader, 8 § p. 3. There are also limitations in terms of value of claims. There is a threshold in terms of the minimum value of disputes decided by the Board.

¹⁷⁷ SOU 1994:151, pp. 459 - 462.

¹⁷⁸ For this discussion, see for instance Lindblom 2008, pp. 103 - 104.

1.2. Procedure

a. Standing

According to section 9 of the Standing Instruction, proceedings can be initiated by the Consumer ombudsman on behalf of a group of consumers (group action); or by a group of consumers if the Consumer Ombudsman has declined himself/herself to initiate proceedings.

The Director General of the Swedish Consumer Agency is the Consumer Ombudsman (Konsumentombudsman, KO). The Swedish Consumer Agency is a state agency whose task is to safeguard consumer interests. KO can represent consumer interests in relations with business traders and pursue legal action in the courts.

b. Opt-out procedure

Group proceedings before the National Board of Consumer Disputes are based on an opt-out principle. The claim extends automatically to all members of the group without a need for an active step to be made by every consumer. This makes the procedure feasible.

c. Competent authority

The Board was already set up in 1968, as part of the then consumer policy. The Swedish National Board for Consumer Disputes consists of the Chairman (who is also the administrative head of the agency). The Board also consists of a Vice-chairman, external Chairmen of the different departments and their members. The Chairman, Vice-chairman and Chairmen of the divisions shall be lawyers qualified for the bench (§ 26 Instruction). The Chairman and Vice-chairman of the Board (after proposal from the Chairman) and the Chairmen of the departments are appointed by the Government. The other members of the Board are nominated by consumer, labour, industry and other, 11-16 §§.

d. Main procedural rules

The procedure is entirely in written form. No oral evidence can be collected. The Board informs the trader against whom a complaint is lodged and gives him or her an opportunity to make written observations. The dispute is considered by the Board even if the trader does not come with such observations. The parties are not entitled to be present at the meeting of the panel.

A department constitutes a quorum when the Chairman, Vice Chairman or external Chairman and four members are present, representing equally consumers and tradesmen, 30 § of the Standing Instructions of ARN. A department also constitutes a quorum with the chairperson and two other members, unless one of the members requests that four members participate. A matter can be decided only by the Chairman, Vice Chairman or externa Chairman if it is of simple nature or if the business has not

commented upon it (30-31 §§ Standing Instructions of ARN). If the members of the Board disagree on the verdict, the rules in Chapter 16 of the Civil Procedural Code¹⁷⁹ apply (Chapter 16 concerns voting in civil cases). The ARN decision is not subject to appeal, but can, subject to certain conditions, be reviewed, 35-36 §§ of the Standing Instructions. The decision may be reviewed inter alia a decision was obviously incorrect due to a clear oversight or error by the Board and correction of the decision cannot be considered.

e. Evidence

As already mentioned, no oral evidence can be collected.

1.3. Available remedies

The ARN issues a recommendation in which it can recommend how the dispute should be settled. The Board can only pronounce itself on issues of contractual liability. It can recommend both monetary remedies as well as changes in conduct. The most typical remedy is compensation for damages due to breach of contract. ARN issues a recommendation in which it can recommend how the dispute should be settled. The decision is not enforceable. Nevertheless, there is a high rate of compliance among business operators with the recommendations of the Board, approximately 77 % (end of June 2016). The duration of handling a case in 2016 averaged 85 days.

1.4. Costs

Proceedings are free of charge for the parties. The parties are, at the same time, not entitled to compensation for the costs of legal representation or other costs for preparing and participating in the procedure. The absence of any fees is one of the main advantages of the procedure. In case the Consumer Ombudsman initiates the group proceeding, the cost of legal representation etc. stays on the Consumer Agency.

1.5. Number of claims

As mentioned above, the duration for handling a complaint was in 2016 on average 85 days. The number of cases was 13 537, mostly regarding travel (2 636), motors (2 369), electronics (2 143) and housing (real estate, tenant- ownership etc, 1 795). The Board also found itself forced to reject 3 507 applications, because the consumer did not submit additional information, which the Board had requested. Another cause for rejection was that the dispute did not reach the demands in terms of value of the claim. A third cause was that the case was too complex, to time-consuming for the Board to handle.

1.6. Other interesting legislation

The Swedish Consumer Ombudsman can act as a representative of individual

¹⁷⁹ See SFS 1942:740.

consumers before ordinary courts in proceedings between a consumer and a business operator. The legal basis is stated in Lag (2011:1211) om Konsumentombudsmannens medverkan i vissa tvister (Act on Participation of the Consumer Ombudsman in certain disputes).

A prerequisite for the Consumer Ombudsman to intervene in a lawsuit in support of the consumer is that the case is of particular importance for law-building and legal interpretation and that there is a general consumer interest in the dispute being tried by a court of law (cf. § 2).

The Consumer Ombudsman may also act in protection of collective consumer interest in market law and unfair contracts terms. The consumer Ombudsman may in certain cases of minor importance issue a prohibition order or information disclosure order (§ 28 of the Market Practices Act, 2008:486). A trader whose marketing is unfair may be prohibited from continuing with it, 23 §. A trader who, in his marketing, fails to provide material information may be requested to leave such information, 24 §. A service provider under the Act on Electronic Commerce etc., 2002:562, who fails to provide the technical means provided for in the Act, may be required to provide such aids. If the Consumer ombudsman gives such an order and it is approved by the trader, it has the effect of a decision by the Patent- and Market Court, 28 §. The Consumer ombudsman may determine that the injunction (prohibition order or information disclosure) should apply immediately.

The Swedish Patent- and Market Practices Court is a specialized court competent to examine cases under a number of market law statutes, like the Market Practices Act and the Unfair Contract Terms Act (see lag (1994:1512) om avtalsvillkor i konsumentförhållanden).

The Consumer Ombudsman has also the possibility to initiate proceedings under the Market law Act or the Unfair Contracts Terms Act at the Patent- and Market Court, 47 §.

2. Competition Law

The Swedish Competition Authority has the possibility to issue prohibition orders within the area of competition (See 2008:579, Competition Act). The Swedish Competition Authority, which is a state agency under the Ministry of Enterprise, places particular emphasis on anti-cartel enforcement, intervening when private and public stakeholders abuse a dominant position in the market, and intervening in respect of anti-competitive sales activities by public entities. The directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states has been implemented in the Swedish konkurrensskadelagen (2016:964).

3. Concluding comments

A few concluding comments will be made on the approach to Collective Redress as illustrated by the foregoing study. The first point to make is that there have been important recent developments in the various countries studied. We have thus seen that there have been significant reforms of collective redress procedures, including the large-scale legislative reform in France, the introduction of a new collective redress procedure in Belgium, and an ambitious reform (albeit it limited in sectoral terms) in England & Wales. In the Netherlands, there has been a good deal of case law under the WCAM collective settlement procedure, and even in Germany where no major reforms have yet occurred, there continues to be ongoing discussions about the possibility of introducing a general collective redress mechanism based on the KapMuG model.¹⁸⁰

The second point to make is that the survey reveals that the current position across the selected EU countries is of a significant diversity of collective redress procedures. Whilst some of the procedures are solely sectoral-based, others are more broadly-framed, to include a swathe of different sectors. Some collective redress procedures allow for a pro-active cause of action for collective claims, others (such as the Dutch WCAM procedure) are restricted to collective settlements, and others (such as the UK anti-trust mechanism) instead offer both possibilities. The exact architecture of the collective redress procedure thus varies greatly between different jurisdictions, though it is possible to identify in most cases a multi-stage procedure, including a filtering mechanism such as certification, as well as a more intensive, merits-based review. It is also interesting to note that the traditional suspicion in European spheres of opt-out procedures -for a variety of constitutional, procedural and practical reasons- has slowly dissipated over time, with 4 out of 6 of the systems studied (Belgium, England & Wales, the Netherlands, and Sweden) allowing for such a dispute-resolution approach in certain circumstances.

Third, as a corollary of the foregoing, whilst it is not possible to identify a distinctive “European Model” of Collective Redress as yet, it is nonetheless true to say that the procedures in all the European jurisdictions studied are very different from the US-style class action mechanism, even in those countries (such England & Wales) which share a similar common law heritage. The European systems thus illustrate a degree of control mechanisms on the procedures, such as a restricted access to the bringing of collective claims (eg through consumer organisations), a limited role for opt-out procedures, and restrictions on funding (eg exclusion of contingency fees or similar fee arrangements).

¹⁸⁰ In June 2017, news report suggested that German governing coalition’s lawmakers ultimately could not find a common position on the collective action mechanism proposed by the German Ministry of Justice.

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PART TWO
COLLECTIVE REDRESS IN CONSUMER
PROTECTION IN SOUTH EAST EUROPE:
COUNTRY REPORTS

COLLECTIVE REDRESS IN CONSUMER PROTECTION IN ALBANIA

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Executive summary

The research study “Collective Redress mechanisms in light of the European Commission Recommendation (2013/396/EU) on common principles for injunctive and compensatory collective redress mechanisms emphasizing cross-national comparisons, underlying issues of commonality and difference” aims to present an overview of collective redress mechanisms in terms of legislative and institutional framework and legal practice in different EU and SEE member states.

The following report refers to the current Albanian legal regime regarding collective redress. The methodology used in this study is based mainly on the study, analysis and interpretation of the current legal framework, and less on the legal practice. In addition to an overview of the existing framework, the report reflects the tendency to extend and interpret this legal framework for the purpose of implementing of collective redress mechanisms. This is due to the fact that, the Albanian procedural law does not provide expressly for a mechanism of collective redress. Despite the fact that the Albanian procedural law allows multiple claimants, it contains no actual legal provisions implementing the Commission Recommendation 2013/396/EU. The Albanian law does not currently provide specific mechanisms of collective redress in the area of criminal law either. However, the Albanian legislation includes an injunctive collective redress mechanism applicable in consumer protection cases.

Several interviews have been conducted in the course of this study, which due to the lack of legal framework and as a result of the lack of practice, have had a minimal impact on the study. Lack of the necessary legal instruments for the implementation of collective redress has also determined the judicial or administrative practice, which is scarce, not to say inexistent.

As per the guidelines, the report is structured into six Chapters: 1. National Compliance with the relevant EU *acquis*; 2. Legal framework for collective redress; 3. The role of the court, inspection bodies, regulatory bodies, ombudsman and others in collective redress; 5. The role of consumer organization in collective redress; and 6. Recommendations and conclusions.

With regard to the compliance of the national legislation with EU *acquis*, it can be said that:

- The Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests is adopted by the Albanian legislator.
- The Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumers disputes is not adopted by the Albanian law on consumer protection.
- The Directive 2014/104/EU of the of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States is not adopted by the Albanian legislator yet.
- The Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law is not adopted by the

Albanian legislator.

In July 2016, the Ministry of Economic, Tourism, Trade and Entrepreneurship Development has started the procedure of amending the Law no.9902 on Consumer Protection, dated 17 April 2008, with the aim of approximating it with: (i) Directive 2011/83 /EC of the European Parliament and of the Council of 25 October 2011 on consumer rights; (ii) Directive 2013/11/EC of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution of Consumers' Disputes and some additions and amendments to Regulation (EC) No 2006/2004; as well as (iii) Directive 2009/22/EC (Consumer Protection Directive). This draft law does not foresee approximation with the Commission Recommendation 2013/396 /EC. Actually, the abovementioned draft law has not yet been approved by the Albanian Parliament.

The actual Albanian procedural law does not provide for a general injunctive and compensatory collective redress mechanism, in the terms of the Commission Recommendation 2013/396/EU. The only general mechanism provided for in the Code of Civil Procedure in its Article 161 is the **group action** under which the action can be filed jointly by many plaintiffs or against many defendants if: (a) they have common rights or obligations on the object of the action; (b) their rights and obligations from the point of view of fact or of the law have the same basis. In such actions, each plaintiff should have a direct, personal and current interest in the action. The general procedural principle of Albanian law is that: In a civil litigation, no one can bring a claim in his name for protecting the right of another person, unless otherwise provided by law.

However, special Albanian laws provide for some injunctive and compensatory *quasi*-collective mechanisms, thus partially achieving the goals of the Commission Recommendation 2013/396/EU. Although the Albanian legislation is not approximated with this Recommendation, it is a fact that the areas where the injunctive and compensatory *quasi*-collective mechanisms under the Albanian legislation apply are largely in line with the areas recommended by this Recommendation, such as: protection against discrimination, consumer protection, protection against unfair competition, environmental protection etc.

The special procedural mechanisms, stipulated by the special laws mainly are: (i) representative collective action, (ii) collective action with special representation, (iii) representative collective administrative complaint, and (iv) collective administrative complaint with special representation. It is worth pointing out that in principle, under the current Albanian legislation, only injunctive relief, and not compensatory relief can be sought through the representative actions or representative collective complaints.

The report outlines the mode of operation, the procedure, the purpose and the effects of these *quasi*-collective mechanisms under the current Albanian law in particular areas, from a comparative point of view with the Commission Recommendation. It is also outlined the co-operation between the stakeholders implementing the collective redress mechanisms.

Considering that the actual Albanian procedural law does not provide for a general injunctive and compensatory collective redress mechanism, in the terms of the Commission Recommendation 2013/396/EU, the provision of such a general collective redress mechanism in a special law is recommendable, because: (i) it would unify the procedure for the settlement of disputes that arise from unlawful acts committed

against a group of people. (ii) it would be an extraordinary incentive for the consumers to seek protection of their rights through injunctive or compensation collective redress mechanisms, because at present the costs of individual legal remedies for violated rights are usually much higher than the amount of the damage that might have been caused to the consumer. Through collective actions these costs are reduced by being divided between several persons. (iii) It would deter large companies from violating rights of certain groups of people, as they would be aware of the real potential of being sued by them.

The approximation of Albanian law with the Directive 2013/11/EC on Alternative Dispute Resolution for consumers' disputes would make possible the establishment of an authority, which is above the parties and that would provide good and fair solutions for both parties. Such authority would (i) guarantee a cost-free process for consumers; (ii) enable settlement of disputes by agreement, but also by decision (iii) enable the establishment of a body/staff specialized in consumer disputes (iv) facilitate customers' orientation in case of violation of their rights. The study also addresses several problems of the Law on Consumer Protection which can be resolved without the need of a comprehensive reform in legislation.

Although consumer protection laws in Albania date back to 1997, the level of Albanian consumers' awareness of their rights is still low. The Albanian consumers are not aware of their rights and moreover of how to exercise these rights. They are not yet ready to initiate court proceedings for the protection of their collective interests, either individually or collectively. An indicator of this low level of awareness is also the small number of consumer protection organizations (5 organizations) compared to other countries in the region or beyond. Even the state's attention in this direction is not adequate. Despite the fact that the Law on Consumer Protection expressly provides for the possibility of the financial support of associations from the Ministry of Economic, Tourism, Trade and Entrepreneurship Development, until 2016 the Albanian State Budget has not foreseen any amount for the fulfillment of this purpose. The Albanian state has not been able to financially support, directly or through various grants, any association acting in the field of consumer protection.

In the last decade, it is evident a commitment of the public administration structures, mainly of the Consumer Protection Commission at the Ministry of Economic Development, Tourism, Trade and Entrepreneurship and of the Consumer Protection Agency, at the Municipality of Tirana, to educate, inform and raise consumers awareness of their rights. The increase of consumer awareness is equally important as the approximation of Albanian legislation with the *acquis communautaire* and both should be done simultaneously.

1. National compliance with the relevant EU *acquis*

Albania's main challenge today is accession to the European Union. In this context, Albania has undertaken an ambitious reform program to align its legislation with that of the EU, thus fulfilling the membership criteria. The signing and entry into force of the Stabilization and Association Agreement (hereinafter: SAA) burdened the Albanian state with the responsibility of approximating the legislation also in the field of consumer protection, the obligation deriving from Article 76 thereof. Reforming legislation in the

field of consumer protection is only one of the challenges that Albania must face under the Stabilization and Association Agreement with the EU signed in 2006.

In fulfilling the obligations deriving from the SAA, the Albanian legislator adopted in 2008 a new Law on Consumer Protection¹(hereafter LCP), which aims to protect the interests of consumers in the market as well as the definition of rules and establishment of appropriate institutions to protect consumer rights. Some of the basic rights of consumers, guaranteed by the LCP, are: the right to protect economic interests; the right of appeal; the right to compensation; the right to legal protection; as well as the right to organize in associations or unions to protect the interests of consumers.² Guaranteeing these rights by law is a positive step, but not sufficient to create an efficient, fast and proportionate cost-effective mechanism for respecting these rights. This law has undergone some amendments aimed at approximating and harmonizing it with the European Union Directives in the field of consumer protection.³

1.1. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

Albanian legislation has been approximated with Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 relating to injunctions for the protection of consumers' interests. The purpose of the Directive is to protect the collective interests of consumers in order to ensure the proper functioning of the internal market. In a detailed analysis of the provisions of Directive 2009/22/EC in relation to the provisions of the Albanian consumer protection legislation, we conclude that this Directive's purpose accompanies the spirit of Albanian law.

The Directive has been adapted in Article 55 of the LCP, which provides that: "In cases of actions that contravene the provisions of this law, which undermine the collective interests of consumers, the structure responsible for consumer protection and consumer associations which have been declared representative of consumers' collective interests according to Article 53⁴of this law may address the Consumer Protection Commission and/or the court to request the rendering of a decision on: a) the cessation or prohibition of the infringement; b) the publication of the decision according to point a, in full or in part, 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; c) an order against the losing defendant for payments into the state budget, in the event of failure to comply with the decision within a time-limit specified by the Commission/ Court, of a fixed amount for each day's delay or for each new similar infringement after the fixed time-limit". The definition of the infringement provided for in this provision as an act that is in contravention of the provisions of the Law on Consumer Protection and which harms their collective interests is similar to that provided by the Directive.

Within the provisions of the Directive and the approximation of Albanian

1 Law no. 9902 on Consumer Protection, dated 17.04.2008.

2 Article 4 of the Law no. 9902 on Consumer Protection, dated 17.04.2008.

3 Law no. 10444 on some amendments and supplements to the Law no. 9902 on Consumer Protection, dated 14.07.2011. Law no. 15/2013 on some amendments and supplements to the Law no. 9902, dated 17.04.2008 on Consumer Protection, as amended.

4 Article 53 provides - 3 specific criteria for consumer associations in order to represent consumers' collective interests, which are: a) active membership; b) experience; c) geographic extent.

legislation with it, legitimated entities for the protection of consumers' collective interests are considered: the Responsible Consumer Protection Structure (hereinafter: RCPS) and the Consumer Associations, which are respectively the body of public administration and private legal entities that as the object of their activity have the protection of the rights and interests of consumers. The Directive has provided that these legally-qualified entities may address either a court or a competent administrative body, while the Albanian legislator has gone further, providing the opportunity to address both together, the court and the Consumer Protection Commission (administrative body), in addition to being able to address specifically each of them. The legislator has determined the ministry responsible in the field of commerce to carry out the publication of the decisions related to the cessation or prohibition of the infringement, charging the financial bill to the losing party.

1.2. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes

Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes aims to increase the level of consumer protection by contributing to the well-functioning of the internal market by providing consumers - the opportunity to resolve disputes between them and traders through entities that provide independent, impartial, transparent, effective, prompt and honest procedures. Currently, Albanian legislation has not been approximated to this Directive, but has partially adopted the Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes [C2001/310] in consumer protection legislation. The purposes of Directive 2013/11/EU and of Commission Recommendation C2001/310 which dates earlier in time, are compatible.

Law no. 9902 on Consumer Protection, dated 17.04.2008, as amended, in Article 56/ paragraph (1) provides for the possibility of the Albanian consumers to address, inter alia, ... (ç) the arbitration court... and (dh) any other (body particularly established for out of court dispute settlement in the event of infringement of their rights⁵. In terms of the provision, the Albanian legislator has clearly provided for the consumer's possibility to resolve disputes by arbitration. Overall, this legal provision is an indication of the tendency of Albanian legislation to enable these disputes to be resolved alternatively out of courts. However, taking into consideration the Preamble of the Directive 2013/11/EU and respectively paragraph 41 thereof, which provides that: "*Alternative Dispute Resolution (hereinafter: ADR) procedures should preferably be free of charge for the consumer. In the event that costs are applied, the ADR procedure should be accessible, attractive and inexpensive for consumers. To that end, costs should not exceed a nominal fee*", we say that despite the tendency of the Albanian legislator to provide in law one of the forms of ADR, arbitration, this provision does not fully meet the purpose of Directive 2013/11/EU. As provided in the Albanian law, resolution of consumer disputes through arbitration is not based on a special regulation that could facilitate payments or access of consumers to a special arbitration court, but is based entirely on the general rules

⁵ Article 56, paragraph 2 provides: "The Council of Ministers shall determine the criteria to be fulfilled by the body provided in letter "dh" of paragraph 1 of this article."

of operation of voluntary arbitration. As long as the law does not provide for a special regulation for resolving these issues through arbitration, the effects of applying the existing provision are the same as the effects that would result in the absence of this provision in the LCP.

In the same spirit and logic, Article 2(2) of the Law on Mediation, provides that: “Mediation applies for the resolution of all the disputes in the civil, commercial, labor and family law”. In this sense, there is no legal hindrance for Albanian consumers to resolve disputes between them and traders through mediation, but on the other hand there is no specific provision that could facilitate access to this mediation procedure, which according to the law is set up as a private activity.

In regard to the other provision, “any other body particularly established for out of court dispute settlement in the event of infringement of their rights”, in its chronological interpretation in relation to Article 56(2), according to which: “*The Council of Ministers Decision shall determine the criteria to be fulfilled by the body provided in point 1/dh of this Article.*” it seems that the legislator’s intention was to provide consumers with other dispute settlement options, apart from judicial settlement, and on the other hand, to set a minimum standard for these structures in order to guarantee the rights of consumers. In principle, these structures may be independent private or public bodies. Based on the experience of other countries, the Chambers of Commerce can also provide out-of-court settlement services for disputes between the consumer and the trader.

The Albanian legislator has taken some concrete steps for the full approximation of the Directive, which have resulted unsuccessful. In 2014, the responsible Ministry compiled a draft Decision on Determining the Criteria for Out-of-Court Dispute Resolution between Consumers and Traders, aimed at approximating Albanian legislation with the European Parliament and Council Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes. This draft decision was not approved. Likewise, at the end of 2016, MEDTTE initiated some legislative amendments to the Law on Consumer Protection, an important part of which was aimed at approximating it with this Directive, which are not adopted as well.

1.3. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Albanian legislation has not yet been approximated with this Directive. Approximation of Law no. 9121, dated 28.07.2003 “On Competition Protection”⁶, with this Directive is envisaged to be implemented in the medium-term actions to be undertaken by the Albanian state and shall be implemented during 2019.⁷

However, the right of the damaged party to claim compensation of damages

6 Law no. 9499, dated 03.04.2006, Law no. 9584, dated 17.07.2006; Law no. 10 317, dated 16.09.2010 on some amendments and supplements to the Law no. 9121 dated 28.07.2003 on Competition Protection, as amended.

7 Decision of the Council of Ministers, No. 42, dated 25.01.2017, “On the adoption of the National Plan for European Integration 2017-2020”, pp. 555-556. Found at: http://www.qbz.gov.al/botime/fletore_zyrtare/2017/PDF-2017/12-2017.pdf
[10.05.2017]

is one of the fundamental rights guaranteed by the Albanian Civil Code.⁸ Also, Law no. 9121 on Competition Protection, dated 28.07.2003, as amended, provides in its Part IV, Article 65, the possibility of any person impeded in its activity, by a prohibited agreement or an abusive practice to address a lawsuit to the Court of Tirana with the object of compensation of damages caused, according to the legal regulations provided for in the Civil Code.

In a systematic analysis of the above provisions, and in their extended interpretation, we can say that according to the current Albanian legislation any person who is damaged by unfair competition may claim to be compensated for the damage caused, according to the principle of full compensation of damage, i.e. effective damage plus lost profit.

The Law “On Competition Protection” also recognizes to the Competition Commission the right to impose interim measures. The procedure for imposing interim measures by this Commission may be initiated on its own motion or on the basis of a request from the interested parties.⁹ An interested party may also be an association or group of people. The measures that the Commission may decide are: a) termination or entering into a contractual relationship; b) issuing of licenses; c) obligation to act or not to act in a certain way; and d) any other remedy enabling the elimination of anti-competitive effects.

1.4. Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law

The purpose of Commission Recommendation 2013/396/EU is to facilitate access to justice in respect to violation of rights under European Union law and to that end recommends that all Member States provide collective redress mechanisms at national level, that follow the same basic principles throughout the European Union, taking into account the legal traditions of the Member States and safeguarding against abuse.¹⁰ Albanian legislation has not been approximated with this Commission Recommendation. The latest amendments to the Law on Consumer Protection date back to February 2013. Referring to Council of Ministers Decision no. 42 on the adoption of the National Plan for European Integration 2017-2020, dated 25.01.2017, there is no prediction regarding the approximation of Albanian legislation with this recommendation over the period 2017-2020. However, in the comparative study between the Recommendation and the current legislation, we note some compliance.

Article 4 of the Law on Consumer Protection lists, among others, as basic rights of consumers: the right to complain; the right to claim compensation; the right of legal defense; the right of being organized in associations or unions aiming the protection of consumers’ interests and of representation in decision-taking bodies. In the spirit of this law, each consumer has the right to complain in case of violation of their rights, and to seek redress.

⁸ Article 608 of the Albanian Civil Code.

⁹ Article 44 of the Law “On Competition Protection”.

¹⁰ Point 9 and 10 of the Preamble of Commission Recommendation dated 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law.

The paragraph 7 of the Preamble of the Recommendation says: “The areas where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value, are consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection”. The areas in which Albanian legislation provides for quasi collective mechanisms aimed at achieving the same purposes as those of Recommendation 2013/396/EU are partially in line with those of the Recommendation and are: consumer protection, competition protection, environmental protection, protection against discrimination, etc.

With regard to the provisions of Recommendation 2013/396/EU on the creation of bodies responsible for representing collective interests of consumers, Albanian legislation explicitly recognizes this right to consumer associations. Pursuant to Article 54(3) of LCP: “Consumer Associations must meet the following criteria in order to represent consumers’ collective interests: a) active membership; b) experience; c) geographic extent.” These criteria do not fully comply with the criteria set out in Commission Recommendation 2013/396/EU, which are: (a) the entity should have a non-profit making character; (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

The following articles of the law recognize the right to represent consumers’ collective interests also to the Responsible Consumer Protection Structure. The latter is an administrative body under the Ministry of Economic Development, Tourism, Trade and Entrepreneurship (hereinafter: MEDTTE), and will be dealt with in the report to follow. In order to protect consumers’ collective interests, the responsible structures (consumer associations and RCPS) have the right to address an administrative body (Consumer Protection Commission) and/or court with a representative collective action and/or complaint.

2. Legal framework for collective redress

2.1. General description

The provision in the law of collective mechanisms within the meaning of Commission Recommendation 2013/396/EU, aims to prevent and stop illegal practices and to ensure that compensation can be obtained for the detriment caused in mass harm situations. The possibility of joining claims and pursuing them collectively constitutes a better means of access to justice than the individual actions of consumers in which the cost may become an obstacle to address the court individually.

According to this Recommendation, national legislation should provide for (i) a legal mechanism that ensures a possibility to claim cessation of illegal conduct collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); and (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled

to bring a representative action (compensatory collective redress).

The Albanian procedural law in force does not provide for a general regulation of injunctive and compensatory collective redress mechanisms, in the sense of the Commission Recommendation. The only general mechanism envisaged by the Civil Procedure Code in its Article 161 is the **group action**, according to which the action can be filed jointly by many plaintiffs or against many of the defendants (joint litigants) in case: (a) they have common rights or obligations on the object of the action; (b) their rights or obligations have the same basis from the point of view of the fact or of the law. In such actions, each plaintiff should have a direct, personal and current interest in the action. However, as we shall see below, special Albanian laws provide for some injunctive and compensatory *quasi* collective redress mechanisms, thus partially achieving the aims of the Commission Recommendation 2013/396/EU.

2.2. Applicable areas for collective redress

According to the Preamble of Commission Recommendation 2013/396/EU, injunctive and compensatory collective mechanisms are recommended to be implemented in areas such as: consumer protection, competition protection, environment protection, protection of personal data, financial services legislation and investor protection. The principles of Commission Recommendation 2013/396/EU should be implemented horizontally and equally in all the aforementioned areas but also in other areas that may be relevant.¹¹

Despite the fact that Albanian legislation has not been approximated with this Recommendation, the areas where the *quasi* collective mechanisms are applied, according to Albanian legislation, comply in most of the areas recommended by Recommendation 2013/396/EU. Special laws provide for a number of similar and specific administrative and judicial collective mechanisms that partially guarantee redress through the prohibition of infringement and/or compensation of damages in areas such as protection from discrimination, consumer protection, protection against unfair competition, environmental protection, etc.

2.3. Applicable procedure(s) for collective redress according to the national legislation

The general procedural principle of Albanian law is that: “No one can make valid on his name the right of another person in a civil legal process, except when expressly provided by law”.¹² However, special laws provide for certain special arrangements, which although not in the form recommended by Commission Recommendation 2013/396/EU, aim at achieving its purposes.

Law no. 10 221, dated 04.02.2010 “On Protection from Discrimination”, (hereinafter: LPD) provides for a group action and a criminal denunciation in its Article 34(1), according to which: “Every person or group of persons who claim that discrimination has been exercised against them for one of the causes mentioned in article

¹¹ Point 7 of the Preamble of Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law.

¹² Article 95 of the Code of Civil Procedure of the Republic of Albania.

1¹³of this law, may submit a claim to the competent court according to the definitions of Civil Procedure Code for indemnification according to law or, as the case may be, to make a criminal denunciation before the competent organs for criminal prosecution”. According to this provision, a group of persons may file a claim in court only on the basis of the general rules of representation provided for in Civil Procedure Code.

This law also provides for a **collective action with special representation**, according to which, an organization (association) with a lawful interest or the commissioner may submit a lawsuit in the name of a person or group of persons, provided that the commissioner or organization shall have the consent by special power of attorney or by declaration before the court of the person or group of persons harmed from the discrimination¹⁴. In applying this provision, the association does not have the special legitimacy, but has the right to a special representation meeting the requirements of Article 96 (d) of Civil Procedure Code.¹⁵In the sense of this law, organizations with legitimate interests are those organizations that have been registered in the Republic of Albania and have as the declared object of their activity the protection of human rights or which offer assistance to victims of discrimination.¹⁶

The above lawsuits are filed to the competent court no later than 5 years from the day the allegedly discriminatory conduct occurred and no later than 3 years from the day the damaged party becomes aware of this conduct. With the filing of the lawsuit for the prohibition of discrimination, the plaintiff must also pay the lawsuit fee of 3,000 ALL. If the plaintiff seeks compensation for the damage, the fee of the lawsuit to be paid by filing the lawsuit in the court is 3,000 ALL when the value of the damage claimed is up to 100,000 ALL and 1% of the value of the claimed damage when the latter is bigger than 100,000 ALL.¹⁷ The plaintiff has the obligation to present evidence in support of his claim, using any kind of legitimate evidence that may prove discriminatory conduct. As the plaintiff presents the evidence on which his allegations are based, and on the basis of which the court may presume discriminatory conduct, the defendant is obliged to prove that the facts do not constitute discrimination according to this law.

The Law on Protection from Discrimination also provides for collective administrative complaint with special representation. According to its Article 33: “A person or group of persons who claim that they have been discriminated against, or an organization with legitimate interests that claims discrimination in the name of a person or group of persons, may submit a complaint together with available evidence to the Commissioner for Protection from Discrimination (hereinafter: Commissioner), in writing or in exceptional cases orally, so that minutes can be taken. The Commissioner is a public legal person that provides effective protection against discrimination and any

13 Article 1 of the Law “On Protection from Discrimination” provides: “This law regulates the application and respect of the principle of equality in relation to gender, race, colour, ethnicity, language of gender identity, sexual orientation, political, religious or philosophical beliefs, education, or social status, pregnancy, parenthood, parental responsibility, age, family or marital status, civil status, residence, health status, genetic predisposition, disability, particular group membership or any other cause”.

14 Article 34(3) of the Law on Protection from Discrimination.

15 Article 96 of the CPC provides that: “Representatives of the parties with power of attorney may be: d) other persons provided by law that may be representatives of the parties...”

16 Article 3(9) of the Law on Protection from Discrimination.

17 Joint Instruction of the Ministry of Finance and Ministry of Justice, no. 33, dated 29.12.2014 on determining the service fee for judicial administration services and services of the Ministry of Justice, Prosecution and Notary.

form of conduct that incites discrimination.¹⁸ Even in this case, legitimate organizations should submit a special proxy to represent the person or group of persons. As can be seen, not only before the court but also before the administrative bodies legitimate organizations cannot represent persons in the form of a special legitimation, but only on the basis of the general rules of representation by proxy.

The submission of individual administrative complaint does not charge to the complainant any fee. The submission of collective administrative appeal by an organization with legitimate interest charges the applicant the costs of the proxy. Filing a complaint before the Commissioner is not a condition to file a claim lawsuit and does not constitute an obstacle for the damaged party to address the court or prosecuting authorities¹⁹. The complaint must contain, at least: a) the name of the complainant; b) an explanation of how to contact the complainant; c) the subject alleged to have committed discrimination or an explanation in the inability to identify him/her; c) explanation of the alleged discrimination; d) the measures requested from the commissioner; e) the date and signature of the complainant or his representative. Upon receipt of the complaint, the Commissioner verifies the facts. For this purpose, the Commissioner may ask the complainant and the person against whom the complaint is directed to file written submissions within 30 days of the day on which the parties receive notice. When the Commissioner sees fit, he invites the parties to reach a settlement agreement.

Law no. 9902, dated 17/04/2008 "On Consumer Protection" as amended, (hereinafter: LCP) provides for the right of representative **collective administrative** complaint, through which is aimed to prohibit the violation and in special circumstances also provide for the compensation of damage. This mechanism, together with the representative collective action that will be dealt with below, provided by Albanian legislation, are more similar forms to the legal, injunctive and compensatory collective mechanisms, according to Commission Recommendation 2013/396/EU. According to Article 55 of LCP: **"In case of any act contrary to the provisions of this law, which harms the consumers' collective interests, the responsible consumer protection structure** (hereinafter: RCPS) and the consumer associations which are declared to be representative of the consumers' collective interests in accordance with Article 53 of this law may address the Consumer Protection Commission and/or the court seeking rendering of a decision on: a) the cessation or prohibition of the infringement; b) the publication of the decision according to point a, in full or in part, 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; c) an order against the losing defendant for payments into the state budget, in the event of failure to comply with the decision within a time-limit specified by the Commission/Court, of a fixed amount for each day's delay or for each new similar infringement after the fixed time-limit".

As can be seen, the LCP expressly provides for the right of the RCPS and the Consumer Associations to request that the administrative body impose the cessation or prohibition of the infringement. In a systematic and indirect interpretation of the provisions of the law, it can be said that the above structures have also the right to seek damage compensation, because Article 57(5) of the law entitles the Consumer Protection

¹⁸ Article 21 of the Law on Protection from Discrimination.

¹⁹ Article 34(3) of the Law on Protection from Discrimination.

Commission (hereinafter: CPC) to also decide on the value of the damage.²⁰

The consumer, when his rights are violated, has the right to file a complaint with: a) RCPS; b) consumer associations; c) ombudsman, d) arbitration courts; d) judiciary; e) any other body particularly established for out of court dispute settlement. The law explicitly provides that the right to collective administrative complaint may be exercised by consumer associations, and not by other forms of customer organization such as centers etc. However, based on Article 56(1.1) of the LCP, which refers to Instruction no. 11 dated 02/09/2013, the consumer may exercise the right of complaint individually or through any association, organization or non-profit centre in defense of his/her or their rights. Under these conditions, we can say that collective administrative complaint can also be filed by another organization, with another form of organization different from the association.

According to the LCP, RCPS and CPC are two separate bodies, where the RCPS also carries out the function of the technical secretariat of the CPC. The Minister's Instruction on defining complaints handling procedures creates a kind of confusion in their unification, providing that collective administrative complaints can be submitted to the RCPS or the CPC. In practice, any complaint addressed to the CPC *de facto* goes to RCPS as the first instance.

The collective administrative complaint may be filed electronically or in writing within 30 days of the finding or awareness of the violation committed. The complaint must necessarily contain: a) the applicant's identification data; b) the address of the complainant; c) a brief description of the alleged violation; d) the name of the commercial entity that has committed the violation of the consumer's right; e) address of the entity that has committed the violation; f) a description of the type of damage the consumer has suffered from a violation of his right; g) explanations regarding the actions performed by the complainant until the moment of submission of the complaint; h) data regarding the actions performed by the complainant until the moment of submission of the complaint. Complaints addressed to the CPC are sent to RCPS in order for the latter to check the fulfillment of the formal complaints criteria. When the complaints are complete, they are registered in the special register of complaints at the RCPS. CPC makes a decision on complaints within 30 days of its registration, but for motivated reasons, it may extend the above deadline but not more than 20 days. CPC reviews the complaint within the scope and causes set out in the complaint, by analyzing the type of violation and the relevant provision/provisions of the Law on Consumer Protection that has been violated by the entity specified in the complaint. During the in-depth review, the CPC receives evidence depending on the type of violation, hears the parties or their legal representatives, determines the type of violation, ascertains the type of administrative offense and determines the respective measure or fine. During the in-depth review, the CPC should follow all the steps of a due legal process. All decisions must be reasoned, recorded, published and notified to the complainant and interested parties.

The Law on Consumer Protection also provides for a **representative collective action** as a typical form of an injunctive mechanism (not compensatory) within the meaning of Commission Recommendation 2013/396/EU. Pursuant to Article 55 of the LCP mentioned above, in cases of actions that violate the provisions of this law,

²⁰ According to Article 57 of the Law on Consumer Protection.

which undermine consumers' collective interests, the responsible structure for consumer protection and consumer associations, which have been declared representative of collective interests of consumers, may also address the court to seek a decision on: a) the cessation or prohibition of the infringement; b) the publication of the decision according to point a, in full or in part, 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; c) an order against the losing defendant for payments into the state budget, in the event of failure to comply with the decision within a time-limit specified by the Commission/Court, of a fixed amount for each day's delay or for each new similar infringement after the fixed time-limit."

Unlike the collective administrative complaint, the Law on Consumer Protection *first* legitimizes only associations to file a representative action for the cessation of the violation and no other organizations such as centers. Centers can only file actions at the court through RCPS, but not as entities with special legitimacy. *Second*, the law does not entitle associations to claim compensation, through the special legitimation. The consumer may individually seek compensation in court under the conditions of ordinary representation, according to the rules of Civil Procedure Code. Upon filing the representative collective action, the RCPS or the Association have to pay the judicial fee in the amount of 3,000 ALL, as well as other costs of the process such as attorney or expert's fees, etc.

Law no. 9121, dated 28.07.2003 "On Competition Protection", provides for a **representative collective administrative complaint** under Article 29(1), according to which third parties or interested parties in matters relating to restrictions, distortions or impediments to competition submit to the Competition Authority (hereinafter: CA) complaints and notices of these findings and require from CA to decide on the prohibition of infringements.²¹The Authority safeguards and guarantees the anonymity of complainant, whenever the latter requires it. Associations are unconditioned by any form of representation (with or without proxy) to file an administrative collective complaint, and through this appeal the CA may be put into motion if it considers it grounded. CA is a public body, independent in the performance of its duties and consists of the Commission and the Secretariat. The Competition Commission (hereinafter: CC) is the decision-making body of the CA and consists of five members. It acts as a permanent collegial body. The Law on Competition Protection entitles interested parties, those being even groupings, to request from the CC also the taking of security measures aimed at cessation of the violation. The representative collective complaint does not have any cost for the complainant.

The complaint must contain the required information in a special form approved by the CC. The standard complaint form should include: 1) the complainant's specifications if he/she wishes to be identified or remain anonymous, as well as the date of completion or submission of the form; If he/she does not wish to remain anonymous, the identity, residence or address of the complainant's work, whose rights and freedoms have been infringed, as well as contact details of the telephone, fax, e-mail; 2) claims of alleged limitations or violations of competition to him, or other entities; 3) the enterprise or institution alleged of being a violator of the law and against which he/she complains

²¹ Article 45 of the Law on Competition Protection.

or signals; 4) a description of the facts to which he/she refers; 5) listing of the evidence of the alleged violation that he has; 6) other public institutions that were previously aware of the subject matter of the complaint; 7) any type of original, or photocopy document supporting the claim, complaint or notification.²²

The parties to the complaint must be notified of the handling of the complaint by the Secretary General no later than 15 days from the day of receipt by the CA. If the CC determines that on the basis of available information there is insufficient evidence to act on a complaint, it requests the Secretariat to inform the complainant of the CC decision and to set a time limit within which the complainant may submit his written claims. CC is not obligated to consider any written claim submitted after this deadline. If the complainant submits his claims within the time limit set by the Secretariat and the written claims made by him do not lead to a different assessment of the complaint, the CC shall reject the complaint by decision. This decision can be appealed to the competent court.²³

The Law on Competition Protection does not provide for a special collective judicial redress mechanism. Article 65 entitles any person with ordinary legitimacy (common forms of representation according to the provisions of the Civil Code) whose activity is hindered by a prohibited agreement or an abusive practice to file an action at the Court of Tirana and claim: a) removal or prevention of the restricting practices of competition which risks to be carried out or are carried out in contradiction of these articles; b) reparations or compensations of damages caused, in accordance with the relevant provisions of the Civil Code. This lawsuit can be filed irrespective of a procedure initiated with the CA.

Law no. 8454, dated 04.02.1999 “On Ombudsman”, in Article 12 provides for the representative collective administrative complaint. According to this provision: “Every individual, group of individuals or non-government organization, claiming that his/their rights, freedoms or lawful interests have been violated by the unlawful, improper actions or failures to act by the organs of the public administration, shall have the right to complain or notify the Ombudsman and to request his intervention to remedy the violation of the right or freedom”. Groups of individuals or non-governmental organizations may exercise the right to complaint to the Ombudsman only when they claim a violation by the administrative bodies, such as: Electricity Power Distribution Operator (OSHEE) and so on. The Ombudsman is not a decision-making body, but a recommended body.

Law no. 14 431, dated 09.06.2011 “On Environmental Protection”, (hereinafter: LEP) has been fully approximated with Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 “On environmental liability with regard to the prevention and remedying of environmental damage” and expressly provides for the representative collective administrative complaint. According to Article 52 of the LEP: “Physical or legal entities and environmental associations in the territory that are directly affected or suffer the consequences of the damage caused to the environment have the right to request from the National Environment Agency to request from the operator: a) restoration of the environment to its previous state; b) compensation for environmental damage in accordance with the provisions of this law, if

²² Article 26/214 of the Regulation on the Functioning of the Competition Authority.

²³ Article 15 of the Regulation on Investigation Procedures of the Competition Authority.

the restoration of the environment to its previous state is impossible”. Also under Article 48 (a): “In the event of a threat to the environment, its pollution and damage, the public shall have the right: a) to require the appropriate public authorities to take appropriate measures within the time limits and in accordance with the authority granted by law”. The National Environmental Agency (hereinafter: NEA) is a central public institution. When assessing that the rehabilitation and remedy of the environment to the state that it had before the damage was caused is impossible, the NEA obligates the operator to pay compensation for the damage caused to the environment.

This law provides in Article 48 (b) for the **collective action with special representation**. According to this provision: “In the event of a threat to the environment, its pollution and damage, the public has the right to bring a lawsuit in court, in accordance with the conditions provided by the Code of Civil Procedure, against the public authority or natural and legal person”. The use of the term “public” in the law entitles different organizations or groups of people to bring collective action in court and have the right to represent a special certain public.

2.4. Available remedies for collective redress according to the national legislation

According to the Law on Protection from Discrimination, the court invested on the basis of a **collective action with special representation**, if convinced of a violation of the LPD, orders the cessation of the violation if it continues, and also determines compensation, including a deadline for carrying out the compensation. The court decision is communicated to all interested parties, including the Commissioner. Regarding compensation, in the spirit of Commission Recommendation 2013/396/EU, Article 38 of the Law provides that: “Indemnification includes, among other things, the correction of the legal violations and their consequences through return to the prior situation, appropriate compensation for the monetary and non-monetary damages or through other appropriate measures”. Thus, compensation for damage includes effective damage plus the lost profit.

Regarding the **collective administrative complaint with special representation** made to the Commissioner, the latter is pronounced by decision, which is notified to the parties within 90 days from the day of receipt of the complaint or if a public hearing took place within 90 days of the day of the hearing. The decision contains the appropriate redress arrangements and measures, setting a deadline for their execution. If the Commissioner orders the measure, the person against whom the complaint is filed reports within 30 days before the Commissioner about the actions taken to enforce the decision. If the person against whom the complaint is filed does not inform the Commissioner or does not execute the decision, the Commissioner shall impose a fine on the person against whom the complaint is filed. In making a decision to impose a fine, the Commissioner shall consider: a) the nature and scope of the violation and the impact on the victim; and b) the personal and financial circumstances of the offender. The decision imposing a fine also sets a reasonable time within which the fine should be paid. Any person who violates the provisions of this law shall be fined as follows:

- a. a natural person, from 10,000 to 60,000 ALL;
- b. a legal person, from 60,000 to 600,000 ALL;
- c. a natural person within a legal person who is responsible for the violation,

from 30,000 to 80,000 ALL;

- d. a person who exercises a public function and is responsible for the violation on the basis of this law, from 30,000 to 80,000 ALL.

As a last measure, especially when a natural or legal entity fails to comply with a Commissioner's decision or does not pay the fine within three months after the deadline set by the Commissioner and the sanction has not been challenged in court, the Commissioner may request the competent authorities to revoke or suspend the permit or authorization of a natural or legal entity to exercise its activity.²⁴ A natural or legal entity against whom a punitive fine is imposed shall have the right to appeal to the competent court according to Civil Procedure Code. The fines are paid into the State Budget.

According to the Law on Consumer Protection, the Consumer Protection Commission is a decision-making administrative body designed to review administrative (individual and collective) complaints and take measures for the implementation of LCP provisions. In cases when CPC finds violation of LCP provisions, it has the right to decide on:

- a. the cessation or prohibition of the infringement;
- b. the publication of the decision according to point a, in full or in part, 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;
- c. Fines, proceeds of which go to the State Budget²⁵ The amount of fines varies depending on the violation from 100,000 ALL to 2% of the annual turnover of the previous financial year of the entity that is declared in violation of the LCP. In a case of recurrence, when the offender commits the same offense for the second time within a period of five years, the fine is doubled.

The fines are imposed within 2 months from the date the violation was found and such decision is an executive title. Against the decision of the CPC, the offender against whom is taken the administrative measure has the right to request re-examination in the court within 30 days.²⁶

When the CPC finds that the complainant has been harmed, after the end of the administrative review, it assesses the extent of the damage and by a special decision decides on the compensation of the damage to the consumer. Although it is not explicitly provided in law, in practice, this provision has been interpreted narrowly and the compensation of damage is imposed by the CPC only in cases where the complaints have come from a specific consumer rather than associations on behalf of a customer group.

In the event that a consumer association or RCPS files a **representative collective action** in court, the latter may decide: (i) the cessation or prohibition of the infringement; (ii) the publication of the decision according to point a, in full or in part, 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; c) an order against the losing defendant for payments into the state budget, in the event of failure to comply with the decision within a time-limit specified by the Commission/Court, of a fixed

²⁴ Article 33(15) of the Law on Protection from Discrimination.

²⁵ Article 60 of the Law on Consumer Protection.

²⁶ Article 59 of the Law on Consumer Protection.

amount for each day's delay or for each new similar infringement after the fixed time-limit. With such a lawsuit, the parties cannot seek and neither the court can decide to reward compensation.

According to the Law on Environmental Protection, based on the representative collective administrative complaint of environmental associations, the National Environmental Agency may decide: (a) restoration of the environment to its previous state; b) compensation for environmental damage in accordance with the provisions of this law, if the restoration of the environment to its previous state is impossible. When assessing that the rehabilitation and remedy of the environment to the state that it had before the damage was caused is impossible, the NEA obligates the operator to pay compensation for the damage caused to the environment.

This law is based on the principle “polluter pays”, according to which: “A natural or legal person whose acts or omissions influence environmental pollution bear the financial responsibility of carrying the costs incurred by such damage or danger to environmental damage. Such costs include costs of environmental damage assessment, assessment of necessary measures, and costs of avoiding environmental damage, including the costs of rehabilitation and compensation of damaged physical or legal persons”.²⁷ Thus, the entity that has polluted the environment, in addition to returning it to the previous state, is obliged to compensate the damage to natural and legal persons. The legislator used the term “rehabilitation and compensation of damaged natural and legal persons” that is consistent with the purpose for full compensation of damage. The main purpose is: a) to prevent and remedy all damage to the environment; b) environmental rehabilitation; c) introduction of measures and practices to minimize the risk of environmental damage. The Council of Ministers is the body which approves: a) a list of activities deemed to be environmentally hazardous, and b) the criteria for assessing potential threats and determining damage to the environment. The Minister responsible for environment approves: a) measures for the rehabilitation of the damaged environment; and b) the method for specifying expenditures for the determination and elimination of threats and damage. The National Environmental Agency specifies rehabilitation measures in terms of environmental damage caused. This is the competent authority for the identification of the operator who presents the direct threat of a potential damage or has caused the damage to the environment, the assessment of the significance of the damage caused, and the determination of the rehabilitation measures. In the impossibility of fulfilling the obligations, arising from rehabilitation measures by operators, some of these resources are provided by the State Budget.

On the basis of a **collective action with special representation** filed in accordance with Article 48(b) of the LPD, the court may impose an obligation on the entity that has polluted the environment, to restore the environment to the previous state and compensate the damaged natural and legal persons. The legislator used the term “rehabilitation and compensation of damaged natural and legal persons” that is consistent with the purpose for full compensation of damage.

According to the Law on Competition Protection, the Competition Commission (administrative body), based on a representative collective administrative complaint, has the right to make decisions to prohibit the violation. Pursuant to Article 45 thereof:

²⁷ Article 12 of the Law on Environmental Protection.

“Where the Commission finds a violation of Articles 4 and 9 of this Law, it shall, by decision, oblige undertakings and groups of undertakings concerned to prohibit such infringements. For the purpose of prohibiting the infringement, the Commission may require the undertakings and groupings of the undertakings concerned to take the necessary, including structural, measures. Based on the principle of proportionality, structural measures are foreseen when measures to act or not to act in a certain way are ineffective”.

2.5. Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organizations to initiate the procedure

The collective administrative complaint has no cost to either the consumer or the organizations in defense of their interests. Collective administrative complaint with special representation (as in the case of the Law on Protection from Discrimination) carries the cost of proxy representation which is significant for the Albanian economic reality. The cost of a special proxy, according to the Order of the Ministry of Justice “On the approval of the tariffs for notary services” is 3,600 ALL.²⁸

Filing in court of collective actions, either representative or with a special representation, has costs. However, the costs of representative collective actions are lower than the costs of actions with special representation and several times lower than a number of individual actions. In summary, the costs of these actions are as follows:

First, as in the case of individual collective action, representative collective actions or collective actions with special representation, the plaintiff (the consumer or association) has to pay the tax of the action 3,000 ALL.

Secondly, in the case of collective actions with special representation or group actions, the plaintiffs must pay notary expenses of the special proxy or appear in court themselves. The latter, if there are a significant number of persons, is technically impossible to achieve. The cost of a special proxy, as we said above, is 3,600 ALL. The filing of representative collective actions does not have the costs of representation, because in this case the body is specially legitimated by the law to bring such actions. We reiterate that through these actions, consumer associations or RCPS may only request cessation of infringement against the consumer.

Third, another considerable cost for all types of actions is the attorney’s fee. Albanian law does not impose restrictions on attorneys’ fees. Attorneys have the right to be paid on the basis of agreements with the parties they represent and the success fees are also eligible.²⁹ Bearing in mind that a collective action that protects the interests of some individuals may be represented by an attorney and that individual actions dictate attorneys for each individual, it is evident that the cost of attorneys in collective actions (representative or with special representation) is smaller than that of individual actions.

Fourth, in most of the court cases, it is necessary to appoint an expert in court to assess the damage or the violation. Expert payments are prepaid by the party seeking him/her and determined by market conditions, because the expert exercises private activity. For the same reasoning as for attorney’s fees, this cost makes collective actions more advantageous in relation to individual actions.

²⁸ Order of the Ministry of Justice No. 279, dated 14.06.2012.

²⁹ Article 11 of Law no. 9109 on the profession of lawyer in the Republic of Albania, dated 17.7.2003.

Taking into account the above costs, the question arises: Is an ordinary customer interested and can he file individual or collective actions in court? It can be said quite reasonably that Albanian consumers are not willing to pay such costs. The lack of revenue in their budget makes it difficult even for associations or customer centers to meet this obligation. Regardless of the legal space, the various mechanisms that the law creates, it is *de facto* very difficult, not to say impossible for consumer protection organizations to initiate court proceedings to protect the collective interests of Albanian consumers.³⁰

The experience of the Consumer Protection Association, a non-profit organization, declared in defense of consumers' interests, indicates that a collective action was filed in 2003 by this association due to unfair terms in electricity contracts and problems with billing from the relevant operator. Official sources at this association asserted that the process was dismissed because consumers withdrew due to the costs involved in such a procedure. Also, the timing of reviewing and making a decision from the Albanian judicial system was deemed inappropriate by consumers.³¹

2.6. Sectoral collective redress mechanisms

In the second chapter of this report are highlighted the areas of application of some *quasi* collective mechanisms under Albanian legislation aimed at achieving the purposes of Commission Recommendation 2013/396/EU. However, it should be noted that the tendency to implement these mechanisms is also found in some other special laws, which we have summarized outlining them below, excluding those that are already dealt with in the second chapter.

a. The Law on the rights of the patient

*Law on Health Care in the Republic of Albania*³² aims at high quality healthcare and an efficient health care system, based on principles such as: the right to health care, as a fundamental right of human being; ensuring equal rights in health care based on non-discrimination; the health care system functions based on an efficient and qualitative service, ensuring patient safety and impartiality; participation of different stakeholders, patients, consumers and citizens, and accountability to citizens³³. As can be seen, the law recognizes to the subjects the right to seek a qualitative service and the right to demand accountability in various institutions when the service provided is defective.

The Albanian Charter of Patient Rights, approved by the Ministry of Health on 31 January 2011 (hereinafter: the Charter)³⁴ is the main act that in the field of consumer rights protection, in their role as a patient, affirms fully and clearly all patients' rights, in full compliance with national legislation and relevant acts of the Council of Europe and the World Health Organization. Among the main rights recognized to Albanian patients by this Charter are also:

i. **The Right to Complain.** *Every patient has the right to complain whenever*

30 Interview with Ms. Ersida Teliti, Executive Director of "Albanian consumer" Center.

31 Interview with Ms. Fatmira Bicaku, Assistant at the Consumer Protection Association.

32 Law no. 10107, dated 30.03.2009 "On Health Care in the Republic of Albania", amended by Law no. 51/2013, dated 14.02.2013 and Law No. 76/2015, dated 16.07.2015.

33 Article 2 of the Law on Health Care in the Republic of Albania".

34 Available at:

http://www.shendetesia.gov.al/files/userfiles/KARTA_SHQIPETARE_E_TE_DREJTAVE_TE_PACIENTIT.pdf

*he or she suffers an injury and the right to receive a response or other type of feedback.*³⁵

- ii. **The Right to Compensation.** *Each patient has the right to receive sufficient compensation within a reasonably short time, whenever he/she experiences physical or moral impairment as well as psychological harm as a result of a healthcare treatment.*³⁶
- iii. **The right to be actively organized in non-governmental organizations** to advocate/ protect the rights of patients.³⁷

These rights, interpreted systematically in accordance with the spirit of the Charter and the Law on Health Care in the Republic of Albania, recognize the right of patients to act individually or collectively through organizations that have as subject of their activity the protection of patients. The Charter recognizes patients' right to complain, individually or collectively, through their organizations.

Article 38 of the Law on Health Care in the Republic of Albania recognizes the right of the Inspectorate covering the health field³⁸ to impose fines when the provision of health care is contrary to this law³⁹. This inspectorate acts in accordance with this law and with Law no. 10 433, dated 16.06.2011, "On Inspection in the Republic of Albania"⁴⁰, "Inspection, as a process, is carried out by Inspectors of the Inspectorate covering the Health field, who during the implementation of the inspection process are entitled, among others, to take urgent measures⁴¹ such as: a. termination of the performance of an act, activity or part thereof; b. ordering the subject of the inspection to notify third parties or the public of the potential dangers; c. any other measure deemed necessary and proportionate to achieve the purpose of the urgent measure.

As it can be seen, the legislator has created an administrative structure for protecting the interests of patients. The law does not explicitly specify which entities are legitimated to address this administrative structure, but in an expanded and purposeful interpretation as well as the spirit of the abovementioned acts, we can say that this Inspectorate can be put in motion on the basis of a collective complain.

35 Point 13 of the Charter.

36 Point 14 of the Charter.

37 Point 15 of the Charter.

38 State Health Inspectorate.

39 Article 38 provides: "The provision of health care in contravention of the provisions of this law constitutes an administrative offense and is punishable by health care inspectorate as follows: a) failure to meet the obligations provided for in Articles 21 and 22, General and quality of health care services, with a fine from 50 000 to 100 000 ALL and, in repeated cases, with the license revocation. b) Refusal by the service provider of the state oversight process conducted by the responsible institutions pursuant to Articles 23, 24 and 25 of this Law, with a fine of 20,000 to 50,000 ALL. c) Violation of Article 27 of this Law by natural or legal persons, public or private, providing healthcare in the Republic of Albania shall be fined 500 000 ALL and, in case of repetition, 5 times the fine and denunciation of the competent bodies. d) Non-registration of health professionals, according to the definitions made in Article 31, with a fine from 5 000 to 10 000 ALL. The fine is the main punishment, while the measure of the licence revocation is an additional penalty".

40 Law no. 10 433, dated 16.6.2011 "On Inspection in the Republic of Albania".

41 Article 43 of the Law on Inspection in the Republic of Albania.

d. Food safety

*Law on Food*⁴² aims to establish the basis for ensuring a high level of protection of human health and consumer interests. In this context, this law provides for the establishment of a central institution that is the National Food Authority (hereinafter: NFA) with the aim of minimizing the risks, the NFA should provide prompt, timely, objective and understandable information about food, pests and risks amongst others, to consumers and interest groups. In extended interpretation, consumer protection organizations are also included in interest groups. In order to protect consumers interests, the law aims to establish effective institutions to prevent or stop false or misleading practices; impairing of the quality of food from the use of inadequate ingredients, and any other practices that mislead the consumer.

In addition to establishing responsible and competent administrative structures to ensure safe food throughout the food chain, the Law on Food provides for civil liability of food business operators in the event of harm to human health caused by food consumption resulting unsafe in all stages of production, processing and distribution⁴³. Article 47 of this law provides that when food presents a serious risk to human health or the environment and that such danger cannot be eliminated, upon the proposal of the NFA, depending on the degree of difficulty of the situation, the Minister of Agriculture, Food and Consumer Protection (hereinafter: MAFCP) orders:

- Temporary ban on placing on the market or use of food;
- Specification of specific conditions for specific foods;
- Elimination of food without causing damage;
- Other temporary and appropriate measures.

If the food is imported, the measures taken are:

- Temporary prohibition of imports of food from exporting countries or from parts of the exporting country or transit countries;
- Determination of specific measures for specific foods from exporting countries, parts of exporting countries or transit countries;
- Elimination of food without causing damage;
- Other temporary and appropriate measures.”

In the sense of this article, what is noticed is that the food that poses a risk refers to a significant number of people who are harmed in their health or the environment, where the number of the target group in this case is on the increase. In this case, the representation is undertaken by a public institution such as the NFA. In other words, the consumer or consumer association may represent a collective administrative complain to the NFA and if the NFA is satisfied that the violation exists, it proposes that the MAFCP should take action as the authority responsible for taking such action. Among the measures that may be imposed by this public authority are: temporary ban on placing on the market or use of food; eliminating the food without causing damage; as well as

42 Law no. 9863, dated 28.01.2008, as amended by Law no. 74/2013 on some amendments and supplements to Law no. 9863 on Food, dated 28.01.2008, as amended.

43 Article 22 and of the Law on Food.

other measures aimed at the cessation or prohibition of a violation or possibility for compensation for harm caused to consumers.

c. Safety of products

Law no. 10 480, dated 17.11.2011 “On General Safety of Non-food Products”,⁴⁴ defines the rights and obligations of producers and distributors, as well as the competencies of the responsible structures in market surveillance. The law stipulates that supervision of compliance with the requirements of this law is carried out by a network of responsible structures⁴⁵ and is supported by the customs authorities.

The responsible structure has the competence to take injunctive and binding measures when unsafe products are placed on the market. In the spirit of law, such measures aim to protect the interests of a large number of consumers, thus preventing collective harm. Article 10 of this law provides that among the rights and obligations that the responsible structures have are:

1. To prohibit, by written order, the placing on the market of any product which is dangerous or does not comply with the provisions of this Law or by-laws in its application, and to provide the additional measures required to ensure that the ban is consistent with them;
2. To request, by written order, the immediate withdrawal from the market, the immediate ban of trading of dangerous products that are available on the market and to notify consumers of the risk they pose;
3. To order in writing or, if appropriate, organize together with the producers and distributors the return of unsafe products from consumers and, if deemed necessary, order the disposal/ destruction of such products under appropriate conditions;
4. To publish copies of orders issued under any provision of this law.

This structure cooperates with the customs authorities. Customs suspend the clearance of a product for free circulation when any of the following cases are found during the checks:

- a. the product poses a serious risk to health, safety, the environment or any other public interest referred to in this law;
- b. the product is not accompanied by the documentation required under the relevant Albanian legislation or is not marked in accordance with that legislation;
- c. are informed by the ministry/ ministries responsible for the suspension of customs clearance of certain products, based on European Commission decisions on the prohibition of trade and return of products or from the rapid information exchange systems of the EU countries on dangerous products.⁴⁶

After that, the responsible structure can decide:

- i. Clearance of customs;

⁴⁴ Amended by Law no. 16/2013 dated 14.02.2013.

⁴⁵ Article 9/ item 3 of this Law provides: “The Structure in charge of market surveillance exercises its responsibility in implementing this law in accordance with Law no. 10 433, dated 16.6.2011 On Inspection in the Republic of Albania unless provided expressly different in this Law”.

⁴⁶ Article 24 of the Law no. 10 480 dated 17.11.2011 “On the general safety of non-food products”.

- ii. Temporary prohibition of customs clearance until completion of appropriate controls;
- iii. Prohibition of customs clearance, if this structure is informed that the product is dangerous or when it is not in compliance with this law.

*Law no. 10489, dated 15.12.2011 “On Trade and Market surveillance of Non-food Products”*⁴⁷ applies to those non-food products which are not subject ruled by any other law or sub legal act. The main purpose of this law is to define the rights and obligations of traders⁴⁸, their responsibility for placing products on the market as well as the rights, obligations and competences of the responsible body. The whole spirit of this law is the protection of life, health, the environment and public interests.

Article 27 of the Law stipulates that: “1. The supervision of the implementation of compliance with the requirements of this Law shall be carried out by a network of responsible market surveillance structures, according to the legislation on general safety of non-food products. 2. The activities of the responsible structures shall be supported by the customs authorities, in accordance with the provisions of this Law. 3. Responsible bodies shall be entitled to take measures to prohibit the sale or to prohibit or restrict the making available of products on the market when:

- a. the products are not in compliance with the legislation applicable to them;
- or
- b. the health or safety of users are endangered, even though these products:
 - i. are used in conditions that may be reasonably foreseeable;
 - ii. are installed and maintained properly, according to the prevision.”

Thus, such injunctive or restrictive measures are imposed by the network of structures responsible for market surveillance, supported by the customs authorities. These measures take on particular importance in cases where the health and safety of users is impaired as a result of placing these non-food products on the market. The main measures taken by these structures are the temporary ban on making the product available on the market. In all cases where the responsible body deems it reasonable, where the product presents a serious risk, it is forbidden to market and make the products or services available on the market, by notifying the consumer in any case⁴⁹.

Article 29 defines the measures that may be taken by the responsible structure which, in addition to taking measures that aim the prohibition or restriction of the movement of such goods, also has the obligation to notify the user within their territory within a reasonable time for the risk that they have identified for each product, in order to reduce the risk of injury or other harm, to avoid damaging the health or life of consumers.

Article 34 provides for the competence of the customs authorities in the case of imported products which have the right to suspend the clearance of the product for free circulation in the territory of the Republic of Albania when it is found that the product presents a serious risk to health, safety, the environment or other public interests. In this case, the damage that may be caused is collective. After that, the responsible structure

47 Amended by Law no. 17/2013, dated 14.02.2013.

48 The Law uses the term: economic operator.

49 For more details, see Articles 31-33 of Law No. 10489, dated 15.12.2011 “On Trade and Market Surveillance of Non-Food Products”.

further investigates the issue and within three working days takes one of the following decisions:

- a. Decides on the product customs clearance if it is proven that this product does not pose a serious risk to health and safety and/or is in compliance with the relevant legislation;
- b. Decides on the temporary prohibition of customs clearance until the necessary checks are carried out;
- c. Decides on the prohibition of customs clearance, if the structure responsible proves that the product is dangerous; when it proves that the product is hazardous, is not in compliance with the relevant legal requirements or, regardless of compliance, may endanger the safety of life, health, the environment or other public interests.

Thus, in taking measures of injunctive or restrictive character, the law has recognized to an administrative body the right to order and take such measures in order to protect collective interests. The law does not explicitly state the persons legitimized to address the responsible structures, but in the spirit of the law aiming to protect life, health, the environment or other public interests, and referring to the practice, we can say that such an administrative complaint may also be presented by a group of persons or associations and there is no legal obstacle to reviewing their complain.

2.7. Legislative consultations and reform proposals

a. Legislative proposals

In July 2016, MEDTTE has initiated the procedure of amendment of Law No. 9902, dated 17.04.2008 “On Consumer Protection” , in order to fully approximate with:

- i. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 On Consumer Rights;
- ii. 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
- iii. Directive 2009/22/EC (Directive on consumer ADR)⁵⁰.

This draft law creates the competent authorities for alternative dispute resolution for services of public interest. According to Article 52(2) thereof: “1. The competent authority for out-of-court resolution of disputes between the consumer and the trader on services of public interest, as defined in Article 56(1)(f) of this Law, is:

- a. For activities in the field of electricity and natural gas, the functions of out-of-court settlement of the dispute with the consumer are carried out by the Energy Regulatory Entity (ERRE), pursuant to Article 24 of Law no. 43/2015 on the Electricity Sector, as well as Law no. 102/2015 on the Natural Gas Sector;
- b. For activities in the field of electronic communications and postal services,

⁵⁰ The information is found in the footnote of the draft law found at: http://www.ekonomia.gov.al/files/userfiles/1_Amendim_LIGJ_LCP_Final_.pdf

- the functions of the out-of-court settlement of the dispute with the consumer shall be carried out by the Electronic and Postal Communications Authority (AKEP), pursuant to Article 120/1 of Law no. 9918/2008 on Electronic Communications in the Republic of Albania, as amended, and Article 55 of Law no. 46/2015 on Postal Services in the Republic of Albania;
- c. For activities in the field of water supply and waste disposal and treatment, the functions of the out-of-court settlement of the dispute with the consumer are carried out by the Water Regulatory Authority (ERRU), pursuant to Article 30 of Law no. 8102/1996 on the Regulatory Framework of the Water Supply and Disposal and Wastewater Treatment Sector, as amended;
 - d. For activities in the field of insurance and reinsurance, the functions of out-of-court settlement of the dispute with the consumer are carried out by the Financial Supervisory Authority (FSA), pursuant to Article 13 of Law no. 9572 on the Financial Supervisory Authority, dated 3.7.2006, as amended, as well as the structures determined pursuant to Article 70 of Law 52/2014 “On Insurance and Reinsurance Activity”;
 - e. For activities in the field of civil aviation, the functions of out-of-court settlement of the dispute with the consumer are carried out by the Civil Aviation Authority, pursuant to Law no. 10 040/2008 on Air Code of the Republic of Albania and Law no. 10233/2010 on the Civil Aviation Authority.
 - f. The competent authority for the out-of-court settlement of the dispute between the consumer and the trader for banking financial services, as well as its organization and functioning are determined by the special legislation regulating these services”.

Whereas Article 52(6) provides that: “1. The competent authority responsible for out-of-court settlement of disputes other than those relating to services of public interest shall be established as an institution of dependence of the Ministry with public legal personality. 2. The rules provided for in Articles 52(3) to 52(5) of this Law shall also apply in the settlement of disputes other than those relating to services of public interest. 3. The functioning of the authority according to the definition of point 1 of this article is approved by a decision of the Council of Ministers”. The new draft law regulates certain procedural aspects, as well as the rights and obligations of the parties throughout this process.

MEDTTE, in accordance with the legislation in force for public consultations, on 16 November 2016, conducted a round table to consult this draft law. After discussions with stakeholders and interest groups (associations and consumer centers) a number of proposals were made. MEDTTE, through CPC, undertook to reflect on the recommendations. So far there is no further development. From discussions with representatives of the CPC, the proposed changes and recommendations are reflected in the new draft, but the draft law has not yet been submitted to the Albanian Parliament.

3. Institutional framework for collective redress

3.1. Overview of legal provisions determining stakeholders in implementing collective redress

3.2. Stakeholders responsible for putting collective redress into practice

3.3. Mapping the cooperation among stakeholders

Since the Albanian procedural law does not make a general regulation of collective redress actions, the existing *quasi* collective mechanisms and stakeholders responsible for their implementation are determined by special laws in certain areas, as far as they provide for such mechanisms and their implementing stakeholders.

Regarding the cases when the special law enables the filing of collective actions, the competent court is determined on the basis of general principles for the determination of jurisdiction and competence, unless the special law expressly provides otherwise. In Albania, there are no special courts for consumer issues such as in Turkey. In principle, group actions, representative collective actions or collective actions with representation mentioned above in the report, are filed in the civil court of the first instance of the place where the defendant has his/her domicile or residence, and when they are not known, the place where he/she has temporary residence. When the defendant has neither residence nor temporary residence in the Republic of Albania, the actions are brought to the court where the claimant resides⁵¹. When the defendant is a legal person, the actions are brought to the court of the place where the legal person has its seat⁵². Exceptionally, the Law on Competition Protection provides that the actions arising from its enforcement are brought before the first instance court in Tirana.

The *quasi* collective administrative redress mechanisms and stakeholders responsible for their implementation are provided for in special laws depending on the scope of implementation.

According to Article 56 of the Law on Consumer Protection, the consumer is entitled to an administrative complain to: (a) the state administrative bodies responsible for consumer protection⁵³; (b) consumer associations; (c) the ombudsman; (d) the arbitration court; (e) the first instance courts; (f) any other body particularly established for out of court dispute settlement. Pursuant to Article 55 of this Law, in cases of actions that are in contradiction with the provisions of this law, which undermine the collective interests of consumers, the responsible body for consumer protection and consumer associations, which are declared representative of collective interests of consumers, may address the Consumer Protection Commission and/or the court to seek a decision on: a) the cessation or prohibition of the infringement; b) the publication of the decision according to point a, in full or in part, 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.

Not all the structures mentioned above in the law provision are active or decision-making in relation to collective administrative complains. Some of them play a role in initiating collective administrative complains, others are decision-making structures, and others are stakeholders who have a recommendatory role. We summarize below the

51 Article 42 of Civil Procedure Code of the Republic of Albania.

52 Article 43 of Civil Procedure Code of the Republic of Albania.

53 Article 2 of the Instruction no. 11, dated 02/09/2013 "On defining the procedures for handling consumer complains: "The consumer can exercise the right of complain individually or through any association, organization or non-profit center in defence of his/her/their rights".

role of each stakeholder and the way of cooperation among them.

a. The state administrative structure responsible for consumer protection

The responsible body for consumer protection (hereinafter: RCPS) is an administrative structure subordinated to the Ministry of Economic Development, Tourism, Trade and Entrepreneurship (MEDTTE). Among other things, this structure is responsible for overseeing LCP implementation, developing consumer complain handling systems and alternative dispute resolution schemes, supporting consumer associations' activities⁵⁴ etc. This structure also serves as the Technical Secretariat of the Consumer Protection Commission (hereinafter: CPC), which together with the Inspectorate responsible for market surveillance, are the implementing bodies for the protection of consumers' rights. Based on Article 2 of Instruction no. 11, dated 2/09/2013 on defining the procedures for handling consumer complaints, the right to complain to this structure cannot be exercised exclusively by a consumer individually, but the latter can exercise it through any association, organization or non-profit center in the protection of his/her rights. This structure is legitimated to make a collective administrative complain to the CPC and/or to file a representative collective action in court for the cessation and prohibition of the infringement.⁵⁵

b. Inspectorate responsible for market surveillance

Pursuant to Article 50 of the LCP, the Responsible Market Surveillance Inspectorate (hereinafter: RMSI) is the implementing structure of consumer protection legislation, general safety for non-food products, and is entrusted with responsibility for conducting market surveillance activities. In the Law on Consumer Protection it is envisaged that RMSI closely cooperates with RCPS and reports to the latter. Currently this inspectorate is not yet constituted and according to the information on the official website of the CPC is expected to be set up soon under MEDTTE.

c. Consumer Protection Commission

CPC is an implementing administrative body, established in 2009 in implementation and for enforcement of Law no. 9902, dated 17.04.2008 "On Consumer Protection" as amended. This commission is a decision-making body, and through its decisions, as appropriate, orders the prohibition of the violation, takes measures to remedy the violations, decides on consumer compensation, warns about the non-repetition of such violations, and imposes administrative fines. The decisions of the CPC are published on the MEDTTE website. The CPC is composed of 2 representatives of the Ministry responsible for the trade area, one of whom is responsible for the structure of consumer protection; 2 representatives from the Ministry of Justice and 1 representative from civil society with experience in the field of economy and jurisprudence.⁵⁶

⁵⁴ Article 49(2) of the Law on Consumer Protection.

⁵⁵ Article 55 of the Law on Consumer Protection

⁵⁶ Article 52 of the Law on Consumer Protection.

d. Consumer associations

Pursuant to Article 53 of the Law on Consumer Protection, consumers have the right to establish on voluntary basis independent consumer associations in order to protect their interests according the legislation in force. Consumer associations are organizations independent from traders and have a statutory aim the protection of consumer rights.

Consumer associations have the right: a) to educate, inform and raise continuously consumers' awareness of their rights; b) to organize and manage consumer advisory centers, in accordance with the criteria established by the Ministry responsible for the trade; c) to follow up and handle consumer complains; d) to exchange information with the state bodies responsible for consumer protection; e) to organize independent testing of the quality and safety of goods and services in the market and make public the results of these tests; f) to undertake legal actions in court against traders in cases of violation of consumer rights. The financial resources of consumer protection associations are the same as those provided in the relevant legislation for non-profit organizations. The ministry responsible for the field of trade should support consumer associations with financial assistance within the limits of the approved budget. The manner of distribution is carried out through tendering procedure.

Like the RCPS, consumer associations are legitimated to file a collective administrative complain to the CPC and/or file a representative collective action in court for cessation and prohibition of the infringement.⁵⁷

e. The Ombudsman

The Ombudsman Institution (hereinafter: PA) was foreseen for the first time in the Albanian Constitution adopted in November 1998, while the Law on the Ombudsman was adopted by the Albanian Parliament in February 1999. The Ombudsman protects the rights, the freedoms and legitimate interests of any person from unlawful or improper actions of the public administration. Any individual or group of individuals including the minor children can address the PA. An administrative, individual or collective complain can be submitted to the PA institution electronically, by mail, by physical delivery to the institution, by telephone, etc. Regarding the complaints filed there, the PA does not have a decision-making authority, but only a recommendation giving role. However, due to the institutional co-operation that the PA has with other state administration structures, in practice, the PA has managed to provide settlement for a number of disputes.⁵⁸

f. Arbitration courts

The possibility that the law gives consumers to address to the settlement by arbitration is a provision which tents to implement the Commission Recommendation of 04 April 2001 on the principles for out-of-court resolution of consumer disputes [C2001/310] and Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

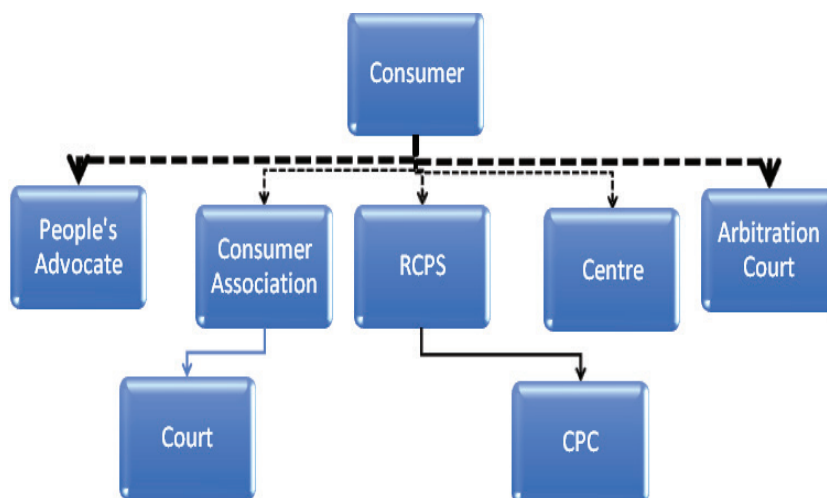
⁵⁷ Article 55 of the Law on Consumer Protection.

⁵⁸ The Ombudsman report 2015. Found at:

<http://www.avokatipopullit.gov.al/sites/default/files/ctools/RAPORTI%20SHQIP%202015%20.pdf>

However, as mentioned in the first chapter of this report, this provision does not fully meet the purpose of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. The purpose of the Directive is not only to provide a general opportunity for resolution of issues through one of the methods of out-of-court resolution of disputes, but also to create a special legal framework that can provide consumers with free service or with minimal tariffs.⁵⁹ In the sense of the Directive, such a special rule does not exist in Albanian legislation. The practice does not recognize any case where the parties have settled consumer disputes by an arbitration court.

Schematic representation of cooperation among stakeholders according to LCP



Legend:

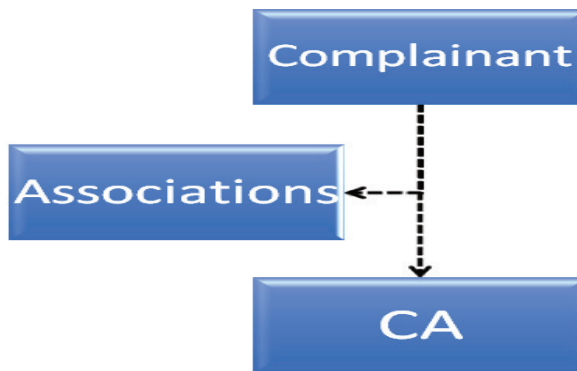
- Individual administrative complain
- Individual action
- Representative collective complain
- Representative collective action

According to Article 18 of the Law on Competition Protection, the Competition Authority (hereafter CA) is a public body, independent in the performance of its competencies. Pursuant to Article 29/1 of this Law, “Third parties or interested parties in matters relating to restrictions, distortions or impediments to competition submit to the Competition Authority complains and notices of these findings”. Article 19 of this law provides that the Competition Commission is the decision-making body of the Authority and consists of five members. Among other things, this commission has the power to make decisions as provided for in the law, it gives assessments and recommendations on competition-related issues to the central and local administration bodies and other public institutions, trade associations, trade unions, consumer associations, chambers of commerce and industry; defines the advantages of investigations and the respective deadlines for them etc. The Authority safeguards and guarantees the anonymity of

⁵⁹ Point 41 of the Preamble to the Directive, 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes.

complainant, whenever the latter requires it. Complaints or notifications, regardless of the manner of submission, after being recorded in the protocol register, are forwarded for professional treatment within a specified deadline to the Secretariat of the Authority. The procedures for handling complaints are set out in the Regulation on the functioning of the Authority.”

Schematic representation of cooperation among stakeholders according to the Law on competition protection



Legend:

- Individual administrative complain
- Representative collective administrative complain

According to Article 21 of the Law on Protection from Discrimination, the Commissioner for Protection from Discrimination (hereinafter: CPD) is a public legal person, who provides effective protection against discrimination and any form of conduct that incites discrimination. Among other things, the Commissioner has the power to: a) to examine complain s from persons or groups of persons who claim that they have been discriminated against as provided in this law; b) to examine complaints from organizations that have a lawful interest to act in the name and with the written consent of individuals or groups of individuals who claim that discrimination has occurred; c) to represent a complainant in the judicial organs in civil cases, with his approval in compliance with point 3 of article 34 of this law., etc. The CPC is at the same time a decision-making body in relation to representative collective complaint, and may be the initiating body of collective actions with special representation.

Schematic representation of cooperation among stakeholders according to LPD

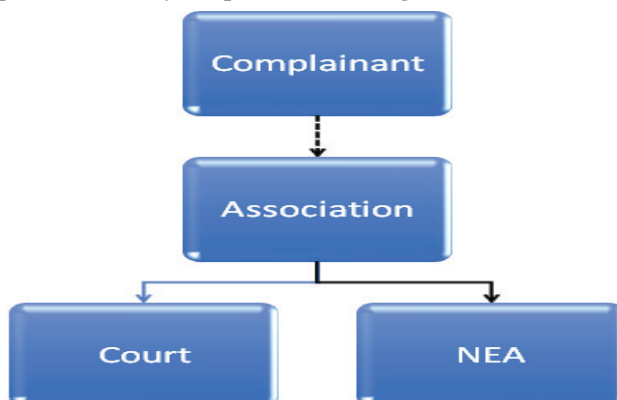


Legend:

- Individual administrative complaint
- Individual action
- Collective complaint with special representation
- Collective action with special representation

*According to article 49 of the Law on Environmental Protection, the **National Environmental Agency** (hereinafter: NEA) is a central public institution subordinated to the Minister of Environment, which exercises its jurisdiction throughout the territory of the Republic of Albania. NEA is the competent authority for identifying the operator that presents the direct threat of a potential damage or caused damage to the environment, the assessment of the significance of the damage caused, as well as the decision-maker to determine the rehabilitation measures. Natural persons or legal entities and environmental protection associations in the territory directly affected or suffering the consequences of the damage caused to the environment shall have the right to claim to NEA to request from the operator: a) restoration of the environment to its previous state; b) compensation for damage caused to the environment, in accordance with the provisions of this law, if the restoration of the environment to its previous state is impossible⁶⁰.*

⁶⁰ Article 52 of the Law on Environmental Protection.

Schematic representation of cooperation among stakeholders according to LEP**Legend:**

- Individual administrative complaint
- Individual action
- Collective complaint with special representation
- Collective action with special representation

4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress

4.1. The role and competencies

1. The role and competence of the courts

As already discussed in the report, the Law on Consumer Protection specifically legitimizes only RCPS and consumer associations to bring representative collective actions in court for the cessation or prohibition of infringements that undermine the collective interests of the consumers they represent. In order to file these types of actions, the above structures do not need special representation proxies from the consumers they represent.

In the case of such actions, the court assesses the special legitimacy of the associations based on the criteria set out in the law. Pursuant to Article 53 of LCP, consumer associations must meet three criteria to represent the collective consumers interests. These criteria are: a) active membership; b) experience; and c) geographic extent. Active membership is proven in court by the association through the payment of the quota. Experience is proven based on the longevity and range of activities the association has developed over a relatively considerable time. While the geographic extent is proved through the registration acts of the association at the National Business Centre and the activities organized by it.

In interpreting this provision, the consumer centers do not have specific legitimacy to bring representative collective actions. If the centers want to protect the interests of a group of consumers, they can do so only through the RCPS. The consumer is legitimated to file a complaint through the RCPS centre. The latter enjoys special legitimacy to bring representative collective actions in court.

In court proceedings, the court applies the general rules of adjudication. The burden of proof lies with the consumer association or RCPS to prove its claims. At the conclusion of the adjudication, if the court finds that the claims are based in law and evidence, it may only decide within the limits of the action and those set out in Article 55 of the LCP as follows:

- a. the cessation or prohibition of the infringement;
- b. the publication of the decision according to point a, in full or in part, 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;
- c. an order against the losing defendant for payments into the state budget, in the event of failure to comply with the decision within a time-limit specified by the Commission/Court, of a fixed amount for each day's delay or for each new similar infringement after the fixed time-limit;
- d. publications, according to letter "b" of this point, are carried out by the ministry responsible for the field of trade. Publishing costs are borne by the losing party.

The Law on Consumer Protection does not give the RCPS and the consumer associations special legitimation to seek damage compensation in court. Under these conditions, neither the court invested on the basis of a representative collective action can decide on compensation. Of course, that compensation of damages can be claimed through group actions or individual actions.

2. The role and competence of the Consumer Protection Commission

Pursuant to Article 52 of the Law on Consumer Protection, CPC was created with the purpose of reviewing violations and taking measures for the implementation of LCP provisions, as well as the by-laws issued for its implementation. CPC is a decision-making body and for identifying alleged violations by complaining consumers is based on findings, claims, complaints and any other kind of information that constitutes sufficient grounds for review. For the verification of violations, the CPC cooperates with the RCPS, which is responsible for the functions of the Technical Secretariat of this Commission.

Referring to the CPC statistics, 26 decisions taken by the CPC have been issued since 2009, which is the year of its establishment and about 90% of them were given in favour of consumers. According to the information received at the office of the CPC, the ratio between the complaints filed with the CPC by the RCPS and the Consumer Associations is 55% with 45% in favour of the RCPS. In most cases, the fines imposed were relatively easily executed from the party found guilty until when in 2011, with the latest amendments to the law, the value of the fines increased significantly. Prior to 2011, the amount of the fine ranged from 500 Euros to 700 Euros, while with the 2011 amendments, the value of the fine varies from 700 Euros to 2% of the annual turnover of the previous financial year of the entity found guilty. After increasing the fine value in 2011, there is a resistance of the guilty entity to pay and the cases were brought to court. The fined party or party to which the CPC has imposed the obligation to pay compensation shall have the right to challenge the decision of the CPC determining the

value of the fine and/or compensation pursuant to Article 59 of the Law within 30 days.⁶¹

2.1. The representative collective action in court versus the collective administrative complaint at the CPC

Analyzing the two ways of complaints by Albanian consumers (CPC complaint; and action in court), it turns out that, through the collective administrative complaint of consumers to CPC at the end of the complaint process, the consumer can achieve without any expense:

- a. the cessation or prohibition of the infringement;
- b. partial or complete publication of the decision;
- c. fining of the entity, (the amount of the fine goes to the State Budget); and
- d. in the event that damage is found, the CPC shall award damages in favour of the consumer.

Whereas, through the representative collective action the consumer must (a) pay the lawsuit fee (3,000 ALL); (b) pay the costs of a lawyer and/or expert; (c) pay court expenses if he/she loses the trial and can achieve:

- a. the cessation or prohibition of the infringement;
- b. partial or complete publication of the decision;
- c. fining of the entity, (the amount of the fine goes to the State Budget).

3. The role and competence of the Ombudsman

The Ombudsman is a public institution whose mission is to protect the rights, freedoms and legitimate interests of any person from unlawful or improper public administration actions. Any individual or group of individuals, including the minor children, may address the Ombudsman if he or she thinks that he or she is the victim of an error, injustice or violation of his rights and freedoms. The Ombudsman does not provide legal assistance and does not have the power to intervene in court proceedings.

Pursuant to Article 21 of the Law on Ombudsman, in the case of complaints from interested persons, the Ombudsman conducts a full investigation of the case and then undertakes these actions:

- a. explain to the complainant that his rights have not been infringed;
- b. make recommendations on how to remedy the infringement to the administrative organ that, in his judgment, has committed the violation; The submission of the recommendation suspends the unlawful or improper acts or actions until this recommendation is reviewed and a response is given to the Ombudsman.
- c. make recommendations on how to remedy the infringement to the authority supervising the administrative organ that has committed the violation; Failure to review the recommendation within 30 days suspends acts or actions that are illegal or improper.
- d. recommend to the public prosecutor to start an investigation if he finds that a criminal offence has been committed; or resume the dismissed or suspended investigation.
- e. upon finding serious violations, propose to the relevant authorities, including

⁶¹ Article 59 of the LCP: "Against the decision of the CPC, the person against whom the administrative measure is imposed has the right to request re-examination in the court within 30 days".

- the Assembly, to dismiss officials under their jurisdiction;
- f. in case of infringement of right by organs of the judiciary, the People's Advocate, without interfering with their procedures, shall notify the competent authorities of the violations;
 - g. recommend to the injured persons to take their case to the court.
- These actions do not exclude each other.”

Referring to the high number of complaints addressed to the Ombudsman regarding the field of consumer protection, the reality shows that very few consumers are well-informed about their rights. According to the Ombudsman report for 2016⁶², a total of 249 complaints were addressed to it, which are mainly related to overbilling from public service providers (*OSHEE or Water Supply and Sewerage Companies sh.a*) or to the quality of services that are offered by them. It is one of the areas with the highest number of complaints filed with PA, but also the highest number of positive solutions for individual complaints of citizens. From statistics, it results that almost 50% of complaints with a “*consumer right violation*” have been resolved because of the close institutional co-operation that PA has with the respective operators.

4.2. Case law and best practices in collective redress

The research of judicial practices in Albanian courts has been made impossible for several months due to a decision taken by the Commissioner for the Right to Information and Protection of Personal Data for non-publication of decisions. Judicial practice data is mainly derived from interviews with judges, organizations' representatives, print media and taking into account the results of long-time ago researches when consulting online judicial decisions was allowed. From interviews with some of the court of first instance in Tirana, which is the largest court in the country, there is no case where the consumer through a consumer association or RCPS has filed a representative collective action for cessation of the infringement. The only case that has been referred to us by the Association for the Protection of Consumers is a 1996 case where the association has been in the role of the secondary intervenor in the process and not the plaintiff. From researches made long ago in the court archives, there is not even any case where consumer associations have filed an action, as representatives of consumers with proxy for compensation of damage incurred as a result of LCP violations. There are some cases in which consumers have individually requested the reimbursement of the damage caused and 3-4 other cases where the losing party decision has appealed the CPC the decision, mainly for the amount of the fine imposed.

According to information taken from the press, it results that in 2017 a group of Valbona Valley residents together with the Land Association have filed a lawsuit in the administrative court and have requested the suspension of works of a hydro power plant being built in a segment of the Valbona River. The Administrative Court dismissed the claimant's request by decision dated 01.06.2017 as ungrounded in evidence and law⁶³.

The CPC's practice is richer. However, although associations have the right to make collective administrative complaints to the CPC, in absolute majority of cases, the complaints were individual.

62 Report provided by the Ombudsman Office but unpublished.

63 <http://fax.al/news/10118222/gjykata-rrezon-banoret-te-vazhdoje-ndertimi-i-hec-it-ne-valbone>

CPC decisions by years are:

- In 2009, 1 decision, by which is redressed the right: the prohibition of broadcasting publicity spots;⁶⁴
- In 2010, 12 decisions, of which 3 decisions for the prohibition of the violation and restoration of the situation plus the punishment by fine⁶⁵, 8 decisions ordering the prohibition of the violation and restoring the situation⁶⁶, 1 decision to dismiss the case regarding the violation of Law 9902/2008 due to the correction of the violation by the entity itself and the order to take measures for non-repetition of such practices in future;⁶⁷
- In 2011, 4 decisions, of which: 2 decisions to prohibit the violation and restore the situation plus a fine⁶⁸; 1 decision ordering the prohibition of the violation and restoring the situation⁶⁹; 1 decision ordering only a fine for non-disclosure of information;⁷⁰
- In 2012, 7 decisions, of which 2 decisions for fines for non-disclosure of information⁷¹, 2 decisions for restoring the situation and the obligation of the

64 Decision no. 1, dated 07.10.2009 “Review of two advertising spots in the media by company AMC SH.A”

65 Decision no. 2, dated 01.04.2010 “Review of the practice of non-submission of invoices by the fixed telephony operator Albelemek sh.a in the consumers residence”. Decision no. 6, dated 30.07.2010 “Review of the recurrent practice in connection with the exclusion of VAT on the prices of the service provided by the operator Albelemek sh.a - for the ADSL service tariffs. “Decision no. 10, dated 25.10.2010 “Review of the promotional game of company AMC sh.a: “Ëndrra e Verës”.

66 Decision no. 3, dated 01.04.2010 “Review of publicity “Talk infinitely with all the numbers Albelemek, only 500 ALL per month”; Decision no. 4, dated 30.07.2010 “Review of the declaration “Approved by the European Community” in the labelling of water Tepelena, by the operator Uji Ftohtë Tepelenë sh.p.k”; Decision no. 5, dated 30.07.2010 “Review of the method of billing the fixed telephony service, by operator ALBTELEKOM sh.a”; Decision no. 7, dated 30.07.2010 “Review of two Albanian Airlines publications i) Piza-Piza starting from 76 euro ii) Tirana - London 39 euro + taxes”; Decision no. 8, dated 06.08.2010 “Review of the practice of offering two offers of Vodafone sh.a., respectively: “Vodafone Card for all”: and “Weekly Vodafone Card Package”; Decision no. 9, dated 06.08.2010 “Review of drinking water supply contract of Water Supply and Sewerage sh.a, Korçë”; Decision No. 12, dated 08.11.2010 “Review of commercial practice regarding the interruption of the provision of free urban transport services to travellers, and the suspension of the provision of monthly general subscription tickets by private operators”; Decision No. 13, dated 13.12.2010 “Review of the complaint presented by the University “Pavaresia” Vlorë for the publicity displayed in the local media, written and visual by the Reald Vlorë University, regarding the provision of study cycles for seven branches, both accredited and licensed”.

67 Decision No. 11, dated 25.10.2010 “Review of the complaint filed by University Justiniani I, for the publicity in written and visual media regarding the provision of the third cycle study program (Doctorate), by the European University of Tirana.

68 Decision no. 15, dated 04.02.2011, “Review of the complaint concerning the change of the interest rate, contrary to the Loan Contract No. 3875 dated 3.03.2008 and Annex Contract entered into between Alpha Bank – Albania, Branch in Shkodër”; Decision no. 16, dated 04.02.2011 “Review of the method of billing of fixed telephony service, and delivery of those bills to consumers by ALBTELEKOM Sh.a. Operator”.

69 Decision no.14, dated 04.02.2011 “Review of the complaint filed with the Commission by clients of Eagle Mobile company, concerning the publication on the website of this company of the End User Agreement, which is provided only in English language.

70 Decision No. 17, dated 07.11.2011 “Review of the Response of the Operator CEZ Distribution to the request for information of the Consumer Protection Commission addressed to this operator regarding the commencement of consideration of a considerable number of consumer complaints against the CEZ Operator Distribution”.

71 Decision No. 18, dated 27.01.2012 “Review of the complaint of a former student on non-public university “Vitrina” “in the direction of this university regarding the de-registration of the “Vitrina” University, as well as providing the list of study programs of the first academic year completed by the student versus a certain fee unannounced by the university in the contract concluded between these two parties”; Decision no. 19, dated 22.02.2012 “Review of the complaint from Esmeralda Elezaj, former student of the Non-Public University “Vitrina”, regarding the deregistration practice pursued by this University; Decision no. 21, dated 22.02.2012 “Review of consumer complaints against CEZ Distribution operator”; Decision no. 22, dated 22.02.2012 “Review of the complaint, regarding the practice followed by the Student Treatment Company of Shkodra, in cases when the students have paid the annual rent fee and when the student decides not to meet the lease contract”.

entity to indemnify the complainant⁷²; 1 decision ordering the prohibition of the violation and restoring the situation⁷³; 2 decisions for termination of administrative proceedings;⁷⁴

- In 2013, 4 decisions, of which: 1 decision with a fine for non-disclosure of information⁷⁵, 2 decisions for restoring the situation and the obligation of the subject to indemnify the complainant⁷⁶, 1 decision to prohibit the violation and restore the situation;⁷⁷
 - In 2014, 3 decisions to prohibit the violation and restore the situation;⁷⁸
 - In 2015, 3 decisions, of which: 2 decisions to prohibit the violation and restore the situation⁷⁹; 1 decision to cease the administrative proceeding and give recommendations for legal initiatives to regulate the situation;⁸⁰
 - In 2016, 6 decisions, of which: 2 decisions to prohibit the violation and restore the situation⁸¹; 4 decisions for the approval of the terms of the standard contracts⁸²

72 Decision no. 20, dated 22.02.2012 “Review of the complaint from Esmeralda Elezaj, former student of the Non-Public University “Vitrina”; Decision no. 23, dated 22.02.2012 “Review of the complaint, regarding the practice followed by the Student Treatment Company of Shkodra, in cases where students have completed the prepayment of the annual rent fee under the contract and when the student decides not to meet the lease contract, which in the present case is for objective reasons of winning a scholarship at a university in another district.

73 Decision no. 24, dated 03.05.2012 “Review of consumer complaints against CEZ Distribution Operator

74 Decision no. 25, dated 03.05.2012 “Review of the AMC letter with the case: “Appeal on unfair and misleading commercial practices followed by Vodafone Albania sh.a.”; Decision no. 26, dated 03.05.2012 “Review of Vodafone’s complaint “against unfair trading practices conducted by AMC”.

75 Decision no. 27, dated 05.02.2013 “Review of the issue of the Vitrina University regarding the lack of information requested from CPC”.

76 Decision No. 28, dated 06.05.2013 “Review of the complaint from a group of former non-public students “Vitrina” regarding the de-registration from the University “Vitrina”, as well as the provision of a list of programs versus certain payment by the university, unforeseen in the contract concluded between these parties”; Decision No. 29, dated 06.05.2013 “Review of a complaint from a group of former students of the Non-Public University “Vitrina”, regarding: doubling the tariffs set out in the contract, for taking part in exams, scientific works etc”.

77 Decision No. 30, dated 10.05.2013 “Review of the complaint of Vodafon Albania sh.a., concerning the commercial practice of the offer “Telephone calls without limit”, of the mobile operator Eagle Mobile sh.a.”

78 Decision no. 31, dated 29.07.2014 “Review of summary information from the Consumer Protection Sector concerning the deficiencies in providing information on Consumer Loans from Second Level Banks”; Decision no. 33, dated 17.10.2014 “Review of the Valuation Report of “General Conditions of the Electricity Supply Contract for Family Clients”.

Decision no. 34, dated 26.12.2014 “Review of complaints against the Foreign Exchange Office “Pro-Exchange” for commission application for each foreign exchange transaction”.

79 Decision no. 35, dated 18.02.2015 “Review of the Report “Preliminary Assessment of the Contract for Water Supply and Sewerage Services”; Decision no. 37, dated 26.06.2015 “Review of Consumer Complaints regarding the practice followed by the Water Supply and Sewerage Company Tirana (UKT) through the notice published in the water bill for the obligation of verification of measuring apparatus by consumers”.

80 Decision no. 36, dated 18.02.2015 “Review of the complaint submitted by Vodafone Albania against the Albtelekom sh.a. company for commercial publicity practice Eagle the only network 3.5G”.

81 Decision no. 38, dated 12.07.2016 “Review of the complaint filed by the Competition Authority regarding the practice followed by Albtelecom, sh.a. in providing “Package 690”; Decision no. 39, dated 28.07.2016 “Review of the case with the object: “Complaint filed by ROFIX against Company Alba Road sh.a. for unfair commercial practice in publicity “Thermal insulation of facades - mantel - isothermal system”.

82 Decision no. 40, dated 07.10.2016 “Review of the report “Preliminary assessment of the general conditions of the “Subscription contract: Terms and Conditions” of “Albanian Satellite Communications” sh.pk [Tring];”; Decision no. 41, dated 07.10.2016 “Review of the report “Preliminary assessment of the general conditions of the “Contract for the provision of electronic communications services and cable television” by Albanian Broadband Communication sh.pk (ABCCom sh.p.k.)”; Decision no. 42, dated 07.10.2016 “Review of the report “Evaluation of the general conditions of the “Service Contract”, of the operator “Abissnet” sh.a.”; Decision no. 43, dated 07.10.2016 “Review of the report “Evaluation of the General Conditions of the SUBSCRIPTION CONTRACT for the Family Category, the Public Telephony Service Provider and Fixed Internet Access Albtelecom sh.a.”

5. The role of consumer organizations in collective redress

5.1. Legal precondition for consumer organizations' activities to represent consumer rights in collective redress

Consumer associations must meet certain criteria in order to be allowed by law to represent the collective interests of consumers and as such to have specific legitimacy in filing a representative collective action in court and to exercise the right to collective administrative complaint at the RCPS and/or CPC. These criteria are explicitly provided for in Article 53(3) of the Law on Consumer Protection and are: (a) active membership; b) experience; c) geographical extent.

On the official CPC website, there are 5 consumer protection rights organizations, namely: Shoqata e Mbrojtjes së Konsumatorit Shqiptar, “Konsumatori në fokus”, Qendra “Peshëmatje-çmime”, “Zyra për Mbrojtjen e Konsumatorit” dhe Qendra “Konsumatori shqiptar” (“Albanian Consumer Protection Association”, “Consumer in Focus”, “Scale-price Centre”, “Office for Protection of Consumer” and “Albanian Consumer Center”). It is noted that the legal form of their constitution is not only “association”, but also “center”. The reason for this legal form of organization is the impossibility of securing membership fees. This indirect weakness becomes a significant obstacle for the centers for filing representative collective actions. Judicial practice does not bring any case upon which the interpretation of the court can be taken into consideration if the provision leaves room for extended interpretation with the aim of introducing into the group of associations even the centers representing the collective interests of consumers. However, the fact that the law provides explicitly as one of the criteria of the association “active membership”, I think this is an insurmountable legal obstacle in the current legal framework. The only way for the centers to realize the aims of the representative collective action is by filing its complaints to the RCPS and encouraging the latter to bring the case to court.

5.2. Assessment of the environment for consumer organisations to deal with collective redress

Unlike other countries in the region or beyond, where the number of consumer protection organizations is very large, there are only 5 organizations in Albania that have a direct focus on consumer protection.⁸³ As far as the organization is concerned, 2 of them are organized in the form of “association”, i.e. non-profit organizations with membership, and 3 are organized in the form of “centre”, i.e. as non-profit no membership organizations. The form of legal organization is dictated by the financial conditions of consumers. As most consumers are not aware of paying membership fees, the consumer protection rights groups have chosen to be organized in other forms of organization such as centers that do not require membership as establishment criteria. Associations can provide income from both the annual contributions of the members and their activities, while the centers can only provide income depending on different projects, activities or undertaking different campaigns.

⁸³ Information obtained on the official website of the CPC on 25.05.2017. For more details see: <http://kmk.ekonomia.gov.al/index.php/shoqatat/>

The Law on Consumer Protection in Article 54(3) provides for the possibility of financial support from the Ministry of Economic Development, Tourism, Trade and Entrepreneurship only to associations and not to other non-profit organizations. However, until 2016, there is no single item foreseen in the Albanian state budget to fulfill this aim.⁸⁴ The Albanian state has not been able to financially support directly or through various grants any association that acts in the field of consumer protection. Furthermore, even if the state had granted financial assistance under this exemption, the centers (currently 3 out of 5 existing in protection of consumer interests) would have been and continue to be excluded from the law to benefit financial aid.

Despite the lack of funding from MEDTTE, Albanian consumer protection organizations have been active in addressing public administration bodies for the protection of their collective interests. Initiation by them of administrative and non-judicial procedures is determined by the negligible costs of collective administrative complaints, which are covered by the organization.

In Albania, organizations in the field of consumer protection, due to lack of funds and income, survive through receiving minimal value projects. The legal criterion that only the “association” has the right to receive financial aid has prompted associations to declare fictitious membership. Notwithstanding that these non-profit organizations (associations or centres) have been established and operate under the law in force “On non-profit organizations”, their effective bodies are only the executive director or chairman/president of the association. Much of their work is based on volunteering.

If we refer to the requirements set out in Commission Recommendation 2013/396/EU, in addition to the money, a key element for legitimizing consumer protection organizations is also human resources. In Albania, due to lack of funding, most of these organizations have reduced staff that work either on a voluntary basis, or depending on the projects or funds of the organization.

In recent years, organizations have started to address various state institutions with the object of ceasing the violation or prohibit violations from different traders, primarily to protect the collective interests of consumers, with particular emphasis on the right to information. However, these bodies of public administration have never analyzed, from the legal point of view, the legitimacy of these non-profit organizations in the right to seek such measures to protect the collective interests of consumers.⁸⁵

Filing representative collective actions or collective actions with special representation under the terms of the analysis already made in this report has considerable costs for organizations.

Another obstructive factor that is not directly related to associations is the length of court proceedings, as well as the prosecution of the three levels of adjudication. We can also mention the lack of human resources, which is a key factor in raising the level of consumer awareness and improving the environment to promote the filing of these actions. Finally, we can say that the legal framework, the lack of financial and human resources, create a negative environment in function of filing these actions in order to protect the collective interests of consumers.

⁸⁴ According to information received from MEDTTE officials.

⁸⁵ Interview with Ms. Ersida Teliti, Executive Director of the Centre “Albanian Consumer”.

5.3. Prerequisites for awareness raising toward consumers in collective redress

Although consumer protection laws in Albania date back to 1997, the level of Albanian consumer awareness of their rights is still low. It can be easily noticed that the Albanian consumer lacks the awareness of his rights and moreover the way of exercising these rights. Albanian consumers are not yet ready to initiate litigation, either individually or collectively, for the protection of their collective interests. An indicator of this level of awareness is the small number of consumer protection organizations (5 organizations) compared to other countries in the region or beyond.

In the last decade, there is a commitment of public administrative structures, mainly the MEDTTE Consumer Protection Commission, as well as the Consumer Protection Agency at the Municipality of Tirana for the education, information and awareness raising of consumers regarding their rights. The Consumer Protection Agency is the only institution at the local government level that focuses its work on consumer protection. Through its activity, it provides, inter alia, awareness and prevention of infringement or violation of consumer rights through the component of consultation and qualitative, intensive and continuous education.⁸⁶

In order to increase the level of consumer awareness and establishment of structures at the level of local government for the protection of their rights, MEDTTE has initiated the opening of two counseling centers⁸⁷ by consumer associations. Consumer Counseling Centers will be competent to provide advice on related matters such as: protecting consumer economic interests, and legal protection and consumer indemnification, including out-of-court settlement of consumer complaints. The manner of their organization and functioning is determined by the Minister of MEDTTE Instruction No. 721 on the criteria for the organization and management of consumer counseling centers, dated 27.10.2010.⁸⁸

Improving the level of consumer counseling through the functioning of counseling centers run by consumer associations is a legal obligation stemming from the Intersectoral Strategy on Consumer Protection and Market Surveillance 2020.⁸⁹ The strategy aims to improve consumer education, considering consumer education as an important part of consumer protection, addresses the education of children, adolescents and adults in their role as consumers, aiming at developing attitudes, values of orientation and behavior in order to gain the awareness of acting in the market in a competent and informed manner.

Increasing consumer awareness is a challenge just as important as approximating Albanian legislation with *acquis communautaire*. Therefore, they should be undertaken in parallel. In the context of increasing consumer awareness of collective redress mechanisms, we consider taking a plan of measures, such as:

- In parallel with the approximation of the Albanian legislation with the Commission Recommendation, awareness-raising campaigns should be undertaken to highlight the positive aspects of collective, injunctive and compensatory redress mechanisms.

⁸⁶ For more information about the CPA: <http://mbrojtjakonsumatorit.al/>

⁸⁷ Can be found at: <http://mobile.ikub.al/LIGJE/PeR-KRITERET-E-ORGANIZIMIT-DHE-Te-DREJTIMIT-Te-QENDRAVE-Te-KeSHILLIMIT-1012210139.aspx>

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⁸⁹ The complete text can be found at: <http://kmk.ekonomia.gov.al/wp-content/uploads/2015/11/Strategjia-e-Mbrojtjes-se-Konsumatoreve-dhe-Mbik%C3%ABqyrjes-se-Tregut.pdf>

The consumer should be informed about the advantages of the cost of implementing collective mechanisms compared to individual ones. A mix of comparisons between them would be an indisputable incentive for consumers to use these mechanisms. Examples of international practices would have a significant impact.

- The consumer should be informed about the novelties that the collective compensation mechanism brings. If according to the current legislation, through a representative collective action, the consumer can only get the prohibition of the violation under the terms of the representative collective action within the meaning of the Commission's Recommendation, the consumer may also get compensation for damages, other than the cessation of the infringement.
- Consumer education is part of the 9-year primary education curriculum. Increasing the attention of educational bodies responsible for the correct implementation of this program would have a positive impact. A child taught by consumer culture is a prosperous consumer of the future. Moreover, it is also a very good example of the family environment where he or she lives.
- Consumers should be made aware that the provision of collective mechanisms in the law will affect the improvement of the behavior of traders towards consumers. Traders will be a little more cautious in dealing with consumers, being aware of the consequences of collective actions/complaints.

6. Recommendations and conclusions

Albanian legislation regulating aspects of collective protection of rights is not fully approximated with European Union legislation in this area, so this remains a challenge for Albania as an aspirant country to become a member of the European Union. Therefore, approximation of the Albanian legislation with (a) Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes (b) Directive of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union" and in particular with (c) Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law" (2013/396/EU) is the first recommendation proposed at the conclusion of this study. Such approximation of Albanian legislation would mark a very positive step in the area of collective protection of rights, for several reasons:

First, taking into account that the Albanian procedural law does not provide for a general regulation for collective, injunctive and compensatory redress mechanisms, in the meaning of the Commission Recommendation (2013/396/EU), the general regulation in a special law of a collective injunctive and compensatory mechanism is recommended because: (i) it would unify the dispute settlement procedure that arises because of the unlawful actions that can be made against a group of people; (ii) it would be an extraordinary incentive for the consumer to seek redress through the prohibition of the infringement and/or the indemnity, because at present the costs of individual legal remedies for redress of a violated right are usually much higher than the value of the

damage that may have been caused to the individual. Through collective action, these costs are reduced by dividing most of them among several persons; (iii) It would deter large companies from committing violations to certain groups of persons because they would be aware of the real potential of filing a lawsuit against them.

However, even if it is not possible to have a general regulation of the representative collective action as the most typical and efficient collective redress mechanism, the provision of these collective mechanisms in particular areas would be a positive and appreciated step in function of achieving the purpose of the Recommendation. Currently, Albanian legislation provides for some *quasi* collective mechanisms, which are only injunctive and not compensatory in the areas of protection against discrimination, consumer protection, protection of competition and the environment. Approximation of Albanian legislation with the Commission Recommendation (2013/396/EU), where according to paragraph 7 of the Preamble it is envisaged that: “*collective, injunctive and compensatory mechanisms are recommended to be implemented in areas such as: consumer protection, competition protection, environment protection, protection of personal data, financial services legislation and investor protection but also in other areas that can be relevant*”, should lead to the expansion of the areas of application of these mechanisms in Albanian legislation.

Second, full approximation to Directive 2013/11/EU on alternative dispute resolution for consumer disputes would enable the establishment of out-of-court structures for resolving customer disputes. The current Law on Consumer Protection leaves room for the creation of administrative structures based on Article 53(f), but *de facto* such structures have not been established yet. Establishment of an authority over the parties as a public legal entity, independent and able to offer good and fair solutions for both parties would be highly recommended. Such authority would: (i) guarantee a cost-free process for consumers; (ii) enable settlement of disputes by agreement, but also by decision. Under such conditions the parties would be constrained to find a resolution without aggravating the situation between them; (iii) enable the establishment of a body/staff specialized in consumer disputes; (iv) facilitate consumer orientation in case of violation of their rights.

Also, in this context, it is of great importance also to sensitize and encourage consumers to resolve issues through negotiation and/or mediation. We point out that after the increase in the level of fines by the CPC, large companies, (unlike what they did before 2011, which paid the fines quietly), are resisting paying and are bringing cases to court. This fact has created the right ground for out-of-court settlement of issues because the company in case of violation will have to pay a big fine and for it is not very important in whose pocket the money will go. For the company, it is important to pay as little as possible. On the other hand, the fine is in any case paid to the State Budget and not to the Consumer. By resolving disputes out-of-court, the company is likely to pay less and the consumer has the potential to be compensated. Therefore, public awareness (consumers and traders) with the application of out-of-court dispute settlement methods is one of the best, short-term and long-term alternatives to be intensively supported.

In addition to the above-mentioned recommendation for the approximation of Albanian legislation with that of the EU, other recommendations are proposed regarding the implementation of collective mechanisms, as well as in the way that the Law on

Consumer Protection provides for them. At present, some issues are identified, which can be resolved without the necessity of a comprehensive reform in legislation, as follows:

First, this law explicitly provides that the right to collective administrative complaint and the right to file a representative collective action can only be exercised by the Responsible Consumer Protection Structure (administrative body) and by the Consumer Associations. Consequently, these rights cannot be exercised by other organizations that also have the purpose of protecting the rights and interests of consumers. Such a limitation in law seems unreasonable given that the circumstances that dictate the form of legal organization are financial, such as the inability of members to pay membership fees, and not a strategic one. It is therefore recommended that in the spirit of the Commission Recommendation, it should be determined the criteria to be met by the representative entity, rather than its legal form of organization. I recall that Article 15 of the Recommendation provides that: “The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements: (a) the entity should have a non-profit making character; (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.”

Second, Article 55(a) LCP provides for the right of RCPS and Consumer Associations to request that the administrative body (CPC) and/or the court impose the cessation or prohibition of the infringement. In terms of the provision these terms “cessation” and “prohibition” do not make a difference; therefore, from the legislative technique point of view this provision should be amended.

Third, based on Article 55 of LCP, RCPS and Consumer Associations have no right to seek damage compensation through representative collective complaint. While under Article 57(5) of LCP: “*When the Commission, in the examination of the administrative offense, finds that there is damage caused as a result of the administrative offense, after the end of the administrative review, it also assesses the extent of the damage and by a special decision decides on the compensation of the damage*”. The law does not make a clear distinction whether Article 57(5) is applicable under Article 55. An accurate legal provision regarding the collective compensation mechanism would be in the function of achieving the purpose of the Commission Recommendation (2013/396/EU).

Fourth, the Law on Consumer Protection provides for the possibility of financial support from the Ministry of Economic Development, Tourism, Trade, and Entrepreneurship for consumer associations. However, until 2016, the Albanian state budget has not foreseen any item in order to fulfill this aim and the Albanian state could not support financially directly or through various grants any association operating in the field of consumer protection. Furthermore, based on Article 54(3), MEDTTE supports financially only consumer associations. Once again it is emphasized that the exclusion of other non-profit organizations the object of the activity of which is the protection of consumers’ interests does not appear to be reasonable either in the spirit of the Commission’s Recommendation, which, as we said above, binds the legitimization of

entities to achieve the collective protection of rights with the fulfillment of some criteria and not with the form of organization of the entity.

Fifth, the concentration of representative collective actions in one particular court, e.g. the Tirana court, by defining in law its competence would be a positive step because (i) being rare cases, this is one of the ways to enable judges be specialized in this field; (ii) for statistical purposes, in order to control their performance, it would be more useful to register them in a single court; (iii) the judicial precedent would be easier and more applicable in such a case.

Sixth, based on Article 50 of LCP, the Responsible Market Surveillance Inspectorate is envisaged to be the implementing structure of consumer protection legislation, general safety for non-food products, and responsible for carrying out market surveillance activities. Currently this inspectorate is not yet constituted. Its constitution should have priority.

Other recommendations regarding the implementation of the Law on Consumer Protection are:

- a. Responsible structures for the protection of consumer rights should be more active and have more public access, using different ways of informing the citizens about their rights and the means of their realization.
- b. Responsible bodies in the field of consumer protection should make timely decisions regarding the prohibition or cessation of the violation in order to protect consumers more effectively.
- c. Provision of effective and general training of all implementing stakeholders of collective, injunctive and compensatory redress mechanisms such as representatives of administrative bodies, courts and consumer protection organizations.
- d. Creation of procedural facilities in the case of claims filed by these organizations for the protection of consumers' collective interests. These organizations may be exempted from the lawsuit fee in the case of filing such claims in court.
- e. Increase of interaction between implementing stakeholders of collective mechanisms through cooperation agreements among stakeholders.
- f. Increase of interaction between consumer protection structures and consumer protection organizations, whereby the former delegate the right to inform to the latter by raising the level of consumer confidence in these institutions.

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COLLECTIVE REDRESS IN CONSUMER PROTECTION IN BOSNIA AND HERZEGOVINA

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Executive summary

With the ratification of the Stabilisation and Association Agreement (SAA), Bosnia and Herzegovina (BiH) has taken over the obligation to harmonise its legal system with the EU legal order. Precisely in the area of collective redress, the EU has recently adopted a whole range of measures (Directives and Recommendations). The analysis and comparison of the legal solutions in BiH revealed that with regards to the harmonisation with the EU Law in the field of collective redress, BiH still has some serious tasks to fulfil. Nevertheless, it will not be an easy process. Firstly, because of the lack of coordination between different levels of legislation (in one entity of BiH, Republika Srpska, statutes have been adopted that regulate the same matter as previously adopted statutes at the central state level of BiH. This is true for statutes on consumer protection, food and product safety). Secondly, there is the constitutional division of competences between the state level and federal units; matters analysed here are mostly regulated by statutes of the entities (Republika Srpska, Federation of Bosnia and Herzegovina) and the Brčko District of BiH. There are some important differences between these statutes, even when they are implementing EU *acquis*; therefore, the process of harmonisation with EU law causes less harmonisation between the legal orders within BiH.

The BiH legal order is harmonised with the Directive 2009/22/EC and at least at a regulative level offers a higher level of consumer protection (differently that the Directive it provides for a collective claim for compensation). This is allowed due to the minimal harmonisation principle followed by the Directive. Differently, the Directive 2013/11/EU on ADR in consumer protection is not implemented in BiH. Nevertheless, in the entity Republika Srpska there is an alternative dispute resolution mechanism for consumers. Considering the obligations arising out of the SAA, this Directive should also be implemented in the legal order of BiH. The same is true for the Directive 2014/104/EU on actions for damages caused by infringements of the competition law. The application of general rules on compensation for damages does not provide for an effective legal protection, whereas the Directive obliges the Member States to undertake measures that would make such requests effective (e.g. rules on the disclosure and burden of proof, rebuttable presumptions, limitation periods etc.).

Certainly, the most important novelty and a step forward in the law of the entities is the fact that in both entities, Republika Srpska in 2013, and in the Federation of BiH in 2015, the Civil Procedure Code has been amended and the amendments introduced special civil procedures for the protection of collective interests and rights. The rules of procedure are the same regardless of the collective interests and rights in question, and only *exempli causa* some areas are listed in which the rules on measures of collective redress can be applied. These interests are determined as interest with regards to the human environment, moral, ethnic, consumer, antidiscrimination and other interests that are provided for in special laws. The list of protected rights and interests is not enumerative. Here the legal order is in convergence with the EU Recommendation that advocated for means of collective redress for the protection of rights guaranteed by EU law. The Civil Procedure Codes do contain a quantitative restriction – the collective claim is permitted only in case when the rights and interests are heavily endangered and violated. With this regards the laws are not in line with the Recommendation 2013/396/

EU, but also with the previously mentioned EU Directives, that do not contain such a restriction.

The collective claim may be raised by subjects (associations, bodies, agencies etc.) that are established with the purpose of protection of rights and interests and that are given these competences by special laws, under the conditions and presumptions provided for in these laws. The analysis of special legislation identified as a weak point precisely the regulation of subjects competent for taking measures of collective redress.

The amendments of the Civil Procedure Codes brought a more precise regulation of collective claims and made them enforceable. This cannot be stated with regards to the compensation claim that did not receive a clear shape in the consumer protection laws, and became unenforceable with the amendments of the Civil Procedure Codes. With this solution, the protection enabled by the consumer protection laws has been very restricted. Still, even if this solution does restrict the (consumer) protection, the protection provided for in consumer protection laws was not effective, because none of the procedural questions regarding the collective claims has ever been solved. Such disharmony in legislation on consumer protection and legislation on the civil procedure is not desirable and will not advance the protection of collective consumer interests. The horizontal approach of the protection of collective rights is seriously distorted by the provision of the Civil Procedure Codes themselves that provide for the application of special civil procedures for the protection of collective rights and interests, only if nothing else is provided for in other special legislation.

With regards to the cause of action, the civil procedure codes of the entities are following the Recommendation 2013/396/EU, apart from the compensation claim. However, with regards to the linguistic formulation and nomotechnics, they are partly unclear and should be largely revised. They contain several formulations that cannot be put into context of currently valid provisions of the civil procedure, enforcement procedure of even administrative procedure, and that can endanger the effectiveness of such collective protection.

Apart from the horizontal approach, in BiH also a sectoral approach is present (in Brčko District of BiH there is only a sectoral approach). In several fields that have been the subject of this analysis, there are more or less developed mechanisms of collective redress (the collective redress mechanism are developed in detail within the Antidiscrimination act. There are also provided for, but not to the same extent of precision, in the consumer protection laws and the laws on environment protection). In some fields of law, there is a need of an elaborative systematic interpretation of three legal texts (a special law, law regulating the obligation relations and civil procedure codes) in order to draw a conclusion on the possibility of collective redress (the field of food safety and general product safety). Considering the court practise until this date, it is not to be expected that courts will make such a “heroic” achievement and interpret the sectoral laws that do contain and guarantee collective rights, but are vacant with regards to the protection mechanisms, in the recommended manner. The condition that needs to be fulfilled in order to protect the collective rights recognised in these laws is that the laws themselves identify the stakeholders of collective redress and that is mostly not the case. Different sectoral legislation also provides for a different content of protection. Some of the laws only provide for injunctions with regards to activities

that are causing damages to collective interests (e.g. competition law), some in addition provide for collective compensatory claims (consumer protection laws), and in some fields when interpreting the legislation as a whole it follows that collective interests are concerned, but without any explicit provision. That leads to problems in application of the Civil Procedure Codes. In the sectoral legislation in BiH the present variety of solutions is not desirable.

In the field of competition law there are mechanisms of collective redress, but there are no special rules on compensation of damages caused by the violation of the competition. Here, by the application of general rules on compensation of damages, but because of the specifics of violation and damages caused by the violation of competition rules, damages claim and also collective claims cannot be effective as envisaged by the Directive 2014/14/EU.

The laws regulating the capital market do not contain collective redress mechanisms for investors, nor do they refer to laws that do contain such mechanisms, or even identify the subjects of protection. Furthermore, they do not identify investors as consumers, so that the collective protection of investors on the ground of consumer protection laws is questionable. The protection depends on the interpretation of the courts, if an investor is a consumer, but it is hard to expect a broad interpretation by the courts that would also recognise investors as consumers without a specific legal provision on it. A collective protection of investors would be possible under the Competition Act, but only in case when competition rules are violated.

In the field of patients' rights there are also no means of collective protection provided for by law that could contribute to an effective protection of their rights and interests. Such legal means would be necessary, considering that patients are in a weaker position in relations to the doctor and the medical institution. The patients are left on their own in pursuing their rights and general rules on damages are making their position even harder (especially with regards to the burden of proof on the causality, problems with regards to the medical expert's opinions etc.). Subjects of protection of collective patients' rights are not identified, and that is a precondition for the „activation“ of rules on protection of collective rights and interests on the grounds of civil procedure codes.

The sectoral legislation on food safety and general product safety also provides for consumer protection as one of its principles. Although it does not contain provisions on collective redress, neither the procedural (e.g. the question of the right to bring an action or questions related to the claim itself etc.), nor the substantive ones (the preconditions of responsibility for damages), a systematic interpretation of the laws on food safety or general product safety, consumer protection and obligation relations (damages), it is possible to conclude that in case of the defects in food or products means of consumer protection are applicable or even the consumer collective redress mechanisms. We may conclude that the subjects competent for bringing a collective claim are consumer associations, which is arising out of the General Product Safety Act, but also from the fact that the addressees of the protection are the consumers.

Collective redress in the field of environmental protection exists on several levels – from the right to information, the right to participate in administrative procedures of the issuance of environmental permits, to the court proceedings (only in both of the

entities), in which the “interested public”, and foremost NGO’s may request actions to remove the danger of damages or to abolish activities of persons that are not in line with the defined environmental principles; collective compensation claims are not permitted.

The Anti-discrimination Act provides for a developed mechanism of collective redress. The procedural rules of this act do not reveal a great extent of disharmony with the provisions of the civil procedure codes of the entities on collective redress. However, the existence of two parallel mechanisms of judicial protection means, unfortunately, the abandoning of the horizontal approach recommended by the Commission. With regards to certain questions this Act does provide for better solutions than the civil procedure codes (e.g. the revision is always allowed, regardless of the value of the matter).

An important precondition for the collective redress is the identification of the subjects that are the carriers of the protection. The same is true for the fact that these subjects need to have the capacity to initiate procedures of collective redress. The Recommendation 2013/396/EU contains criteria with regards to the capacity of the subjects to undertake measures of collective redress, and they are especially related to the financial resources of these subjects. With regards to both mentioned aspects in the law of BiH some weaknesses are apparent. Here we have a very specific situation in the field of consumer protection, where BiH has numerous stakeholders responsible for the initiation of collective redress procedures. Among them, as the most important, we can point out the Ministry for foreign trade and economic relations, Competition Council of BiH, Ministry of trade of the Federation of BiH, Ministry of trade and tourism of Republika Srpska, the Alliance of consumer associations and the consumer associations themselves, with the important fact that all of the above mentioned are also members of the Council for consumer protection on state level. It is the precisely the Council for consumer protection that is proposing the Annual programme of consumer protection which most of the activities undertaken in collective consumer protection are based on. So is this analysis in the field of consumer protection as well.

Consequently, it cannot be stated that there are not enough stakeholders for collective redress in consumer protection, or that there is no formal way of communication between them. This is especially true when you add to the list the probably most important stakeholder of collective interests in consumer protection in BiH, and that is the Ombudsperson for consumer protection of BiH. The recommendation of 2013/396/EU also does not restrict the Member States from the introduction of public bodies as stakeholders of collective redress.

Beside the abovementioned public institutions and bodies, a collective claim may be initiated by consumer associations as well. At latest with the adoption of the Recommendation 2013/396/EU the question if such competence shall be given to associations has become redundant. The Recommendation supports this approach by providing criteria that such organisations need to fulfil, so that the question is not if consumer associations shall be granted competences in collective redress, but under which conditions and how.

With regards to other laws and statutes that contain provisions on collective redress, the situation is different. In some laws the protected subjects are not identified at all (and that is a precondition for the application of special civil procedure for collective claims as provided by the Civil Procedure Codes of the entities), and in some other, the

subjects are not specified by precise criteria. Hence, for e.g. in laws on environment protection collective redress mechanisms may be initiated by NGO's. The condition to be fulfilled by the NGO's is that in their statutes they need to be devoted to the protection of environment. In collective anti-discrimination procedures, the right to initiate the procedures is given to associations, bodies, institutions and other organisations that are registered in line with the regulations of BiH on the association of citizens, and have a legitimate interest for the protection of a certain group or are dealing with the protection of certain groups of persons within the scope of their activities. The criteria of legitimate interests and dealing with the anti-discrimination protection are very blurry. In a line of the laws and statutes analysed, there are either no or only insufficient conditions that need to be fulfilled by these organisations/associations in order to be qualified subjects for the initiation of collective redress mechanisms. Not in a single act there is a provision on how is it going to be estimated if in a concrete procedure a body has a legitimate interest for the protection of a certain group, so that it will need to be determined by the courts on the case by case basis.

Neither of the laws analysed here do contain clear provisions on the financing of organisation competent for bringing an action, which is contrary to the Recommendation 2013/396/EU. Member States should ensure that the subject competent for collective redress does have sufficient means to bear the costs of the procedure, that it is able to bear the financial consequences if it loses in a case before the courts. This is a problem that is not solved in Bosnia and Herzegovina. The sensitivity of this problem becomes apparent with a look at the novelties in Civil Procedure Codes that provide for a possibility of the other side to raise counter-claims for damages, but also for punitive damages.

The legal framework for putting consumer collective redress into practise is very favourable. There is a larger number of persons competent for initiating collective claims, and despite the complex but well-connected institutional framework for the protection of collective redress, the analysis of the court practise reveals that until today not many successful collective redress procedures have been litigated so far. The effects of the collective redress mechanism initiated by public bodies are rather modest. There is only one claim brought by the Ombudsperson for consumer protection (the claim is still pending). One claim was brought by consumer associations before the Competition council and was successful. Consequently, 11 years after the adoption of the Consumer Protection Law, we only have one final decision of the Competition council that can be taken as an example of good practise. However, the procedure was not carried out in accordance with the Consumer Protection Act, but on the grounds of the Competition Law.

Surely one of the reasons is a small budget that the Ombudsperson for consumer protection disposes of on an annual level that leaves him without enough resources. This is in general the problem with all of the public subjects as stakeholders of consumer collective redress. The problem of financing is crucial also with regards to consumer associations. These associations have little support by the competent authorities on the entity level and no support by the authorities on state level.

The amendments of the civil procedure codes are most favourable precisely for the associations for consumer protection that should take the leading role in judicial collective protection of consumers. However, until today the association did not prove

proactive in this field. Many opportunities are missed, foremost with regards to floating rates in the foreign currency clauses of consumer credit contracts, when an open and public need for one collective claim for thousands of affected citizens imposed itself, but remained unanswered.

Some progress is visible, but only in another field of law, in the anti-discrimination law, where the ice for collective claims raised by associations in BiH is broken.

1. National compliance with the relevant EU acquis

1.1. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests¹

Law on Consumer Protection in Bosnia and Herzegovina (hereinafter: LCP BiH)², has not been significantly changed ever since its adoption in 2006³, which means that the changes in the area of consumer protection, adopted at the level of EU since 2006, were not incorporated in this law. Yet, some new EU Directives were incorporated in other special / sectoral laws.

The first Directive 98/27/EC of the European Parliament and of the Council of 23 April 1998 on injunctions for the protection of consumers' interests⁴ is incorporated in the LCP BiH. Assessment of harmonisation, however, cannot be carried out in relation to the original Directive, but rather the codified version from 2009. This new version of the Injunction Directive has not been implemented in LCP BiH. It is also necessary to assess to what extent is the Law on Consumer Protection of Republika Srpska from 2012⁵ harmonised with this Directive.

The goal of this Directive is to harmonise laws and other legislation of the Member States related to proceedings initiated with request for an injunction order. It aims at protection of collective interests of consumers, granted under directives listed in Annex I to the Injunction Directive. List of directives in Annex 1 to the Directive 2009/22/EC is broader than the list attached to the original Injunction directive, which could create some problems in lack of harmonisation of the legislation in BiH with this Directive. BiH, in course of implementation of consumer directives, primarily opted for the method of codification, and incorporated a series of directives in its laws on consumer protection. However, all directives from the Annex 1 were not incorporated in the laws that regulate consumer protection. Therefore, it does not mean that the collective protection mechanisms in BiH are only limited to those consumer rights, which are granted under directives implemented in laws regulating consumer protection. On the contrary, the collective protection mechanisms can be applied to all domains of the consumer protection. The protection mechanisms primarily apply to the legal relations regulated in laws on consumer protection, i.e., to the rights granted under

1 This footnote has a sense and relevance only in B/C/S language version.

2 Law on Consumer Protection, Bosnia and Herzegovina, Official Journal of BiH, No. 25/06 (21 February 2006).

3 Law on Amendments to the Law on Consumer Protection, Bosnia and Herzegovina, Official Journal of BiH, No. 88/15 (10 November 2015). The amendments from 2015 are related only to the possibility of contracting the index clause in the consumer loan agreements.

4 OJ L 166/51, 11 June 1998.

5 Bosnia and Herzegovina, Republika Srpska, Official Journal, Nos. 6/12 (15 December 2011), 63/14 (2 July 2014), 18/17 (23 February 2017).

directives incorporated in those laws. In addition, the collective protection mechanisms apply to the consumer rights defined in other (special & sectoral) laws, which represent the incorporation of certain Directives, as well as the consumer rights granted under other pieces of legislation, which does not represent the implementation of European Law. LCP BiH provides a possibility for injunction orders aimed at ordering cessation of any act or practice in contravention with the provisions of LCP BiH or any other law, which harm the common interests of consumers. In this way, LCP BiH extends the injunctive collective protection to consumer rights beyond the scope of protection from directives listed in Annex 1, giving thus a higher degree of protection to consumers. A different solution has been adopted in Republika Srpska, but the final outcome is the same. It is provided that the protection of the consumer rights granted under LCP RS is exercised before court. This is a limiting provision, since the protection is linked only to the rights stemming from that law (Article 123, paragraph 3 of the LCP RS). However, the provision on consumer disputes included a definition according to which a consumer dispute is any dispute arising from the contractual relation between seller and consumer (Art. 128, paragraph 1 of the LCP RS), which also secured the protection of consumer rights, defined in other laws.

Moreover, the laws on consumer protection in BiH provide also for a possibility of compensation in collective consumer disputes, which is not included in Directive 2009/22/EC. Article 7 of the Directive defines its character; it is a directive with minimal harmonisation, where the Member States are allowed to adopt or maintain in force the provisions, designed to grant entitled bodies and any other person concerned more extensive rights to bring action at national level, which is the case in BiH.

LCP BiH (Article 120) and LCP RS (Article 134) provide that the competent court will decide on collective redress, which satisfies the requirement of Article 2 of Directive 2009/27/EC. The laws on consumer protection did not explicitly regulate which courts would have jurisdiction over the collective redress claims of entitled bodies. LCP BiH, as a law enacted at the level of State BiH, cannot make a decision on jurisdiction and competence of entities' courts, as the legislator would then exceed its powers. Later on, the entities' civil procedure codes defined also, in addition to general jurisdiction (place of residence of the defendant) a special jurisdiction for consumer disputes and collective disputes. To that end the legislation in BiH is harmonised with Directive 2009/22/EC.

Directive, in its Article 2, provides that the injunctions should be ruled with "appropriate efficiency, and if necessary in short proceedings". In line with the concept of civil proceedings in BiH, this provision should require not only the urgent proceeding, but also special civil proceeding that might also be "short" proceeding in which certain stages of general civil proceedings could be shortened or even avoided. Following the consumer law in BiH, the collective redress proceedings take place according to the provisions applicable to urgent proceedings (Article 122 of the LCP BiH; Article 136, paragraph 1 of the LCP RS); interpretation is left to the provisions of the laws regulating civil procedure in both BiH entities (Federation of BiH and Republika Srpska). Unfortunately, the novelties in entities' civil procedure codes do not provide further detail on this matter; it is not even provided that the collective redress proceedings should be urgently ruled. To that end, there are only two deviations from the rules on general civil proceedings. These deviations pertain to the duration of the deadline for a

voluntary fulfilment of the obligation set by injunction order and to the non-suspensive effects of an appeal (see *infra* 2.3.).

Directive 2009/27/EC, in its Article 2.1.(b) defines that, where appropriate, measures such as the publication of the decision, in full or in part, in such form deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement should be prescribed. This legal remedy is also provided in laws on consumer protection (Article 122 LCP FBiH; Article 136, paragraph 2 LCP RS) and Civil Procedure Code of FBiH (hereinafter: CPC FBiH) in its Article 453b, paragraph 4⁶ and Civil Procedure Code of RS (hereinafter: CPC RS) in its Article 453b, paragraph 4,⁷ so that the BiH law, in this segment, is harmonised with this Directive. In addition, with a view to ensuring compliance with the decisions, in so far as the legal system of the Member State concerned permits, an order against the losing defendant can be issued for payments into the public budget or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation. LCP BiH provided for such solution, but it also exists in laws that regulate the enforcement procedure in both entities in BiH (see 2.6).

Directive 2009/27/EC provides that the action can be brought by a qualified claimant which has a legitimate interest in protection of consumers and which is legally incorporated in line with the law of the Member State. Although the Directive leaves to the national legislation to define the qualified claimant, it provides some instructions. The qualified claimant can be one or more independent public bodies, exclusively entrusted with the protection of collective consumer interests and/or organisations established with the task to protect consumer interests. LCP BiH, as well as LCP RS, provide for a series of bodies and persons authorised for protection of collective consumer interests. All these bodies, listed in these laws, do not meet the requirements prescribed by the Directive. However, there are some authorised organisations, including some independent public bodies, that carry out a task to protect collective consumer interests that fit these criteria (e.g. Ombudsperson for consumer protection), and therefore the BiH legislation is harmonised with the EU law. More about authorised claimants under 3.

Conclusion: Law in BiH is harmonised with Directive 2009/22/EC, and offers in some aspects a higher degree of consumer protection, which is allowed, since this Directive is a directive with minimal harmonisation.

1.2. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes⁸ (hereinafter: ADR Directive)

ADR Directive is not incorporated into the legal order of the Federation of BiH and Brčko District of BiH. LCP BiH, since 2006, applies in these two administrative

⁶ Civil Procedure Code of the Federation of BiH, Bosnia and Herzegovina/Federation of BiH, Official Journal of FBiH, Nos. 53/03 (23 October 2003), 73/05 (21 December 2005), 19/06 (13 April 2006), and 98/15 (19 November 2015).

⁷ Civil Procedure Code of Republika Srpska, Bosnia and Herzegovina/Republika Srpska, Official Journal of Republika Srpska, Nos. 58/03 (23 June 2003), 85/03 (17 October 2003), 74/05 (27 July 2005), 63/07 (7 July 2006), 49/09 (14 May 2009), 67/13 (27 June 2013).

⁸ OJ L 165/61, 18 June 2013.

parts of BiH, and it provides only in one provision a possibility for alternative dispute resolution for consumer disputes. Unlike LCP BiH, LCP RS is more detailed in terms of out-of-court settlement, and the arbitration of disputes is among the possible forms of out-of-court settlement (Article 126, paragraph 2 and 128, paragraph 2 of LCP RS). As this law was adopted in 2011, it is not possible to conclude that the subsequently adopted Directive 2013/11/EU has been incorporated into LCP RS. More *infra* 2.6.a.

It should be highlighted here that there is no direct link between collective mechanisms of consumer protection and alternative dispute resolution. Recital 27 of the ADR Directive provides in terms of collective protection that the European Union will not propose a possibility of collective ADR, until the comprehensive assessment of effects at the level of EU is completed. However, considering that the Recommendation 2013/396/EU (see 1.4.) was adopted after the ADR Directive, it may be considered that it leaves the option of collective alternative dispute resolution.⁹

1.3. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing action for damages under national law for infringement of the competition law provisions of the Member States

Law on Competition of BiH was adopted in 2005, and the last amendments were adopted in 2009.¹⁰ Given the time of its adoption, it is apparent that the Directive 2014/104/EU is not incorporated into the legal order in BiH. This Directive does not require the Member States to introduce the mechanisms of collective protection related to Articles 101 and 102 of TFEU (Recital 13), which is the subject matter of this research. Primary objective of this Directive is not protection of collective consumer interests and stakeholders in the market, but rather effective application of the mentioned TFEU provisions, which is the matter of public order (Recital 1). Full effect of Articles 101 and 102 of TFEU, particularly practical effect of prohibitions defined in these Articles, requires that an individual, consumer and entrepreneur, public authorities, can claim compensation before national courts for the harm caused to them by an infringement of competition rules (Recital 3). Since the Law on Obligations (hereinafter: LO)¹¹ provides, as one of its basic principles, the principle of prohibition of causing damage (Article 16), it is clear that the action for compensation could be initiated also for damage caused by infringement of competition rules. However, Directive 2014/104/EU obligates the Member States to take steps and make those claims more efficient (i.e. rules on disclosure

9 European Commission in the Communication 401/2 stated on page 15 that it is a useful step to recommend the Member States to develop collective consensual dispute resolution mechanisms. Available at: http://ec.europa.eu/justice/civil/files/com_2013_401_en.pdf (checked on: 30 April 2016). It is interesting that the point 58 of the Preamble to the ADR Directive contains the instruction that Directive 2009/22/EC on injunctions for the protection of consumers' interests should be changed in way that it includes the referral to ADR Directive so as to ensure the protection of collective consumers' interests defined in ADR Directive. See M. Povlakić, S. Mezetović (2016), 'Kolektivna zaštita (potrošača) prema pravu Evropske unije i pravu Bosne i Hercegovine', in: *Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, Nr. 14, p. 251, footnote 26.

10 Law on Competition of BiH, Bosnia and Herzegovina/Official Journal of BiH, Nos. 48/05 (29 June 2005), 76/07 (24 July 2007) and 80/09 (1 October 2009).

11 Socialist Federative Republic of Yugoslavia, Official Journal, Nos. 29/78 (26 May 1978), 39/85 (17 July 1985), 57/89 (28 September 1989), Republic of Bosnia and Herzegovina/Official Journal, Nos. 2/92 (11 April 1992), 13/93 (2 June 1993). Basis for application of this law in Republika Srpska is Article 12 of the Constitutional Law for the implementation of the Constitution of Republika Srpska, Bosnia and Herzegovina, Republika Srpska/Official Journal of Republika Srpska, No. 21/92 (17 December 1992).

of evidence, burden of proof, assumptions, statute of limitation, etc.). The protection mechanisms, including the compensation for damage, as well as collective protective mechanisms, do exist in Law on Competition of BiH, but without possibilities provided in this Directive, which make them more efficient (see *infra* 2.6.b).

1.4. Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violation of rights granted under union Law (hereinafter: Recommendation 2013/39/EU or Recommendation)

Civil Procedure Code of the Federation of BiH and Civil Procedure Code of Republika Srpska, by their latest amendments (Republika Srpska 2013, and Federation of BiH 2015)¹² introduced a special civil procedure for the unified protection of collective rights and interests, granted under separate laws. Such a concept follows a so-called horizontal approach, which is the basic determination of the Recommendation. Given the time of these amendments to the civil procedures codes, it could be concluded that these laws follow the Recommendation 2013/396/EU. However, the historic interpretation could contest this statement; drafts of these amendments were made before the Recommendation, and they followed entirely the amendments to the Civil Procedure Code of the Republic of Croatia from 2011, which for the first time introduced the special civil procedure for the protection of collective interests and rights,¹³ and these provisions have never changed even in the Republic of Croatia.

Nevertheless, special procedure for protection of collective rights and interests and rights converges, in some of its provisions, with the provisions of the Recommendation 2013/396/EU, which aims to prevent and stop unlawful actions that infringe the rights granted under the Union Law, and to ensure the compensation in cases of collective damage. According to the entities' civil procedure codes, collective protection is offered to collective rights and interests granted under special laws (Article 453a, paragraph 1 of the CPC FBiH/ Article 453a, paragraph 1 of the CPC RS). This formulation refers to the rights granted under national legislation, which includes protection of the rights granted under EU law, to the extent in which it is incorporated in the BiH legislation.

With the general clause, according to which the collective redress mechanisms are given for protection of all rights granted under the Union Law, the Recommendation follows the horizontal approach; goal is not a sectoral collective redress for individual types of rights, but rather the same collective redress mechanisms applicable to all rights granted under the Union Law. Horizontal approach shall mean the application of common principles, which secures an equal access to the judiciary by way of collective redress among other matters in the area of consumers. At the same time, it is important to note that the list of areas in which the common principles could be applied is not exhausted, but rather they could be applied in any other area in which collective redress could be relevant (Rec. 4 and 7). The entities' civil procedure codes also adopted the

12 Law on Amendments to the Civil Procedure Code of Republika Srpska, Bosnia and Herzegovina/Republika Srpska, Official Journal of Republika Srpska, No. 67/13 (27 June 2013), and the Law on Amendments to the Civil Procedure Code of the Federation of BiH, Bosnia and Herzegovina/Federation of BiH, Official Journal of FBiH, No. 98/15 (19 November 2015).

13 Articles 502a – 502h of the Law on Amendments to the Civil Procedure Code of the Republic of Croatia, Official Journal, No. 57/2011 (25 May 2011).

horizontal approach, with some limitations. Namely, they contain the open list of areas in which common redress can be applied with a “self-excluding” clause – provisions on collective proceedings for protection of collective rights and interest apply only if the special law, granting the collective rights and interests, provides something different (Article 453a, paragraph 4 of the CPC FBiH, Article 453a, paragraph 4 of the CPC RS). Some laws (i.e. laws which regulate the prohibition of discrimination or consumer protection) contain more or less detailed provisions on procedures for protection of collective rights and interests, which contest this horizontal approach.¹⁴ Otherwise, some other laws, which should be relevant for collective redress, do not precisely grant collective rights and interest, so that the application of the collective protection, given in the civil procedure codes, is jeopardised. Any of these approaches are harmonised with the Recommendation, which recommends to the Member States to allow the collective redress in all areas granted under the Union Law, where such a protection could be “interesting” (Rec. 7 in fine).

Unlike the Recommendation 2013/396/EU, which starts by specifying the massive infringement or damage in a situation when two or more persons argue to have suffered the consequences of a certain activity (Rec. 1), the entities’ civil procedure codes, or other laws, do not define the collective interest, or massive infringement or damage, which further means that they do not define the situation providing for collective redress mechanisms. As for the entities’ civil procedure codes, this protection is offered when the collective rights and interests are significantly endangered which is related to the intensity of infringement, but not to the number of damaged or injured individuals. The Recommendation understands the collective redress as a legal mechanism that ensures a possibility to claim cessation of illegal behaviour or to claim for compensation collectively by two or more natural or legal persons or by an entitled claimant to bring a representative action (item 3a). By acknowledging the legal tradition in the Member States, as well as the fact that they apply different collective redress mechanisms, the Recommendation leaves the question opened as to what type of collective actions can be brought.¹⁵ In BiH the laws, which regulate the protection of consumers and civil procedure understand the collective redress as the proceedings, which can only be initiated by entitled entities/bodies/organisations, which means that only representative actions are allowed.

According to the Recommendation, the collective redress encompasses injunctive and compensatory legal mechanisms. Entities’ civil procedure codes set forth only injunctive collective redress, but not the compensatory collective redress, and in this way, they differ from the Recommendation, whereas the consumer protection laws provide for both injunctive and compensatory collective redress.

Recommendation puts forward principles relating to both judicial and out-of-court collective redress that should be common across the Union Member States. Only Republika Srpska has a detailed mechanism for out-of-court settlement and only for

¹⁴ More about it: M. Povlakić / S. Mezetović (2016), ‘Kolektivna zaštita (potrošača) prema pravu Evropske unije i pravu Bosne i Hercegovine’, in: *Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, Nr. 14, p. 261- 262.

¹⁵ On collective actions in the EU Member States, instead of numerous other authors see V. Efremova, Towards introduction of collective redress mechanism in the European Union – pros and cons (2013), in: Th. Bourgoignie, T. Jovanić (Eds.), *Strengthening Consumer Protection in Serbia*, Liber Amicorum Svetislav Taboroši, Belgrade: Law School of the University of Belgrade, p. 304.

consumer disputes, whereas the Federation of BiH provides only for this possibility without further elaboration (infra 2.6.a). There is no high degree of convergence in this case between the BiH law and the Recommendation.

Recommendation sets forth several general principles of collective redress. They include:

- Standing to bring a representative actions: the Recommendation provides for criterion of functioning of the bodies entitled to bring the collective action in order to avoid an abuse (Recital clause 18, items 6 and 7 of the Recommendation). This entitled claimant can bring the collective redress if it fulfils clearly defined conditions of eligibility. These conditions are not stipulated in entities' civil procedure codes. Rather these laws refer to special laws which deal with collective interests and rights. These special laws are in general vacated in defining requirements which have to be met by those bodies. It would significantly impact their possibility to bring action in practice (e.g. the issue related to sufficient capacity in terms of financial and human resources has not been regulated) – see 2.5, 2.6.a, 5.1 and 5.2);
- Admissibility: verification at the earliest possible stage of litigation whether the conditions for collective actions are met, and possibility that manifestly unfounded cases are not continued. The courts should carry out the necessary examination of their own motion (*ex officio*). (items 8 and 9 of the Recommendation). This principle is not stipulated in the BiH law.
- Information on collective redress action: a possibility to inform about the pending actions has been provided by Recommendation (items 10 and 11 of the Recommendation); a general principle of civil procedure is principle of publicity, which means a possibility to attend the hearing. A possibility to disseminate information about the actions is possible only in line with the laws regulating the access to information (right on information). Just like the Recommendation (item 11), the entities' civil procedure codes also regulate the other side of the access to information, which is the protection of the reputation or the company value of a defendant (Article 453h of the CPC FBiH, 453ž of the CPC RS);
- Losing party pays principle amount (item 13 of the Recommendation): this is one of the basic postulates of the civil procedure in BiH in general, but it is rather questionable considering the capacity of bodies entitled to bring collective redress (see 2.5).
- Transparency: there are no provisions on transparency in BiH law in terms of a duty of the claimant party to declare the origin of the funds that is going to use to support the legal action (item 14 of the Recommendation).

Among the special principles applicable to the injunctive redress, the principle of urgent proceeding stands out (item 19 of the Recommendation). This is plausible considering the fact that the action is based on cessation of practice that violates the collective rights and interests (mass infringement and mass harm). This principle was already stipulated in the Injunction Directive. The consumer protection laws in BiH stipulate the urgency in proceedings, but not the Entities' civil procedure codes. Another principle applicable to the injunctive redress, according to the Recommendation, is a duty of state to ensure efficient enforcement of the injunctive order including the payment of

a fixed amount for each day's delay. (item 20). In BiH this principle is included in the laws on consumer protection, Entities' civil procedure codes and also in the Entities' enforcement procedure codes (see 2.3).

As regards the compensatory redress, an "opt-in" principle is recommended (item 21 of the Recommendation), which basically means that the explicit consent of a person who suffered damage is required to be included in the collective action. "Opt-in" principle acknowledges the freedom of potential claimants to decide whether they wish to be a party in the proceeding or not. The laws regulating the consumer protection and compensatory collective redress in BiH do not have any provisions to this regard, whereby a special civil proceeding related to the general protection of collective rights do not provide for a possibility of compensation. The issues related to lawyers' and representatives' remuneration, which, under Recommendation, should not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties (items 29 and 30 of the Recommendation), nor the prohibition of punitive damages (item 31 of the Recommendation) are regulated in BiH law.

Conclusion: in general, civil procedure codes accept the horizontal approach regarding the collective redress (in this aspect BiH legislation is in line with the Recommendation), but there is not a possibility for compensation in such proceedings (in this aspect BiH legislation deviates from the Recommendation). The compensation in collective redress proceedings is only provided by the laws on consumer protection. However, not a single procedural matter related to compensatory collective redress (with exception regarding the principle of urgency) is regulated, particularly the matter of granting the "opt-in" or "opt-out" principle; other principles applicable to compensatory collective redress under Recommendation are also not incorporated in the BiH law. There are no clear provisions on financing the organisations entitled to initiate the action, and the conditions that they have to meet in order to bring the action are not always precisely defined. It may be stated that the BiH law only partially follows the Recommendation 2013/396/EU. For further similarities and differences, see the analyses of individual pieces of legislation.

2. Legal framework for collective redress

2.1. General description

Annex 4 of the Dayton Peace Agreement, which is the Constitution of Bosnia and Herzegovina (hereinafter: BiH)¹⁶, defines BiH as a complex state consisting of two entities: Federation of Bosnia and Herzegovina (hereinafter: FBiH) and Republika Srpska (hereinafter: RS). Legislative competence is divided between the state and entity level, in a way that preference has been given to the entity level, whereas the state BiH is competent only for matters explicitly specified in the Constitution of BiH (Articles III.1 and III.5). Moreover, by the decision of special international arbitration of 5 March 1999, one part of BiH is defined as a special district (Brčko District of BiH) with full legislative competence. As for the matters relevant for this research, some laws were adopted at the state level, some at the entity and the level of Brčko District of BiH.

¹⁶ Constitution of BiH has never been officially translated to official languages in BiH, and has not been published in Official Journal.

Republika Srpska has enacted, in the last several years, a range of laws previously adopted at the state level, such as Law on Consumer Protection of Republika Srpska¹⁷, Law on food¹⁸ and Law on General Product Safety¹⁹, whereby the transitional and final provisions do not resolve the matter of relations between these entity's laws and the laws adopted at the state level. All the constitutional and legal matters are left out of this research, and the research starts from the actual situation according to which the laws adopted at the level of BiH only apply in the Federation of BiH and Brčko District of BiH; Republika Srpska has almost its own laws. This makes the legal order in BiH “asymmetric”. Namely, after enactment of certain law in one of the entities, which regulates same matters previously regulated in laws adopted at the state level, a possibility for evolution of laws and monitoring the further development of EU law at the state level ends. The Law on Consumer Protection of BiH is the most paradigmatic example for it – this law has not been amended since 2006²⁰, so that the legislation adopted at the state level did not incorporate consumer directives adopted in the EU after 2006. The further implementation of consumer directives was performed by adoption of a special law at the entity level.²¹ Both entities adopted such laws, but not Brčko District of BiH (which did not implement the consumer directives by its own legislation). This underlines the mentioned “asymmetry” even more, and suggests lack of harmonisation of BiH legal order with the European.

The matters of this research are directly related to harmonisation of BiH law with the EU law. The Stabilisation and Accession Agreement²² between the European Communities and their Member States and Bosnia and Herzegovina (hereinafter: SAA), was signed in 2008²³ and came into force in June 2015. Pursuant to Article 70 of SAA, the duty of BiH to harmonise legislation stems from the signing of the Agreement. The harmonisation has to be gradual, and in its early stage the focus should be on the basic elements of the *Acquis*, which are related to internal market and other matters of trade. The matters of consumer protection in general, the matter of protection of consumers who use the financial services, the matter of capital and services freedom clearly fall among the priority areas.²⁴ The duty of harmonisation with the applicable and future EU legislation is also one of the defined duties in the SAA, which is not easy to accomplish considering the abovementioned “asymmetry”, respectively the lack of coordination

17 Law on Consumer Protection of Republika Srpska, Bosnia and Herzegovina/Republika Srpska, Official Journal, Nos. 6/12 (15 December 2012), 63/14 (2 July 2014), 18/17 (23 February 2017).

18 Law on Food of Republika Srpska, Bosnia and Herzegovina/Republika Srpska, Official Journal, No. 19/17 (27 February 2017).

19 Law on General Product Safety of Republika Srpska, Bosnia and Herzegovina/Republika Srpska, Official Journal, No. 46/17 (19 May 2017).

20 See footnote 2.

21 That is the case for example with the Law on Protection of Financial Services Users of the Federation of BiH, Bosnia and Herzegovina/Federation of BiH, Official Journal of FBiH, No. 31/14 (20 March 2014), which incorporated Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing the Council Directive 87/102/EEC, OJ L 133/66 (22 May 2009).

22 On the nature of the Stabilisation and Accession Agreement see more in Z. Meškić/D. Samardžić (2012), *Pravo Evropske unije I*, Sarajevo: Deutsche Gesellschaft für internationale Zusammenarbeit (GIZ), Open Regional Fund for South Eastern Europe – Legal Reform, pp. 459-461.

23 Decision on the system of European integration process coordination in Bosnia and Herzegovina, Bosnia and Herzegovina, Official Journal of BiH – International Treaties, 10/08 (6 November 2008).

24 In terms of priorities of harmonisation of consumer law in the Republic of Croatia, see more in M. Bevanda, (2007) *Odgovornost za štetu izazvanu neispravnim proizvodom*, Conference proceedings of the Law School of the Rijeka University (1991) v. 28, No. 1, p. 589, footnote 12.

among different legislative levels. Moreover, there is a possibility that the laws adopted at different legislative levels are not harmonised among themselves: in this way, there is an internal lack of harmonisation of laws within the process of harmonisation with the EU law.

The proceeding for collective redress is defined in several laws. The entities' civil procedure codes (as *legi posteriori* in relation to the sectoral laws) start from the horizontal approach and they stipulate only the injunctive collective redress, whereas some special laws follow sectoral approach and include the compensatory collective redress, which is also a sort of "asymmetry" in this area. At the same time, the Civil Procedure Code of Brčko District of BiH²⁵ does not have at all any provision on special collective redress proceedings.

2.2. Applicable areas for collective redress

Several laws in BiH do stipulate certain forms of collective redress, either in detailed or in rudimentary form. The sectoral approach to this matter was chronologically the first, and the possibility for a collective redress was firstly stipulated in the area of consumer protection, followed by law regulating a prohibition of discrimination, the competition law, environment protection law, etc. See more about the individual rules applicable to collective redress related to specific types of rights and interests under 2.6.

Opposite to the sectoral approach, the entities' civil procedure codes follow the horizontal approach and they introduce a special civil proceeding for the protection of collective rights and interests, whenever these are stipulated in other sectoral laws (Articles 453a – 453h of the CPC FBiH, 453a – 453ž of the CPC RS). Proceeding rules are always the same, regardless of what rights and interests are in focus. The areas in which the collective redress mechanisms could apply are listed only *exempli causa*. These collective interests and rights are defined as interests and rights applicable to environment, moral, ethnic, antidiscrimination, consumer interests as well as others interests granted under the Bosnian and Herzegovinian law (Articles 453a, paragraph 1 and 2 of the CPC FBiH, 453a, paragraphs 1 and 2 of the CPC RS). The list of protected rights and interests is not exhausted. The entities' civil procedure codes provide for a quantitative limitation – collective action can be brought only when collective rights and interests are seriously violated or infringed (Article 453a, paragraphs 1 and 2 of the CPC FBiH, 453a, paragraphs 1 and 2 of the CPC RS). These laws deviate from the Recommendation 2013/396/EU, which does not have such limitation. There are no criteria on how to determine whether the interests are seriously violated, which leave some freedom to the court to make that estimation or even possibility for unbalanced ruling. Laws on consumer protection in BiH do not provide for such a limitation, which means that the civil procedure codes narrow the degree of protection.

Yet, we argue that it is not simple to state that the horizontal approach to collective redress is in place in BiH, given the fact that the entities' civil procedure codes apply only if special laws did not provide otherwise (Article 453a, paragraph 4 of the CPC FBiH, 453a, paragraph 4 of the CPC RS).

²⁵ Civil Procedure Code of the Brčko District of BiH, Bosnia and Herzegovina/Brčko District of BiH, Official Journal of BD BiH, Nos. 08/09 (18 March 2009), 52/10 (27 October 2010), 27/14 (25 June 2014).

2.3. Applicable procedure(s) for collective redress according to the national legislation

The Entities' civil procedure codes regulate the collective redress procedure as a special civil procedure; here the provisions of these two laws are identical. Every special procedure brings certain deviations from the general rules on civil procedure. In every action for protection of collective rights and interests, the most striking deviation lies with the capacity to bring collective action and with the claims, which could be subject of the action (see *infra* 2.4). As regards the right to bring a collective action, the Entities' civil procedure codes contain an instructive norm: an action can be brought by legal persons (associations, bodies, agencies, etc.) established for purpose of protecting certain rights and interests and which are entitled for collective redress by special laws, provided they meet the requirements and conditions stipulated in these special laws. Therefore, more about these matters will be discussed by the consideration of individual sectoral protective mechanisms, and in the part on the institutional framework for collective redress (see 2.6 and 3).

Other deviations from general procedure rules are related to territorial jurisdiction. Territorially competent courts in these cases are not designated only by the general rules on jurisdiction (place of residence/registered seat of the defendant), but alternatively based on *lex loci delicti*, which is the place where an activity, violating collective rights and interests, was performed, unless otherwise determined in a special law (Article 453e of the CPC FBiH, Article 453d of the CPC RS). This provision was supposed to be primarily incorporated in the chapter regulating the matter of jurisdiction of the Entities' civil procedure codes (Article 28 et seq. of the CPC FBiH, Article 28 et seq. of the CPC RS). The jurisdiction in the compensatory disputes, in addition to the rules of general territorial jurisdiction, is determined based on the place where the infringement or consequence of the infringement took place; the latter is not stipulated for the collective redress procedures. Since these are the consequences of unlawful activity, we argue that this additional matter of jurisdiction should be foreseen as well. Regarding the consumer disputes, the novelties in the Entities' civil procedure codes provide for an additional competence. The consumer is entitled to bring an action before the court in the place where the consumer has permanent or temporary residence (Article 33a of the CPC FBiH, Article 33a of the CPC RS). This rule cannot be followed in case of collective consumer disputes. This will not have any negative implication on consumers, as their collective interests will be protected by entitled claimants. This provision may potentially make consumers' position more difficult, if they opt to join the dispute brought by the authorised claimant.

The Entities' civil procedure codes do not explicitly stipulate that the collective proceedings should be treated with all due expediency or by way of summary proceedings. On the contrary, the Law on Prohibition of Discrimination and laws on consumer protection explicitly treat the collective redress proceedings as summary proceedings. The features of summary proceedings are generally reflected in shortening of statutory deadlines or in non-suspensive effects of legal remedies, and, however, such solutions are provided in the Entities' codes on civil procedures in reference to the collective disputes. The court, which has positively decided on the claim in the collective redress

proceeding may rule that the appeal will not have a suspensive effect or may order a shorter deadline, than generally prescribed for voluntary complying with the instructions ordered in judgment (Article 453f of the CPC FBiH, Article 453d of the CPC RS). This solution offers a certain degree of flexibility and possibility of adapting to a specific dispute, as well to the nature of infringed interests.

Before the beginning or during the collective redress proceedings, the court may, upon claimant's request, order interim measures provided in the civil procedure code (453g of the CPC FBiH /453e of the CPC RS). The interim measures can be ordered if the claimant makes plausible that the defendant has infringed or seriously jeopardised the collective interests and rights, whose protection is sought in the collective redress action. Further, it should be plausible that the interim measures are necessary to eliminate the danger of irreparable harm or to prevent violence. The Entities' civil procedure codes refer to the general system of interim measures prescribed in Article 273 of the CPC FBiH / CPC RS, but also provide for a special, additional interim measure. This interim measure may also consist in court's setting of temporary rules for performing of the defendant's professional activity.

As for the third intervening party joinder, it is stipulated that another entitled claimant can join on the claimant's part in the on-going collective redress proceeding as a joint litigator. The primary claimant has to agree with this intervention. Natural or legal persons are entitled to join collective redress proceeding, which was brought for the protection of their collective rights and interests. In this case the consent of the primary claimant is not required (Article 453d of the CPC FBiH, Article 453g CPC RS).

With the view of preventing potential abuses and undue influence, a person who performs an activity related to which an entitled claimant argues that it harms or damages collective interests and rights granted under law, may exercise certain defensive mechanisms (Article 453h of the CPC FBiH, Article 453ž of the CPC RS). It is provided that the defendant in a collective redress may file a counterclaim, but may also propose countermeasures even before the collective redress is brought before court. Persons against whom the action is brought due to violating collective interests by their activities, are entitled to bring an action for the declaratory judgment, arguing that their activities or omissions do not violate or harm collective interests or rights. The defendant can request several measures: a prohibition of certain activity, especially going public about the matter, publication of judgement in media at the expense of party making such allegations as well as compensation. Moreover, this person may ask for a so-called punitive damage. This legal institute of Anglo-American law has not been in general known to the BiH law, which follows the continental legal system. Except for compensation for suffered damage, granted in line with the rules of the general tort law, a person that allegedly harmed collective interests are entitled to a special compensation whose amount would be determined by court applying the principle of free assessment. Compensation ordered in this way does not aim at reparation, but rather the punishment. Punitive damage shall be owed only if proven that the claim in collective redress proceeding was obviously ill-founded, and that the related litigation, particularly its publicity in media, gravely harmed the reputation and business interests of a defendant. This new institute may increase the discipline and may deter the ill-founded actions and ill-intentioned campaigns in media;

however, just the opposite, it may also deter the initiation of collective redress.²⁶ It has to be stated here that there is a sort of lack of equality of arms – claimants in collective redress may not file for compensation or punitive damage.

2.4. Available remedies for collective redress according to the national legislation

The Entities' civil procedure codes precisely define what type of claims may be filed by bodies entitled to protect collective interests (Article 453b of the CPC FBiH, Article 453b of the CPC RS). Primarily, it can be sought for the declaratory judgment, which should establish that certain activity or omission of the defendant violated or harmed collective interests and rights granted under law, which the claimant is entitled to protect. This declaratory claim can be independently brought, but in the practice it will be accumulated with other claims (claim for injunction, publication of judgement). This claim will generally have character of preliminary question – any other court ruling is conditioned by the declarative decision that in this certain case there was a violation or harm of granted collective rights and interests. This is important particularly for the “follow-on” claims, which will be discussed further in the text.

Further, the injunctive claim can be brought. This claim is directed towards a prohibition of activities that violate or harm collective interests and rights granted under law. The Entities' civil procedure codes explicitly define in this context that violation or harm may stem from certain contractual provisions or business practices. This may be particularly the case with consumer law (provision is related to unfair contractual provisions and unlawful business practice, prohibited in laws that protect consumers) or with competition law (prohibited agreements, unlawful business practice). Since the intention of legislator is to protect different collective interests, the mentioning of contractual provisions or business practices is given *exempli causa*.

In case that the damaging consequences have already occurred, the claim requesting the elimination of the consequences caused by unlawful activities of the defendant can be brought. The meaning of the formulation “elimination of damage consequences” is not clear. Under the Law on Obligations, the elimination of damage consequences would primarily mean the compensation for damage, pecuniary and non-pecuniary; however, this wording in the Entities' civil procedure codes does not include the standard compensatory claim. The phrase “elimination of the consequences of loss” should mean *status quo ante*, as if there was no unlawful business practice, action or activity, although without a payment of the compensation for the suffered damage, since the Entities' civil procedure codes do not provide at all for such a kind of protection. This conclusion is supported by legal wording on elimination of **general** (*emphasis by authors*) consequences of loss, which could include disturbance in market, pollution, etc. The elimination of damaging consequences encompasses the reinstatement of prior situation or situation that will most likely resemble the initial position or situation in which a violation of collective interests or rights could not have possibly occurred. This provision suggests that not only the elimination of consequences after the damage has occurred can be requested, but also preventive activity, that is the elimination of the potential damage. This legal institute would be close to the elimination of imminent

²⁶ Recommendation 2013/396/EU recommends a prohibition of *punitive damages*, as this could lead to overcompensation in favour of claimant, whereas this possibility in favour of defendant was not considered.

harm, which is provided in the Law on Obligations (Article 156 of the LO). This could be particularly efficient mechanism in protection of collective interests, but only in case that the proceeding is effectively treated with all due expediency.

It is not completely certain that the legal provision, according to which certain terms and conditions for performing an activity or business practice as well or building certain edifice can be ordered to the defendant, would give positive results in practice. Namely, following the wording of this legal provision, it is unclear whether a court may impose such rules on its own motion (*ex officio*) or only on a party's request. In former case, it is difficult to expect the court to formulate general terms and conditions or other acts regulating the way to operate some business activities. The same applies to the obligation to build certain edifice. Such judgements would not be directly enforceable, given that the building project does not depend only on the will of the defendant, but generally this situation includes certain administrative proceedings and permits.

The court can also decide that the judgement accepting certain claim provided in civil procedure codes in relation to protection of collective rights and interests be published in media at the defendant's expense.

Unlike the consumer law, the CPC FBiH and the CPC RS do not provide for a possibility that the entitled claimant may require compensation, which significantly changes the scope and quality of collective protection; however, in this way questionable matters of compensation of damage in such litigations are avoided. Here, the Entities' civil procedure codes deviate from the Recommendation 2013/396/EU. They however stipulate (Article 453c of the CPC FBiH, Article 453v of the CPC RS) that the findings in the judgement, delivered in the collective redress proceeding, according to which the collective interests and rights granted under law, are violated or harmed, has a mandatory effect i.e. obliges the court in subsequently compensatory proceedings initiated by the natural or legal persons who suffered damage or harm. In this way, the judgement delivered in a collective redress proceeding obliges the court ruling on individual claims and thus could facilitate the position of the individual claimant. It is not completely clear what "mandatory effect" of such judgement would mean. However, the interpretation under which it means that existence of the damage, unlawfulness of the activity and causal connection (causal nexus) have been proven, would be a great advantage for the individual claimant, in which case s/he should only prove the amount of damage or harm suffered. These solutions follow the idea that supports the so-called follow-on actions envisaged in Recommendation 2013/396/EU (items 33 and 34), but they nevertheless present a very broad interpretation of the Recommendations. For these reasons it is not possible to argue that the national law is harmonised in this matter with the Recommendation.

Unlike the laws that define consumer protection, Entities' civil procedure codes do not stipulate a possibility of payment of fines for every day of delay in complying with the court judgement. However, it does not mean that the fines are not possible. It is not necessary to have such a provision within a special civil collective redress proceeding,

since such a possibility is incorporated in enforcement procedures.²⁷ In the concept of national civil and enforcement law, this is the enforcement court, which will order the payment of fine if the losing party refuses to follow the injunctive judgement.

It may be stated in the conclusion that in reference to the claims sought, the provisions of the Entities' civil procedure codes follow partly the Recommendation 2013/396/EU, but at the same time they include a series of formulations that do not fit with the rules of civil, enforcement or even administrative procedure in force in BiH, which will undermine their efficiency.

2.5. Costs & funding of the procedure for collective redress with an overview of pros and cons consumer organisations to initiate the procedure

The approach of the legislator in BiH since the adoption of the first Law on consumer protection in 2002, and later in the new Law on consumer from 2006, was that the collective redress could be initiated also by associations for consumer protection. With the adoption of the Recommendation 2013/396/EU, the question if such competence shall be given to the associations for consumer protection became redundant. The Recommendation supports this approach by stipulating criteria, which these associations need to fulfil, so that the question is not if consumer associations shall be granted the competence in collective redress, but rather under which conditions and how. The Recommendation gives a possibility that also a certain public body can be entitled to bring collective action, which is also provided in the law of BiH. There is no need to give up the mechanisms of public protection; these two protection mechanisms can parallel exist.

Granting the right to the entitled organisations to bring the collective redress is a way to avoid objections raised in relations to the collective redress mechanisms, generally based on the American experience in joint actions (*class actions*). This institute is vehemently rejected in continental European law, usually with arguments that a claimant industry and potential misuses should be avoided.²⁸ The opponents of *class action* usually present two arguments. The first is matter of costs, given that the major portion of granted amounts will be paid to the attorneys, and it is considered that this is often a true goal of these litigations. The second argument is that this mechanism of protection, considering the enormous amounts litigated, turned into a form of pressure exerted on a certain person performing a business activity, which often forces a potential defendant to make an out-court settlement, in order to avoid unpredictable process outcome which can result in its bankruptcy.²⁹ Model under which an attorney represents

27 Article 210 in conjunction with Article 17 of the Law on Enforcement Procedure of the Federation of BiH (Law on Enforcement Procedure of the Federation of BiH, Bosnia and Herzegovina, Federation of BiH, Official Journal of FBiH, Nos. 32/03 (8 July 2003), 52/03 (24 October 2003), 33/06 (21 June 2006), 39/09 (9 June 2009), 35/12 (18 April 2012.) and 46/16 (9 June 2016). Identically, the Law on Enforcement Procedure of Republika Srpska – Bosnia and Herzegovina/ Republika Srpska, Official Journal of Republika Srpska, Nos. 59/03, 85/03 (17 October 2003), 64/05 (28 February 2005), 118/07 (27 December 2007), 29/10 (16 March 2010), 57/12 (6 June 2012), 67/13 (18 July 2013) and 98/14 (2 July 2014). 28 H.-J. Rabe (2010), ‚Kollektivklage‘, ZEuP 1/2010, p. 2.; H. Koch, J. Zekoll (2010), ‚Europäisierung der Sammelklage mit Hindernissen‘, ZEuP pp.109., 115., 116.

29 These arguments have been contested since recently (even in public media) and the introduction of class action is advocated in, for example, FR Germany. See the comment of prof. Axel Halfmeier, ‚Von Amerika lernen‘, Süddeutsche Zeitung, 18 May 2016. Class action is already introduced in France. See Ch. Klein (2014), ‚Die class action à la française – Frankreich führt die Gruppenklage ein‘, Recht der internationalen Wirtschaft RIW 6/2014, p. 1, whereby the suffix “in a French way” is intended to emphasise the attempt to avoid negative effects of American class actions.

a group of claimants, who base their claims on the same or similar facts or legal grounds, and is compensated with a percentage of the awarded amount (*quota litis*) bears certain risks. This *quota litis* model is criticised in Europe and should be avoided there.

Problems related to collective redress initiated by entitled associations are differently reflected in claims for declarative judgment, in injunctive claims which aim to prohibit further activity, to prohibit a certain business practice and put void certain provisions in contract or general terms and conditions, on one hand, and in compensatory claims on the other. In the first case, the constitutional issues regarding the access to justice do not arise, respectively the issues related to model “opt-in” or “opt-out”. The declaratory judgements as well as injunctive judgments, by their very nature act *erga omnes*. In case of the compensatory claim, an important issue is the identification of litigant who is the addressee of rights or obligations based on that claim and how is the granted amount divided (i.e. should the amount be paid in favour of a certain fund, should it be divided among those whose rights have been infringed, and if so, how should this division be made).

But, in both cases, the important issue is the capacity of the associations for consumer protection to initiate and successfully pursue the collective redress. This shall include their competences (appropriate expertise) as well as necessary funding. In BiH, minimum requirements for the incorporation of an association should be fulfilled (see 5.1). It is necessary to prescribe additional criteria, which should be fulfilled by these associations in order to get authorisation to initiate collective redress. One of these criteria should be related to adequate funding.

Problem of funding is reflected in some other aspects as well. The first problem is the payment of court fees, which should be paid in advance, then the remuneration of the attorney, unless the organisation has its own qualified lawyers. The second problem is the payment of costs of proceedings if the claimant party loses the case, and further the payment of counterclaims brought by the other party, which could request the compensation of suffered harm and/or punitive damages (see 2.3).

The funding of these organisations can be secured in two ways – by private third-party funding or from public funds. In the case of private third-party funding, a situation should be avoided that this third party follows only the goal to participate in the amount of the settlement reached or compensation awarded (in that regard, item 32 of the Recommendation). Financing of the entitled associations has to be transparent. This problem could be avoided if item 14 of the Recommendation is followed, under which the claimant party should be required to declare to the court at the beginning of the proceedings the origin of funds that it is going to use to support the legal action, as well as recommendation that it should be granted that there is not any conflict of interest between the third party and the claimant party and its members (items 15 and 16 of the Recommendation). If these recommendations are followed, funding of entitled associations by third parties could also be advocated. The laws on consumer protection in BiH primarily start from the second model of funding i.e. the public funds. It is possible to transfer public powers to the consumer associations, and to allocate funds for their activities (Article 133 of the LCP BiH). In Republic Srpska, the programme of the consumer protection foresees the activities, which can be resigned to consumer associations and for those activities some funds can be allocated by way of public tender.

However, these activities do not envisage the bringing of actions before courts (Article 124 of the LCP RS). The biggest problem related to this matter is the fact that Bosnia and Herzegovina cannot be expected to provide for sufficient funds to process the committed violations.

It is necessary that these associations are non-profit organisations; the awarded compensation should be allocated according to the prescribed criteria (e.g. to the Environment protection fund, Fund for the improvement of consumer protection, etc.).

The answer could be summarised as follows:

- The consumer associations should, in addition to certain public bodies, such as Ombudsperson, be entitled to bring collective redress;
- It is necessary to make a selection among the consumer associations: some of them should be allowed to bring collective redress, and they should be those associations which fulfil clearly stipulated criteria;
- The financing of these associations from public funds should be allowed, but also financing by third parties. For latter, the clear criteria in terms of transparency of financing should be stipulated. The Recommendation 2013/396/EU should be followed here;
- The Non-profit associations should not be allowed to participate in the awarded compensation except to the extent needed to cover their costs (although a better solution would be that funds for these actions are secured before the lawsuits started);
- The awarded compensation should be paid to appropriate funds aimed at financing and improvement of certain sectors of collective interest and rights;
- In general, the capacities of these associations should be strengthened.

2.6. Sectoral collective redress mechanisms

a. Consumer law

With the adoption of the Law on consumer protection in 2006, BiH for the first time introduced collective redress mechanisms in the consumer law.³⁰ Subsequently, this protection was also envisaged in the LCP RS. There are significant differences between the two laws concerning both, quantitative terms and contents terms. LCP BiH has only four provisions on this matter (Articles 120 to 124), whereas LCP RS details this matter in ten provisions (Articles 126 to 136 of the LCP RS). The differences in general apply to the out-of-court protection, which is well elaborated in Republika Srpska, while the provisions on court protection are identical (Articles 135 and 136 of the LCP RS; Articles 120 to 123 of the LCP BiH).

The applicability of collective mechanisms of protection is not limited to the LCP BiH, which incorporated several consumer directives. It is not only possible to bring a legal action before court if the matter relates to an activity or practice violating the LCP BiH, but also in case of violations of other laws, detrimental to the common interests of consumers (Article 120 of the LCP BiH; Article 135, paragraph 1 of the LCP

³⁰ Previous Law on consumer protection from 2002 (Bosnia and Herzegovina, Official Journal of BiH, Nos. 17/02 (25 June 2002) and 44/04 (29 July 2004) did not envisage this protection. It was provided that entities authorised for consumer protection may bring an action, but it applied only to the annulment of contracts due to unfair clauses and unacceptable general terms and conditions (Articles 132 and 133).

RS). This provision is crucial as it represents a link with all other parts of the legislation relating to the consumer protection. These other special laws principally define the rights of consumers, but nevertheless do not contain any procedural provisions. Such provisions are provided in the LCP BiH and LCP RS, and yet their extent is rather moderate. Efficient collective protection is not possible on this basis. This deficiency is (partly) rectified by somewhat more detailed procedural provisions in both Entities' civil procedure codes (see supra 2.1. to 2.5.).

Procedural provisions in the LCP BiH affect primarily the subjects of consumer protection, i.e. the entities entitled to bring legal actions. It can be noted that this covers a broad range of entities such as public authorities, independent agencies and bodies (for more on entities authorised for consumer protection see infra 3.2). The list of entitled entities partly differs in the LCP BiH and LCP RS, but the basic issue remains the same. The lists of entitled entities are overly ambitious and are often not compatible with the rules regulating their competences and activities. In general, the basic competence of a number of these authorities and bodies does not entail the representation and participation in litigation. For example, in the case of a dispute, involving compensatory claims, the Ministry of Foreign Affairs would be represented by the Attorney General, whose abilities to litigate in such situation are questionable. All these entities, financed from the state budget, should incorporate specific financing costs in their respective budgets for bringing legal actions (advance on costs for proceedings), but also foresee certain funds for costs of proceedings and other counterclaims, should they not succeed in the dispute. In BiH this is not a realistic scenario. As stated in supra 1.4., Recommendation 2013/360/EU leaves it up to the Member States to grant this competence also to state authorities (Item 7), but in return the Recommendation provides detailed requirements related to the financing of entities entitled to protect collective interests (Items 14 to 16.); a series of public authorities, entrusted with the protection of collective rights and interests of consumers in BiH, cannot meet these requirements. A small or even non-existent number of collective redress cases brought by these authorities serves as best proof for this argument. Finally, it is more realistic to expect that some consumer associations could bring legal actions, provided they meet the requirements stipulated in law (Articles 111 to 115 of the LCP BiH; Article 123 of the LCP RS).

LCP BiH provides that the Council of Ministers has to adopt an annual national programme of consumer protection, which defines the consumer protection policies, the tasks that have priority in the implementation of the consumer protection policy, which will be executed by consumer associations after they have been vested with the public powers (underlined by authors), and defines the framework for financial means required for these tasks (Article 108 of the LCP BiH). The national programme of consumer protection shall be primarily exercised by transferring of public powers on the associations of consumers. The efficiency of such protection will however depend on the availability of funds. Republika Srpska also envisaged the programme of consumer protection to be adopted by the government, which would define the goals of consumer protection policy, the mode and dynamics of achieving those goals, the bodies entitled for the implementation of the programme, funds and other elements relevant for the protection of consumers (Article 121, paragraph 2 of the LCP RS). The law does not contain a statement that the consumer protection policy shall be implemented by the

transfer of public powers to consumer associations; but the transfer as such is stipulated, and the conditions and procedure are equally provided by the law (Article 124, paragraphs 4 and 5 of the LCP RS).

From the systematic interpretation of provisions regulating consumer protection and civil procedure the conclusion may be drawn that there is only a possibility for representative collective consumer protection brought by entities vested with this authority by a special law. These provisions did not foresee that collective redress mechanisms could include a joint legal action brought by several injured parties, based on the same facts and legal situation and coming forward with the same or similar requests (which is the feature of class action)³¹. The legal framework in BiH only allows the joint/representative claims (*representative action*). Recommendation 2013/396/EU leaves it to the discretion of Member States, to envisage either option of collective redress, thereby acknowledging their legal traditions (Item 3a). Consumers in BiH, individuals or groups (with no formal association), do not have an active legitimation to bring an action for collective protection of rights and interests of other consumers who are in the same situation. Naturally, they are not prevented from following the regular path to protection, with all the weaknesses and issues observed in individual protection of consumers, which created the necessity for collective redress mechanisms.³²

The laws regulating consumer protection failed to find a solution for an important matter related to the effects of court decisions on consumers who are not represented in an organisation that brought a collective claim, i.e. the question whether consumers, in the capacity of interveners, may join the litigation. This matter is (positively) resolved in the civil procedure codes of the Entities (Article 453d of the CPC FBiH; Article 453g of the CPC RS).

As for the proceedings, the laws on consumer protection define collective redress proceedings as urgent matters, and that is the only specific element (in addition to the active legitimation) in comparison with the general litigation provided for in these laws.

Both laws on consumer protection envisage the outcome of the disputes and thus indirectly define the claims to be brought: a) at the first place this is an injunctive relief when the court may order the activity or practice to be stopped if in violation of LCP BiH or other laws, and infringement to the common interests of consumers, b) the court may order the publication of court decisions or declarations by individuals that violated the rights of consumers, which rectify such violation, c) the court may order a certain kind of penalty for the delay in enforcing court decisions (Articles 120 and 122, paragraphs 2 – 4 of the LCP BiH; Articles 135, paragraph 1 and 136 of the LCP RS). As for the penalties for delay, see *supra* 2.4.

Both consumer protection laws provide for a possibility to claim compensation for damages inflicted upon collective consumers' interests within the lawsuit for

31 On class actions see V. Efremova (2013), 'Towards introduction of collective redress mechanism in the European Union – pros and cons', in: Th. Bourgoignie / T. Jovanić (Eds.), *Strengthening Consumer Protection in Serbia*, Liber Amicorum Svetislav Taboroši, Belgrade: Law School of the Belgrade University, p. 304.

32 On the issue why an efficient protection of consumers is not possible in individual cases and the reasons for introduction of collective redress instead of many other authors, see V. Efremova (2013), 'Towards introduction of collective redress mechanism in the European Union – pros and cons', in: Th. Bourgoignie / T. Jovanić (Eds.), *Strengthening Consumer Protection in Serbia*, Liber Amicorum Svetislav Taboroši, Beograd: Law School of the Belgrade University, pp. 300, 301; T. Zoraska Kamilovska / T. Shterjova (2014), *Postupci za zaštitu kolektivnih prava i interesa sa osvrtom na stanje u Republici Makedoniji*, Pravo – teorija i praksa, 07 – 09/2014, p. 43.

injunction (Article 123 of the LCP BiH; Article 136, paragraph 5 of the LCP RS). This is the only provision on compensation contained in both laws, whereas a series of questions usually asked in relation to compensation for the violation of collective interests and rights are not resolved at all. These concerns are related to the distribution of the awarded amount, the payment of costs of the proceedings, whether the opt-in or opt-out options are followed, i.e. whether the binding decisions only apply to those consumers who were represented by an association or not, and whether the consumers, in their capacity as interveners are entitled to join the litigation. This last concern is resolved by the civil procedure codes of the Entities (see 2.3). A serious issue is reflected in the fact that the laws on consumer protection and Entities' civil procedure codes do not stipulate the same extent of protection: the former foresees injunctions and compensatory claims, while the latter only provides for injunction.

As for the out-of-court protection, the methods of alternative dispute resolution (hereinafter: ADR) are envisaged. Procedures for the alternative dispute resolution shall be established by the authorised bodies for consumer protection in Bosnia and Herzegovina, which are tasked with processing consumer claims. These procedures shall be established and implemented in line with the criteria set by the Ombudsperson for consumer protection in BiH (Article 124 of the LCP BiH). His task is also to set criteria for procedures related to alternative dispute resolution, but the Ombudsperson is not the body that implements those procedures. The Ombudsperson for consumer protection established those criteria in 2009³³. They include criteria applicable to ADR (as included in the ADR Directive) such as economy, legality, transparency, efficiency of the proceedings, etc. In essence, these are 16 provisions establishing the principles, but not regulating the procedure. The entitled bodies for consumer protection in Bosnia and Herzegovina have not yet established the ADR procedures.³⁴ Republika Srpska incorporated the ADR provision in its LCP RS (Articles 129-134 of the LCP RS). It envisaged the out-of-court protection by means of a special body – Arbitration Board. ADR may take the form of collective protection as it is allowed that an individual consumer as well as an authorised association for consumer protection with the prior approval of consumers may bring the case (Article 130, paragraph 3 of the LCP RS). This is a specific arbitration procedure, where the Arbitration board, as an independent and impartial body, processes disputes between buyers and sellers, where the amount in dispute does not exceed 10,000 KM. Still, the course of procedure is not regulated, but rather the competence to regulate this matter is assigned to the Chamber of Commerce of Republika Srpska and the Chamber of Crafts and Entrepreneurship of Republika Srpska.³⁵ A particularly important provision here is Article 133 of the LCP RS, according to which the Board's decision does not affect the right of a consumer to exercise its rights to bring legal action before court. The LCP BiH does not contain such provision.

To that end, an important question is the matter of possible successive ADR

33 Criteria were adopted on 5 February 2009, and published on the web page of Ombudsperson <http://www.ozp.gov.ba/content/kriteriji-za-ars> (3 June 2017).

34 A proposed activity is Predlaganje rješavanja potrošačkih sporova putem ARS: Izvještaj o radu Vijeća ministara BiH za 2015. godinu, p. 137.

http://www.vijeceministara.gov.ba/akti/program_rada/Archive.aspx?langTag=hr-HR&pageIndex=1 (20 May 2016).

35 Rulebook on Arbitration Board for consumer disputes was adopted. <http://komorars.ba/poslovno-okruzenje/arbitraza/> (1 June 2017).

and court action in BiH, in other words that one option does not exclude the other. This would mean that appropriate provisions on grounds to stay or suspend the statute of limitation, i.e. the preclusive deadlines, should be altered so as to prevent the right to become time-barred or lost due to the fact that the dispute was not resolved by an alternative dispute resolution method. The ADR Directive contains a suitable rule in this regard and obligates the Member States to secure that the parties, which initiated the ADR procedure, the outcome of which is not binding, are not prevented by the statute of limitation to bring the case before courts (Article 12). BiH law does not contain such provision, which could significantly limit the prospects of ADR. Yet, Article 388 of the LO provides that the statute of limitation is suspended in the case of a legal action and any action by the creditor against the debtor before a court or other competent body, whose aim is to establish, secure and exercise creditor rights. For example, the Arbitration Board is a body whose competence is defined by law. The Application of such provision might resolve this matter.

b. Competition law

This area is regulated at the level of the state BiH, primarily by Law on Competition of BiH (hereinafter: LComp BiH).³⁶

Actions that prevent, restrict or distort market competition may violate individual and collective interests. LComp BiH misses a definition of collective interest, which is under Recommendation 2013/396/EU a massive violation and damage (Article 3.b of the Recommendation). The Competition Council of BiH is body entitled to take measures against distorted market competition.³⁷

The procedure before the Competition Council of BiH may be initiated by one or more legal and natural persons which have a legal or economic interest in fair competition, by chambers of commerce, associations of employers and entrepreneurs, associations of consumers, bodies of executive authorities in Bosnia and Herzegovina. The Competition Council of BiH may also bring the legal action *ex officio* in case that it finds a reasonable doubt that competition was significantly prevented, restricted or distorted (Article 27). The list of the entitled entities suggests that there is a possibility to bring collective redress mechanisms, whereby not only the appropriate associations of i.e. employers or entrepreneurs should be treated as persons entitled for collective redress, but also the Competition Council of BiH itself or executive authorities in BiH. In addition, as for the protection of consumer interests, the entitled persons, defined in laws regulating the consumer protection can bring collective redress if the consumers' rights and interests are infringed by unfair competition (Article 98 of the LCP BiH, Article 120 of the LCP RS).

The analysis of requests for procedures before the Competition Council in the period 2012 – 2017 suggests that some collective redresses have been brought, especially in the cases of prohibited agreements.

As for the assessment of prohibited agreement, the Competition Council of BiH has on two occasions, *ex officio*, initiated the procedures: once, against the agreement

³⁶ Law on Competition, Bosnia and Herzegovina/Official Journal of BiH/Nos. 48/05 (29 June 2005), 76/07 (24 July 2007) and 80/09 (1 October 2009).

³⁷ Compositions and competence of the Council are regulated in Articles 20 to 25 of the Law on Competition of BiH.

concluded by two cable operators and it determined that the agreement did not prevent, restrict or distort the competition in terms of the market division³⁸, and, in the second case, against the Healthcare Insurance Fond of Republika Srpska, where the violation of rules of competition were ascertained³⁹.

The associations of consumers brought only one case; it was the Club of consumers of Central Bosnian Canton, and their claim was granted, and it was established that the competition in the market of heating energy was restricted.⁴⁰

In this period, particularly in the pharmaceutical sector there were several cases (distribution of medications, equal treatment of the privately and public owned pharmacies in the market of medications, etc.), also brought by some associations in their capacity of representatives of interests of certain groups, such as Association of representatives of international manufacturers of medications in BiH⁴¹, Association of private pharmacies of the Canton Sarajevo⁴², Chamber of Pharmacists of the Tuzla Canton⁴³, and Pharmaceutical Chamber of the Zenica-Doboj Canton⁴⁴.

Associations of employers brought a case to assess whether an agreement can be ascertained as prohibited (Association of renewable energy producers).⁴⁵

In total, 32 cases were initiated before the Competition Council BiH to verify if the agreements were prohibited, of which 9 were brought to protect collective interests, that is 11 if we add to them the case brought *ex officio* by Competition Council. Collective claims amount to 34.38% of the total number of claims, which is a significant number. This number would be even bigger if the law in BiH also stipulated as the collective proceedings in terms of collective protection the cases brought by two or more natural and legal persons. Number of cases brought by associations is not small, particularly if we consider Article 53 of the LComp BiH, according to which the fines could be collected from members of certain association in case that this association does not have sufficient funds. This is quite an inhibiting measure, and the provision that should be altered.

There were also four requests for the abuse of dominant position (two times, they were brought by the associations of cable operators, once by the association of privately owned pharmacies, and once by the association for collective management and

38 Competition council of BiH, Decision 02-26-6-018-63-II/11 of 31 July 2012. Available at <http://bihkonk.gov.ba/category/odluke/zabranjeni-sporazumi> (4 June 2017).

39 Competition Council of BiH, Decision 04-26-3-25-15/II/12 of 18 April 2013. Available at <http://bihkonk.gov.ba/r-j-e-%c5%a1-e-nj-e-po-zaklju%c4%8dku-o-pokretanju-postupka-po-slu%c5%bebenoj-du%c5%benosti-protiv-fonda-zdravstvenog-osiguranja-republike-srpske-radi-sklapanja-zabranjenih-sporazuma.html> (4 June 2017).

40 Competition Council of BiH, Decision 05-26—2-037-49-II/14 of 22 December 2015. Available at <http://bihkonk.gov.ba/category/odluke/zabranjeni-sporazumi> (4 June 2017).

41 Competition Council of BiH, Decisions: 04-26-3-027-65-II/11 of 27 May 2015, 04-26-3-027-38-II/11 of 4 October 2012 and 04-26-3-027-7-II/11 of 14 February 2012. All available at <http://bihkonk.gov.ba/category/odluke/zabranjeni-sporazumi> (4 June 2017).

42 Competition Council of BiH, Decisions: 05-26-2-039-75-II/13 of 25 September 2014 and 03-26-3-043-43-II/14 of 15 March 2016. Both available at <http://bihkonk.gov.ba/category/odluke/zabranjeni-sporazumi> (4 June 2017).

43 Competition Council of BiH, Decision 01-26-3-014-22-II/16 of 28 February 2017. Available at <http://bihkonk.gov.ba/category/odluke/zabranjeni-sporazumi> (4 June 2017).

44 Competition Council of BiH, Decision 03-26-3-03-60-II/14 of 9 October 2012. Available at <http://bihkonk.gov.ba/category/odluke/zabranjeni-sporazumi> (4 June 2017).

45 Competition Council of BiH, Decision 03-26-3-010-40-II/11 of 4 October 2012. Available at <http://bihkonk.gov.ba/category/odluke/zabranjeni-sporazumi> (4 June 2017).

protection of copyrights).⁴⁶

The measures of the Competition Council of BiH are recommendations and/or sanctions (Article 43). The recommendations aim at prevention, suspension or ordering to refrain if certain actions represent the infringement of the competition rules. The sanctions are fines for behaviour, which contravenes to the Law on Competition of BiH. The Competition Council of BiH may also order interim measures and impose suspension of activities, fulfilment of particular conditions or other measures necessary to eliminate prevention, restriction and distortion of the competition (Article 40). Under these provisions the request for protection of individual or collective interest is by the rule intended for injunction, respectively for suspension of actions that harm the rules of competition, but not for the compensation. Moreover, Article 53, paragraph 2 explicitly defines that the Competition Council of BiH order will not affect potential criminal and/or civil liability. Accordingly, in the follow-up proceedings courts can rule on the compensatory claims applying general tort law rules. In case of collective interests of consumers, the collective compensatory claim is possible as well (Article 123 of the LCP BiH, Article 136, paragraph 5 of the LCP RS) and can be brought by bodies entitled by laws regulating consumer protection; the Competition Council of BiH and associations of consumers are amongst these bodies (Article 98 of the LCP BiH)⁴⁷.

It may be concluded that there are collective redress mechanisms in the area of competition law, but special rules on compensation for violation of market competition are missing. It is possible to apply here general tort law rules⁴⁸, but due to the nature of infringements and damages in the area of competition, the compensatory claims, even collective claims, cannot be efficient and effective under general tort law rules. It is necessary to implement here Directive 2014/14/EU.

c. Capital market law

Provisions on capital market are part of a series of laws, whereby some of them are adopted at the level of the state BiH, and some at the level of Entities and Brčko District of BiH. Fundamental laws in this area are Law on Securities Market of the Federation of BiH (hereinafter: LSM FBiH)⁴⁹, Law on securities of Brčko District of BiH (hereinafter: LS BD BiH)⁵⁰ and Law on Securities Market of Republika Srpska

⁴⁶ Review of requests to assess the abuse of dominant position is available at <http://bihkonk.gov.ba/category/odluke/zloupotreba-dominantnog-polozaja> (4 June 2017).

⁴⁷ Competition Council has the power to initiate the procedure for consumer protection in line with the Law on Consumer Protection of BiH, but not under the parallel legislation in Republika Srpska; it would be necessary to apply here the Law on Consumer Protection adopted at the state level, especially considering that the Law on Competition is also adopted at the level of the state BiH.

⁴⁸ This matter is important for the assessment of harmonisation of BiH law with the EU law, and it is also one of the questions from the European Commission Questionnaire (Chapter 8, I.E) question 41). Available at: http://www.dei.gov.ba/dei/direkcija/sektor_strategija/Upitnik/upitnik/default.aspx?id=17826&langTag=bs-BA (1 June 2017).

⁴⁹ Bosnia and Herzegovina/Federation of BiH, Official Journal of Federation of BiH, Nos. 85/08 (23 December 2008), 109/12 (7 December 2012), 86/15 (3 November 2015), 25/17 (31 March 2017).

⁵⁰ Law on Securities of Brčko District of BiH, Bosnia and Herzegovina/Brčko District of BiH, Official Journal of BD BiH, Nos. 15/03 (30 July 2003), 27/04 (14 July 2004), 42/04 (30 September 2004), 28/07 (26 June 2007), 14/02 (3 May 2012).

(hereinafter: LSM RS)⁵¹. Differences between these laws are not insignificant. The analysis of these laws is focused only on the matter if they envisage collective redress mechanisms. At the same time, this regulation is not primarily focused on protection of consumers, but rather on protection of investors. The notions of investor and consumer do not necessarily match, but the doctrine suggests the view that the primary goal of some directives in the area of capital market is indeed the consumer protection, and that the natural person who e.g. deposits money for personal needs should be considered a consumer (see below the Directive on system of deposit insurance). A large dispersion of investors is a characteristic of the stock corporations, particularly of the investment funds, whereby between an issuer and investor there is a significant asymmetry regarding their starting positions and the level of information.⁵² Thus, this area has a potential for collective redress mechanisms.⁵³ Laws in the area of capital market in BiH do not stipulate special mechanisms of protection, collective redress mechanisms included, except in one case which will be discussed further in text. These laws also do not identify explicitly collective rights and interests, entitled entities of collective protection, which is the precondition for application of special proceedings rules related to collective redress. The application of the LCP BiH and the LCP RS is also problematic, given that these laws apply to all consumers, regulated either in these or special laws. But, the laws in the area of market capital and investment services do not regulate explicitly the rights of consumers.

The essence of horizontal approach to collective protection in BiH is that this protection is provided under same rules independently of the rights and interests in question, provided that these rights and interests are identified in the special law as well as the subjects of protection (Article 453a, paragraph 1 of the CPC FBiH, 453a, paragraph 1 of the CPC RS). Recommendation 2013/396/EU aims at providing collective protection granted under the EU law. It is exactly the area of protection of investors, due to its direct link with the market freedoms, which was extensively the subject of European legislative interventions. Interpretation that would ignore this fact and exclude a possibility for investor protection by collective redress mechanisms would not be in line with the Recommendation and BiH commitments arising from SAA. With the exception of the LSM FBiH, the other two laws on securities market stipulate protection of securities holders and investors as their fundamental principles.⁵⁴ But this principle clearly exists also in the Federation of BiH and it can be assumed from the provisions regulating the duties towards investors imposed on societies quoted on the stock exchange, investment funds, system of deposit insurance, etc. All the three laws stipulate a series of duties towards investors as well as liability for noncompliance. However, they do not stipulate how the investors' right could be exercised. Necessity of collective protection of investors based on previous given reasons should not be questionable. The following considerations will offer several examples suggesting that

51 Law on Securities Market of Republika Srpska, Bosnia and Herzegovina/Republika Srpska, Official Journal Nos. 92/06 (6 September 2006), 34/09 (7 April 2009), 30/12 (14 March 2012), 59/13 (27 June 2013), 108/13 (27 June 2013), 3/17 (20 January 2017).

52 Hopt/Voigt in: Hopt/Voigt (2005), *Prospekt-und Kapitalmarktinformatiionshaftung*, Tübingen: Mohr Siebeck, p. 108.

53 Generally, for the protection of investors and comparative data on collective disputes in this area see E. Čulinović Herc (2009), 'Povreda obveze objave podataka na tržištu kapitala i sporovi ulagatelja (dioničara) uvrštenih društava', in: *Zbornik Pravnog fakulteta Sveučilišta Rijeka* (1991) v. 30, No. 1, pp. 135-170.

54 Article 1, item d) of the LSM RS, Article 1 of the LS BD BiH.

the collective redress mechanisms are hardly applied in the area of capital market in BiH.

As already stated, there is an exception suggesting a possibility for collective protection. Authorised participants in capital market in the Federation of BiH and Republika Srpska (natural and legal persons who with prior approval of regulator may perform the activities with securities) may establish professional associations. Incorporation, associations of articles, and other general acts are subjected to approval of the regulator (Article 211 of the LSM FBiH, Article 135 of the LSM RS). These professional associations have different tasks under the respective laws, and one of them is to pronounce measures against authorised participants in securities market, members of those associations, and to take measures aimed at protection of interests of service beneficiaries in the securities market, and to take responsibility for the compensatory claims of beneficiaries for harm caused by errors, negligence, and illegal activities of the members of this professional association (Article 212f of the LSM FBiH, Article 136d of the LSM RS). The provision is rather specific – professional association protects beneficiaries of services who suffered harm from members of that association. It does not imply legal action; it could be rather concluded that the professional association would compensate the harm from its own budget. Given the extent of injury and potential number of injured parties, this is not a realistic option. It suggests some actions, even claims on behalf of the beneficiary of services against its own members, which is also not a logical formulation. However, this legal provision is the only one that explicitly provides for a possibility of collective redress. It should be intervened here and provide these professional associations with a possibility to protect collective interests of investors in the cases of other violations as well.⁵⁵

Laws on capital market respectively on securities in BiH do follow to a certain extent Directive 2004/39/EC on Markets in Financial Instruments (known as MiFID),⁵⁶ and Directive 2003/71/EC on prospectus⁵⁷. These directives (*inter alia*) determine the liability of issuer of securities vis-à-vis their holders (investors). Stock companies are obliged to inform shareholders and this obligation ends in different forms, both during the primary market issuing and later. During the first public offer of securities, information that should be published is contained in prospectus. Laws provide conditions that have to be met by the prospectus related to information and identify persons who would be liable for erroneous and incorrect prospectus. Once the company is quoted on the stock exchange, it has to publish financial reports prescribed by the law and other *ad hoc* information (e.g. privileged information).⁵⁸ The violation of the rights of investors may occur in all these stages. By the nature of these violations, they are massive.

55 One professional association of authorised entities and participants in the securities market is registered in the Register of associations maintained by the Ministry of Justice of the Federation of BiH: Association Stock Exchange Agents of the Federation of BiH. See at <https://www.fmp.gov.ba/index.php?part=tabela&vrsta=ug> (12 June 2017). As this Association does not have its web page, and it is not possible to learn more about its operation, but this already suggests that this collective redress mechanism is inefficient.

56 Directive 2004/39/EC of the European Parliament and of the Council on Markets in Financial Instruments of 21 April 2004 (OJ L 145/1, 30 April 2004, p. 27). This Directive should be on 3 January 2018 replaced with Directive 2014/65/EU (MiFID II).

57 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345/64, 31 December 2003, p. 84). This Directive was amended by Directive of the European Parliament and of the Council 2010/78/EU (24 November 2014).

58 Articles 237 to 240 of the LSM FBiH, Article 284 of the LSM RS, Article 71 of the LS BD BiH.

As for the liability for prospectus, the Directive on prospectus does not harmonise the national tort laws, but rather the harmonisation is related to the existence of liability for prospectus, subject of liability (liability for accuracy and completeness of prospectus), and persons liable for prospectus.⁵⁹ National rules define the matter of liability for prospectus and persons liable for prospectus.⁶⁰ All the three laws on securities market have provisions which establish prospectus liability, whereby there are significant difference in terms of liability for publication and contents of prospectus (Article 33 of the LSM FBiH, Article 14 of the LSM RS, Article 13 of the LS BD BiH), and in terms of persons liable for prospectus (Article 34 of the LSM FBiH, Article 32 of the LSM RS, Article 22 of the LS BD BiH). But, they do not have any rules on liability assumptions, so it is necessary to apply general torts rules.⁶¹ The matters of protection of investors and liability for prospectus in BiH in its entirety have not yet been raised as a relevant practical issue. There is no data on compensatory claims for erroneous prospectus, compared to cases in comparative law, which had a wave of collective litigation cases.⁶²

The second example is related to regulation of investment funds. One question from the Commission Questionnaire submitted to Bosnia and Herzegovina is related to the possible compensation schemes for investors, and how does the indemnity function in case that an investment company is not able to pay a financial returns to Fund investors.⁶³ Laws on Investment Funds do not have provisions for situations in which investment companies cannot do so or provisions on the compensation of investors; right to financial returns is not defined as a collective right or interest. It is clear in this case that the BiH law is not harmonised with the EU law.

The third example is related to the Law on Deposit Insurance of Bosnia and Herzegovina (hereinafter: LDI)⁶⁴ adopted to ensure, within the limitation in the law, the protection of deposits of natural and legal persons in banks in BiH, and thus contribute to preservation of the overall financial stability (Article 1 of LDI). Massive withdrawal of deposits in case of financial crisis may seriously endanger financial stability of any state,⁶⁵ and therefore this law should prevent such a situation by insuring certain deposits. The LDI protects both natural and legal persons as depositors. Directive 94/19/EC of the European Parliament and of the Council on deposit-guarantee of 30 May 1994⁶⁶ was the model for this law. Some authors argue that, although this Directive follows also

⁵⁹ Article 6 of the Directive on prospectus.

⁶⁰ E. Čulinović Herc (2009), in: 'Povreda obveze objave podataka na tržištu kapitala i sporovi ulagatelja (dioničara) uvrštenih društava, in: *Zbornik Pravnog fakulteta Sveučilišta Rijeka* (1991) v. 30, No. 1, p. 139.

⁶¹ As regards the nature of this violation, there are significant differences in comparative legislation and views of the doctrine. E. Čulinović Herc (2009), in: 'Povreda obveze objave podataka na tržištu kapitala i sporovi ulagatelja (dioničara) uvrštenih društava, in: *Zbornik Pravnog fakulteta Sveučilišta Rijeka* (1991) v. 30, No. 1, p. 140-144. For German law P. Mißler (2003), 'Zum Stand der Prospekt Haftung', p. 2, <http://home.uni-leipzig.de/bankinstitut/dokumente/2003-07-16-03.pdf> (12 June 2017).

⁶² E. Čulinović Herc (2009), in: 'Povreda obveze objave podataka na tržištu kapitala i sporovi ulagatelja (dioničara) uvrštenih društava, in: *Zbornik Pravnog fakulteta Sveučilišta Rijeka* (1991) v. 30, No. 1, p. 137.

⁶³ Question 94, Chapter IV. Securities market and investment services.

⁶⁴ Law on Deposit Insurance, Bosnia and Herzegovina/Official Journal of BiH, Nos. 20/02 (18 July 2002), 18/05 (22 February 2005), 100/08 (4 December 2008), 75/09 (15 September 2009) and 58/13 (15 July 2013).

⁶⁵ N. Misita (2007), in: 'Elementi evropskog prava zaštite depozita', *Aktualnosti građanskog i trgovačkog zakonodavstva i prakse*, No. 5, p. 133.

⁶⁶ OJ L 135/5/ of 31 May 1994. Directive was amended by Directive 2005/1/EC of 9 March 2005, OJ L 79/09 of 24 April 2005.

other goals, its fundamental goal is consumer protection.⁶⁷ Article 7, paragraph 6 of this Directive orders Member States to ensure that the depositor's rights to compensation may be the subject of action by the depositor against the System of the deposit-guarantee. Doctrine considers this provision as a right of depositor to bring a legal action against System of the deposit-guarantee in case that the granted compensation is not paid.⁶⁸ The subsequent amendments to this law explicitly stipulated this right. LDI has a provision that the Agency for deposit insurance should pay depositors who acquired their right to compensation based on binding court decision, which suggests that the depositor may bring the action for the repayment of the insured deposit (Article 12.3).

If there is right to legal action against System of the deposit-guarantee, the question is rather logical then whether there is possibility for a collective redress for protection of depositors, as it is the case with consumers? Depositor is also a consumer in case of natural person who deposits funds, intended for private needs, in a financial institution.⁶⁹ In that case it would be possible to apply the provisions related to consumer protection, since they provide protection to consumers for relations defined in this and other laws; although, an explicit instruction is missing in LDI, which is the identification of investor as consumer under certain conditions, there is a suspicion here whether the courts would follow such interpretation.

Conclusion: Laws regulating capital market do not stipulate collective redress mechanisms for investors, and they do not have referral to laws that regulate such mechanisms, nor they identify subjects of protection. In this way, the protection in line with the rules applicable to special collective proceedings stipulated in the Entities' civil procedure codes is questionable. The matter of protection of investor is related to consumer protection in EU law (and doctrine), but the law in BiH does not provide for an explicit link here, which should be revised. So, the possibility for collective protection of investors in line with the laws regulating consumer protection is questionable, as it depends on the interpretation by the court if the investor is also a consumer. It is difficult to expect a broad interpretation by courts whether investor is consumer, if there is no explicit provision. Collective protection of investors could be possible according to the Law on competition, if certain actions would distort rules of competition. Considering the Commission Questionnaire and number of questions targeting this area and consumer protection, the stage in which BiH is, its commitments arising from SAA, it would not be justifiable to proceed with narrow and strict interpretation that would deny collective protection of investors, especially those who could be considered consumers. However, an intervention on the part of legislator is desirable here, so as to facilitate the application of the rules on collective proceeding regulated in the Entities' civil procedure codes (explicit recognition of collective rights and interests for investors and identification of subjects of protection).

67 N. Misita (2007), in: 'Elementi evropskog prava zaštite depozita', *Aktualnosti građanskog i trgovačkog zakonodavstva i prakse*, No. 5, pp. 139, 142.

68 Agency for deposit insurance has a litigation capacity (Article 14, paragraph 3 of the LDI).

69 N. Misita (2007), in: 'Elementi evropskog prava zaštite depozita', *Aktualnosti građanskog i trgovačkog zakonodavstva i prakse*, No. 5, p. 134.

d. Patients' rights

Patients' rights in BiH are regulated in the laws of both entities and Brčko District of BiH.

Fundamental law in this area in the Federation of BiH is the Law on rights, duties and responsibilities of patients.⁷⁰ Law incorporated among the fundamental patients' rights the right to complaint (Article 43), which includes a possibility of patients' protection through the administrative procedure, the administrative dispute as well as through court compensation proceedings (Article 44). The law also stipulated a possibility for alternative dispute resolution by way of mediation. Before the commencement as well as during the court proceedings, a patient may protect his/her rights by initiating the mediation procedure, in line with the legislation on mediation (Article 43, paragraph 2). The collective redress mechanisms are not provided in any of these cases. It is not provided as well that the entitled claimants may protect rights of patients in out-of-court or court proceedings. However, there are certain collective redress mechanisms for patients in this law. The law foresees the establishment of health councils at the level of local community with the task to improve the patients' rights. To that end, these councils, *inter alia*, should monitor the infringement of individual patients' rights in the territory of their respective units of local self-government, propose measures for protection and improvement of patients' rights in their respective territory (Article 67). In order to perform its duties, health council is authorised to advice, propose and make recommendations (Article 68), but it cannot initiate out-of-court or court proceedings.

Republika Srpska did not adopt a special law on the patients' rights and duties, but this topic is, though in somewhat more modest version than in the Federation of BiH, regulated in the Law on Healthcare of Republika Srpska (Articles 17 to 34).⁷¹ These provisions stipulated basic rights of patients (e.g. right to protection of health, right to information, right to privacy protection, right to medical treatment only with consent, self-determination right, etc.). It is provided that a patient deprived of healthcare protection or a patient who is not satisfied with the provided medical services, or actions taken by medical staff or any other employee in the healthcare institution, may file a complaint with the director of that healthcare institution. If a patient is not satisfied with the decision taken by director, s/he may bring an action before the competent court (Article 31). It is not clearly specified what claims could be filed before the court, but since there is no limitation prescribed, all those claims are allowed, which are suitable for protection of patients' rights, including compensation. The latter is specifically defined in Article 32. Lacking other provisions, it follows that a patient may ask for compensation of damages caused by malpractice in line with the general rules on tort law. There are no indications about possible collective redress mechanisms applicable to patients in this law.

A special law in this area has not been enacted in Brčko District of BiH, but rather the basic patients' rights and duties are defined in the Law on Healthcare of Brčko

⁷⁰ Law on Patients' Rights, Duties and Responsibilities of the Federation of BiH, Bosnia and Herzegovina/Federation of BiH/Official Journal of the Federation of BiH, No. 40/10 (22 June 2010).

⁷¹ Law on Healthcare of Republika Srpska, Bosnia and Herzegovina/Republika Srpska, Official Journal of Republika Srpska, Nos. 106/09 (9 November 2009), 44/15 (21 May 2015).

District of BiH (Articles 21 to 43).⁷² The provisions of this Law are rather similar to those in Republika Srpska, but some additional matters are also regulated (e.g. right to a religious ceremony and food in line with the religious convictions). As for the right to complaint, there is also a difference compared to the legal solutions in Republika Srpska, given that the medical institution has a possibility for ruling in two instances – director rules on a complaint, and if a patient is not satisfied with its ruling, then the Management Board of that medical institutions, if it exists, or competent Chamber, should decide on patient's claim (Article 39). Patient is entitled to compensation in line with the law. However, it has not been specified what law has been meant by legislator – the Law on Healthcare or law which regulates the matter of liability and compensation. The dilemma is even bigger as the Law on Healthcare of BD BiH has some specific rules applicable to compensation. Namely, the claim should be brought to the medical institution where the medical service was provided. Competent Chamber, upon request of director of the public or private healthcare institution, appoints a five-member board with the task to evaluate whether a professional error has been committed. This body provides its findings to the healthcare institution for purpose of exercising patient's right to compensation. This formulation suggests that the right to compensation is exercised within the healthcare system, without the court involvement. If the possibility to bring compensatory claim before the court would be excluded, the patients' rights would be seriously jeopardised. Therefore, it is necessary to interpret this legal provision as a sort of attempt to have a peaceful dispute settlement prior to bringing a legal action before court. Brčko District of BiH also failed to provide collective redress mechanisms for patients.

CPC FBiH and CPC RS do not mention patients' collective interests and rights in provisions applicable to collective proceedings, but as the list of topics in which a collective claim can be filed is not exhausted, it is possible to bring the injunctive collective redress mechanisms in this area as well. However, as long as the legislator fails to identify entitled claimants and define conditions under which collective redress mechanisms are possible, it will not be possible to protect rights of patients in collective proceedings. In comparison to the medical practitioner and medical institution, the patient can be considered a weaker party, which is the basis for protection of consumers. The doctrine already stated that there are problems in application of general tort law rules to the liability of medical practitioners.⁷³ The patients' uneven position in compensatory claims is reflected in the facts that a patient does not have the same expertise as the medical staff, that there is an asymmetry in information, that the damaging party has the evidence, that it is difficult to prove causal nexus⁷⁴, that the expert opinion is provided

72 Law on Healthcare of Brčko District of BiH, Bosnia and Herzegovina, Brčko District of BiH, Official Journal of BD BiH, Nos. 38/11 (12 October 2011), 9/13 (30 May 2013), 27/14 (25 May 2014), 03/15 (25 February 2015).

73 About the specifics of assumptions for liability of medical practitioner, see S. Petrić (2005), 'Pretpostavke odštetne odgovornosti davatelja zdravstvenih usluga u pravu Bosne i Hercegovine', in: *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, No. 3, pp. 84-85; S. Nikšić (2016) 'Odgovornost za štete u zdravstvenim ustanovama – pretpostavke, odgovorne osobe, oslobođenje od odgovornosti', in: K. Turković, S. Roksandić Vidilička, A. Maršalević (Eds.), *Hrestomatija hrvatskog medicinskog prava*, Zagreb: Law School of the Zagreb University, pp. 772-779.

74 About the problem of proving the causal nexus and providing expert opinion, see I. Crnić (2009) 'Odštetna odgovornost liječnika i zdravstvenih ustanova', in: *Pravo u gospodarstvu*, vol. 48, No. 1, p. 136; M. Bukovac Puvača (2007) 'Uzročna veza kao pretpostavka odgovornosti liječnika za štetu kod „neželjenog rođenja“ djeteta sa teškim malformacijama', in: *Hrvatska pravna revija*, July-August 2007, pp. 12-13.

by medical professionals and institutions whose impartiality is often questionable.⁷⁵ At the same time, although much greater values may be jeopardised on the patients' side (life, body, health) than at the consumers' side, there are collective redress mechanisms for consumer protections. Therefore, the legislator should consider the collective redress for protection of the patients' rights.

The doctrine considers the need to introduce the "Attorney General for Patients"⁷⁶, and as long as such institutions is not established in BiH, a potential role of Ombudsperson in this area could be considered. The Ombudsperson for consumer protection in BiH observed some shortcomings in individual protection of patients: "Patients should contribute to strengthening of healthcare system through organised forms of actions... The Ombudsperson for consumer protection in BiH fully supports the implementation of the Law on Patients' Rights and Duties, which includes a necessary establishment of health councils. Non-existence of the health councils prevents the process of additional education of the staff in healthcare institutions and patients, in capacity of the other party, all aimed at achievement of a quality partnership in health sector, which should be a significant step towards raising awareness about the rights of patients. If anyone believes that his/her right is violated, s/he should be able to contact a health council, an association for protection of patients or Ombudsperson"⁷⁷. It is interesting that the Ombudsperson for consumer protection considers having competence for patients' protection as well. There are so many reasons for a patient as a beneficiary of medical services to be treated as a consumer, which would allow the protection of patients' collective rights through associations of patients or Ombudsperson.

In conclusion: The area of patients' rights is considered to be vacant and requiring reform. Above all, the patients' rights are differently and comprehensively regulated in both entities and Brčko District of BiH, so that patients do not enjoy same level of protection throughout BiH. There are no clearly defined collective redress mechanisms that could contribute to the patients' protection, considering that the individual patient has inferior position compared to the medical practitioners and medical institutions. The health councils, although envisaged in law, do not exist in the Federation of BiH. Due to the specific position of a patient in relation to a doctor and medical institution, special rules of liability are proposed for introduction, given that the general rules of liability are insufficient to protect patients (e.g. burden of proof); there is also a proposal that the protection of patients should be commissioned to third, independent party whose position and powers should be regulated by laws regulating the patients' rights, as this is a prerequisite for "activation" of the rules on protection of collective rights and interests under entities' civil procedure codes. The patients' position can be enhanced by

75 About the problem of proving the causal nexus and providing expert opinion, see I. Crnić (2009) 'Odštetna odgovornost liječnika i zdravstvenih ustanova', in: Pravo u gospodarstvu, vol. 48, No. 1, p. 136; B. Matijević (2008) 'Osiguranje od profesionalne odgovornosti u djelatnosti zdravstva', in: Hrvatska pravna revija, June 2008, p. 48; S. Roksandić Vidilička (2016) 'Liječnici kao stalni sudski vještaci – uvjeti za imenovanje i uloga u parničnom postupku', in: K. Turković, S. Roksandić Vidilička, A. Maršalevski (Eds.), Hrestomatija hrvatskog medicinskog prava, Zagreb: Law School of the Zagreb University, p. 676; S. Nikšić (2016) 'Odgovornost za štete u zdravstvenim ustanovama – pretpostavke, odgovorne osobe, oslobođenje od odgovornosti', in: K. Turković, S. Roksandić Vidilička, A. Maršalevski (Eds.), Hrestomatija hrvatskog medicinskog prava, Zagreb: Law School of the Zagreb University, pp. 776-777.

76 Z. Bošković (2010) 'Pravobranitelj pacijenata', in: Hrvatska pravna revija, October 2010, pp. 53, 57-58.

77 Conclusions from the Roundtable "Uloga zdravstvenih vijeća u unapređenju prava pacijenata". Available at web page of Ombudsperson for consumer protection of BiH: <http://www.ozp.gov.ba/node/73> (1 June 2017).

introduction of specially body entitled to protect patients (General Attorney for patients, Ombudsperson for protection of patients), which is a better solution for protection of patients than the associations of patients.

e. Food safety

Matters related to food safety were originally regulated by Law on food in Bosnia and Herzegovina (hereinafter: LFood BiH).⁷⁸ In 2017, Republika Srpska adopted Law on food regulating the same matters (hereinafter: LFood RS).⁷⁹

One of the main principles in both laws is the protection of consumers' interests (Article 11 of the LFood BiH, Articles 9 and 11 of the LFood RS). These laws provide for general liability of entities/bodies that perform activities related to food in all stages of production, processing, treatment and distribution, by stipulating obligation of ensuring that the food satisfies the requirements under the legislation on food and the obligation to monitor compliance with the legislation. Entities in charge for the operation with food at all stages of production, processing, treatment, distribution and sale are liable for any harm to the human health due to the consumption of defective food (Article 25 of the LFood BiH). In the Republika Srpska there is a parallel regulation under which the competent institution and bodies have same liability; however, legal provisions are somewhat different in terms of wording, but partly also in terms of content. The liability in Republika Srpska does not exist only regarding to human food, but also to animal food. The LFood RS explicitly suggests that the liability for damages is governed by the general tort law rules (Article 24). But, even without such explicit instruction in LFood BiH, and lacking special rules in this law, the liability can be based only on general tort rules. Liability in LFood BiH is limited to damage resulting from harm to human health. This limitation is both unclear and inefficient. Such solution would be understandable if this law had special rules regulating assumptions for liability related to damage of human health, while leaving other matters to general rules of torts law. General principle of the Law on Obligations applicable to damaging prohibition provides for compensation of any damage (Article 16), including damage caused by noncompliance with laws on food, regardless of whether that damage resulted from the harm to health or any other value.

Laws on food do not envisage any special rules on liability, and thus, as already stated, general rules of tort law apply. They are also contained in both the laws regulating consumer protection and law regulating the torts (Law on Obligation). With regards to consumer protection, the mechanisms envisaged in laws on consumer protection apply. This law also applies to determination of the capacity to bring an action in case that special / sectoral law does not have any provisions related to this matter. The liability assumptions are nevertheless provided in the Law on Obligations. Principal provision considered here is Article 179 of the LO on liability of producers for defective products. For application of Article 179 of the LO, see *infra* 2.6.f, that is, considerations related to product safety.

It may be concluded that the sectoral laws that regulate food safety, which also follow, as their main principle, the consumer protection, do not have special provision

⁷⁸ Law on Food of BiH, Bosnia and Herzegovina, Official Journal of BiH, No. 50/04 (9 September 2004).

⁷⁹ Law on Food of the Republika Srpska, Bosnia and Herzegovina, Republika Srpska, Official Journal of Republika Srpska, No. 19/17 (27 February 2017).

on collective consumer protection, neither procedural (i.e. matter of capacity to bring an action, etc.) nor substantive (assumptions of liability are not regulated). Based on the systemic interpretation of laws regulating food safety, consumer protection, and torts it can be concluded that all redress mechanisms, including collective redress mechanisms, can be applied in case of defective food.

f. Product safety

Initially this subject matter was regulated by the Law on General Product Safety passed on at state level in 2004,⁸⁰ subsequently to be replaced by the new Law on General Product Safety in 2009 (hereinafter: LGPS).⁸¹ By way of this Law, BiH transposed the European Directive on General Product Safety 2001/95/EC.⁸² A new Law on General Product Safety was passed on in Republika Srpska in 2017 (hereinafter: LGPS RS).⁸³ In addition to LGPS BiH, this subject matter is also regulated by the Law on Market Supervision in Bosnia and Herzegovina⁸⁴, and the Law on Technical Product Requirements and Approximation Assessment.⁸⁵ The mentioned three laws constitute the basis and legal framework for adoption of technical regulations and standards for safety assessment of certain products.

LGPS RS envisages detailed measures of inspection supervision, including protection mechanisms on behalf of authorised inspectors; this could be considered as a form of collective protection in the administrative procedure. The inspector acts in the interest of consumers and end-users on the market, but certainly with the goal of protecting public interests as well. Trading in safe products only is undoubtedly in the public interest. The consumer (and other interested parties) may submit complaints in a written form to the Inspectorate in charge of product safety. These complaints are being handled in line with regulations related to inspection supervision and consumers protection (Art. 38 LGPS RS). At this point LGPS RS establishes connection with the law regulating consumer protection. Commitments arising from the said law are, as a rule, of a public nature. The inspector has a number of duties of a public nature, but when acting upon a complaint submitted by the consumer, he/she will apply protection measures prescribed under the Law on Consumer Protection. More specifically, the authorised inspector in Republika Srpska would be involved in out-of-court resolution of consumer disputes arising from non-safety of products (Art. 126, Para 2 and Art. 127 of the Law on Consumer Protection RS), and he/she could file a claim for damage compensation (Art.120, lit. z of the Law on Consumer Protection RS). There is a reservation whether the inspector has an effective capacity to initiate a litigation proceeding for damage compensation. See 2.6.a and 4.1.

The basic responsibility of both producer and distributor is to distribute a safe

⁸⁰ Law on General Product Safety of BiH, Bosnia and Herzegovina, Official Gazette BiH, No. 45/04 (15.04.2004).

⁸¹ Law on General Product Safety of BiH, Bosnia and Herzegovina, BiH, Official Gazette BiH, No. 102/09 (09.09.2009).

⁸² Directive 2001/95/EC of the European Parliament and of the Council on general product safety 2001/95/EC of 03.12.2001., OJ L 11/14/2002.

⁸³ Law on General Product Safety of Republika Srpska, Bosnia and Herzegovina, Republika Srpska, Official Gazette Republika Srpska No. 46/17 (19.05.2017.).

⁸⁴ Law on Market Supervision in Bosnia and Herzegovina, Bosnia and Herzegovina, Official Gazette BiH Nos. 45/04 (09.09.2004.), 44/07 (22.05.2007.) i 102/09 (15.12.2009.).

⁸⁵ Law on Technical Product Requirements and Approximation Assessment of BiH, Bosnia and Herzegovina, Official Gazette BiH, No. 45/04 (09.09.2004.).

product only (Art. 3 LGPS BiH, Art. 7 LGPS RS). In addition to this, both laws regulate the duty of informing consumers. This responsibility rests both on the producer and the distributor (Art. 7 LGPS BiH, Art. 16 and 17 LBGS RS). In any case, violation of any obligation legally prescribed for the producer or the distributor which would consequently cause damage, would lead to damage liability of the producer or distributor under general principle of prohibition of causing damage (Art. 16 of the Law on Obligations).

Laws regulating general product safety in BiH do not prescribe specific rules of liability of the producer/distributor for damages caused by trading in unsafe, hazardous products, but instead stipulate that the application of that law does not preclude liability of the producer for damage caused by the use of a defective product, in accordance with regulations which define such liability (Art. 5 LGPS BiH, Art. 5 LGPS RS). This can be construed as a reference to a law which regulates liability for damages and this is the Law on Obligations. This is primarily the case with Art. 179 regulating responsibility of a deficient product producer. The liability of the producer for deficient product is a special form of liability. This is liability for damages caused by a hazardous object or hazardous activity; thus, the responsibility is shifted to the person who has brought about a hazardous situation causing damage, and it is directed towards maximum protection of interests of the damaged party.⁸⁶ The responsibility of the producer/distributor for deficient product is objective (strict) responsibility. This responsibility covers all products (for example medical drugs as well)⁸⁷

The question raised here is whether the reference to general tort rules excludes application of laws which regulate consumer issues, i.e. whether in such compensation litigations it is possible to file a collective injunctive and compensatory redress provided in consumer law. The Law on Consumer Protection of BiH stipulates that “relations and cases in the area of consumer protection which are not regulated herein shall be regulated under provisions.... of the Law on General Product Safety, and relevant provisions of Law on Obligation in Bosnia and Herzegovina. In case of a doubt or contradiction of provisions, a provision which provides a higher degree of consumer protection shall be applied. “A negative” conflict of laws occurs here between the two laws: The Law on Consumer Protection of BiH makes reference to LGPS and *vice versa*. Given the fact that LGPS does not regulate consumer protection with regards to the product safety, but it prescribes obligations of producer and distributor, as well as principle of consumer protection, and on the other hand the LCP does regulate consumer protection in general, then in cases when there are grounds for responsibility given in the laws on product safety, rules on consumer protection mechanisms contained in LCP should be applied, while for all issues which are not regulated therein, provisions of Law on obligations should be applied. LGPS BiH regulates liabilities of the producer and the distributor in

86 The Doctrinal in the region holds that LO provides for a higher degree of protection than Directive 85/374/EEC. For more, see u H. Kačer, A. Radolović, Z. Slakoper (2006), *Zakon o obveznim odnosima s komentarom*, Zagreb, p. 941. On the basis of responsibility in general, see M. Bevanda (2007), ‘Odgovornost za štetu izazvanu neispravnim proizvodom u hrvatskom i bosanskohercegovačkom pravu’, in: *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, (1991) v. 28, No. 1, p. 609. On reasons for objective (strict) liability for a defective product, see M. Baretić (2016) ‘Građanskopravna odgovornost za neispravan proizvod u zdravstvu’, in: K. Turković, S. Roksandić Vidilička, A. Maršalevski (Eds.), *Hrestomatija hrvatskog medicinskog prava*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, p. 752.

87 To this effect M. Baretić, ‘Građanskopravna odgovornost za neispravan proizvod u zdravstvu’, in: K. Turković, S. Roksandić Vidilička, A. Maršalevski (Eds.), *Hrestomatija hrvatskog medicinskog prava*, Zagreb: Pravni fakultet Sveučilišta u Zagrebu, p. 754.

regard to product safety; hence, provided technical regulations are in place, it provides an answer to the question “when”, i.e. in what situations the consumer may request protection. LCP BiH sets the grounds for consumer protection and provides an answer to a question “how”, i.e., what type of protection is available to consumers when their rights established under LCP BiH and other laws have been violated. This means that collective redress mechanisms are possible in this area as well. Concerning damage compensation, LCP BiH contains only one provision and resolves just the issue of right to bring a claim. Since none of issues related to damage liability, i.e., none of terms of liabilities are regulated under this law, it is necessary to apply LO. Additionally, LCP BiH is more favourable than LO since it enables collective protection in addition to individual protection.

Art. 4 LCP RS prescribes in Para 3. and 4. that application of the provisions of that law does not affect the rights of consumers arising from other laws, whereas provisions regulating obligatory relations are applied on relations and cases in the area of consumer protection which are not regulated under the Law on Consumer Protection and specific laws. Evidently LCP RS does not set forth liabilities assumptions. However, the issue of consumer redress mechanism is indeed regulated therein. Since none of issues related to damage liability, i.e. preconditions for responsibility, is regulated under LCP RS, it is necessary to apply provisions of LO.

The question on how to establish the case of an unsafe product remains problematic. According to some authors, citizens of Bosnia and Herzegovina are totally unprotected due to the lack of an adequate system of control and protection in the case of imported products.⁸⁸ Bosnia and Herzegovina does not yet have an infrastructure in place which would enable to conduct procedures of assessment of product compliance.⁸⁹ The country is at an initial stage of adoption of EU regulations in this area, whereas adoption of technical regulations and conclusion of protocols of compliance assessment of some products with EU regulations should represent the first step, particularly in light of the fact that product safety is related to Chapter 1 “Free movement of goods”; non-adoption of technical regulations on one hand prevents placement of BiH products on the EU market, and on the other hand, what is relevant to this topic, leaves consumers and citizens mainly unprotected against unsafe products.⁹⁰ Laws regulating general product safety constitute only a framework for adoption of EU technical regulations and standards. If due to a lack of technical regulations it is impossible to establish that a product is unsafe in numerous cases, protection mechanisms cannot be activated, including collective redress mechanisms.⁹¹

In conclusion, it can be stated that sectoral laws regulating product safety do not contain specific provisions on consumer protection, neither procedural (for example capacity to bring an action, regulation on claims which can be brought, etc.), nor

88 A. Mujčinović, (2016) ‘Efektivna zaštita BiH građana od nesigurnih proizvoda kroz harmonizaciju tehničkih propisa BiH sa direktivama EU’, in: *Društveni ogledi*, 3 (1), p. 184.

89 A. Mujčinović, (2016) ‘Efektivna zaštita BiH građana od nesigurnih proizvoda kroz harmonizaciju tehničkih propisa BiH sa direktivama EU’, in: *Društveni ogledi*, 3 (1), p. 192.

90 A. Mujčinović, (2016) ‘Efektivna zaštita BiH građana od nesigurnih proizvoda kroz harmonizaciju tehničkih propisa BiH sa direktivama EU’, in: *Društveni ogledi*, 3 (1), 184.

91 Until now only some by-laws related to safety of individual products were adopted (for example. Regarding elevators, personal protection equipment, equipment under pressure, etc.). See Ministarstvo vanjske trgovine i ekonomskih odnosa sa inostranstvom.

substantive (liability assumptions), but instead refer to general rules of responsibility. By way of systematic interpretation of laws regulating general product safety, consumer protection and contract and torts (damage liability), it may conclude that if a defective product violates the rights and interests of the consumer, it is possible to apply all means of consumer protection, including collective protection mechanisms. Provisions of the laws on general product safety point to that fact that consumer associations may be considered as authorised to initiate collective redress proceedings. However, in order to activate protection mechanisms, including collective redress, and make them effective and efficient, it is primarily necessary for Bosnia and Herzegovina to harmonise its technical regulations related to individual products, as well as to establish standards that individual products have to meet.

g. Environmental protection law

Several laws regulate this subject matter in the District Brčko BiH. These laws regulate protection of the environment and nature in general, and individual components of the environment (laws on water protection, air protection, waste management, etc.). However, the respective law regulating environmental protection is the basic law in this area in all three parts of Bosnia and Herzegovina: The Law on Environmental Protection of the Federation of BiH (hereinafter called: LEP FBiH)⁹², the Law on Environmental Protection of Republika Srpska (hereinafter called: LEP RS)⁹³ and the Law on Environmental Protection of the District Brčko BiH (hereinafter called: LEP BDBiH)⁹⁴. These laws cover all environmental components (air, water, soils, flora and fauna, bio sphere, lands, built environment, while all these areas are regulated under specific regulations as well), and all activities aimed at making use of or exploiting natural resources, i.e. affecting the environment. (Art. 2 LEP FBiH, Art. 2 LEP BD BiH, Art. 4 LEP RS).

The basic principles of environmental protection comprise public initiatives, public participation in activities aimed as environmental protection, and establishment and development of institutions for environmental protection and preservation. (Art. 1 Para 2 LEP FBiH, Art. 1 Para 2 LEP BD BiH, Art. 2ž LEP RS). We could look for a basis for collective protection mechanisms in the quoted legal provisions. Undoubtedly such mechanisms are contained therein, even though the said laws do not mention the term “collective” to designate protection mechanisms, but instead refer to the public, i.e. the interested public and its participation in environmental protection.

Under the term public, the Law refers to one or more natural persons, their associations, organisations or groups (Art 2 LEP FBiH, Art 2 LEP BD BiH). In Republika Srpska the interested public implies foundations as well (Art. 14 lit. j. LEP RS). Associations or organisations are synonyms, since according to positive law there

⁹² Law on Environmental Protection of the Federation of BiH, Bosnia and Herzegovina/Federation BiH Federation, Official Journal of the Federation BiH, Nos. 33/2003 (08.07.2003), 38/09 (02.06.2009).

⁹³ Law on Environmental Protection of Republika Srpska, Bosnia and Herzegovina/Republika Srpska, Official Journal Republika Srpska, Nos. 71/12 (10.07.2012), 79/15 (10.09.2015.).

⁹⁴ Law on Environmental Protection of the Brčko District of BiH/Bosnia and Herzegovina, Brčko District of BiH, Official Journal of the Brčko District of BiH, Nos. 24/04 (30.06.2004.), 01/05 (30.12.2004.), 19/07, 09/09 (18.03.2009.).

is only form of associations; mentioning several different terms has no significance.⁹⁵ The term “groups” is problematic since it is not clear whether it refers to a group of associations, or, what is more likely according to the text of provision, to informal groups. The latter is disputable in terms of party capacity to bring an action under BiH law. All three laws contain provisions on the interested public, referring to the public interested in decision making on environment, be it for a location of a project or due to the nature of an intervention in the environment, or because the public may come under influence or is likely to be affected by the intended intervention in the environment. All three laws presume that non-governmental organisations belong to the interested public, specifically those defined in the law irrespective of whether they will be affected by an intervention in the environment (Art. 30 Para 2 LEP FBiH, Art. 14 lit. k. LEP RS, Art. 2 LEP BD BiH). Under the term non-governmental organisations the said laws imply associations engaged in environmental protection that, based on their association articles, committed themselves to promotion of environmental protection. (Art. 4 LEP FBiH, Art. 14 lit. lj LEP RS). In the District of Brčko BiH there is an additional requirement that associations have to be registered on the territory of the District (Art. 2 LEP BDBiH), which is in contradiction with the proclaimed principle of non-discrimination with regard to the seat of the association (Art. 40 LEP BD BiH).

Participation of the public in environmental protection as well as informing of the public are particularly encouraged (Art-30-33 LEP BD BiH). Interested public enjoys the right of access to information, as well as to participate in environmental impact assessment and procedures related to issuance of environmental permits and licences.⁹⁶ In course of such procedures, the interested public has the right to file a complaint if a request to access to information has been rejected, or has not been reviewed or replied to in an inadequate manner. In case that the interested public took part in the first instance proceeding, it is entitled to file a complaint according to the regulations of the administrative proceeding (Art.33-39 LEP FBiH, Art. 36 -41 LEP RS, Art. 32-37 LEP BD BiH). The activities of engagement of the (interested) public should be perceived as specific preventive collective redress mechanisms in the administrative proceeding.

However, “representatives of the interested public” in the Federation of BiH and the Republika Srpska are entitled to submit a claim before the court, in case that a natural or legal person acts in contradiction to environmental principles arising from environmental laws (Art. 39 LEP FBiH, Art. 42 Para 2 LEP RS). Legal formulations raise several questions, but due to limitations of this research study, they cannot be reviewed in detail. In short, in the Federation of BiH this relates to a possibility to file a claim for undertaking of all measures aimed at eliminating of the damaging consequences, filing of an injunction claim or paying of a compensation fee to the Fund for Environmental Protection of the FBiH. These provisions are complementary with provisions of the Law on Civil Procedure of the FBiH related to collective disputes. In Republika Srpska it is not specified to what such claim refers.

⁹⁵ In Bosnia and Herzegovina there are laws on associations and foundations enacted at level of the state BiH and entity level, whereas in the Federation BiH there are such laws also at cantonal level. For more, see 5.1.

⁹⁶ Information on these activities can be found at Ministry of Tourism and Environment of the Federation BiH web page. See: <http://www.fmoit.gov.ba/ba/page/47/javne-rasprave>. It is not possible to assess to what extent these activities are systematic and comprehensive.

Even though in the Federation of BiH and Republika Srpska there are separate litigation procedures for protection of collective interests, it is not easy to link the diffused definition of “representatives of the interested public” in procedural terms with capacity to bring an action. Yet this capacity is not questionable concerning non-governmental organisations acting in the area of environmental protection. The provision of Art. 453a of LCP FBiH/Art.453a LSP RS envisages that associations, bodies, institutions or other organisations legally founded, which are engaged in protection of legally established collective interests and rights of citizens within their registered or prescribed activity, may file a collective redress when such authorisation is explicitly envisaged under a specific law, under terms and conditions contained therein. However, Entities’ laws on environmental protection do not prescribe more precise conditions for non-governmental organisations. Without more precise criteria that non-governmental organisations have to meet, their role as claimants may be disputable. This is even more true with regard to the interested public as not being a non-governmental organisation, i.e., not having a legally recognised form of organisation.

All three laws have a separate chapter dedicated to liability for damage caused to the environment (Art. 103-111 LEP FBiH, Art. 125-126 LEP RS, Art. 99-107 LEP BDBiH). Despite the fact that all concern the same concept that “a polluter pays” and qualification of an activity, which causes hazard to the surroundings as a hazardous activity, the provisions of these three laws appear to be different. Provisions of the RS Law on Environmental Protection seem to be most precise, given the fact that in linguistic and nomotechnic terms, those are most complementary with general torts law. For the present research study, the essential question is whether a collective redress claim can be filed for damage compensation. In Republika Srpska it is explicitly prescribed that every party who suffered damage may file a claim (Art. 125 LEP RS). This means that it could be a non-governmental organisation, but only if acting as a damaged party, and not a party protecting interests of other persons whose collective rights and interests have been infringed. In laws of Federation of BiH and BDBiH, i.e. in the introductory provision of the chapter dealing with damage liability the subject matter of the given law is stipulated, and *inter alia* “rules for granting rights to non-governmental organisations” as well. However, in the context of provisions regulating damage compensation caused by activities detrimental to the environment, there is not a single provision referring to the rights of non-governmental organisations.

In conclusion: it could be stated that collective mechanisms in the area of environmental protection exist at different levels - from the right to be informed, over the right of participation in administrative procedures related to issuance of environmental permits and licences, to the right to initiate court proceedings (only in the Federation of BiH and Republika Srpska). In court proceeding the interested public, and primarily non-governmental organisations, may request undertaking of actions or ceasing of activities (in the Federation of BiH) from those subjects who carry out activities which are not in compliance with defined environmental principles. In terms of procedural provisions, here it is possible to apply regulations contained in Entities’ laws on civil procedure regulating a special procedure for collective redress. All three laws contain elaborated provisions on compensation for damage caused to the environment, but do not envisage the possibility to file a collective redress claim. As in other sectors, it

remains questionable whether authorisation to non-governmental organisations to file a collective redress claim will be realised in practice. When it comes to non-governmental organisations, following the letter of the law, it appears that non-governmental organisation may take part in complex procedures if their respective association articles declare their dedication to environmental protection. It is stated under 1.4 what criteria the Commission recommends for participation in collective protection/redress (before all adequate funding). These laws do not contain such provisions so the question remains whether this positive attitude of the lawmaker will have any practical effect. Without a doubt, capacities of “the interested public” need to be strengthened as anticipated by all three laws. However, this remains more a declaratory commitment than a real possibility.⁹⁷

h. Other areas

h.a Antidiscrimination law

Collective redress mechanisms are envisaged under the Law on Prohibition of Discrimination in BiH (hereinafter: LPD BiH).⁹⁸ This law was considerably amended in 2016,⁹⁹ whereby provisions related to protection against discrimination requested by individuals or groups (Art. 12 to 16), as well as a provision on collective redress (Art.17.¹⁰⁰) were also changed. The 2016 amendments took into consideration doctrinal critical remarks addressed to the first textual version of the law.¹⁰¹

The Law on Prohibition of Discrimination contains procedural provisions on protection of individuals or groups against discrimination.¹⁰² In the original text, collective redress was singled out after these provisions, so the question was raised whether these provisions were to be applied on the procedure for collective protection of rights.¹⁰³ It seemed at the first glance that any other answer would be illogical since in that case the provision on collective protection would be isolated and not grounded in procedural norms. The 2016 amendments resolved this issue; Art. 17 Para 3 prescribes that procedural provisions for protection of individuals or groups shall be applied to collective redress as well. Specific elements of the procedure for protection against discrimination will be presented in the following text. All provisions are applicable to collective redress, except for the provision on damage compensation.

97 For example, the Ministry of Tourism and Environment of the Federation BiH is obligated to organise training of non-governmental organisations engaged in issues of environmental protection. Training should contribute to strengthening of capacities of these organisations. However, the 2017 Annual Plan of this, Point 2.3.4 envisages raising of awareness on environmental protection, but there is no specific information that the Ministry organises training of non-governmental organisations engaged in environmental protection. <http://www.fmoit.gov.ba/ba/page/98/pravni-financijski-i-opci-poslovi> (02.06.2017.).

98 Law on Prohibition of Discrimination, Bosnia and Herzegovina/Official Journal BiH No. 59/2009 (23.07.2009).

99 Law on Amendments to the Law on Prohibition of Discrimination, Bosnia and Herzegovina/ Official Journal BiH 66/2016 (31.08.2016).

100 Here, again the legislator, contrary to Recommendation 2013/396/EU (Point 3a) does not recognise collective protection mechanism in procedures conducted by two or more persons (groups).

101 See M. Čolaković, I. Grubešić, F. Idžaković, M. Izmirlija, Z. Meškić (2016), ‘Legal Protection against Discrimination in Bosnia and Herzegovina’, in: Center for SEELS (Ed.), *Legal protection against Discrimination in South East Europe*, Regional Study, Skopje: Center for SEELS, pp. 158 – 160.

102 Art 12. to 16. Law on Prohibition of Discrimination.

103 On the topic see M. Powlakić / S. Mezetović (2016), ‘Kolektivna zaštita (potrošača) prema pravu Evropske unije i pravu Bosne i Hercegovine’, in: Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, Nr. 14, p. 256.

A procedure for protection against discrimination, regardless whether filed by an individual or brought as a representative action, is qualified as urgent (Art. 11 Para 4 and 5 LPD BiH).

Associations, bodies, institutions and other organisations registered in accordance with regulations relevant to associations in Bosnia and Herzegovina, and who hold a justified interest to protect the interests of certain groups, or who are involved in protection against discrimination of certain groups of persons by the nature of their activities, are considered to have capacity to bring a collective redress action. The general condition for filing a claim, which is also true for collective redress, is that the entitled subject should make credible that actions of the respondent infringed the right to equal treatment of a larger number of persons mainly affiliated to the group whose rights are protected by the entitled claimant.¹⁰⁴ In practice this provision has been interpreted in a way that the claimant carries the burden of proof that there was discrimination. This has been criticised¹⁰⁵, and the relevant provision amended. When a person or a group of persons in all proceedings envisaged under the LPD BiH, based on available evidence, make credible that discrimination occurred, the burden of proof that discrimination did not occur rests with the opposite side. With this formulation in the amended text of the law, all dilemmas related to the burden of proof in litigation procedures regarding discrimination have been resolved.¹⁰⁶

LPD BiH prescribes what requests may be submitted by individuals or groups. All requests may be filed in case of a collective lawsuit, except for a damage compensation claim; a collective redress for damage compensation on the grounds of discrimination is not envisaged, but instead it is possible to file a complaint a) to establish that the respondent violated the right to equal treatment with regard to the group whose rights the plaintiff protects, b) to prohibit undertaking of actions which violate or may violate the right to equal treatment, i.e. to carry out activities to remove discrimination or its consequences with regard to the members of the group in question c) to publish a ruling which establishes violation of the right to equal treatment in the media at the expense of the respondent.

LPD BiH contains separate rules on jurisdiction. Thus, in addition to a general forum, it stipulates the court in the territory of residence or stay of the claimant, or the place where the prohibited action took place shall have jurisdiction. (Art. 13 Para, LPD BiH). In case that the court deliberated on injunctive redress and publication of the ruling, it may decide that the legal remedy does not have a suspensive effect and may pronounce a shorter term for voluntary fulfilment of the court order; with regard to these measures and for the purpose of having a more efficient procedure in place, there are similarities with provisions of the Entities' laws on civil procedures which regulate collective disputes.

In procedures related to protection against discrimination, revision is always

¹⁰⁴ Art. 17. Law on Prohibition of Discrimination.

¹⁰⁵ See M. Čolaković, I. Grubešić, F. Idžaković, M. Izmirlija, Z. Meškić (2016), 'Legal Protection against Discrimination in Bosnia and Herzegovina', in: *Legal protection against Discrimination in South East Europe*, Regional Study, Skopje: Center for SEELS, p. 159.

¹⁰⁶ See M. Čolaković, I. Grubešić, F. Idžaković, M. Izmirlija, Z. Meškić (2016), 'Legal Protection against Discrimination in Bosnia and Herzegovina', in: *Legal protection against Discrimination in South East Europe*, Regional Study, Skopje: Center for SEELS, p. 158.

allowed. This is a good solution, which is missing in collective disputes regulated under Entities' laws on civil procedure. There, the revision is conditioned by the worth of the item in dispute. Moral, anti-discriminatory and similar interests do not have to be of material value allowing for submission of a revision request, but the significance of violated interests certainly justifies revision (Art. 13). The deadline for revision is three months from the date of receipt of the second instance court judgment, and it is much longer than the deadline set forth under the civil procedure. A longer deadline is in favour of both parties, since both parties may be dissatisfied by an outcome of the litigation procedure, whereas the objective of this provision is certainly to strengthen the position of the injured party.

The deadlines for submission of an action against discrimination have been prescribed as much longer than in the original text of the law. This was also criticised. The subjective deadline is three years, and objective deadline five years. In case of systematic discrimination, a possibility of filing a complaint is not limited in time (Art. 13 Para 3 LPD BiH). In procedures related to protection from discrimination, as well as in procedures of collective redress, the court may order interim measures in accordance with provisions of the law regulating civil procedure, prior and during the (Art. 14).

In case that an individual or a group initiate a procedure for the purpose of protection against discrimination, the subject registered for protection activities in this area may interfere into the dispute, but only with approval of the claimant. It is envisaged that such approval later also may be revoked. From the point of logic of the litigation procedure and general provisions on interfering parties (Art. 370 and 371 LCP FBiH, Art 370-371a LCP RS), the possibility to exclude interfering parties is not a solution that deserves positive evaluation (the question raised here is about consequences of already undertaken litigation actions).

Given the fact that the Law on Prohibition of Discrimination BiH prescribes conditions for submission of collective redress action by entitled persons, and *mutatis mutandis* application of procedural rules contained in Art. 11-16 on the collective redress as well, it is not possible to apply Entities' laws on civil procedure. This solution is not the most adequate one because it represents departure from the horizontal approach, even though procedural provisions of LPD BiH partially represent better solutions than provisions of Entities' laws on civil procedure regulating collective disputes. Application of provisions of laws regulating the civil procedure is possible only when a complaint of discrimination is submitted together with a complaint for protection of other rights to be reviewed in the general civil procedure and if all complaints are mutually interconnected. In this case appropriate rules for the type of dispute at hand are applied, unless otherwise envisaged by this law (Art. 12, Para 4 LPD BiH).

In conclusion, it can be ascertained that LPD BiH has a rather developed mechanism of collective protection. These procedural rules do not contain a high degree of contradiction with provisions of Entities' laws on civil procedure in collective disputes, but regrettably the horizontal approach followed by Entities' laws and recommended by the Commission is abandoned. The weak point of this law is related to capacity to bring collective action: it is not prescribed how it is evaluated whether a certain body/ association has a justified interest for protection of the rights of a certain group. Hence, this will have to be established by the court in every single case.

h.b Combating late payment in commercial transactions

The Law on Financial Operations of the BiH Federation¹⁰⁷ by which Directive 2011/EU on combating late payment in commercial transactions was transposed into the legal order of the BiH Federation¹⁰⁸ envisages the possibility of collective protection of creditors. The Law, following Directive 2011/7 EU, establishes certain prohibition and limitation in freedom of contracting. If contractual provisions were to be in contradiction to imperative rules (for example, a long deadline to make payment) or if such provisions were to be part of standard contracts (i.e. in terms of general business conditions), or if provisions in contradiction to the principle of consciousness and integrity were introduced into general business conditions and hence cause unequal position in terms of rights and obligations of contracting parties to the detriment of creditors of monetary obligations, such provisions would be declared void and null. The Law on Financial Operations defines the establishment of their voidness as a collective interest of creditors of monetary obligations. An authorised person may file a lawsuit for protection of collective interests and rights in accordance to provisions of laws regulating the litigation procedure.¹⁰⁹ Chambers of commerce or professional creditors associations are enumerated as authorized bodies.

2.7. Legislative consultations and reform proposals

a. Legislative proposals

At present there are no comments with regard to this issue in Bosnia and Herzegovina.

3. Institutional framework for collective redress

3.1. Overview of legal provisions determining stakeholders in implementing collective redress

The basic document which regulates stakeholders for collective protection of consumers is the BiH Law on Consumer Protection (LCP BiH). Art. 4 of LCP BiH stipulates that “Competent bodies for consumer protection in Bosnia and Herzegovina have the main responsibility for promotion and exercising of the rights of consumers.” Furthermore, pursuant to Art. 5 LCP reads as follows: “Requests in the area of consumer protection shall be taken into account (...) when defining and implementing other policies and activities of competent bodies in Bosnia and Herzegovina. “ According to Art. 121 LCP in connection with Art. 98 LCP, the following institutions may bring collective redress action for the purpose of protection of consumer collective interests: a) Ministry of Foreign Trade and Economic Relations BiH (hereinafter called: the Ministry), b) the Ombudsperson for Consumer Protection in BiH; c) the BiH Council for Consumer Protection; d) the BiH Competition Council; competent bodies of the entities and the BiH District Brčko; f) the Office for Competition and Consumer Protection in the BiH

107 Law on Financial Operations of the Federation of BiH, Bosnia and Herzegovina/Federation BiH, Official Journal FBiH No. 48/16 (02.06.2016).

108 Directive of the European Parliament and of the Council 2011/7/EU (16.02.2011), SI L-48/1/2011.

109 Art. 15 Para 7. FBiH Law on Financial Operations.

Federation and Republika Srpska (hereinafter called: OCCPE); g) consumer associations, and i) inspection and other bodies as envisaged under law. Pursuant to the same Art. 98 LCP these subjects are responsible for consumer protection under the said law; hence pursuant to Art. LCP the said bodies are responsible for implementation and promotion of collective redress for consumer protection. Several years after adoption of LCP at state level, the BiH entity Republika Srpska also passed on a separate law on consumer protection,¹¹⁰ the RS Law on Consumer Protection, Art. 136 of the said law established the following bodies as authorised to initiate proceedings for damage compensation against collective interests of consumers in Republika Srpska: the Ministry, other republic administration bodies within their competencies set forth under the law which regulates the actual competence of administration bodies, agencies, funds and regulatory bodies within their respective competences in accord with the law which regulates their competences, local self-government bodies, consumer protection associations, and the Republic Srpska Inspection Administration and other authorised inspection bodies.

In the area of environmental protection, the basic law on environmental protection in the entities and the District Brčko¹¹¹, as well as special laws on the protection of nature¹¹², air protection¹¹³ and water protection¹¹⁴, omitted to specify stakeholders of interests for collective redress concerning environmental protection. The stated regulations speak about representatives of the (interested) public as stakeholders, which implies one or several natural persons, their associations, organisations or groups, whereas in Republika Srpska it includes foundations as well.¹¹⁵ Despite the fact that according to Art. 453a Para 2 CPC FBiH and RS, collective interest for environmental protection has been placed the forefront, specific laws do not explicitly authorise any party to file a lawsuit. Hence, the possibility of filing a claim remains questionable. Competent ministries and inspection supervision authorities established within these ministries, have not been authorised to initiate collective redress. Concerning other measures of collective protection which may be initiated by representatives of the public, please see in detail herein Point 2.6 g.

According to Art 27 of the Competition Law¹¹⁶, in addition to natural and legal persons, commercial chambers, associations of employers and entrepreneurs, associations of consumers and executive power bodies in Bosnia and Herzegovina may file a complaint with the Competition Council.

110 See more in M. Povlakić (2015) 'Aktuelle Fragen der Umsetzung des Konsumentenacquis in das bosnisch-herzegowinische Recht', in R. Welsler (ed.), *Die Umsetzung der Verbraucherrechte-Richtlinie in den Staaten Zentral- und Osteuropas*, Wien: Manz, p. 149.

111 *Zakon o zaštiti okoliša/Bosnia and Herzegovina/Federacija BiH*, Official Journal BiH Federation No. 33/2003 (08.07.2003), 38/09 (02.06.2009); *Zakon o zaštiti životne sredine Republike Srpske, Bosnia and Herzegovina/Republika Srpska*, Official Journal Republika Srpska No. 71/12 (10.07.2012), 79/15 (10.09.2015.); *Zakon o zaštiti životnog okoliša Brčko Distrikta BiH/Bosnia and Herzegovina, Brčko Distrikt BiH*, Official Journal of the BiH District Brčko No. 24/04 (30.06.2004.), 01/05 (30.12.2004), 19/07, 09/09 (18.03.2009.).

112 Art. 93 etc. *Zakon o zaštiti prirode Republike Srpske; Bosnia and Herzegovina/Republika Srpska/ Official Journal Republika Srpska/ No. 20/14 (27.02.2014.)*; Art. 209 etc *Zakon o zaštiti prirode; Bosnia and Herzegovina/Federacija BiH/ Official Journal of the BiH Federation No. 66/13 (28.8.2013.)*.

113 Art. 33 etc. *Zakon o zaštiti zraka FBiH; Bosnia and Herzegovina/Federacija BiH/ Official Journal FBiH No. 33/03 and 4/20 (19.07.2003)*; Art. 72 etc. *Zakon o zaštiti vazduha Republike Srpske; Bosnia and Herzegovina/Republika Srpska/ Official Journal of Republika Srpska/No. 124/11 (25.11.2011)*.

114 Art. 50 etc. *Zakon o zaštiti voda FBiH; Bosnia and Herzegovina/Federacija BiH/ Official Journal FBiH/No. 33/03 (19.07.2003.)*.

115 Art. 2. ZZOk FBiH; Art. 2. ZZŌ BDBiH; Art. 14 lit. j) ZZŠ RS.

116 *Law on Competition, Bosnia and Herzegovina/ Official Journal BiH/No. 48/05 (29.06.2005.), 76/07. (24.07.2007.) i 80/09 (01.10.2009.)*.

In the area of prohibition of discrimination there is a large number of stakeholders such as the BiH Ministry for Human Rights and Refugees, the Agency for Gender Equality, the Centre for Gender Equality of the FBiH and RS, Centres for Legal Aid in the FBiH, RS and the BD BiH, the Ombudsperson for Human Rights and non-governmental organisations. However, only the two latter ones can be considered as stakeholders of interests in regard to collective redress- the Ombudsperson for Human Rights according to Art. 7 Para 2 (j) of the Law on Prohibition of Discrimination¹¹⁷ and associations or other organisations engaged in protection of human rights, i.e., rights of certain groups of persons according to Art 17 of the Law on Prohibition of Discrimination.

Pursuant to Art. 35 of the Law on Collective Management of Copyright and Related Rights¹¹⁸, the primary role of stakeholders in the area of copyright and related rights is assigned to a collective organisation or a representative association authorised in accordance with provisions therein. In addition, every party with legal interest may request the Council to assess whether the published collective contract in question is in accordance with the law regulating the issue of copyright and related rights, and whether tariff is adequate.

3.2. Stakeholders responsible for putting collective redress into practice

In view of the fact that in Chapter IV issues related to ombudsperson, courts and inspection bodies will be reviewed in detail, here we will pay more attention to other stakeholders of interest who are responsible for putting collective redress into practical use. In this chapter we will review stakeholders in the area of consumer protection only. Most of stakeholders responsible for putting collective redress into practical use, therefore those who will not be reviewed in the next chapter, are enumerated in the BiH Law on Consumer Protection: The Ministry of Foreign Trade and Economic Relations BiH, the BiH Council for Consumer Protection; the BiH Competition Council; competent bodies of the entities and the BiH District Brčko; and the Office for Competition and Consumer Protection in the BiH Federation and Republika Srpska.

The Ministry of Foreign Trade and Economic Relations BiH has a coordinating and supervising role. Namely, pursuant to Art. 99 of LCP, this ministry coordinates the following: devising of national annual consumer protection program; work and activities related to consumer protection with competent bodies of the entities and the BiH District Brčko, the Competition Council, the BiH Council for consumer Protection and respective OCCP in the entities; follows up on state of affairs in the area of consumer protection and proposes, within the scope of its competence, changes of regulations pertaining to consumer protection; co-operates and exchanges information and data with all subjects responsible for consumer protection; keeps records on assigned public work to the BiH Alliance of Consumer Associations. In terms of collective protection of consumers, it is evident from the annual action program 2010-2016 that the Ministry has not planned any activities to improve the situation in this sector. One of the most important activity under the competence of this Ministry relates to initiatives to improve legislation in terms of collective consumer protection.

¹¹⁷ Law on Prohibition of Discrimination BiH; Bosnia and Herzegovina/ / Official Journal BiH, No 59/09 (23.07.2009) i 66/16 (31.08.2016).

¹¹⁸ Official Journal BiH 63/10 (13.07.2010).

As it is evident from the implementation of the 2010 programme, these efforts were not successful since all the initiatives were blocked by representatives from Republika Srpska who held that it concerned transfer of competences.¹¹⁹ Hence, the main activity of the ministry at present is to coordinate work on devising of an annual consumer protection programme-this being evident from those annual programmes.¹²⁰

According to Art. 107 LCP, the BiH Council for Consumer Protection is authorised to propose to the BiH Council of Ministers a national annual consumer protection programme and report on its implementation; to establish basic policies for consumer protection and direct activities which are financed or co-financed from the BiH state budget. In the annual programme the Council is referred to as “an important subject” for consumer protection¹²¹. However, there was not a single planned measure for 2016 entrusted to this Council.¹²² Pursuant to Art. 106 LCP, the Council is composed of representatives of the state-level Ministry of Foreign Trade and Economic Relations who is also presiding, the BiH Competition Council, the Veterinary Office of Bosnia and Herzegovina, the Administration for Phyto-sanitary Protection of Bosnia and Herzegovina, the Institute for Standardisation of Bosnia and Herzegovina, the BiH Agency for Statistics, the Institute of Metrology of Bosnia and Herzegovina, the Institute for Intellectual Property of Bosnia and Herzegovina, the Ministry of Trade of BiH Federation ministries of trade and tourism of Republika Srpska, competent bodies of the BiH District Brčko, two representatives of the Alliance of Consumer Associations of Bosnia and Herzegovina, one representative from each entity from consumer organisations. According to the same article, the Consumer Protection Council of Bosnia and Herzegovina is supposed to hold meetings at least four times a year.

The Competition Council of Bosnia and Herzegovina is an important stakeholder in terms of collective consumer protection, and its competence and activities are fully regulated under the Competition Law, and not under the Law on Consumer Protection. One of the main reasons for creation of a fair competition in the BiH market following the rationale of the Competition Law is to protect collective consumer interests. Namely, competition law protects individual companies and consumers by way of an overall analysis of effect that certain activities have on the entire market structure.¹²³ It is important to note here that the Stabilisation and Association Agreement (SAA), more precisely Art. 71 Para 2 therein, stipulates that every violation with regard to competition shall be evaluated based on criteria arising from regulations on competition previously in force in (the former) European Community, and *particularly* (former) Art. 81, 86 and 87 of the EU Treaty, and instruments relevant for interpretation and adopted by (the former) Communities. Here, the reference is made to meaning of these provisions

119 Bosnia and Herzegovina, Ministarstvo vanjske trgovine i ekonomskih odnosa BiH Izvršenje državnog godišnjeg programa za zaštitu potrošača Bosne i Hercegovine 2010: http://www.mvteo.gov.ba/izvjestaji_publikacije/izvjestaji/default.aspx?id=3838&langTag=bs-BA (26.05.2017.).

120 All programmes available at webpage of the Ministry of Foreign Trade and Economic Relations: http://www.mvteo.gov.ba/izvjestaji_publikacije/ZASTITA_POTROSACA/Default.aspx?pageIndex=1&langTag=bs-BA (26.05.2017.).

121 Bosnia and Herzegovina, Ministarstvo vanjske trgovine i ekonomskih odnosa BiH Izvršenje državnog godišnjeg programa za zaštitu potrošača Bosne i Hercegovine 2016: <http://sllist.ba/glasnik/2016/broj47/broj047.pdf> (26.05.2017.).

122 See A. Kulović/M. Mulaomerović (2011) ‘Primarni nosioci zaštite potrošača u Bosni i Hercegovini’ in: *Tranzicija* Vol. 13 No. 28, p. 3: http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=111774 (26.05.2017.).

123 R. Bechtold/W. Bosch/I. Brinker/S. Hirsbrunner (2009) *EG-Kartellrecht* München: Beck, Art. 81, Point 57; R. Wish (2008) *Competition Law*, Oxford: Oxford University Press, pp. 191 etc.

which are interpreted by the Commission or the EU Court in some procedures. Hence, the Competition Council of Bosnia and Herzegovina applies the same set of criteria. When evaluating violation with regard to market competition, the EU Court during its examination explicitly states the interest of consumers and the need for an autonomous position of individual companies.¹²⁴ This is derived from the Competition Law, Art. 10.2 (b), where limitation of production, market or technical development to the detriment of consumers is considered as taking advantage of dominant position; pursuant to Art. 4 (3) cartel agreements between companies shall be considered null and void, if consumers do not have a fair share of benefits that such contract brings to companies, or in regulations on concentrations were under Art. 17 (i) the Competition Council, when assessing concentration, takes into account whether the interest of consumers are violated. Thus, the Competition Council protects the interests of consumers on one hand, by procedures which under Art. 27 Para 3 8c) of the Competition Law may be initiated by consumer associations. This is very significant and one of the most important examples of collective protection in Bosnia and Herzegovina was set based on the request filed by the association for consumer protection within this procedure. This will be discussed in detail in the text below.¹²⁵ Pursuant to Art. 27 Para 2 of the Competition Law, the Competition Council may initiate a procedure *ex officio*. On the other hand, according to its competencies arising from Art. 25 of the Competition Law, the Competition Council protects consumers when tabling down proposals for amendments to pertinent laws and by-laws or administrative acts, opinions, recommendations, etc. The 2016 programme anticipates that the Competition Council should provide protection exclusively within procedures before the Council, with a recommendation that they should be more active in raising awareness and dissemination of information to consumers.¹²⁶

The Office for Competition and Consumer Protection is referred to in Art. 98 LCP, but it is not mentioned in the state programme for 2016. The Office for Competition and Consumer Protection of Republika Srpska, as a body with the Ministry of Trade and Tourism of Republika Srpska,¹²⁷ has been renamed into the Department for consumer protection with the Ministry of Trade and Tourism of Republika Srpska.¹²⁸ In the BiH Federation these competencies are exercised by the Consumer Protection Service with the FBiH Ministry of Trade.¹²⁹ The Department for development, sports and culture of the District Brčko established the Counselling Service for Consumers.¹³⁰

124 Court of First Instance, T-168/01 (27.09.2006.) para. 171; W. Wurmnest (2010) *Marktmacht und Verdrängungsmißbrauch*, Tübingen: Mohr Siebeck, pp. 232 etc.

125 In Germany associations for consumer protection had fought for a long time to obtain locus standi on the grounds of competition regulations, and this right was granted only in 2013; See: i G. Billen (2013), 'Bemerkungen zu den Brüsseler Gesetzgebungsplänen aus Sicht des Bundesverbandes der Deutschen Industrie (BDI)', in C. Brömmelmeyer (ed.), *Die EU-Sammelklage*, Baden-Baden: Nomos, p. 24.

126 Bosnia and Herzegovina, Ministarstvo vanjske trgovine i ekonomskih odnosa BiH *Izvršenje državnog godišnjeg programa za zaštitu potrošača Bosne i Hercegovine 2016*.

127 For example, Bosnia and Herzegovina, Ministarstvo vanjske trgovine i ekonomskih odnosa BiH *Izvršenje državnog godišnjeg programa za zaštitu potrošača Bosne i Hercegovine 2010*.

128 <http://www.vladars.net/sr-SP-Cyrl/Vlada/Ministarstva/MTT/Za%C5%A1tita%20potro%C5%A1a%C4%8Da/Pages/default.aspx> (26.05.2017.).

129 <http://www.fmt.gov.ba/sektori-i-uredi/sluzba-za-zastitu-potrosaca.html#> (26.05.2017.).

130 Bosnia and Herzegovina, Ministarstvo vanjske trgovine i ekonomskih odnosa BiH *Izvršenje državnog godišnjeg programa za zaštitu potrošača Bosne i Hercegovine 2016*, p. 29.

3.3. Mapping the cooperation among stakeholders

Formal cooperation between stakeholders of interests is carried out primarily upon initiative of the BiH Ministry of Foreign Trade and Economic Relations which under Art. 00 LCP has, inter alia, a coordinating role. This is primarily related to annual programmes proposed by the Department for market supervision, consumer protection and competition. Namely, this department is in charge of devising an annual program for consumer protection, as previously mentioned. In view of the fact that once the program is complete, it is forwarded to the Consumer Protection Council which is comprised of representatives of different stakeholders, we can say that upon initiative of this department within the Ministry,¹³¹ and subsequently within the Consumer Protection Council, and primarily with regard to adoption of an annual programme, the most important segment of formal co-operation between consumer protection stakeholders takes place. The second most important subject upon whose initiative formal cooperation is realised is the Ombudsperson for Consumer Protection. Pursuant to Art.101 (c) LCP, this office mainly cooperates with entity level inspection bodies within its scope of other competencies set forth in Art. 101 (c) LCP. It cooperates with consumer protection associations as well. In addition to this, the Ombudsperson for Consumer Protection pursuant to Art. 101 (i) LCP maintains contacts with the BiH Ombudsperson for Human Rights to resolve mutual problems, particularly concerning services of general interest or public services. Pursuant to Art. 101 (f), it proposes initiatives for amendments of the Law on Consumer Protection to the Consumer Protection Council and the BiH Council of Ministers, and contributes to managing policies for consumer protection in order to make them more efficient.

4. The role of courts, inspection bodies, regulatory bodies, ombudsperson and others in collective redress

4.1. The role and competences

Courts have jurisdiction for litigation procedures based on collective redress, as envisaged in Art. 120 LCP. This provision prescribes that the competent court, by the way of its acts, will order cessation of any activity or practice in contradiction with provision of the said law or any other law, detrimental to the interests of consumers. Under the laws on amendments of the Civil Procedure Codes in the FBiH and RS¹³², a new article 33a CPC was introduced prescribing that in litigation procedures related to consumer protection, in addition to courts of general jurisdiction, the court in the place where the consumer hold residence is also considered as having jurisdiction. This is for the first time in Bosnia and Herzegovina that special jurisdiction is prescribed for litigation procedures related to consumer protection. Courts deciding in the first instance procedure have jurisdiction - basic courts in Republika Srpska, municipal courts in the Federation of BiH, the Basic Court in the BiH District Brčko, and in the second BiH,

131 See also A. Kulović/M. Mulaomerović (2011) 'Primarni nosioci zaštite potrošača u Bosni i Hercegovini' in: *Tranzicija* Vol.13 No.28, p. 3.

132 Bosnia and Herzegovina/Federacija BiH/ Official Journal FBiH/No. 98/15 (23.12.2015.); Bosnia and Herzegovina/ Republika Srpska/Official Journal Republika Srpska/No. 61/13 (27.06.2013.).

the Appellate Court in the BiH District Brčko and the Supreme Courts of the Federation of BiH and Republika Srpska. Art. 453 CPC is of particular importance for this study analysis, because it contains an explicit prescription of collective redress for protection of consumer interests. This article prescribes the right of consumer protection associations and other organisation to initiate a collective redress action. We will pay special attention to this issue in the text below. Additional significance of Art. 453a CPC lies in the fact that this article reaffirms that collective protection of consumers should be conducted following the regulations of the litigation procedure. This caused some dilemmas in practice. We shall reflect on this matter in paper. In terms of conditions to initiate a collective redress action. Art. 453 a CPC introduces a novelty that collective interests have to be “severely violated or seriously threatened”, which under Art. 120 CPC was not required.¹³³ Namely, under Art. 121 CPC, institutions and associations for consumer protection stated in Art. 98 CPC may initiative a procedure for cessation of any activity or practice in contradiction to provisions of the said law or any other law. In that sense, the condition of “collective interest of consumers” is stricter than the actual violation of the law, whereas “severe violation or serious threat” are even much stricter than “any activity or practice”. Here we should take into consideration that according to Art. 1 Para 2 CPC in case of conflict of this law with other laws, in this case the Law on Consumer Protection, a law which is more in favour of consumers should be applied. In his case it is the Law on Consumer Protection. However, it is certain that Art. 1 Para 2 CPC will be interpreted in practice as referring only to legal and substantive level of consumer protection, whereas by virtue of Art. 453aCPC, Art. 121 in connection with Art. 120 CPC has been made more precise. Thus, courts will apply more stringent criteria from the Law on Consumer Protection, because it concerns the most important regulation pertaining to the litigation procedure, and finally, it is *lex posterior*.

Inspection bodies play an important role in terms of consumer protection, even though not directly in collective consumer protection. It should be noted, however, that inspection bodies were the first to promote consumer protection back in 2009 when the problem of informing of consumers with regard to flexible interest rates for commercial loan contracts occurred.¹³⁴ In addition to LCP, other special laws regulating the role of consumer protection stakeholders, first of all entity level laws on inspections are also applied.¹³⁵

Pursuant to Art.118 LCP, upon consumer’s request the inspector issues a decision ordering a seller to meet a justified request by the consumer.¹³⁶

As a rule, in case of violation of LCP on behalf of sellers, the inspector will *ex officio* order an administrative measure to be undertaken together with a deadline for the seller to carry it out.¹³⁷ The seller may file a complaint against the inspector to

133 Z. Meškić (2012) ‘Zakon o zaštiti potrošača BiH u svjetlu Prava EU’, in *Pravo i pravda*, Vol. 11., No. 1., p. 436.

134 Bosnia and Herzegovina, Federalna uprava za inspeksijske poslove *Izveštaj o radu federalne uprave za inspeksijske poslove 2009 i 2010*; Vidi Z. Meškić (2010), u Ch. Jessel-Holst/G. Galev (ed.) *Forum za građansko pravo za Jugoistočnu Evropu*, Beograd: GIZ, p. 591.

135 Law on Inspections FBiH; Bosnia and Herzegovina/Federacija BiH/ Official Journal FBiH/No. 73/14 (10.9.2014); Law on Inspections RS; Bosnia and Herzegovina/Republika Srpska/ Official Journal RS/No. 74/10 (02.08.2010), 109/12 (7.11.2012), 117/12 i 44/2016 (19.5.2016).

136 In FBiH market inspection is in charge of supervising enactment of LCP (Art. 23 of the Law on Inspections FBiH), and in RS market inspection as well (Art. 18 of the RS Law on Inspections).

137 Z. Meškić (2012) ‘Zakon o zaštiti potrošača BiH u svjetlu Prava EU’, in *Pravo i pravda*, Vol. 11., No. 1., p. 438.

the competent relevant ministry. The authorised body in the meaning of Art. 3 of the BiH Misdemeanour Law¹³⁸, as a rule it is the inspector or an authorised policy body, in case that they establish that violation occurred in accordance to Art. 125-128 LCP, may issue a misdemeanour order or submit a request to initiation of a demeanour procedure. Given the fact that under the Law on Consumer Protection there is only one prescribed sanction is a fine in a designated range of amounts, the authorised body by way of a misdemeanour order and pursuant to Art. 27 Para 2 of the Misdemeanour Law may prescribe only a minimum legal sanction. If it deems that a minimum sentence is not commensurate with the committed offence, it may initiate a misdemeanour procedure before the competent court. Basic courts in Republika Srpska, municipal courts in the FBiH and the Basic Court in the BiH District of Brčko have the actual jurisdiction the first instance procedures. In the second instance procedures, jurisdiction rests with district courts in Republika Srpska, cantonal courts in the FBiH and the Appellate Court in the BiH District of Brčko. In case of issuance of a misdemeanour order, the defendant may accept responsibility and pay a fine or request adjudication before the competent court. When the defendant requests adjudication before the competent court, sanctions pronounced in the misdemeanour order shall be deemed null and void, while the court may pronounce any sanction prescribed under law.¹³⁹

Bosnia and Herzegovina belong to a relatively small number of countries that have the Ombudsperson for Consumer Protection which was established under Art. 1000 LCP. This Institution began to operate in February 2007, shortly after the pertinent law took effect.¹⁴⁰ Pursuant to Art. 100 Para 1 LCP, the Ombudsperson Institution is an independent public institution established with an aim to promote good and efficient implementation of policies related to consumer protection in Bosnia and Herzegovina. The Ombudsperson is appointed by the BiH Council of Ministers upon a proposal by the relevant ministry for a term of five years, with the possibility of reappointment. The Ombudsperson for Consumer Protection is of particular relevance in this analysis. The Ombudsperson defines himself/herself as “ a representative of consumer interests”, representing and defending them in both individual cases, and in general media space alike.¹⁴¹ Furthermore, it is considered as a special independent body authorised to undertake investigative actions, publicly criticise, educate and strengthen a weaker part in consumer relations (consumers), advise, publish reports, give instructions and orders, all for the purpose of advocating and defending collective interests of consumers.¹⁴² For the purpose of this analysis it is important to note that competencies of the Ombudsperson for Consumer Protection as stated in Art. 103 C) LCP comprise the right of the Ombudsperson to initiate a proceeding before the competent court in

138 Law on Misdemeanours; Bosnia and Herzegovina/ Official Journal BiH/No. 41/07 (30.03.2007.), 18/12 (29.02.2012), 36/14 (29.04.2014) and 81/15 (19.10.2015.); In addition to the state level Law on Misdemeanours, for substantive and legal issues pertaining to demeanour legislation not prescribed under this law, the law on misdemeanour effective in the FBiH, Republika Srpska and District Brčko (Art, 8 Para 2 of the Law on Misdemeanour BiH) is applied.

139 Art. 32. Para. 2. BiH Law on Misdemeanour.

140 See Bosnia and Herzegovina, Ombudsman za zaštitu potrošača Izvješće o radu Ombudsmana za zaštitu potrošača u BiH 2007: http://www.ozp.gov.ba/sites/default/files/dokumenti/IZVJESCE_IOZZPUBIH_2007.pdf (26.05.2017.).

141 Bosnia and Herzegovina, Ombudsman za zaštitu potrošača, Izvješće o radu Ombudsmana za zaštitu potrošača u BiH 2013:

<http://www.ozp.gov.ba/sites/default/files/dokumenti/izvje%C5%A1%C4%87e%202013.pdf> (26.05.2017.).

142 Bosnia and Herzegovina, Ombudsman za zaštitu potrošača Izvješće o radu Ombudsmana zaštitu potrošača u BiH 2013.

compensation claims concerning collective interests of consumers. Naturally, in order for the Ombudsperson to justifiably initiate a collective redress action they have previously to exercise some of their powers and duties in agreement with Art. 101 LCP, *inter alia*, to explore activities on the market directed towards consumers ex officio, or to follow complaints, and to coordinate their activities with entity level inspectorates, to make decisions and undertake other measures in cases of complaints by consumers or violation of good business customs, provide information on the rights and duties of consumers and render support to consumer associations in their activities, as well as to provide guidelines or recommendations on special standard conditions or activities applied in special business sectors, or which are applied by specific economic operators. It should be noted here that the concept of collective protection by the Institution of Ombudsperson as a rule should represent an alternative way of dispute resolution, while the Ombudsperson y way of investigative action and inquiries outside the scope of presented facts should strive to protect collective interests of consumers.¹⁴³

Based on annual reports submitted by the Ombudsperson for Consumer Protection one may conclude that his/her primary orientation is to protect the interests of consumers, because it has been emphasised in several instances that acting upon individual consumer complaints and objections is pointless since evidently it concerns systematic contravention of regulations on consumer protection. Besides, the Ombudsperson clearly has recognised advantages of a preventive role of collective protection measures. This is how we should perceive the most important role of the Ombudsperson for Consumer Protection. This institution certainly is not supposed to be a substitution for consumer protection provided by courts, nor it would have capacities to do so.¹⁴⁴ The Ombudsperson for Consumer Protection reports demonstrate year after year that the largest number of consumer complaints and objections relates to public utilities services (telecommunication, electric power supply and heating), while banking sector takes the second place. Activities undertaken in this regard have been very different, from the most concrete action of bringing a collective redress action before the Municipal Court in Mostar in 2012¹⁴⁵, instructions to the BiH Federation Government to abolish the decision by the BiH Federation Government that the Ombudsperson elaborated was in contravention to LCP,¹⁴⁶ recommendations addressed to the lawmaker to regulate the issue of guarantors,¹⁴⁷ as well as participation in improvement of other entity level laws, mostly in the area of financial services, such as entity laws on banks, banking agencies, micro- credit organisations and protection of guarantors.¹⁴⁸ However, one of aspects significantly marking the work of the Ombudsperson is a rather modest budget available to this institution. Hence, references are frequently made to Art. 104

143 N. Creutzfeldt (2016) 'Ombudsman Schemes', in P. Cortés (ed.), *The New Regulatory Framework for Consumer Dispute Resolution*, p. 108.

144 L. von Moltke (2003) *Kollektiver Rechtsschutz der Verbraucherinteressen*, München: Beck, p. 33.

145 Bosnia and Herzegovina, Ombudsman za zaštitu potrošača *Izvješće o radu Ombudsmana za zaštitu potrošača u BiH 2013*, p. 10; See also A. Maganić (2016) 'Je li dopuštena kolektivna pravna zaštita protiv pružatelja javnih usluga', u J. Barbić (ed.) *Zaštita potrošača u Republici Hrvatskoj*, Zagreb: Hrvatska akademija znanosti i umjetnosti, p. 127.

146 Bosnia and Herzegovina, Ombudsman za zaštitu potrošača *Izvješće o radu Ombudsmana za zaštitu potrošača u BiH 2014*, p. 17.

147 Bosnia and Herzegovina, Ombudsman za zaštitu potrošača *Izvješće o radu Ombudsmana za zaštitu potrošača u BiH 2010*, p. 14.

148 Bosnia and Herzegovina, Ombudsman za zaštitu potrošača *Izvješće o radu Ombudsmana za zaštitu potrošača u BiH 2013*, p. 19.

LCP according to which “in performing its duties the Ombudsperson for Consumer Protection in Bosnia and Herzegovina shall give priority to the problems of the highest priority for consumers, and that they are authorised not to undertake measures with regard to consumer complaints of less importance. “. This implies that the focus of the Ombudsperson Institution is placed on collective measures to be undertaken in the areas where a number of complaints is larger, whereas due to a lack of funds numerous individual consumer complaints will remain unanswered.

4.2. Case law and best practices in collective redress

At the beginning we have to point out that examples of good practice in consumer collective protection in Bosnia and Herzegovina are scarce and that the country is at the initial stage of development in this regard. However, there are some isolated examples of good practice, though it is not well documents nor made available to the public.

Thus, we will start with an example of good practice, with reference to the first and only collective complaint before the Municipal Court in Mostar submitted by the Ombudsperson Office for Consumer Protection in 2012. Due to numerous complaints in telecommunication sector related to unjustifiably high telephone bills, ADSL and GPRS services which were not contracted, unfavourable terms and conditions of contract breach, unclear provisions of the general terms of telecommunication services provision, non-transparent pricing in roaming, failure to provide all relevant information for conclusion of contracts at the time of its conclusion, aggressive and deceitful advertising deliberately misleading to consumers, dishonest (unfair) practice of conclusion of contracts on telecommunication service outside business premises of the service provider. In 2011 the Ombudsperson for Consumer Protection submitted a special report on telecommunication sector which was disseminated to operators as well as to the Regulatory Agency for Communication in Bosnia and Herzegovina. Since the alleged violations of LCP continues on behalf of operators, the Ombudsperson Office pursuant to Art 103 in connection with Art. 120 LCP, and in accordance with provision contained in Art. 40, 41, 94 and 96 LCP, and Art. 15 and 210 of the Law on Obligations and Contracts (LOC), and the BiH Federation Law on Litigation Procedure, submitted a complaint to the Municipal Court in Mostar on 28.11. 2012 against the public company HT Eronet. Despite provisions of Art.120, 121 and 122 LCP regulating legal consumer protection by courts and emergency of procedures, there was no action on behalf of the court. Thus, the Ombudsperson Institution forwarded an urgent note to the President of the Court on 31.01. 2013. After this intervention, two preparatory hearings were held on 08.07. and 20.09. 2013. In conclusion, the Municipal Court in Mostar issued a decree on 08.10. 2013 declaring that it absolutely had no jurisdiction in the legal matter at hand, and all undertaken actions were declared void and null. The complaint was rejected. On 06.11.2023 the Ombudsperson Institution brought collective redress action before the Cantonal Court in Mostar based on inappropriate application of substantive law and violation of the provisions of the Law on Consumer Protection. Namely, the Municipal Court in Mostar issued a decision stating that the court was not competent to adjudicate in this legal matter, abolished all actions and rejected the claim. In disposition of the said decision, the Municipal Court in Mostar has stated that the Law on the BiH Federation Courts prescribes that the competencies of the first instance courts relate to civil-legal

relations and disputes, and economic-legal relations and disputes, whereas in the concrete case it concerned an administrative procedure which falls within the competence of the BiH Communications Regulatory Agency.¹⁴⁹ Even though we have mentioned examples of good practice here, it is evident that good practice relates to proactive work of the Ombudsperson for Consumer Protection only, and not at all to the Municipal Court in Mostar, which serves as a good indicator to show how our courts are still unfamiliar with collective redress in general, and particularly in the area of consumer protection initiated on behalf of the Ombudsperson. The second instance court demonstrated good practice, since acting upon the said complaint, in November 2014 passed on a decision by way of which the claim was admitted, the disputed decision annulled and the case was forwarded for a new procedure and adjudication.¹⁵⁰ Upon our inquiry about the procedure we received an official reply from the Ombudsperson Institution stating that the Municipal Court in Mostar accepted the claim submitted by the Ombudsperson Office in full and instructed the respondent to stop at once with the practice of setting norms and standards of provisions of the General and Special Conditions on Telecommunication Services in contradiction to the provision of Art. 40, 41. 93 and 96 of the Consumer Protection Law.¹⁵¹ However, at present there is an on-going appellate procedure before the Cantonal Court in Mostar. Thus, at the time of writing of this analysis we still do not have a final judgment of the court.

The second example of good practice is a collective redress by over 400 citizens in Bosnia and Herzegovina against the company “Travel House” from Sarajevo. It concerned a case widely reported on by the media in Bosnia and Herzegovina. The said agency offered at the time a package trips to Istanbul and Dubai for the price which ranged between 399 to 5, 000 KM per person. Despite advanced payments, none of passengers did arrive at the designated destination, nor was money returned. The concerned passengers brought collective redress action before the Municipal Court in Sarajevo.¹⁵² The positive aspect of this case is that consumers got united to act in their mutual interest and jointly brought collective redress against the said agency. However, according to available information, it is evident that in this case there was no consumer association or some other body to bring a collective redress action on behalf of consumers. This points very clearly to shortcomings in thus far practice in Bosnia and Herzegovina.¹⁵³

149 For more details see: Bosnia and Herzegovina, Ombudsman za zaštitu potrošača Izvješće o radu Ombudsmena za zaštitu potrošača u BiH 2013, p. 10.

150 Bosnia and Herzegovina, Ombudsman za zaštitu potrošača Izvješće o radu Ombudsmena za zaštitu potrošača u BiH 2014, p. 23.

151 Ombudsman za zaštitu potrošača u BiH, Odgovor na upit, broj 04-26-1-281-2/17, 12.06.2017.

152 Bosnia and Herzegovina, Ombudsman za zaštitu potrošača Izvješće o radu Ombudsmena za zaštitu potrošača u BiH 2013, p. 26.

153 See R. Kulms (2016) ‘Privatiziranje građanskog pravosuđa i pristup sudu’, u Nova Pravna Revija, Vol. 7, No. 1, p. 19.

5. The role of consumer organizations in collective redress

5.1. Legal precondition for consumer organisations' activities to represent consumer rights in collective redress

The Law on Consumer Protection paid considerable attention to establishment and operation of consumer protection associations, and provided for their activities in the area of collective protection. Firstly, pursuant to Art. 111 (1) LCP, activities related to consumer protection are carried out by consumer associations, who by registration in the registry of associations in accordance with law, acquire the status of legal persons. In addition to that, in accordance with Art. 111(2) LCP, consumer associations are non-profit, non-governmental organisations and cannot engage in commercial activities. Consumer protection associations are mostly established in the form of association of citizens, in accordance with the Laws on Associations and Foundations in Bosnia and Herzegovina and both entities. In the BiH Federation, such associations are frequently registered at cantonal level as well.¹⁵⁴ All the three laws equally prescribe that in order to establish an association, it is necessary to have three founders, who may be either legal or natural persons. Furthermore, the principle of voluntary registration in the registry is valid, by way of which the registered party acquires the status of a legal person. In view of the fact that pursuant to Art.111(1) LCP it is prescribed that registration into the registry is compulsory and acquisition of the legal person status is derived from that registration, all consumer protection associations in the territory of Bosnia and Herzegovina have been registered in one of registries of associations at BiH level.¹⁵⁵ It is important to point out to the fact that consumer protection associations comprised of three members only acquire *locus standi* for collective protection, while conditions in comparative law are much more demanding and more difficult to meet.¹⁵⁶ Furthermore, according to Art. 112 LCP, consumer associations are established by consumers for the purpose of representation and protection of their rights and these associations have to act independently of sellers, importers, suppliers and service providers. The intention behind it is to legally protect against establishment of fictitious associations who may advocate for the opposite side, and against associations that are established with an aim to cause harm to competitors.¹⁵⁷ This regulation has not been further elaborated, so it will be interesting to follow up on practice in terms of how a conflict of interest will be established and what will be its consequences.

An insight into appropriate registries of existing association for consumer protection at the BiH level reveals the following structure: there are seven active associations for consumer protection in the BiH Federation territory, according to

¹⁵⁴ Law on Associations and Foundations BiH; Bosnia and Herzegovina/ Official Journal No. 32/01 (30.11.2001.), 42/03, 63/08 (23.07.2008) and 94/16 (15.12.2016); Law on Associations and Foundations FBiH; Bosnia and Herzegovina/ Federacija BiH/ Official Journal No. 45/02 (20.09.2002.); Law on Associations and Foundations of Republika Srpska; Bosnia and Herzegovina/ Republika Srpska/ Official Journal RS No. 52/01 (27.09.2001) and 52/05 (06.04.2005).

¹⁵⁵ According to Art. 123 Para 1 LCP RS, associations acquire the status of legal persons by registration at the court of relevant jurisdiction.

¹⁵⁶ N. Franke (2002) Die Verbandsklagen der Verbraucherverbände nach dem französischen Code de la consommation im Vergleich zum deutschen Recht, Frankfurt am Main, Peter Lang, p. 42.

¹⁵⁷ N. Franke (2002) Die Verbandsklagen der Verbraucherverbände nach dem französischen Code de la consommation im Vergleich zum deutschen Recht, Frankfurt am Main, Peter Lang, p. 43.

information provided by the Consumer Protection Service with the Ministry of Trade. Information of each of these active associations is available on the website of this service.¹⁵⁸ In 2016, following a public invitation, the ministry awarded financial support to five associations in the amount of 66,000 KM (ca. 33.800 EUR).¹⁵⁹ According to records from the registry of the Department for Consumer Protection at the RS Ministry of Trade and Tourism, eight consumer protection associations are registered in the territory of Republika Srpska. Information concerning these associations and a number of projects supported by the Ministry is available on the website of this department.¹⁶⁰ In 2016, these associations in Republika Srpska received financial support in the amount of 90,000 KM (approx. 46,000 EUR) and in the period from 2007-2016 the overall amount of 850,000 KM (approx. 435,000 EUR).¹⁶¹ The BiH state budget does not project any funds to be allocated to consumer protection associations, hence the entire financial support is provided at entity level.¹⁶²

According to Art. 111 Para 4 LCP, consumer associations may establish the Alliance of Consumer Associations of Bosnia and Herzegovina for the purpose of mutual assistance and in the interest of consumer protection in Bosnia and Herzegovina and cooperation with international consumer organisations. The BiH Alliance of Consumer Associations was established in September 2004 and registered with the Ministry of Justice of Bosnia and Herzegovina. The objective of the Alliance of Associations of Bosnia and Herzegovina is to provide assistance to its members and ensure protection of interests of consumers in Bosnia and Herzegovina, and to represent associations at the international level.¹⁶³

According to Art. 111 Para 5 LCP, associations from the two entities and the BiH District Brčko may become members of the Alliance of Associations of Consumers of Bosnia and Herzegovina under the same conditions. The Association of Consumer Association of Bosnia and Herzegovina is relevant because two representatives of this Alliance are also members of the Consumer Protection Council as stipulated in Art. 106 lit. 1 LCP.

According to Art. 112 (2) LCP, consumer protection associations are authorised to take care of protection of individual and collective interests of consumers; to counsel and provide other forms of assistance in exercising of the rights of consumers; to inform consumers about pricing, quality, control and product safety and services on the market or soon to be placed on the market; if needed, associations may organise in cooperation with the Ministry, entity level offices and that of the BiH District Brčko or competent

¹⁵⁸ <http://www.fmt.gov.ba/sektori-i-uredi/sluzba-za-zastitu-potrosaca.html?showall=&start=1> (26.05.2017.).

¹⁵⁹ Bosnia and Herzegovina, Federalni ministar trgovine, Odluka o raspodjeli sredstava „Tekući transferi neprofitnim organizacijama – potpora udruženjima potrošača“ 2016: <http://www.fmt.gov.ba/novosti/odluka-o-raspodjeli-sredstava-za-C5%A1tita-potro-C5%A1a%C4%8Da-2016.html> (26.05.2017.).

¹⁶⁰ Bosnia and Herzegovina, Ministarstvo trgovine i turizma Republike Srpske, Utrošena sredstva – grant za zaštitu potrošača 2007-2016:

<http://www.vladars.net/sr-SP-Cyrl/Vlada/Ministarstva/MTT/Za-C5%A1tita%20potro-C5%A1a%C4%8Da/Pages/default.aspx> (26.05.2017.).

¹⁶¹ Bosnia and Herzegovina, Ministarstvo trgovine i turizma Republike Srpske, Utrošena sredstva – grant za zaštitu potrošača 2007-2016.

¹⁶² Bosnia and Herzegovina, Ministarstvo vanjske trgovine i ekonomskih odnosa BiH Izvršenje državnog godišnjeg programa za zaštitu potrošača Bosne i Hercegovine 2016.

¹⁶³ Bosnia and Herzegovina, Ministarstvo vanjske trgovine i ekonomskih odnosa BiH Izvršenje državnog godišnjeg programa za zaštitu potrošača Bosne i Hercegovine 2016.

inspection bodies, comparative examination of quality, impact on health, prices of food products, environmental protection and inform the wider public about results of their findings; submit to the competent authorities information about responsibility of sellers or service providers who sell products or provide services which are not in compliance with prescribed conditions in terms of safety and quality; cooperate with all competent bodies, inspection offices, consumer associations and other subjects in Bosnia and Herzegovina who are under law, responsible for the protection of consumers. As it is evident, collective protection on this list is not stipulated explicitly as a competence of associations, but instead it can be implied in “care for joint interests of consumers” or under “provision of other forms of assistance in exercising of the rights of consumers”.

However, Art. 121 LCP contains an explicit provision according to which institutions and associations, as well as all other stated stakeholders for application of collective redress arising from Art. 98 LCP are authorised to initiate a procedure before the competent court for adoption of acts referred to in Art. 120 therein. Pursuant to Art. 120 LCP, the competent court may order cessation of any activity or practice which are in contravention with provisions of LCP or any other regulations detrimental to joint consumer interests.

Articles 135 and 136 LCP of Republika Srpska can be construed in the same way. Concerning collective redress in the BiH Federation in the area of prohibited forms of advertising, this possibility is introduced in Ar. 7 of the BiH Federation Law on Prohibited Forms of Advertising of 2016.¹⁶⁴ It is stipulated therein that “sellers, sellers’ associations, advisers, as well as other interested parties who have legal interest for individual or collective protection against prohibited forms of advertising, may request by way of a complaint endorsed by the court that such advertising be stopped.” The need to introduce this regulation occurred since this area was not sufficiently regulated in LCP BiH¹⁶⁵, contrary to LCP Republika Srpska. We should not forget that consumer associations pursuant to Art. 23 (c) of the BiH Competition Law may initiate procedures for consumer protection before the Competition Council within the competencies of this body. It is particularly important that competence of consumer associations for bringing a collective redress action is explicitly reiterated in Art. 453a of the entities laws –LCP BiH Federation and LCP RS; t redress is directly prescribed for protection of collective consumer interests. According to the said provision of Art. 453a (1) LCP BiH Federation and Republika Srpska (1), associations, bodies, institutions and other organisations established under law, who within their registered or prescribed activities are engaged in legal protection of established collective interests and rights of citizens, and if such authorisation is explicitly foreseen and in compliance with terms of law, may bring a redress action for the protection of collective and interests and rights. Art. 453a (2) FBiH and RS explicitly states interests of consumers when enumerating public interests in general. Even though it may seem that the new provision of LCP did not improve the rights to association for the purpose of consumer protection, in terms of substantive-legal aspects of LCP, it turned out that it was neglected in court practice since it was not included in any of classic laws of civil law that case law is accustomed

¹⁶⁴ Law on Prohibited Forms of Advertising FBiH, Bosnia and Herzegovina/Federacija BiH/ Official Journal FBiH/No. 101/2016 (23.12.2016).

¹⁶⁵ Dž. Radončić (2015) ‘Zaštita potrošača od nepoštenje poslovne prakse’, in *Analni Pravnog fakulteta Univerziteta u Zenici*, Vol. 8. No. 15/16, p. 392.

to (in that case outside the scope of laws on obligations and contracts)¹⁶⁶. The same is true with regard to procedural provisions which are outside the ambit of the Law on Litigation Procedure.¹⁶⁷ One need to interpret Art. 123 LCP in this context, since its states that associations are entitled to initiate a complaint for damage compensation caused to collective consumer interests. Namely, as it has been already explained in the first part of the study analysis, this short regulation for collective redress is not sufficient to transform it into everyday practice¹⁶⁸. The final barrier in this regard was made by amendments to the Law on Consumer Protection, where Art. 453b stipulates overtly that the complainant of collective redress cannot request damage compensation. According to Art. 453c LCP, only in individual procedures for damage compensation the court will be bound by the previous court decision on collective redress to the effect that collective consumer interests were violated or threatened. This is yet another mechanism that need to be put into practice, so one should not expect to see revival of associations' rights arising from Ar., 123 LCP soon.

5.2. Assessment of the environment for consumer organisations to deal with collective redress

There are no evident legal problems to submit a collective redress on behalf of consumer protection associations. However, thus far not a single complaint was filed before regular courts in Bosnia and Herzegovina. After an extensive research and direct inquires in several courts in larger towns, we could not find a shred of evidence about such redress. As it will be presented subsequently, one such complaint was submitted to the BiH Competition Council. Reasons for this cannot be found in legal preconditions, since legal preconditions as such do exist. The number of registered associations is not negligible, which points to the fact that there are not serious problems with registration. Regular financial support to associations on behalf of both entities ministries certainly does not indicate that the level of financial assistance is sufficient, but it is evident that there is communication and connections between the entities' governments.

There is the Alliance of Consumer Associations of Bosnia and Herzegovina through which associations may internally communicate, and establish international cooperation as well. The Consumer Protection Council represents a forum in which representatives of consumer protection associations maintain contacts with the BiH Council of Ministers, but with other stakeholders for collective consumer protection as well. In view of specificities of the system in Bosnia and Herzegovina together with the Ombudsperson for Consumer Protection, frequently addressed by consumers as indicated above, we can say that an institutional structure for consumer protection has been established with potency to become an efficient mechanism for collective consumer protection.

Yet, the fact remains that thus established structure failed to provide results in

166 See Z. Meškić (2010), u Ch. Jessel-Holst/G. Galev (ed.) *Forum za građansko pravo za Jugoistočnu Evropu*, Beograd: GIZ, p. 422.

167 See the destiny of thus far the only claim filed by the Ombudsperson for Consumer Protection submitted prior to amendments to LCP, so that the first instance court did not know whether to apply rules of civil procedure for this claim.

168 On models of collective compensatory redress, see M. Baretić (2009) 'Individualna i kolektivna zaštita potrošača u hrvatskom pravu', u V. Tomljenović/E. Čulinović Herc/V. Butorac Malnar (eds.), *Republika Hrvatska na putu prema Europskom pravosuđnom području*, Rijeka: Pravni fakultet u Rijeci, p. 246.

terms of collective redress on behalf of consumer protection associations. It is necessary to look for reasons for this failure. In search for answers, firstly we have to say that it is not true that consumer associations have never initiated a procedure to protect collective consumer interests. Namely, the Consumer Association “Klub potrošača Srednje Bosne” from Travnik, registered in the Central Bosnian Canton registry, submitted a request before the BiH Competition Council for consumer protection from a prohibited agreement based on the Competition Law. The request related to examination of the contract between the city of Travnik and the economic entity “Unis energetika” on an exclusive right of heating energy supply. The contract stipulated that utilisation of heating energy was obligatory for all citizens, whereas in case that some citizens should choose not to utilise it, 25% of fixed expenditure shall be charged for installation maintenance. Furthermore, the standard contract concluded with consumers anticipated that the contract was to be concluded of an indefinite period of time which cannot be broken by service consumers, while at the same time the service provider may decide to terminate contract unilaterally. The Competition Council found that violation of the Competition Law occurred on numerous points. More specifically, it concerned abuse of the dominant position on the market, limitation of market or technical development to the detriment of consumers.¹⁶⁹

This is certainly a positive example since the said consumer protection association submitted a request for protection of a large number of affected consumers, which was ultimately successful. At the same time, it is the example of the first collective redress brought by a consumer protection association in Bosnia and Herzegovina. It is indicative to note that the first successful procedure was conducted following substantive and procedural regulations of the Competition Law, and not the Law on Consumer Protection and the Law on the Litigation Procedure.

Furthermore, when assessing the setting for collective redress, one should take into consideration the fact that there is a separate office of the Ombudsperson for Consumer Protection. According to already submitted reports by the Ombudsperson for Consumer Protection, a number of different complaints being submitted to this office is significant. This is certainly an indication that consumer protection associations legitimised for filing of lawsuits before courts, prefer a simpler and cheaper option of submission of complaints to the Ombudsperson. The Office of Ombudsperson then embark on resolution of contentious issues by submission of an opinion or issuance of instructions. Lastly, the Institution of Ombudsperson has legitimacy to bring a collective redress action. This was actually done in one case.

The intention here is not to table down arguments against submission of complaints related to consumer protection by the Ombudsperson. One of main duties of this office is, *inter alia*, to resolve issues pertaining to collective interests of consumers. Instead, the aim is to point out in summary that in one similar area, prohibition of discrimination and collective protection against discrimination in Bosnia and Herzegovina, cooperation between association for prohibition of discrimination, victims and Ombudsperson, in this case the institution of Ombudsperson for Protection of Human Rights have excelled to a higher level of development. In the area of prohibition of discrimination, where the Ombudsperson for Protection of Human Rights mostly issued opinions or

¹⁶⁹ Bosnia and Herzegovina, Konkurencijsko vijeće BiH/Rješenje/ Official Journal BiH/No. 5/16 (22.12.2015.).

recommendations to the alleged offenders¹⁷⁰. However, in cases when the offender disregarded given recommendations, some associations, before all the association “Vaša prava” [Your Rights]¹⁷¹ brought a collective redress action complaint before BiH courts, whereas recommendations issued by Ombudsperson were enclosed as evidence together with a lawsuit. Due to inexperience of associations, as well as that of courts, attempts to provide protection even in explicit cases of discrimination were futile. However, some very important judgments were obtained as well. The most relevant contribution to collective protection is assigned to the case known as “two schools under the same roof”. This was the first collective redress against discrimination in Bosnia and Herzegovina¹⁷². In any case, the ambiguous position of case law with regard to recommendations issued by Ombudsperson led to amendments to the Law on Prohibition of Discrimination¹⁷³ in 2016, to the effect that Art. 15 Para 9 of the revised Law on Prohibition of Discrimination expressly states that in cases when the party encloses recommendations issued by the Ombudsperson for Protection of Human Rights, the court is obliged to take it into consideration. In addition, it is explicitly prescribed that associations pursuant to Art. 17 Para 1 of the Law on Prohibition of Discrimination may join in the procedure in the capacity of an involved party. Associations may bring collective redress pursuant to Art. 17 Para 1 of the Law on Prohibition of Discrimination as well. This change was introduced in practice because of some problems which occurred in terms of the concept of interference of associations, even though in accordance to the Law on Litigation Procedure, such interference is absolutely indisputable.

This short insight into prohibition of discrimination area is aimed at casting more light on a very similar area, also derived from the European Law- activities of associations led to case law, and even brought about amendments to laws in order to facilitate the work of courts who had less problems with acceptance of the role of associations. Therefore, in the area of antidiscrimination a circle of development has been established from problems encountered in practice to law amendments and several successful redress cases. This is experience based on which collective consumer protection in Bosnia and Herzegovina should be developed.

Finally, it should be noted that according to state programmes for consumer protection, numerous assignments were transferred to consumer protection associations, but not collective redress. We can derive two conclusions from the aforesaid. The first conclusion relates to the fact that a number of duties assigned to consumer protection associations is significantly higher than funds made available to them. The reason for present inactivity of associations certainly can be found in the lack of financial support. On the other hand, state programmes should envisage collective redress as one of the duties, and consequently allocate funds for the same. It is important to note that the state annual programme for consumer protection pursuant to Art. 108 c) LCP should contain a financial framework for allocation of funds, whereas as stipulated in Art. 108 d), there

170 Z. Meškić (2013) ‘Autonomy and antidiscrimination in private law - National Report for Bosnia and Herzegovina’, in N. Dollani/Ch. Jessel-Holst/T. Josipović/N. Reich (eds.), *Civil Law Forum for South East Europe*, Tirana: GIZ, p. 75 ff.

171 Impressive results of this association, see at: <http://www.vasaprava.org/?cat=5> (26.05.2017.).

172 B. Topić (2002) *Neiskorišteni potencijal – uloga i značaj nevladinih organizacija u zaštiti od diskriminacije u BiH*, Sarajevo: Analitika, p. 31 ff.

173 Law on Prohibition of Discrimination BiH; Bosnia and Herzegovina/ Official Journal BiH/No. 59/09 and 66/16 (23.07.2009.).

should be the financial framework for allocation of funds for facilitation of development and activities of consumer protection associations.

Crucial data for execution of duties on behalf of associations for consumer protection has not been included in annual programmes thus far. If eventually this legal obligation is to be fulfilled, financial means designated for collective redress on behalf of associations should be a separate budgetary item.

5.3. Prerequisites for awareness raising toward consumers in collective redress

Structural preconditions for raising of consumer awareness in Bosnia and Herzegovina have already been discussed. There is a number of stakeholders for collective consumer protection with the main task is to work on raising of consumer awareness. Certainly, there are not many positive and successful examples of collective consumer protection. The Law on Consumer Protection follows up, even outside the scope of collective protection, the problem of both citizens and courts not being sufficiently informed about the contents of the law.¹⁷⁴ Public attention was drawn for the first time in cases related to commercial loans with changeable interest rates related to the Swiss Franc when realistically an opportunity was missed to file a collective complaint.

In the aftermath, at least in one part of Bosnia and Herzegovina, the decision by the BiH Competition Council on annulment of the contract between the city of Travnik and the commercial entity “Unis Energetika” was welcomed. Similar examples would encourage citizens to address associations and institutions more frequently in order to receive assistance. Legal environment indeed liberally allows for collective redress to be brought by consumer protection associations, with an aim to overcome economic and social barriers in terms of access to legal protection.¹⁷⁵ It is necessary for some associations active in the area of consumer protection to build up their reputation, as is the case in the area of prohibition of discrimination, in order to earn citizens’ trust and draw public attention. This is where the Ombudsperson for Consumer Protection should look for opportunities to get involved, since their activities related to collective redress ought not to be based on an individual case, because there will be plenty of obstacles and challenges in the future case law, before we can say that the consumer protection collective redress has become regular practice in Bosnia and Herzegovina. We should not hesitate to engage in a debate which has become more intensive throughout the member states of the EU related to provision of economic benefits for associations when bringing collective redress actions related to consumer protection as expression of public interest.¹⁷⁶

174 See Z. Meškić (2010), u Ch. Jessel-Holst/G. Galev (ed.) *Forum za građansko pravo za Jugoistočnu Evropu*, Beograd: GIZ, p. 422.

175 E. Kocher (2013) ‘Kollektiver Rechtsschutz: Effektivität und Erforderlichkeit im Verbraucherrecht’, in C. Brömmelmeyer (ed.), *Die EU-Sammelklage*, Baden-Baden: Nomos, p. 72.

176 C. Meller-Hannich, ‘Effektivität kollektiver Rechtsschutzinstrumente’, in C. Brömmelmeyer (ed.), *Die EU-Sammelklage*, Baden-Baden: Nomos, p. 50; J. Buchner (2015) *Kollektiver Rechtsschutz für Verbraucher in Europa*, V&R unipress: Göttingen, 102.

6. Recommendations and conclusions

In accordance with the questionnaire comparison was made with Directive 2009/22/EC on complaints for injunctions, Directive 2013/11/EU on alternative dispute resolution for consumer disputes, Directive 2014/104/EU on actions for damages for infringements of competition law and Commission's Recommendation 2013/396/EU. It was ascertained that there is no full compliance of BiH law with EU law, except for Directive 2009/22/EC. BiH law provides for the level of protection required by this Directive, and since in addition to complaint for injunctions, collective redress for damages compensation are also feasible, we can say that the level of protection is nominally even higher. Under the Stabilisation and Association Agreement (SAA) Bosnia and Herzegovina committed itself to approximate its legal order to *acquis communautaire* of the Union. Hence, together with a conclusion that in the area of collective protection harmonisation of legislation with EU law is not complete, it is recommended that necessary legislative interventions should be made in the near future in terms of implementation of Directive 2013/11/EU and Directive 2014/104/EU.

In view of the fact that Bosnia and Herzegovina has a specific constitutional-legal organisation and that legislative powers are divided between the BiH state, the entities (Republika Srpska and the BiH Federation) and the BiH District of Brčko, in the process of approximation it is necessary that legislative bodies co-ordinate their activities as to prevent further differences in regulation of collective protection law in Bosnia and Herzegovina.

Even the existing laws have not been fully harmonised which in consequence leads to the lack of uniformity in the level of protection of consumers and other holders of collective rights and interests in a rather small territory of Bosnia and Herzegovina. Moreover, it is a constitutional obligation of the BiH state and its entities not to undermine freedom of movement of people, goods, services and capital (iArt.14 of the BiH Constitution).

By way of novelties on civil procedure in Republika Srpska (2013) and the BiH Federation (2015), a special civil procedure for protection of collective interests and rights was introduced. The rules of the procedure are always the same, regardless of type of collective rights and interests concerned and areas in which means of collective protection can be applied are enumerated only *exempli causa*. These collective interests are established as interests related to human environment and living environment, moral, ethnic, consumer related, anti-discriminatory and other interests recognised under a separate law. The list of protected rights and interests is not limited. Here we observe convergence with the Recommendation in which collective means of protection are aimed at protecting the rights guaranteed under EU law. Entities' laws on civil procedure envisage one quantitative limitation- collective redress is feasible only if collective rights and interests have been gravely infringed or threatened. The stated law here departs from Recommendation 2013/396/EU, as well as from previously mentioned directives in which this limitation is not contained. Relevant laws on the civil procedure need to be revised and the mentioned limitation removed.

A collective redress action may be brought by the following subjects: (associations, bodies, agencies and similar) established for the purpose of protection of

rights and interests for which they are authorised under special laws, under terms and conditions set forth therein.

The analysis of special laws detected that regulation of subjects authorized to undertake measure for collective protection is a weak point in the said laws. (more details in the text below)

Laws on civil procedure do not anticipate collective redress for compensation, as envisaged under laws on consumer protection. This solution considerably limits protection offered by laws on consumer protection, i.e., collective redress for damage compensation which became non-implementable. It is recommended to remove differences between the two laws, as the two most important sources of collective protection. Hence, differences between the two laws are highly undesirable. These differences need to be removed for the purpose of obtaining efficiency in collective protection of consumers. First of all, collective redress for compensation should be anticipated in laws on civil procedure. Provisions on collective redress in laws on consumer protection need to be revised and supplemented because this legal concept is regulated only in one legal provision, and not a single substantive or procedural issue related to collective redress for compensation has been resolved. Namely, it is necessary to act in two directions- to extend the scope of collective protection in procedural law so that damage compensation can be requested, to regulate in detail the preconditions for damage responsibility in consumer law (follow the Recommendation and accept “opt-in” option, resolve the issue of destiny of amount sued for, etc.).

Horizontal approach to protection of collective rights is seriously devaluated by the provisions of laws on civil procedure under which rules of a special civil procedure for protection of collective rights and interests are only applied if not otherwise prescribed under a special law. It is recommended to revise this provision and establish a clear connection between laws on civil procedure and sectoral laws which foresee (or should be foreseeing collective protection), so that all these regulations are united in one coherent system. Preconditions for collective protection and authorized subjects should be regulated under separate laws, whereas the regulations on action should be contained in laws on the civil procedure.

Entities’ laws on civil procedure are linguistically and nomotechnically unclear, and need to be thoroughly revised. These laws contain numerous formulations that cannot be placed in the context of effective norms of litigation, enforcement and even administrative procedure. Thus, efficacy of collective protection may be brought into question.

Sectoral approach to collective protection exists in a number of areas. Relevant laws contain more or less elaborate collective mechanisms of protection. There are differences in terms of the scope of regulation, type of protection, designation of subjects, etc.; thus, there is a large variety and discrepancies with regard to collective protection of different rights and interests. It is recommended that these mechanisms be standardised in line with Recommendation 2013/396/EU.

Collective protection mechanisms exist in the area of competition, but special regulations pertaining to compensation for damage caused by violation of market competition are missing. Here it is possible to apply general rule of compensation liability, but due to specificities of infringements and damage caused by violation of

competition rules, compensation claims, as well as collective compensation claims, cannot be efficient and effective. The aforementioned represents the main objectives of Directive 2014/104/EU and it is necessary to implement this Directive as soon as possible.

The important preconditions of collective protection are the following: a) identification of subjects who are stakeholders, b) that such subjects have capacity to initiate a procedure for collective protection. Recommendation 2013/396/EU comprises a set of criteria with regard to ability of subjects to undertake collective protection actions, particularly related to financing of such subjects. With regard to both aspects, certain weaknesses were identified in BiH law which need to be overcome in order to make collective redress mechanisms effective. Generally, regardless of the sector in question, urgent revision of provisions on subjects of protection is recommended, otherwise the possibility of collective protection afforded by laws on litigation procedure and other sectoral laws will remain ineffective and useless. This assertion is substantiated by the situation with consumer protection where we have the largest number of authorized subjects connected within a complex and well interconnected institutional framework, but without tangible results.

Concerning consumer protection in Bosnia and Herzegovina we can say that there are numerous stakeholders responsible for initiation of collective redress procedures. There are a number of public authorities' bodies among them (competent ministries, the BiH Competition Council, etc.), the Ombudsperson for Consumer Protection as the most important stakeholder in terms of collective consumer protection. Additionally, there are also associations of consumers and the BiH Alliance of Consumer Associations. Protection is structured in three ways: public authority bodies, an independent body financed from the budget (the Ombudsperson for Consumer Protection), non-governmental sector, i.e., consumer protection associations. It was established that we cannot expect inspectors or ministries to bring collective redress action regardless of their competence. Their role in terms of consumer protection is perceived in another area, whereas civil (litigation) procedures are not their original competence for a number of reasons. One of main reasons certainly relates to insufficient allocation of funds from the budget.

Irrespective of numerous subjects for protection, results in the area of collective consumer protection are rather modest, i.e. almost totally missing. We recommend that a focus should be placed on the Ombudsperson for Consumer Protection and consumer associations whose capacities need to be strengthened, both financial and staff related.

As to consumer protection associations, they were the last to become the ultimate subject of consumer protection with issuance of Recommendation 2013/396/EU. These associations in Bosnia and Herzegovina do not meet requirements recommended by the EU at present. It is recommended: a) to make selection and certification of consumer organisations for the purpose of granting authorization to conduct disputes; this needs to be done by prescription of clear criteria that these organisations need to meet; b) enable financing of these organisations from public funds, as well as from third parties with prescription of explicit criteria in terms of transparent financing by third parties. Here adherence to Recommendation 2013/396/EU is required; c) as non-profit organisations cannot avail themselves of amounts awarded in civil procedures, except to an amount commensurate with incurred expenses of the given organisation, awarded amounts

should be paid into appropriate funds for further financing and enhancement of consumer protection; d) strengthening of capacities of such organisations in general, *inter alia*, by meeting of obligations imposed on some bodies by virtue of law (education of consumer protection organisations).

Concerning other la which anticipate collective protection, the situation is different, unfavourable almost in all sectors compared to consumer protection. Moreover, laws on the civil procedure “expect” that specific laws should identify the subjects of collective protection who will then be able to bring collective redress actions.

In some laws, the subjects of protection have not been identified at all (this being a condition for application of provisions on a special procedure for collective protection regulated under entities’ laws on litigation procedure), whereas in some other laws the concerned subjects were not determined under precise criteria.

It is necessary to do it in laws which do not identify at all the subjects of protection. Examples are laws on food safety and general safety of products aimed at consumer protection, but referring only to application of general rules on responsibility. Based on interpretation of these laws one can derive a conclusion that the subjects of consumer protection are authorised to initiate procedures in this area as well, but these laws need to be precise and contain explicit references not only to general rules of compensation liability, but to the procedural course of protection as well.

In laws which identify the subjects of collective protection it is necessary to establish precise criteria that the said subjects have to meet in order to conduct efficiently procedures for collective protection. It is not sufficient just to designate non-governmental organisations with statutes proclaiming certain goal. Thus, for example, collective procedures may be initiated by non-governmental organisations under environmental laws. The condition set forth under this law requires that their respective statutes have to contain declaration about objectives of environmental protection. In collective procedures against discrimination authorised subjects are associations, bodies, institutions with justifiable interest for protection of a certain group, or they are engaged in protection of a group of persons against discrimination within their scope of work. Criteria of justified interests and engagement in protection against discrimination are rather fluid notions. There is no law prescribing how to assess whether a certain body has justifiable interests for protection of rights of a certain group. Thus, all sectoral laws need to be supplemented to the effect that all non-governmental organisations should fulfil certain conditions. It would be useful if competent ministries for certain areas of concern were to publish an annual list of organisations which fulfil prescribed conditions and who would be authorised subjects for collective protection.

In the area of patients’ protection, the following is proposed: a) identification of subjects of protection, b) that primary subjects of protection should not be associations of patients by an independent third party, for example, the Ombudsperson for Protection of Patients/Public Attorney for Protection of Patients. This responsibility could be entrusted to the BiH Ombudsperson for Consumer Protection (and direct the position of the Ombudsperson to that effect) while capacities of the office would need to be strengthened and a specialized department would need to be established and c) special regulations on compensation liability would have to be prescribed since general rules on damage liability cannot protect patients in a satisfactory way (for example, a burden of proof, etc.)

Collective protection of investors should be provided for. At present, this is not possible under effective regulations in Bosnia and Herzegovina, except under regulations contained in the Competition Law, but only if certain doings have violated competition rules. In a view of the Commission's Questionnaire and a number of questions referring to this area and protection of investors and considering commitments arising from the SAA, it is necessary for the lawmaker to intervene in consistent implementation of directive foreseeing this type of protection (MiFID, Directive on Prospectus). It is necessary to define specifically in laws when the investor is at the same time the consumer as well as to provide for application of consumer laws and protect consumers in a litigation procedure, as well as to recognise collective rights and interests of investors outside this context and to identify the subjects of protection.

At present it is evident that efficient collective protection is provided under the Law on Prohibition of Discrimination. Novelties introduced in 2016 significantly contributed to the fact that the said law has an elaborate collective redress mechanism. Procedural rules of the given law do not show a high degree of contradiction with provisions of entities' laws on litigation procedure in collective disputes, and in some instances are even better (permissibility of revision in all disputes, obligatory consideration of Ombudsperson's recommendations). The existence of two parallel mechanisms of court protection, implies regretfully departure from horizontal approach recommended by the Commission.

None of the laws analysed herein contains clear provisions of financing of organisations authorised to bring collective redress actions, which is in contradiction to Recommendation 2013/396/EU. The Member States should ensure that the subject authorised for collective redress should have sufficient funds to bear the cost of the procedure and that in case of losing of a lawsuit it may cover for financial loss. This problem has not been resolved in Bosnia and Herzegovina. Bizarreness of this problem is reflected in new provisions of entities' laws on litigation procedure envisaging a possibility that the sued party in collective procedures under specific conditions may file a counter claim for damage compensation, and even a punitive compensation claim. In general terms, associations/organisations identified as the subjects of protection in Bosnia and Herzegovina do not possess this capacity. In the area of competition, it is even foreseen that member of organisations authorised to file collective redress claims avail of their own fund if the given organisations do not have such fund. This needs to be revised.

The said problem is present in all sectors, including the area of consumer protection. The reason for modest results in collective redress certainly may be found in the fact the Ombudsperson for Consumer Protection has a scarce annual budget and consequently is understaffed. This is overall the problem with all subjects of public authorities as stakeholders of protection of collective consumer interests. The problem of financing is also crucial for consumer protection associations. These associations enjoy rather modest support from the competent entity-level ministries, whereas the state level Ministry for Foreign Trade and Economic Relations does not provide any financial assistance. Funds collected from membership fees cannot be a basis for active investment into a collective redress system.

Changes introduced in entities' laws on civil procedure are mostly in favour

of consumer protection associations who should assume the leading role in collective consumer redress. However, associations failed to demonstrate proactivity in this area thus far. Many opportunities were missed, first of all the opportunity to bring file a collective redress action with regard to commercial loans with changeable interest rates linked to the Swiss Franc at the time when there was a public and transparent need for a joint collective claim by thousands of affected consumers in Bosnia and Herzegovina. Yet, some progress has been made in the area of prohibition of discrimination, where a breakthrough was made with regard to collective redress actions brought by associations in Bosnia and Herzegovina.

Effects of collective redress are modest in part due to the lack of awareness about the need for and possibilities of collective consumer redress. It is recommended that consumer protection associations should be rendered support in concrete collective redress procedures. Only in this way we can influence raising of awareness of consumers, as well as of associations and other stakeholders, about the significance and efficacy of collective consumer redress in Bosnia and Herzegovina. In such disputes, previously obtained recommendations on behalf of the Ombudsperson Institution could be used as evidence. It is certainly recommendable that future amendments to the Law on Consumer Protection should take over the formulation contained in the BiH Law on Prohibition of Discrimination stipulating that courts are obliged to take into consideration recommendations issued by the Ombudsperson Office.

Another avenue to follow would be to render support to the Ombudsperson for Consumer Protection in terms of concrete collective redress. This should be done during the first stage of raising awareness on collective redress. Once the Ombudsperson Office has paved the way for consumer protection associations, associations would be encouraged to follow the same course of action. This would become easier for them since by that time some case law would already be developed. In the long run, the role of the Ombudsperson would be such as not to replace collective redress in courts, but only to support it.

In any case, the only way forward implies concrete positive examples from practice. The two mentioned subjects, the Ombudsperson for Consumer Protection and associations for consumer protection, should develop co-operation in a way to contribute so that collective consumer redress should become regular practice in Bosnia and Herzegovina. The BiH Competition Council, as the third important subject of consumer protection, ought to be included as well. With its proactive role within its competencies, the Council can initiate procedure *ex officio* and thus contribute that good examples from practice in the area of consumer protection may be repeated in the future.

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COLLECTIVE REDRESS IN CONSUMER PROTECTION IN KOSOVO

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Executive summary

This paper reviews EU directives that treat collective redress and out of court mechanisms, and provides the level of national regulatory compliance to them. Moreover, the document provides an analytical review of different national sectoral laws, highlighting availability of collective redress mechanisms in terms of injunctive and compensatory relief, emphasizing the legislative position of collective consumer redress mechanism and its functioning in Kosovo.

Furthermore, the document reviews the stakeholder landscape in terms of collective redress mechanism's application, and it elaborates roles and responsibilities of parties involved in collective redress. Lastly, the document assesses the actual consumer organization environment and provides the needs to be addressed in reaching a more thorough consumer protection that can advance representative action and make collective redress more operational.

EU's recommendation 2013/396/EU on collective redress has brought considerable attention, as it is a mechanism that targets compensatory relief in mass harm situations. Moreover, the representative action in recommendation is assessed to be a mechanism that promises an expedient implementation of injunctive orders and mass compensation. Compared to the EU recommendation, Kosovo's legal standing in collective redress is assessed to be far from being compliant to it, but we may say that particular laws provide injunctive collective redress mechanisms. In general, the national legal infrastructure doesn't provide a uniform approach to collective redress and the level of injunctive and compensatory relief depends from law to law. In the case of the consumer protection law 04/L-121, the law is assessed to provide an injunctive collective mechanism which is not clearly defined and as such lacks implementation. Moreover, the law lacks the compensatory relief mechanism and doesn't elaborate the representative action application procedures that would make this mechanism operational. Drawbacks are also seen in the field of the consumer organizations, who have limited resources and capacities of becoming pioneers of representative action in the field of consumer protection.

Overall, we see that the legal infrastructure lacks a uniform approach in terms of collective redress, which could allow for better guidance and relief in case of collective redress in multiple sectors. In terms of consumer rights, we see that although the collective redress mechanism provides an injunctive relief mechanism, it needs to be better elaborated, roles and responsibilities of consumer organizations and other stakeholders are to be better mapped and clear guidance on implementing the mechanism needs to be provided. Moreover, communications between consumers and consumer organizations should be better designed, strengthened and implemented, whereby a financing mechanism that would allow consumer organizations to initiate representative actions needs to be developed and availability for capacity building must be provided

1. National compliance with the relevant EU acquis

1.1. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

The field of consumer protection in Kosovo is regulated by Law No. 04/L-121 on Consumer Protection, which dates back to 2012. In addition to this law, a key role in the consumer protection legal framework is played by the 2016-2020 Consumer Protection Program, which establishes the policies and actions to be undertaken in the field of consumer protection in the upcoming 5 year period.¹

Based on conducted interviews, in order to provide better consumer protection and greater degree of compliance with EU directives and requirements in the field of consumer protection, the current Law No. 04/L-121 on Consumer Protection is undergoing an amendment process.

The analysis of the current Law on Consumer Protection reveals that it is not fully compliant with EU Directive 2009/22/EC on injunctions for the protection of consumers' interests. However, according to the 2016-2020 Consumer Protection Program, the legislative framework is planned to be harmonized over this period with a number of EU directives, among which is Directive 2009/22/EC.²

As central level policy maker in the field of consumer protection, in 2016 the Consumer Protection Department of the Ministry of Trade and Industry (MTI) worked in conjunction with foreign and domestic experts on drafting the new Consumer Protection bill, which is expected to be in harmony with EU Directive 2009/22/EC. The new Consumer Protection bill passed the stage of public consultations and is currently under final review by the MTI. Article 73 of the current Law on Consumer Protection states that representatives of the responsible institution for the field of consumer protection have the right to request from the Market Inspectorate or other competent, market oversight inspection bodies, to initiate proceedings for the termination of misuses related to consumers' collective redress.³

Moreover, Article 74 of the same law states that in addition to governmental bodies, consumer associations and business associations may also initiate collective consumer redress proceedings.⁴

Compared with EU Directive 2009/22/EC, the Law on Consumer Protection sets mechanisms that can be used to terminate practices that qualify as harmful or discriminatory in relation to consumer rights. However, this law does not fully comply with the approach and norms of EU Directive 2009/22/EC, which prescribe that apart from state bodies, other organizations, whose aim is to protect consumer rights, shall have decision-making rights in proceedings that enable the termination of practices that collectively harm consumers.⁵ The comparison with EU Directive 2009/22/EC also reveals that the current Law No. 04/L-121 on Consumer Protection does not foresee setting deadlines for the implementation of injunctions for the cessation of harmful practices to

1 Kosovo/04/L-121/2012.

2 Kosovo / Ministry of Trade and Industry (2015) /Consumer Protection Program 2016-2020.

3 Kosovo/04/L-121/2012.

4 Kosovo/04/L-121/2012.

5 Council Directive 2009/22/EC (23.04.2009).

consumers. Moreover, the current Law No. 04/L-121 on Consumer Protection does not prescribe consultations and sets no time frame for consultations between parties before an injunction to terminate harmful practices takes full effect.⁶ All of the above contribute to the lack of compliance of the current Law No. 04/L-121 on Consumer Protection with EU Directive 2009/22/EC on injunctions for the protection of consumers' interests.

1.2. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes

Out-of-court mechanisms for settlement of consumer disputes are minimally present in the current Law No. 04/L-121 on Consumer Protection. The issue is addressed only in Article 72 of this law, which states that the Office for Consumer Protection may submit a proposal for mediation to the Tribunal of Arbitration.⁷ If we compare this Article with EU Directive 2013/11/EU on out-of-court mechanisms for settlement of consumer disputes, we see that the current legal framework in Kosovo is not in compliance with this directive. EU Directive 2013/11/EU presents the indispensability of creating a mechanism and entity which enables consumers and other parties to settle their disputes out of courts, in accordance with the rules and norms set out in EU Directive 2013/11/EU.

It should also be noted that arbitration is applied as out-of-court mechanism in disputes of economic nature in which the parties are economic operators. The two institutions providing arbitration in Kosovo, deal with disputes primarily related to economic issues between legal entities.⁸

Furthermore, one of the objectives of the 2016-2020 Consumer Protection Program is to harmonize the current legal framework with EU Directive 2013/11/EU on out-of-court mechanisms for settlement of consumer disputes.⁹

In Kosovo, the settlement of disputes through mediation and arbitration is regulated through the Law on Mediation and the Law on Arbitration.¹⁰ Based on these current laws and practices, mediation is considered the most appropriate mechanism to provide out-of-court settlement of consumer disputes, since it has an operational infrastructure in Kosovo.

1.3. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions

The regulatory framework aiming at the protection of free competition in Kosovo consists of Law No. 03/L-229 on Protection of Competition and Law No. 04/L-226 on Amending and Supplementing Law No. 03/L-229 on Protection of Competition. The analysis of these laws reveals that they do not address damages caused by violations of the competition laws, nor damages to consumers and their possible compensation.¹¹

⁶ Kosovo/04/L-121/2012.

⁷ Kosovo/04/L-121/2012.

⁸ [http://www.kosovo-arbitration.com/page/homepage\(03.05.2017\)](http://www.kosovo-arbitration.com/page/homepage(03.05.2017))

<http://www.amchamksv.org/sq/rregullat-e-procedures-se-arbitrazhit> (03.05.2017).

⁹ Council Directive 2013/11/EU (21.05.2013).

¹⁰ Kosovo/02/L-75/2007 and Kosovo/03/L-57/2008.

¹¹ Kosovo/03/L-229/2010 and Kosovo/04/L-226/2014.

Therefore, the current legal framework in the field of protection of free competition is not compliant with EU Directive 2014/104/EU on actions for damages resulting from the violation of the national provisions of the Competition Law.

Moreover, compensation of consumers in cases of violations of competition laws isn't foreseen even by the legal framework in the field of consumer protection, namely the 2016-2020 Consumer Protection Program and Law No. 04/L-121 on Consumer Protection. The laws in the field of protection of competition provide for an injunctive approach on legal infringements, through injunctions for termination of unlawful practices and punitive measures against parties acting in violation of legal provisions on protection of free competition.

EU Directive 2014/104/EU addresses infringements on the rights of all parties that arise from infringements of competition laws, including consumers. This Directive provides for full compensation of affected natural or legal persons, enterprises and public authorities, regardless of whether there has been a direct or indirect contractual relationship between the parties, and regardless of whether there have been earlier findings of any breach by the Competition Authority.¹² Moreover, the directive lays down the rules regarding actions that relate to claims for compensation arising from infringements of competition laws. Claims for compensation, under EU Directive 2014/104/EU, may be initiated only after the state Competition Authority or the court establish the infringement of the legal provisions in the field of protection of competition.¹³

1.4. Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

The Recommendation aims at creating a uniform approach in all areas where injunctive and compensatory collective redress mechanisms are applicable. The recommendation also states that such mechanisms are of particular value in the field of consumer protection, competition, environmental protection, personal data, financial services and investor protection.¹⁴

According to the above EU Recommendation, collective redress should have a dual, injunctive and compensatory redress mechanism. The injunctive mechanism ensures that collectively, two or more natural or legal persons, or an entity that has the right to act as a representative of a particular group¹⁵, may request the cessation of unlawful acts and practices that are harmful to two or more natural or legal persons.

Meanwhile, the compensatory collective redress mechanism under Recommendation 2013/396/EU allows for two or more natural or legal persons, or an entity entitled to represent a group, to seek compensation and to be compensated for the damage caused by certain actions and practices¹⁶. The Recommendation also states the indispensability of creating entities representing collective interests, which can initiate proceedings for the implementation of collective redress according to the standards and

¹² Council Directive 2014/104/EU (26.11.2014).

¹³ Council Directive 2014/104/EU (26.11.2014).

¹⁴ Commission Recommendation 2013/396/EU (11.06.2013).

¹⁵ Commission Recommendation 2013/396/EU (11.06.2013).

¹⁶ Commission Recommendation 2013/396/EU (11.06.2013).

guidelines issued in EU Directive 2013/396/EU.

Kosovo does not have a uniform approach regarding the mechanisms and principles of collective redress, so we can say that the current legal framework in Kosovo is not in line with the above EU Recommendation 2013/396/EU.

However, in certain areas the Kosovo legislative framework provides for partial collective redress, for instance through the mechanism of joint litigation foreseen in Law No. 03/L-006 on Contested Procedure, which provides for collective redress, but not in line with EU Recommendation 2013/396/EU.¹⁷ A similar case is also the approach of Law No. 04/L-121 on Consumer Protection, which provides an injunctive collective redress mechanism, but not a compensatory mechanism, nor does it provide the right of representative actions under the principles of EU Recommendation¹⁸ 2013/396/EU.

2. Legal framework for collective redress

2.1. General description

The notion of collective redress described in EU Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms enables a uniform approach to all areas where collective redress may be applicable. Since this approach is non-existent in the current legal framework of Kosovo, there is the need to create a mechanism in line with EU Recommendation 2013/396/EU.

The first collective redress mechanism described in EU Recommendation 2013/396/EU enables the immediate injunctive relief of unlawful practices, while the second legal mechanism provides the opportunity for two or more parties that claim to have been harmed in a certain situation, action or practice, to be compensated for sustained damages.¹⁹ Moreover, the EU Recommendation 2013/396/EU provides the possibility of representative actions through which an entity may initiate collective redress proceedings on behalf of an identifiable and disadvantaged group without the need to seek their consent, which is foreseen in very few Kosovo laws, namely the Law on Protection of Competition and the Law on Protection from Discrimination.

Despite not being in full compliance, various Kosovo laws provide collective redress mechanisms that enable the partial implementation of EU Recommendation 2013/396/EU.

One of these laws that provide collective redress is Law No. 03/L-006 on Contested Procedure, which foresees the right to collective redress by filing a joint lawsuit by many claimants or against many respondents.²⁰ This mechanism, which enables the filing of joint lawsuits in civil cases by many claimants or against many respondents, is qualified as joint litigation

Two objectives are achieved through the institution of joint litigation, namely judicial economy and legal certainty, which are also features of collective redress

¹⁷ Kosovo/03/L-006/2008.

¹⁸ Kosovo/04/L-121/2012.

¹⁹ <http://www.publeaks.al/komente-mbi-strategjine-per-reformen-ne-sistemin-e-drejtises-ne-shqiperi/?print=pdf> (05.05.2017).

²⁰ Kosovo/03/L-006/2008.

mentioned in EU Recommendation 2013/396/EU.²¹ In these cases, we have a group of respondents or claimants who submit their claims through single proceedings that avoid the possibility of contradictory decisions pertaining to the same contentious issues.

Joint litigation, according to Law No. 03/L-006 on Contested Procedure, may be material or formal according to the following definitions of the Law on Contested Procedure:

- a. in view of the subject matter of the dispute [litigants] are in a legal union or their rights, respectively obligations, derive from the same factual or legal basis (joint material litigation);²²
- b. the subject of the dispute are the claims, respectively the obligations of the same type based on essentially the same factual and legal basis and if there is the subject matter and territorial competence of the same court for each claim and for each respondent (joint formal litigation).²³

Under Law No. 03/L-006 on Contested Procedure, other claimants and other respondents, who are known as late joint litigants, may join the joint litigation before the main hearing of the case, and have to conform to the state of proceedings at the moment they join the lawsuit. This type of litigation can take place even if instead of the parties in trial, two or more of their legal descendants enter the proceedings.²⁴

According to Law No. 03/L-006 on Contested Procedure, if the dispute is qualified that it can be solved in the same way for all joint litigants, the proceedings qualify as a single joint litigation, and all parties are considered as the sole litigant party.

2.2. Applicable areas for collective redress

According to EU Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms, the application of collective redress has added value in the areas of consumer protection, competition, environmental protection, personal data protection, financial services' legislation and investor protection.²⁵

Also, one of the important features of this recommendation is the right to representative action through which an entity is granted the right to undertake procedural action on behalf of a group without having to seek consent from the injured parties. According to Recommendation 2013/396/EU, such a right should be granted to certified entities and representatives of certain groups that fulfill the criteria set the competent authorities, through which they demonstrate administrative and financial capacities to represent the parties.²⁶

Compared with the principles of EU Recommendation 2013/396/EU, collective redress in Kosovo is partially applicable in the area of consumer protection, competition, labor law, environmental protection, anti-discrimination field and civil proceedings covered by the Law on Contested Procedure. Very few Kosovo laws provide the compensatory collective redress mechanism, and they are the Law on Labor, the Law

21 F. Brestoveci (2006) Civil Procedural Jurisprudence, Prishtina, p. 229.

22 Kosovo/03/L-006/2008.

23 Kosovo/03/L-006/2008.

24 Kosovo/03/L-006/2008.

25 Commission Recommendation 2013/396/EU (11.06.2013).

26 Commission Recommendation 2013/396/EU (11.06.2013).

on Environmental Protection and the Law on Protection from Discrimination. In most cases, the approach of domestic laws primarily provides an injunctive collective redress mechanism and punitive damages.

Likewise, the representation action described in the EU recommendation, or the right of certain entities to take procedural steps under collective title, is foreseen in no other Kosovo laws but the Law on Consumer Protection, the Law on Competition and the Law on Protection from Discrimination.

Law No. 03/L-212 on Labor and Law No. 03/L-025 on Environmental Protection provide the dual collective redress mechanism, and besides provisions that enable the termination of unlawful practices they foresee the option of collective compensation in case infringements are established by the court. Meanwhile, the current Law No. 04/L-121 on Consumer Protection provides an injunctive collective redress mechanism, but it does not provide any compensation rights to consumers in case of violation of their rights.

2.3. Applicable procedure(s) for collective redress according to the national legislation

Since Kosovo's legislative framework does not provide a uniform approach to collective redress proceedings, in this section we will describe the applicable proceedings under the reviewed laws.

Based on Law No. 04/L-121 on Consumer Protection, the procedure for initiation of collective redress is foreseen that can be undertaken by the representative of the institution responsible for the field of consumer protection,²⁷ the Department of Consumer Protection in the MTI, which may request from the Market Inspectorate or other inspection bodies to initiate proceedings for the termination of practices that infringe the legislative framework. Moreover, under the same law, Article 74 provides the option of representative action, stating that collective redress proceedings for consumers may be also initiated by consumer associations and business associations.²⁸ The law does not provide adequate guidance on the application of this mechanism, which is seen as one of the reasons that prevent its application.

In the case of Law No. 03/L-229 on Protection of Competition, the guidelines are more straightforward, since the procedure for reviewing the enterprise concentration and dominant position is specified as compulsory when two enterprises merge to operate as a separate economic unit and as such surpass a certain annual turnover foreseen by law. Such proceedings may also be initiated by the Competition Authority or by other actors, whether private or legal parties, including consumer associations.²⁹

In the case of Law No. 03/L-016 on Food Safety, the procedure foresees that in case of possession of information that certain food is dangerous, the trader or producer should take measures to remove such food from the market and inform the Food and Veterinary Agency about such matters.³⁰ The Inspectorate of the Food and Veterinary Agency has the right to inspect the manufacturer or importer and, if it considers that food

²⁷ Kosovo/04/L-121/2012.

²⁸ Kosovo/04/L-121/2012.

²⁹ Kosovo/03/L-229/2010.

³⁰ Kosovo/03/L-016/2009.

is in conflict with the required security norms, it may prohibit its production or import. Moreover, in particular cases, the Food and Veterinary Agency may apply interim measures until circumstances are clarified or the emergency is overcome.³¹ A similar approach is also applied in the case of general product safety, where the inspectorate supervising the risk of products and assessing whether their production or import should be banned is the Market Inspectorate.³²

In the case of Law No. 03/L-025 on Environmental Protection, the procedure foresees that in case of establishment of infringements by the central or local responsible inspectorate, parties may be required to terminate their activity, to remedy the damage caused, or punitive provisions may also apply. In the event of damages caused, the damaged parties have the right to seek compensation.³³

Under Law No. 05/L-021 on Protection against Discrimination, collective redress may be initiated by a non-governmental organization or by the Ombudsperson without the consent of group members, and may be submitted for review to a court, but under the law the court is not entitled to decide on collective damages.³⁴ The joint litigation proceedings foreseen in Law No. 03/L-006 on Contested Procedure prescribe the initiation of collective redress proceedings by the claimants, by many claimants or against many respondents.³⁵

Under Law No. 03/L-212 on Labor, collective redress applies in cases of collective dismissal of employees, when at least 10% of employees, but no less than twenty (20) employees, are dismissed within the time interval of six (6) months.³⁶

Moreover, in such cases the law provides for immediate monetary compensation of the employees, whereby damages are paid to employees who have an indefinite-term contract. Moreover, in cases where the court decides that the dismissal from work has been unlawful, different reparations are foreseen for employees, from the obligation to be reinstated to work to the compensation of lost time.³⁷

2.4. Available remedies for collective redress according to the national legislation

Law 04/L121/2012 on Consumer Protection, in Article 73 addresses the initiation of proceedings, stating that the authorities responsible for consumer protection have the right to initiate proceedings for termination of practices that are in violation of this law and other by-laws,³⁸ while it does not specify any legal right to collective compensation. Moreover, the same law, under the punitive provisions in Article 76, foresees monetary fines for violations of consumer rights, while it does not specify any fine exclusively foreseen in the cases of collective redress.

Law 04/L121/2012 on Consumer Protection provides an injunctive collective redress mechanism, as Article 76 provides for a set of monetary fines that vary depending on the violation, with a maximum fine of 10,000 Euros.³⁹ The 2016-2020

31 Kosovo/03/L-016/2009.

32 Kosovo/04/L-189/2013.

33 Kosovo/03/L-025/2009.

34 Kosovo/05/L-021/2015.

35 Kosovo/03/L-006/2008.

36 Kosovo/03/L-212/2010.

37 Kosovo/03/L-212/2010.

38 Kosovo/04/L-L121/2012.

39 Kosovo/04/L-L121/2012.

Consumer Protection Program recognizes the right to compensation as a fundamental right, but does not specify any specific measure in case of violations and does not cite any compensation mechanism. Moreover, the document in question states that the right to remedies represents the consumers' ability to have unbiased review/settlement and a fair legal claim, including compensation for bid distortion, low quality goods or unsatisfactory services,⁴⁰ without specifying any concrete compensation options.

Law No. 03/L-006 on Contested Procedure provides for different forms of compensation of injured parties. Compensation is ordered by a judgment and the respondent may be ordered to comply with the designated promise only if the claim of the plaintiff has become feasible before the main hearing of the case is completed.⁴¹

Article 145 of the same law provides that if until the conclusion of the main hearing the claimant accepts the payment of a certain amount of money instead of the item sought, then the court, if it approves the claim, may find in its judgment that the respondent will be relieved of the obligation to deliver the item if he/she pays such amount of money.⁴²

Through joint litigation, Law No. 03/L-006 on Contested Procedure provides a compensatory approach and as such the possibility of compensation depends more on the claim and the verdict issued by the court.

The Law on Labor is more explicit in terms of collective compensation, since it exclusively addresses the issue and states that in case of collective dismissal, the employer shall pay immediate monetary compensation to the employees.⁴³

Moreover, under Article 76.7 of Law No. 03/L-212 on Labor, immediate monetary compensation is paid to employees who have an indefinite employment contract on the day of termination of the contract, according to the following rating of work experience: two (2) to four (4) years of service, one (1) monthly salary; five (5) to nine (9) years of service, two (2) monthly salaries; ten (10) to nineteen (19) years of service, three (3) monthly salaries; twenty (20) to twenty-nine (29) years of service, six (6) monthly salaries; thirty (30) years of service or more, seven (7) monthly salaries.⁴⁴

Moreover, if within one (1) year from the termination of the employment contract the employer needs to engage employees with the same qualifications or training, the employer is obliged to first offer such positions to the employees whose contracts have been terminated.

In the case of Law 03/L-229/2010 on Protection of Competition, the legislative framework provides for temporary injunctions and punitive measures against parties that are found to have acted in violation of the legislative framework. As such, the compensatory approach is not foreseen in the legal framework for competition protection.⁴⁵

The above mentioned analysis of the laws reveals that the Law on Consumer Protection provides an injunctive collective redress mechanism, which enables the termination of harmful practices and punitive damages, while the Law on Contested

40 Kosovo / Ministry of Trade and Industry (2015) /2016-2020 Consumer Protection Program.

41 Kosovo/03/L-006/2008.

42 Kosovo/03/L-006/2008.

43 Kosovo/03/L-212/2010.

44 Kosovo/03/L-212/2010.

45 Kosovo/03/L-229/2010.

Procedure relates the issue of damages with the claim and the judgment, which can pave the way for compensation. A direct approach to collective compensation is seen in the Law on Labor, which treats compensation as indispensable in certain situations by linking the amount of compensation to work experience. Moreover, collective compensation is also foreseen in the Law on Environmental Protection and the Law on Protection from Discrimination.

Law No. 03/L-016 on Food provides only punitive damages,⁴⁶ and a similar punitive approach is also foreseen in the case of Law No. 04/L-078 on General Product Safety.⁴⁷

2.5. Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organizations to initiate the procedure

Law No. 04/L-121 on Consumer Protection does not explicitly mention the issue of coverage of costs associated with collective redress proceedings, but since consumer associations and business associations can initiate proceedings for termination of misuse⁴⁸, it is implied that costs should be covered by them.

Law No. 03/L-212 on Contested Procedure explicitly specifies the coverage of expenses of joint litigation, namely Article 450 of this law states that each party covers in advance the expenses incurred through its own procedural actions. Furthermore, Article 452.1 states that the party that loses the court process has to entirely cover all costs of the winning party.⁴⁹ The law also provides for the coverage of costs in the case of joint litigation, as Article 459.1 states that the joint litigants cover the court expenses in equal shares.⁵⁰ However, in Article 459 the law states that if there are important differences regarding the subject of the dispute, the court will proportionally determine the share of expenses that will be covered by each party in the dispute.⁵¹

Since labor-related proceedings count as separate litigation proceedings within the Law on Contested Procedure, the expenses related to collective redress of workers under the Law on Labor are covered by the provisions of the Law on Contested Procedure as elaborated in the previous paragraph. Here we can add that Article 461 of the Law on Contested Procedure states that the provisions on procedural costs also apply to the parties represented by the public representative.⁵²

Based on the review of these laws, we see that in the case of the Law on Consumer Protection, the initiation of collective proceedings by consumer protection organizations does not necessarily imply procedural costs, since the law does not specify whether or not court proceedings should be initiated. However, in the case of court proceedings, the approach is not favorable to consumer protection organizations, since court proceedings have considerable representation costs.

A disadvantage is observed in the case of the Law on Contested Procedure involving the joint litigation mechanism and workers' rights collective redress

46 Kosovo/03/L-016/2009.

47 Kosovo/04/L-078/2012.

48 Kosovo/04/L-121/2012.

49 Kosovo/03/L-L06/2008.

50 Kosovo/03/L-006/2008.

51 Kosovo/03/L-006/2008.

52 Kosovo/03/L-006/2008.

proceedings, as the consumer protection organization or workers should have financial resources to finance procedural costs, which in case their claim is upheld by the court are reimbursed.⁵³ The Law on Contested Procedure does not mention the case of coverage of costs if the proceedings are initiated by the consumer protection organization, but states that each party in the proceedings must cover its own expenses, and whoever emerges as the losing party must reimburse the winning litigant.

In the Law on Protection of Competition we have an approach where the proceedings are applied by the Competition Authority, and it can be initiated by the Authority itself or other parties, which could be consumer protection organizations. The law makes no mention of court proceedings; therefore, the coverage of costs is not stated in the law.⁵⁴ This facilitates the initiation of collective redress proceedings by consumer protection organizations. The Law on Protection against Discrimination makes no mention of the issue of cost coverage.

2.6. Sectoral collective redress mechanisms

a. Consumer law

The mechanism that foresees collective redress within the Law on Consumer Protection is the application to prevent the practices of a trader or a group of traders that are in conflict with the law. This procedure may be initiated by the representative of the institution responsible for the field of consumer protection,⁵⁵ the governmental bodies responsible for consumer protection, consumer associations and business associations, while it gives no instructions of the procedure to be followed.⁵⁶

b. Competition law

Law No. 03/L-229 on Protection of Competition, through Article 13.4 stipulates that the government, upon proposal from the Competition Authority, by sub-legal act shall determine the manner of submitting the application and the criteria for determining the concentration⁵⁷ based on which the establishment by two or more independent enterprises of a joint venture, which operates on a permanent basis as an independent economic entity, must be notified and a review and approval or refusal process of such action must take place. This process is mandatory for parties that jointly create the independent enterprise and have an annual international turnover of over twenty (20) million Euros, and if the turnover of the enterprises in Kosovo is over 3 million Euros.⁵⁸

If we review this article, we can say that the Law on Protection of Competition provides the injunctive collective redress mechanism, which foresees the protection of parties or market participants, whether they are companies or consumers. Furthermore, through Article 24 of Law No. 03/L-229 on Competition, a Competition Authority, which is a public, independent institution, is established.⁵⁹

⁵³ Kosovo/03/L-006/2008.

⁵⁴ Kosovo/03/L-229/2010.

⁵⁵ Kosovo/04/L-121/2012.

⁵⁶ Kosovo/04/L-121/2012.

⁵⁷ Kosovo/03/L-229/2010.

⁵⁸ Kosovo/04/L-226/2014.

⁵⁹ Kosovo/03/L-229/2010.

The Competition Authority conducts proceedings to ascertain the concentration and abuse of the dominant position of enterprises, and as such it is a collective redress mechanism. Article 34.1 of this law provides for the possibility of initiation of the proceedings for ascertaining the concentration by the Competition Authority or upon request, proposal, objection or any other written from presented by any natural or legal person, professional or economic interest association, economic chambers, consumer associations, the Government of the Republic of Kosovo, central and local public administration bodies.⁶⁰

c. Financial market law

The laws regulating the financial market field are dominated by Law No. 04/L-093 on Banks, Micro-finance Institutions and Non-Bank Financial Institutions, which makes no explicit mention of the issue of collective redress, nor of the compensatory or injunctive mechanism.

However, the Central Bank regulates the issue of complaints from customers or clients of banks and insurance companies through the regulation on the internal process for addressing complaints. Under this internal regulation, no mechanism for collective redress is foreseen, but the regulation obliges any financial institution, including insurance companies, to have an internal mechanism to address the complaints of their customers or clients, which does not provide a collective redress mechanism. After the review of complaints by this internal mechanism of financial institutions, consumers have the option to submit their complaints for review to the Central Bank, courts or other mechanisms that may mediate the dispute.

d. Rights of patients

Law No. 2004/38 on Rights and Responsibilities of Kosovo Residents in Health Care is the main regulatory framework that defines the rights of patients in Kosovo. The law does not foresee collective redress for patients, but this law grants to the citizens the right to complain, whereby according to Article 24.1 the patient has the right to file a complaint against the health institution regarding the health service that has been offered, a complaint which shall be reviewed by the institution at which the complaint is filed.⁶¹

Furthermore, the exercise of the right to complain does not affect the citizen's right to address other institutions for the investigation of the complaint,⁶² whereby under Article 26.1, based on the civil liability of the health institution, a citizen has the right to file a claim for compensation for damages to his or her health during medical treatment, no later than within one year of becoming aware of the damage caused.⁶³

Such a complaint should be addressed by the commission for assessing and compensating the damage caused to the health of the citizen, which is appointed by the Minister of Health and has a mandate of 4 years. The commission decides on the validity and rationality of the citizen's request for compensation and determines the amount of compensation. The decisions of this commission are obligatory for the Ministry of

⁶⁰ Kosovo/03/L-229/2010.

⁶¹ Kosovo/2004/38/2004.

⁶² Kosovo/2004/38/2004.

⁶³ Kosovo/2004/38/2004.

Health, and it submits an annual report on its activity to the Kosovo Assembly.

Patients' rights in the current legal framework are also addressed through the Administrative Instruction 15/2013 on the charter of patients' rights and responsibilities, under which a citizen has the right to file a complaint whenever he or she experiences physical, moral and psychological harm, as well as the right to compensation whenever the person has suffered moral or psychological harm incurred during the health treatment, in accordance with the relevant law.⁶⁴

Although the law outlined above foresees a number of patients' rights, it does not cite any injunctive or compensatory collective redress mechanism for patients, nor any mechanism that may lead to collective complaints, prevention and reparation processes, since the rights mentioned above are more directed towards the individual rather than the group of patients.

e. Food safety

The law dealing with the issue of food safety is Law No. 03/L-016 on Food, which does not explicitly provide access to collective redress mechanisms, but due to the fact that it foresees the application of measures for the protection of consumers, the law provides the injunctive collective redress mechanism.

Article 16.1 of this Law provides injunctive measures that aim at ensuring food safety, whereby under this article, if the food business entity has reason to suspect that the food that has been imported, produced, processed or placed on the market, does not meet the conditions of safe food, the entity must immediately start withdrawing such food from the market.⁶⁵ Also, the law provides that in case of danger, the Food and Veterinary Agency shall inform the involved parties, including the customers. If we analyze Article 16 of this law, we see that the measures foreseen in case of violation of the provisions, provide the injunctive mechanism that enables the termination of practices that collectively harm consumers, but it makes no mention of any right for individual or collective compensation of consumers.

Furthermore, Article 25.1 specifies that the inspectorate within the Food and Veterinary Agency is competent, at any time, to review the production procedures and, if it deems it necessary, prohibit the production or import of certain foods.⁶⁶

f. Product safety

Law No. 04/L-078 on General Product Safety has been amended and supplemented by Law No. 04/L-189 on Amending and Supplementing the Law on General Product Safety.

The legal framework on product safety has a similar approach to food safety, providing the injunctive collective redress mechanism, which is rather based on risk notifications by producers and distributors. Article 5.6 of the Law on General Product Safety states that when based on the information at their disposal parties know or should know that the product they have placed on the market presents consumers with a risk that is not in line with the general safety requirements, they must immediately notify the

⁶⁴ Kosovo/UD15/2013/2013.

⁶⁵ Kosovo/03/L-016/2009.

⁶⁶ Kosovo/03/L-016/2009.

competent authorities about the risk as well as the measures they have taken to prevent the risk to consumers.⁶⁷

Article 5.1.1 of this law provides that manufacturers and distributors should provide consumers and other users with the necessary information, so that consumers and other users can assess the risks carried by those products. Furthermore, Article 5.1.3 states that manufacturers and distributors shall adopt product recall measures from consumers only as a last resort.⁶⁸

In addition to the requirement on producers or distributors to notify hazardous products, the Market Inspectorate has the role of a collective consumer redress mechanism, since under Article 4.A.1 of Law No. 04/L-189 on Amending and Supplementing the Law on General Product Safety, the inspectorate orders the withdrawal from the market and/or recall of products from consumers if it proves that those products endanger the safety and health of consumers and users.⁶⁹

The laws in the area of general product safety provide punitive provisions that do not provide for customer compensation.

g. Environmental protection law

Law No. 03/L-025 on Protection of Environment specifies the responsibilities of various institutions in environmental protection, as well as the obligations and responsibilities of the parties in case of environmental pollution. The law in question provides the injunctive and compensatory approach in case of damages, whereby Article 66.1 of this Law states that the polluter of the environment is responsible for the damage caused and bears the costs for the assessment and elimination of the damage,⁷⁰ but it foresees that parties must turn to courts for individual or collective compensation.

Moreover, the law specifies that if the damage caused cannot be remedied through adequate measures, the person who caused it must compensate for the damage to the value of the destroyed goods. Moreover, the law provides a compensation mechanism under Article 69.1.3, which states that the polluter shall bear the costs for the assessment of the damage and its elimination, in particular the costs of compensation of legal or natural persons who are directly threatened and damaged because of the damages to the environment.⁷¹ Under this law, each party suffering environmental damages has the right to compensation, providing a mechanism for collective compensation.

Moreover, if we analyze Article 85 of the law in question, we see that the law offers injunctive measures, but it does not specify whether it is collective in cases where the municipal or central inspectorate finds that there is a violation of the law, and consequently orders the cessation of certain activities or removal of defects and irregularities in operations and activities that have caused or may result in environmental pollution.⁷² The law foresees monetary penalties of up to 50,000 Euros.

67 Kosovo/04/L-078/2013.

68 Kosovo/04/L-078/2013.

69 Kosovo/04/L-189/2013.

70 Kosovo/03/L-025/2009.

71 Kosovo/03/L-025/2009.

72 Kosovo/03/L-025/2009.

h. Other areas

h.a Antidiscrimination law

Law 05/L -021 on Protection from Discrimination aims to prevent and combat discrimination on the basis of a particular group affiliation or any other group feature. Under Article 1 the law is implemented for all acts or omissions of all state and local institutions, of natural and legal persons of the public and private sector, who violate, have violated or may violate the rights of any person or natural or legal person in all areas of life.⁷³

Having this approach, the law clearly provides collective redress mechanisms in the event of any action that violates collective or group rights. Article 7 of this law provides injunctive and compensating mechanisms in the case of collective or group redress, since Article 7.1 states that affirmative actions are measures taken to prevent or compensate the disadvantaged groups or persons associated with any of the grounds set out in Article 1(1) of this Law.⁷⁴ The mechanism that addresses discrimination under this law is the Ombudsperson, while for the advancement and promotion of human rights it is foreseen that the institution that leads this process will be the Office of Good Governance within the Office of the Prime Minister. Also under Article 11.1 of this Law, all ministries and municipalities are obliged to appoint the relevant unit or officer to coordinate and report the implementation of this law.⁷⁵

If we compare this law with earlier laws, it should be noted that this law deals more comprehensively with collective redress, as it provides certain groups and certain associations, including organizations for consumer protection, with the right to file collective lawsuits.

Under Article 13.1 any person or group of persons who complain that they have been discriminated against on specific grounds may file a lawsuit in the competent court. Meanwhile, Article 13.2 states that associations, organizations or other legal entities may initiate or support legal proceedings on behalf of the applicants, upon obtaining their consent, for the conduct of administrative or judicial proceedings foreseen for the implementation of obligations under this Law.⁷⁶

The law in question explicitly states that in cases of discrimination affecting groups of persons, proceedings may be initiated through a group action undertaken on their behalf by a non-governmental organization or by the Ombudsperson, and in such cases no consent is required from group members.⁷⁷ Through this mechanism the law provides the mechanism of representative action.

Furthermore, in cases of discrimination affecting groups of persons, Article 18.3 states that group damages cannot be sought, but according to the judgment, the persons belonging to the group in question may submit claims and seek compensation for damage.⁷⁸

⁷³ Kosovo/05/L-021/2015.

⁷⁴ Kosovo/05/L-021/2015.

⁷⁵ Kosovo/05/L-021/2015.

⁷⁶ Kosovo/05/L-021/2015.

⁷⁷ Kosovo/05/L-021/2015.

⁷⁸ Kosovo/05/L-021/2015.

2.7. Legislative consultations and reform proposals

a. Legislative proposals

We can say that since early 2000, the EU has been more active in reviewing collective infringements and in applying collective redress.

Kosovo legislation is at an early stage of applying a uniform approach to collective redress in all relevant areas. The obligations arising from the EU accession process oblige Kosovo to take steps to harmonize domestic legislation with that of the EU. If we look at the laws elaborated above, there is a need for the collective redress approach to be more direct, as the absence of a comprehensive approach in the specific laws prevents and hinders the application of collective redress mechanisms.

From the various meetings we have had and from the review of the legislation, we can say that the current law on consumer protection is undergoing a redrafting phase and has already passed the stage of public consultations. The new law will enable a higher harmonization with a number of EU directives in the field of consumer rights' protection that enable a better approach to collective redress and out-of-court dispute resolution. Such a need to harmonize domestic legislation with that of the EU in the field of consumer rights is also foreseen in the 2016-2020 Consumer Protection Program, whereby one of the objectives of the period in question is specifically the harmonization of the local legislation in the respective field with that of EU countries, referring to Directive 2009/22 on injunctions for the protection of consumers' interests as well as Directive no. 2013/11/EU regarding out-of-court options for resolution of consumer disputes.⁷⁹

3. Institutional framework for collective redress

3.1. Overview of legal provisions determining stakeholders in implementing collective redress

The stakeholders in the implementation of collective redress are not the same in all cases, since in the absence of a uniform approach to collective redress they depend on the approach of each law to this mechanism as well as the degree of collective redress provided under the specific law. In order to have a clearer picture of the involvement of different stakeholders in the collective redress process, we will elaborate the stakeholders according to the laws that provide collective redress, either through the injunctions for termination of harmful practices or in terms of providing compensatory rights.

If we look at the current Law 04/L-121 on Consumer Protection, the stakeholders are foreseen to be the representative of the responsible institution in the field of consumer protection, being the Department of Consumer Protection in the MTI, Market Inspectorate or other inspection bodies competent for oversight of the market, individual traders, groups of traders of the same sector, distant communication operators, consumer associations and business associations.⁸⁰

If we review Law No. 03/L-229 on Protection, the stakeholders are presented

⁷⁹ Kosovo / Ministry of Trade and Industry (2015) 2016-2020 Consumer Protection Program.

⁸⁰ Kosovo/04/L-121/2012.

to be the enterprises, which by the act of merging their activities form an entity which operates as a single, newly created enterprise, the Competition Inspectorate, the Competition Council as well as various parties that have the right to initiate the proceedings for reviewing the concentration and the dominant position of certain parties. Under the law, the latter may be any natural or legal person, professional or economic association of economic interest, economic associations, consumer associations, the Government of the Republic of Kosovo, central and local public administration bodies.⁸¹

In the case of Law No. 03/L-016 on Food, the stakeholders are distributors, manufacturers and importers of food, the Food and Veterinary Agency, consumers, the Ministry of Agriculture and the Ministry of Health, authorized testing laboratories and the Board of Directors of the Food and Veterinary Agency.⁸² In the case of Law No. 04/L-078 on General Product Safety, the stakeholders are manufacturers, distributors, importers, Market Inspectorate as well as Customs which control the import of goods.⁸³

Under Law No. 03/L-025 on Environmental Protection, the stakeholders are specific economic operators, the Ministry of Environment and Spatial Planning, the Environmental Inspectorate, the Municipalities, and the public or civil society.⁸⁴ In Law No. 05/L-021 on Protection from Discrimination, key stakeholders are individual or legal persons, specific groups that may initiate group proceedings, the Ombudsperson, the Courts, the Office for Good Governance, and the organizations or NGOs that represent specific public groups.⁸⁵

3.2. Stakeholders responsible for putting collective redress into practice

Law No. 04/L-121 on Consumer Protection states that the parties for the implementation in practice of collective redress are the Market Inspectorate or other inspection bodies, under the powers awarded by this law and other laws and by-laws. These stakeholders qualify to be such parties because according to the law they should stop the practices, if this is requested by the representative of the institution responsible for consumer protection or other parties that have the legal right to do so.⁸⁶

If we look at the Law on Competition, we see that the parties responsible for the application of collective redress are the Competition Authority, which implements the concentration and dominant position review process, as well as the Competition Commission, which is a decision-making party within the Competition Authority.⁸⁷

In the case of the Law on Food, the parties responsible to apply collective redress are producers and importers on voluntary basis, as well as the Food and Veterinary Agency, which has the right to check at any time the imported food and production procedures, as well as to impose emergency measures, impose sanctions and prohibit the production or import of food.⁸⁸

In the case of the Law on General Product Safety, the party that must apply

81 Kosovo/03/L-229/2010.

82 Kosovo/03/L-016/2009.

83 Kosovo/04/L-078/2012.

84 Kosovo/03/L-025/2009.

85 Kosovo/05/L-021/2015.

86 Kosovo/04/L-121/2012.

87 Kosovo/03/L-229/2010.

88 Kosovo/03/L-016/2009.

collective redress of products is the market inspectorate, which has the right to inspect, request the withdrawal of products and impose sanctions in case of violations.⁸⁹

In the case of the Law on Protection of Environment, collective redress shall be applied by the Environmental Protection Inspectorate or Municipal Inspectorate that issues the permits and holds the right to inspection and prohibition of works. Compensation of damages is foreseen to take place in front of courts, where the public has the right to file lawsuits.⁹⁰

The party that is foreseen to apply the Law on Protection from Discrimination shall be determined by sub-legal acts to be issued by the government upon proposal of the Office of Good Governance and the Legal Office. In cases of compensatory collective redress mechanism, decision making rests primarily with the courts.⁹¹

3.3. Mapping the cooperation among stakeholders

In Law No. 04/L- 121 on Consumer Protection, the parties that need to maintain close cooperation are the Market Inspectorate or other inspection bodies that are competent for market oversight, associations for protection of consumers' rights, as well as representatives of the institution responsible for consumer protection and policy makers in the area of consumer rights. Such cooperation should be at the highest level, since it ensures communication on the application of the laws, the needs to amend actions and laws that can provide better protection to consumers.

In the case of Law No. 03/L-229/2010 on Protection of Competition, parties that need to maintain close cooperation are the Competition Authority and the various associations, among which is the consumer association. Furthermore, the Competition Authority shall also have high level cooperation with economic organizations, such as economic chambers, so that they can be informed of cases that could harm the parties and have more fruitful communication in the case of review of concentration cases and damages that may arise from the abuse of dominant position.

The key co-operation that must be maintained in the case of the Law on Food is the one between producers, importers and the Food and Veterinary Agency, the board of the Agency and the Consumer Association, which should express their concerns about the risks that consumers face and apply measures to eliminate them.

The cooperation that shall be strengthened in the case of the Law on General Product Safety is the one between consumers and the Market Inspectorate, whereby there should be more exchange of information about issues and rights or the application of the law. In the case of the Law on Protection of Environment, there is a need for closer cooperation between the Environmental Protection Inspectorate and the public, so that environmental damages are prevented and possible damages are addressed as early as possible. In the case of the Law on Discrimination, cooperation between the Ombudsperson and groups represented by non-governmental organizations or other organizations should be strengthened, so that collective redress may become more applicable.

⁸⁹ Kosovo/04/L-078/2012.

⁹⁰ Kosovo/03/L-025/2009.

⁹¹ Kosovo/05/L-021/2015.

4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress

4.1. The role and competencies

Stakeholders' roles and powers depend on the law in question, since the laws have different schemes that determine stakeholders' responsibilities and roles. However, if by law a specific party is foreseen to be a stakeholder, its role does not differ much from one law to the other. Below we will provide a description of the role and powers of the stakeholders in question.

Under the specific laws, courts are not involved, since the law foresees that collective redress proceedings shall not be brought to them. However, in the laws in which the role of the courts is explicitly mentioned, such as the Law on Contested Procedure, the Law on Financial Market, the Law on Environmental Protection the Law on Labor and the Law on Protection from Discrimination, they have a decision-making role. The courts' decision-making role implies that they decide whether or not and to what extent to apply the collective redress provided by the law.

In the Law on Contested Procedure, courts have a key role, since decision-making on collective redress proceedings is entirely dependent on the courts.⁹² However, such a role is not foreseen in the Law on Consumer Protection⁹³ or in the Law on Patient Protection⁹⁴ or in the Law on Competition,⁹⁵ which do not prescribe courts as stakeholders, or at least they are not qualified as such in these laws.

On the other hand, a special role in collective redress proceedings is played the various inspectorates that are called upon to implement the controls and apply the collective redress mechanisms in certain cases. In the case of the Law on Consumer Protection, the Market Inspectorate is a party that must apply injunctions on harmful practices, if ordered by the responsible persons at the MTI or if it establishes various infringements. On the other hand, under the Law on Labor, the inspectorate supervises compliance with the Law on Labor and imposes punitive measures. In the case of the Law on Food, the Food and Veterinary Agency carries out food inspections and implements the collective redress mechanism by requesting the withdrawal of harmful food or by closing production sites that are not in compliance with the required standards. In the case of the Law on General Product Safety, the Market Inspectorate and Customs have the same role.

Thus, in general, specific inspectorates conduct inspections of specific practices and in case they encounter violations, they have a mandate to apply the injunctive collective redress mechanism, whereas in the laws that provide the option of the compensatory collective redress mechanism the role and responsibility of the courts is larger, since courts have been trusted with the mandate for decision-making regarding the compensating actions.

The role of regulators in the case of collective redress is not emphasized, with the exception of for Law on Competition, whereby the Kosovo Competition Authority,

⁹² Kosovo/03/L-006/2008.

⁹³ Kosovo/04/L-121/2012.

⁹⁴ Kosovo/2004/38/2004.

⁹⁵ Kosovo/03/L-229/2010.

through the commission, has exclusive decision-making powers on issues that can be brought to court only as administrative disputes.

The role of the Ombudsman is in the framework of empowering and promoting fundamental rights and freedoms associated with unlawful and improper acts or omissions of public authorities.⁹⁶ Within this role, the Ombudsman Institution is to investigate complaints received by various parties, including the public as well. In the case when the Ombudsperson initiates proceeding in relation to collective rights, the consent of the particular group is not required. Pursuant to a submitted application or on its proper initiative, the Ombudsperson has the right to conduct an investigation and refer cases to the competent authorities if he/she ascertains the grounds of a criminal offense. The Ombudsperson has rather an advisory and observer role on the different practices, but also on the legal framework on which he/she can issue recommendations. Upon completion of the review and investigation, the Ombudsperson has the right to issue a decision in which are presented the findings and recommendations, and which is sent to the complainant and the responsible public authorities.⁹⁷

4.2. Case law and best practices in collective redress

We have no available information on cases that have applied, and been able to create, the legal basis for collective redress cases in Kosovo. Current laws reveal an approach that is more oriented towards the injunctive collective redress mechanism, and the need for creating a more comprehensive approach is evident.

5. The role of consumer organizations in collective redress

5.1. Legal precondition for consumer organisations' activities to represent consumer rights in collective redress

Consumer Organization are specifically mentioned in the Law on Consumer Protection, while no information is provided regarding the conditions to be met by them for consumer representation. The law states that consumer organizations mediate between central bodies and consumers as well as between traders and consumers in order to protect consumer interests.⁹⁸ Moreover, the law in question makes no mention of any specific preconditions, such as institutional accreditation or certification of the qualifications of non-governmental organizations for collective redress of consumers' rights. Under the law in question, the consumer association is authorized collective consumer redress proceedings without issuing information on the proceedings that must take place.⁹⁹

The other law that foresees that organizations can apply the collective redress mechanism, is the Law on Discrimination, under which in discrimination cases affecting groups of persons, proceedings may be initiated through a group action undertaken on their behalf by a non-governmental organization or by the Ombudsperson, and in such

⁹⁶ Kosovo/05/L-019/2015.

⁹⁷ Kosovo/05/L-019/2015.

⁹⁸ Kosovo/04/L-121/2012.

⁹⁹ Kosovo/04/L-121/2012.

cases no consent is required from group members.¹⁰⁰ Likewise, Article 16.7 of the Law on the Ombudsperson states that if the Ombudsperson initiates proceeding on his/her own initiative concerning the violation of the rights and freedoms of a larger number of citizens, children or persons with disabilities, their consent is not mandatory.¹⁰¹

On the other hand, even the Law on Protection of Competition prescribes that consumer organizations may initiate procedures for verification of concentration and abuse of dominant position without any specific preconditions, such as authorizations or certifications from state institutions.¹⁰²

5.2. Assessment of the environment for consumer organizations to deal with collective redress

We can say that the number of organizations for consumer protection in Kosovo is minimal and with the exception of the “Consumer” Organization, which has a long activity in this field, one cannot count on the activity of any another vocal organization in this field. Besides this organization, we have an organization profiled in the protection of patients’ rights, by focusing on health services, namely the Association for Rights of Patients in Kosovo.

The environment in which these organizations operate provides mechanisms that can be used for collective redress, whereby they can represent certain groups of consumers and defend their causes. However, the legal framework is still not in compliance with that of the EU and does not specify the conditions that consumer protection organizations must meet to represent consumers in collective redress proceedings. We can also say that laws that enable the activation of these organizations in collective redress do not provide a clear and comprehensive guidance on their participation in specific proceedings.

The only organization that is most vocal in the field of consumer protection - the Consumer - is not considered to have the capacity for greater activism and more benefits for consumers, given the resources as well as the complexity of the laws and procedures that require greater commitment and group organization, which also requires financial and organizational support.

Thus, although certain legal mechanisms provide for collective redress and conduct of collective litigation proceedings in which consumer associations can represent group interests, what constitutes a great handicap for the implementation of the laws is the lack of clear descriptions of the proceedings in the specific laws coupled to the lack of resources of these organizations, which need to communicate more actively with consumers. We should also add that the issue of representation and funding of these organizations does not exist at all in legislation, which hampers the work of greater activism and the undertaking of various activities of group interest.

100 Kosovo/05/L-019/2015.

101 Kosovo/05/L-019/2015.

102 Kosovo/03/L-229/2010.

5.3. Prerequisites for awareness raising toward consumers in collective redress

Consumer have low awareness regarding their collective rights and redress mechanisms established by law, given the fact that often certain violations go unpunished, are not interrupted and consumers are not compensated. Before moving to the preconditions, we should mention that the Law on Consumer Protection is not quite clear regarding the role of non-governmental organizations that can raise the issue of collective redress and the manner they represent the interests of consumers. Moreover, although there are laws that best describe the process of collective redress, the prerequisite for raising awareness is the clarification in the mechanisms, proceedings and preconditions that enable collective representation in the field of consumer rights.

Furthermore, consumer rights and collective redress options must be more actively communicated to consumers and a more viable communication method between consumer protection organizations and consumers should be established. Likewise, it is necessary to draft the specification of proceedings, from the identification of rights to the realization of collective rights, and the framework within which NGOs may represent consumers. Thus, regulating the legal framework by clarifying the process of collective representation and collective redress, opens the door to providing direct guidance about the rights of consumers and their collective representation. Likewise, another prerequisite for raising awareness among consumers is better communication between NGOs and consumers, so that NGOs may be more proactive in receiving information on violations.

6. Recommendations and conclusions

In the section of recommendations that could improve the current state of application of collective redress in the area of consumer rights, we would include the revision of the current Law on Consumer Protection, where there is a need for a more direct guidance on the application of representative actions that enable the cessation of harmful practices for consumers.

This can also be done through an administrative instruction, whereby can be listed the proceedings through which by consumer protection organizations can address the issue and the preconditions that these organizations must fulfill to represent the public. This would pave the way for harmonization of the legislative framework with EU Recommendation 2013/396 EU on the field of representative actions. The next step is to strengthen consumer organizations in establishing more active communication with consumers and to provide a legislative framework under which they can have sustainability and financial independence to initiate and implement representative actions. Moreover, the Market Oversight Inspectorate should establish cooperation with consumer protection organizations in order to assure early identification of possible infringements.

Given the fact that the compensatory approach is not included in the legal framework for consumer protection, the creation of a legal mechanism that enables consumer compensation without pursuing lengthy court proceedings, would improve the scope of collective consumer redress. Likewise, taking into account the approach of EU recommendation 2013/396/EU, it is visible that the field of collective redress would be greatly improved not by amending each law, but by establishing a uniform approach to

collective redress that enables a dual redress mechanism for all areas.

The dual collective redress mechanism described in EU Recommendation 2013/396/EU is a new approach in the field of collective redress in Kosovo, where apart from the Law on Protection against Discrimination, the other laws in Kosovo are partially harmonized with this directive. The most frequent approach of Kosovo laws is to provide the injunctive collective redress mechanism, bypassing the compensation mechanism and the representative action. Given the current situation, there is low public awareness on collective rights and the mechanisms that enable the application of collective redress, whether for consumers or other parties falling within the scope of different laws. In addition, a large number of the laws outlined above provide inadequate instructions that may partially provide collective redress.

This is seen in the case of the Law on Consumer Protection, which does not specify the proceedings to be followed in the instances of case initiation or representation of interests by the consumer protection associations. All this makes it impossible to apply collective redress and is the reason behind the small number of cases brought to authorities or courts.

If we compare the laws that provide better guidance on implementation procedures and possible collective redress mechanisms, it can be seen that the direct approach of these laws and sub-legal acts greatly facilitates their application by the parties and contributes to public awareness through the experience of the parties that are part of the process. Taking these into account, it can be seen that the laws that better define the rights, proceedings and available mechanisms related to collective redress are more frequently applied, as is the case with the Law on the Ombudsperson, which lists the proceedings and options for collective complaints. Moreover, under the Law on Protection against Discrimination, no collective damages may be awarded, but according to the judgment on the group action or group claims, the persons belonging to the group in question may submit claims and seek individual compensation for damages.¹⁰³

In order for collective redress in the field of consumer protection to be implemented, the primary steps are the amendment and improvement of the legislative approach and the creation of organizational and financial conditions that enable organizations of consumer protection to implement representative actions.

103 Kosovo/05/L-021/2015.

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COLLECTIVE REDRESS IN CONSUMER PROTECTION IN MACEDONIA

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Executive summary

In the Country Report for Macedonia, the authors analyse the legal and institutional framework for collective redress of, primarily consumers' rights but also the other areas where such protection exists.

In terms of harmonization of the national legislation with the relevant European Union Acquis, the analysis showed that there is only minimal compliance. Directive 2009/22/EC on injunctions to protect the interests of consumers, in its previous version (Directive 98/27/EC) has been transposed in the Law on consumer protection, but there are many inconsistencies in the transposition. They particularly relate to determining the rights that can be protected through mechanisms of collective redress, procedures that are to be applied and authorizations of the bodies that may propose collective redress. Directive 2013/11 / EU on alternative resolution of consumer disputes is not implemented into national legislation, although its mechanisms that enable mediation as a way of resolving consumer disputes exist. Directive 2014/104/EU for damages for violation of the rules of competition is reflected in one provision of the relevant law and the general rules of tort law. Commission Recommendation of 11 June 2013 does not have corresponding effect on the national legislation.

The main conclusion in regard to the legal framework is that there are general rules for collective redress. It is partially covered and possible only in certain sectors, but there are no procedural mechanisms that would facilitate their implementation. Although the Law on Consumer Protection provides a basis for collective redress, there are many inconsistencies and ambiguities in its provisions. Thus, the Law, in a way, provides two-instance proceedings - authorized bodies give proposals for acting to the competent inspectorate, which initiates proceedings before the competent court, but in the same time for the same issues authorizes the inspectorate to act independently. Furthermore, the role of consumers' organizations is not clearly defined, nor they are introduced by an act of the competent minister. The Law provides means of legal remedies that correspond to the requirements of EU legislation. Collective redress of consumers against acts of traders is possible under the Law against Unfair Competition. But, although such basis exists, procedural laws do not provide for mechanisms that would facilitate their implementation. The way that the issues of standing and limits the effectiveness of the judgments are regulated are traditional and at this point prevent the realization of collective redress.

National legislation provides for the collective redress of interests of citizens in environmental protection. This protection is before administrative authorities (in view of the different decisions enacted by competent administrative authorities) and in respect of claims for environmental damages. There are problems in terms of practical realization of this opportunity, as well.

The collective redress, probably in most consistent manner, is regulated in the field of protection against discrimination, where the organizations and groups have specified roles in the procedures. The Law provides for the use of classical institutes of civil procedural law, hence it is realistic to expect that such protection could be implemented, but certain obstacles could still be identified.

The institutional framework for collective redress of consumers' rights is not

established as by the law and the reason lies in the fact that there is no appointment of authorized bodies that would have powers in this domain. The protection of collective interests can be realized in an administrative procedure (through the bodies for inspection) on the one hand, but a regular civil procedure based on a claim brought by authorized persons to bring an action for collective redress of consumers' rights of consumers is still not possible. In collective representation of the interests of consumers responsible for initiating administrative and judicial proceedings should be: Directorate for Personal Data Protection (when infringing on personal data), the National Bank of Macedonia (collective protection in financial services banks and savings houses), Agency for insurance supervision (related to the violation of the rights of the insured), Ombudsman of the Republic of Macedonia (for public services), Commission for protection of competition (collective protection of the consumers when infringement arises from the abuse of monopoly or dominant position and restrictive market practices), consumer organizations, Chambers of Commerce, inspection bodies and other organizations and institutions.

Based on the analysis the following recommendations are provided:

1. To carry out systemic reform and to create a legal framework that will provide vertical and horizontal harmonization of substantive and procedural laws that provide the basis for collective redress of rights.
2. It is necessary to adopt an entirely new Law on Consumer Protection in which the rules on consumer protection set by the EU Acquis as consistently transposed so as to achieve vertical harmonization. The legislator should clearly define whether the collective redress of consumers' rights will be realized in proceedings before administrative bodies or before the court or the both and will be required to clearly delineate the role of the authorized bodies in these different procedures. The law should clearly and precisely to determine which consumer rights will be subject to collective redress. Furthermore, there is need to define the role of consumers' organizations in the proceedings before the relevant authorities which will provide collective redress (inspection authorities and/or courts, or before the holders of the code of conduct). Finally, the legal remedies to be enabled should be specified.
3. The adoption of the new Law on Consumer Protection will impose the need for amending the laws that govern special rights of consumers in specific areas (competition, food safety, products, electronic communications, etc.) and achieving full horizontal harmonization.
4. If it is determined that the collective redress of consumers' rights is possible before the court, a set of procedural mechanisms should be introduced in the procedural laws (Law on Contentious Procedure). This would be, for instance introducing a new chapter that will fully regulate the procedure for collective redress of the (consumers') rights at the courts. Also, it would be opportune in the Republic of Macedonia to provide subject-matter jurisdiction of a limited number of courts, and it would be best if it came down to one court. The procedure should provide for the manner of obtaining evidence and how to treat the findings of the inspections and the administrative courts for violation of the rights that collectively protected. The new system of procedural mechanisms

should resolve the issue of the limitations of the decision's effect so as they have force not only the subjects who were litigants (*ultra partes*) i.e. all entities whose rights and interests have been represented in the proceedings regardless whether they have taken part in the proceedings. Procedural mechanism for collective redress of (consumers') rights should in particular lay down rules on the financing and costs of the proceedings. Comparatively there are different mechanisms for financing actions of collective redress of rights, so they should be reviewed in a way that the rules will enable, on one hand legal certainty for the parties, but on the other will encourage persons whose rights are infringed to involve in such procedures. This mechanism can for example be such as to enable if the parties seeking collective redress succeed in the dispute the other party to bear the costs (which as a rule currently exists in the system), but if they fail each party to bear only its costs. In this, the state should establish a clear system to fund consumers' organizations as a legitimate representative of consumers including in collective disputes. Furthermore, specific mechanisms for alternative resolution of consumer disputes should be introduced in the legal system. This could be realized so that all laws that regulate certain rights of consumers will provide that in case of dispute, the parties shall seek first attempt to resolve it peacefully. This could be established by a special law on alternative resolution of consumer disputes that would regulate the different forms of alternative dispute resolution (conciliation, mediation, arbitration, etc.), the bodies before which alternative disputes will be settled and the procedure that will apply.

5. Even before the proposed reforms take place, it is recommended that the Minister of Economy establishes a list of authorized bodies to represent collective interests in the process of collective redress.
6. In any case the modalities for funding consumers' organizations should be reviewed, so their role in the process of collective redress may be realized in full which means that they have sufficient resources to cover the risk of such procedures. It is recommended to create an appropriate legislative framework and practical mechanisms that will enable consumers' organizations, in cooperation with all relevant institutions, to monitor infringements of the rights of consumers, to inform them of the possibilities for protection and eventually organize them for collective redress of their rights and interests.
7. It is necessary to take measures to strengthen cooperation between the institutions in this area and joint actions while dealing with unlawful acts by traders and service providers that can be achieved through transposition of regulation 2004/2006 in our legislation.
8. The powers of the ombudsman could be increased in terms of protection of collective interests, especially in massive violations of consumer rights in other areas covered by Directive 2009/22/EC.
9. The Commission for Protection of the Competition should have competencies in the domain of consumer protection and be one of the bodies that would be authorized for a wider campaign informing consumers of all cases of massive damage, so that they can exercise their rights.

1. National compliance with the relevant EU acquis

1.1. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

The issue of transposition of Directive 2009/22 /EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests¹ in the relevant legislation of the Republic of Macedonia is complex in two respects. Firstly, it can be said that an attempt has been made to transpose this Directive into the Law on Consumer Protection² in 2011³, and secondly that from a formal point the Directive 2009/22 /EC has not been transposed by the Macedonian legislator⁴ at all, but instead, there has been implementation of solutions which are part of the old Directive 98/27/EC, which are also included in the Directive 2009/22/EC.

The LCP was amended in 2011 by adding Part III-b (31-h to 31-q) titled "Consumer Collective Redress". This title indicates that it is a matter of introducing a mechanism that would provide collective protection of the rights of a larger group of subjects -consumers. However, when the provisions are read and analyzed, one can immediately conclude that it is not a matter of procedural action for collective redress, but a possibility for an authorized body to propose to the competent inspectorate to initiate a proceeding before a competent court in case of acting contrary to the provisions of the LCP. If we analyze the provisions of the LCP (31-h to 31-r), it will be established that they are unclear, with imprecise formulations and that some of the solutions contained in the provisions of the LCP contradict each other.

The rules in *Article 1 of Directive 2009/22/EC* are set out in Article 31-h of the LCP, which stipulates that the authorized bodies (referred to in Article 31-i) may submit a proposal to initiate a proceeding (but not to initiate a proceeding, which does not correspond to Directive 2009/22/EC) for actions contrary to the provisions of Articles 53-117 of the LCP⁵ (paragraph 1 of Article 31-h), of PART III-a, Articles 31-a, 31-b, 31-c, 31-d, 31-e, 31-f and 31-g of the LCP⁶ and the Law on Obligations. Thus, the "authorized body" may not initiate a proceeding; instead, it may only submit a proposal to the competent inspectorate. The competent inspectorate may, in turn, initiate a proceeding before a competent court, whereby neither the respective proceeding, nor the competent court has been defined. Such definition of substantive law violations is narrower than the one provided by the Directive and its Annex 1, which includes the Directives containing

1 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009; Directive 2009/22/EC (1.5.2009).

2 Law on Consumer Protection ("Official Gazette of the Republic of Macedonia" No. 38/04, 77/07, 103/08, 24/11, 164/13, 97/15 and 152/15), hereinafter referred to as the LCP.

3 The Law Amending the Law was published in the Official Gazette No. 24/2011. The Macedonian legislator argues in the explanation that in these amendments to the law, Directive 98/27/EC of the European Parliament and of the Council of May 1998 on protection of consumer rights has been transposed, and not the new Directive 2009/22/EC.

4 See Draft Law Amending the Law on Consumer Protection <http://www.sobranie.mk/materialdetalis.nsp?materialId=0f1324e0-444c-4b7d-832e-54f789514235> (accessed 03.04.2017).

5 Articles 53-117 of the LCP define unfair terms (Articles 53-83), concluding contracts out of premises and distance contracts, informing the consumer in contracts that are not distance contracts and contracts out of premises of the trader, informing the consumer about the right of withdrawal from distance contracts and contracts concluded out of the premises; other rights (Article 84-103) and consumer contract for a temporarily limited right to use a certain real estate time sharing (Articles 107-117).

6 These provisions regulate unfair commercial practices.

legal basis for collective redress.⁷

With regard to the requirement of Directive 2009/22/EC in *Article 2, paragraph 1* that national legislations envisage competent judicial or administrative bodies to act, the transposition is again incomplete, rendering the Law vague and unreliable. In accordance with Article 31-h of the LCP, the authorized body may propose to the competent inspectorate to initiate a proceeding before a competent court. In this way, a certain two-stage procedure is introduced, that is, the authorized bodies may initiate (propose) actions before competent inspectors, and their claims in court should be put forward by the inspectorate. This possibility is not foreseen in the Law on Contentious Procedure. However, the competent inspectorate in an administrative proceeding may represent the interests of consumers by taking measures to determine whether certain violations have been made. This is not explicitly foreseen in the LCP, but rather arises indirectly from the provisions of Article 31-m referring to the solutions that the inspectorate may adopt in the course of inspection supervision.

Article 2, paragraph 1, item a of Directive 2009/22/EC is fully implemented in Article 31-p of the LCP, and *item b* of the same in Article 31-n. The requirement of *Article 2, paragraph 1, item c* of Directive 2009/22/EC is allowed in accordance with the national legislation and foreseen in the Law on Obligations and in the Law on Enforcement.

The transposition of *Article 3 of Directive 2009/22/EC* in the LCP is diffuse and relatively contradictory. The “authorized bodies” are differently defined in the article which provides the definitions in terms of the LCP, in Article 31-i of the LCP, as well as in Article 83 and Article 128, paragraph 1, line 11 of the LCP. This issue has been elaborated in detail in the analyses in point 2.6. Although these amendments were made in 2011, according to the data up to date, the Government of the Republic of Macedonia has not adopted an act for determining authorized bodies, which would be on the European Commission List.

Article 4 of Directive 2009/22/EC has been transposed in Article 31-i, paragraphs 3,4, and 5 of the LCP, while it should be taken note of the provisions regarding the rights of the authorized persons described above.

⁷ According to Directive 2009/22/EEC, collective redress is provided for the violation of the rights provided for in the Directives listed in Annex I to this Directive, namely: - Directive 87/557/EEC on consumer protection in respect of contracts concluded outside the business premises; - Directive 87/102/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit; - Directive 89/522/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in the Member States concerning the pursuit of television broadcasting activities; - Directive 90/314/EEC on package travel, package holidays and package tours; - Directive 93/13/EC on unfair terms in consumer contracts; - Directive 97/7/EC on the protection of consumers in respect of distance contracts; - Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; - Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce in the internal market (Electronic Commerce Directive); - Directive 2001/83/EC on the Community Code relating to medicinal products for human use; - Directive 2002/65/EC concerning the distance marketing of consumer financial services; - Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market; - Directive 2006/123/EC on services in the internal market; - Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, exchange and resale. It should be taken into account that this list is now the new Directive 2011/83/EU of the European Parliament and the Consumer Rights Council (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, OJ L 304/64, 22.11.2011), which derogates Directive 85/577/EEC on contracts concluded outside the business premises of the trader, and Directive 97/7/EC on distance contracts supplementing Directive 93/13/EC on unfair terms in consumer contracts and Directive 99/44/EC on the sale of consumer goods and associated guarantees. This list also includes the Directive 2013/11/EU of the European Parliament and the Council on Alternative Consumer Dispute Resolution (Of.G.18.06.2013).

Article 5 of Directive 2009/22/EC provides for the possibility for the national legislation to condition the claim for collective redress by carrying out a procedure for alternative dispute resolution, but this option is not provided for in the Macedonian law. Namely, the alternative dispute resolutions mechanisms in the national legislation are in principle voluntary and only in limited cases is it a procedural prerequisite.

1.2. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes

The Directive of the European Parliament and the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes (hereinafter referred to as Directive 2013/11/EU)⁸ entered into force on 8 June 2013 and the Member States were required to transpose it into their national legislation by 9 June 2015.

The Directive 2013/11/EU has not been explicitly transposed into the legislation of the Republic of Macedonia, but there are provisions that point to alternative consumer dispute resolution in specific laws.⁹

The LCP in Article 71 stipulates that in consumer contracts as unfair terms shall be deemed those which in case of dispute: limit the means of proof that the consumer may use; force the consumer to waive his/her legal remedies against the trader and allows the trader to choose his/her place of registered seat or residence specified in the contract, to put forward his/her lawsuit in a place which is not covered in the applicable domestic jurisdiction regulations. It may be considered that this Article complies with Article 10 of Directive 2013/11/EU.

Article 16 of the Law on Distance Provision of Financial Services¹⁰ explicitly stipulates that the contracting parties in the contracts for distance provision of financial services to consumers¹¹ shall endeavour to settle the arising disputes by means of alignment, settlement, mediation or in another peaceful manner.

Pursuant to the Law on Consumer Protection for Consumer Credit Contracts¹² (Article 33), creditors and consumers shall endeavour to resolve the arising disputes by means of alignment, settlement, mediation or in another peaceful manner.

The Law on Electronic Communications¹³ determines the competence of the Agency for Electronic Communications to resolve disputes between the final beneficiaries and operators in accordance with the provisions of this Law. The Agency initiates the dispute resolution procedure at the request of one of the parties to the dispute, but in

8 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), OJ L 165, 18.6.2013 [Directive 2013/11/EU (18.6.2013)].

9 Compare: J. Дабовиќ - Анастасовска, Н. Здравева, „Поттикнување на медијацијата како механизам за решавање на потрошувачките спорови во правото и во практиката на Република Македонија, *Четврти Скопско-Загребски колоквиум: Зборник на трудови* (ур. Б. Давитковски), Правен факултет „Јустинијан Први“, Скопје 2013, 119-122.

10 Law on Distance Provision of Financial Services (“Official Gazette of the Republic of Macedonia” No. 158/2010 and 153/2015).

11 Pursuant to Article 5, paragraph 1, item 1, “distance contract” means any financial service contract concluded between a provider and a consumer in an organized distance selling or service delivery system by a provider who, for the purposes of that contract, applies one or more means of communication at a distance.

12 Law on Consumer Protection in Consumer Loan Agreements (“Official Gazette of the Republic of Macedonia” No. 51/2011, 145/2015 and 23/2016).

13 Law on Electronic Communications (“Official Gazette of the Republic of Macedonia” No. 39/2014, 188/2014, 44/2015 and 193/2015).

accordance with Article 53, paragraph 3, before initiating the procedure, it is obliged to propose the mediation procedure to the parties to the dispute. The mediation procedure is aimed at the parties to resolve the dispute amicably by signing an agreement. In the mediation procedure, the Agency acts as an intermediary and runs the mediation procedure by applying the principles of impartiality, equity and fairness while respecting the objectives and regulatory principles of the Law.¹⁴

The alternative consumer dispute resolution is explicitly provided for in Article 1 paragraph 2 of the Law on Mediation of the Republic of Macedonia.¹⁵¹⁶

Article 16 of the LM also incorporates Article 12 of Directive 2013/11/EU regarding the statute of limitation and the preclusive deadlines during the attempt for alternative dispute resolution, in the particular case – in the course of the mediation procedure.

1.3. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union

Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union¹⁷ lays down the rules necessary to ensure that any person who has sustained damage due to a breach of a competition law by an enterprise or association of enterprises may effectively exercise the right and require full compensation for the damage caused by that enterprise or association.

The Law on Protection of Competition¹⁸ regulates the prohibited forms of prevention, restriction or distortion of competition, measures and procedures related to restrictions of competition (Article 1), and its objective is to ensure free competition on the domestic market in order to encourage economic efficiency and well-being of the consumers. Although the Law has been amended several times, the legislative reforms have not included harmonization with Directive 2014/104/EU, and hence the Law with one provision only determines that if damage is caused by means of any act that constitutes a violation in accordance with the provisions of this Law, the person who sustains damage may request compensation in accordance with the Law (Article 58). Taking into consideration that the Law on Obligations regulates in detail the compensation for damage, the analysis of the provisions of the Directive through the prism of the Law indicates that there is a high level of compliance of the rules. Given that the Directive does not require the national legislation to introduce mechanisms for

14 According to Article 7 these principles are: encouraging competition in the provision of public electronic communications networks, public electronic communications services and associated facilities and services, promoting the interests of citizens, contributing to the development of the European market, while applying the principles of objectivity, transparency, non-discrimination and proportionality.

15 Law on Mediation (“Official Gazette of the Republic of Macedonia” No. 188/13, 148/15 and 55/16).

16 <http://www.mchamber.mk/upload/Obrazets-barane-za-sproveduvane-medijatsija.pdf>

; <http://www.mchamber.mk/upload/Polnomoshno-za-zastapuvane-vo-medijatsija.pdf> (accessed 15.03.2017).

17 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance; OJ L 349, 5.12.2014, p. 1–19 [Directive 2014/104/EU (5.12.2014)].

18 Law on Protection of Competition (“Official Gazette of the Republic of Macedonia” No. 145/2010; 136/2011; 41/2014 and 53/2016).

collective redress,¹⁹ the Macedonian legislator has not foreseen such mechanisms.

1.4. Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violation of Rights Granted under Union Law

The European framework for collective redress procedures, which is regulated by the 2013 Recommendation,²⁰ also refers to injunctive/prohibitive procedures, and to compensatory procedures, and provides for minimum standards regarding the regulation of this procedural mechanism, which should be shaped within the specified border lines: a) to be able to allow for efficient resolution of a large number of individual claims for damages, thereby enhancing procedural economy; b) to be able to achieve an accurate and fair outcome of the proceedings within a reasonable timeframe, whereby guaranteeing the rights of all entities involved in the proceeding; c) to provide strong protective measures against malicious prosecution; d) to avoid creating any financial incentives to put forward speculative damages.²¹

The Recommendation recognizes several types of claims that can be put forward for collective redress: to claim cessation of certain practice – a failure to act of the one who violates the right; to prohibit certain practice of the person who violates the right; and to claim compensation for damages if damage has been caused by a violation of the right.

The procedural regime in the Republic of Macedonia does not provide for a separate proceeding for collective redress. At present, this goal can be achieved only by means of several traditional procedural instruments, regulated by the provisions of the Law on Contentious Procedure²² – co-litigation, intervention and joinder of litigation.

Article 143 of the Law on Obligations²³ also introduces *actio popularis*. According to this article, everyone can request from another person to remove the source of risk which poses a threat of significant damage to themselves or to an indefinite number of persons, as well as to refrain from any activity that gives rise to harassment or risk of damage if the occurrence of harassment or the damage cannot be prevented by appropriate measures. The court, at the request of the interested person, shall order appropriate measures to prevent the occurrence of damage or harassment, or to remove the source of risk, at the expense of the possessor of the source of risk, if they fail to do so. If the damage occurs during the performance of an activity for the common good for which a permit has been obtained from the competent authority, only compensation for

19 The Preamble, paragraph 13, stipulates that this Directive should not require Member States to introduce collective redress mechanisms for the implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

20 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013.

21 For the development of collective redress in the European Union, see more V. Efreanova(2013), *Towards introduction of collective redress mechanism in the European Union: pros and cons / Ka uvodenju mehanizama kolektivne zaštite potrošača u Evropskoj uniji: za i protiv* Strengthening consumer protection in Serbia/Jačanje zaštite potrošača u Srbiji-Liber amicorum Svetislav Taboroši urednici Prof. dr Thierry Bourgoignie Doc. dr Tatjana Jovanić, Beograd: Pravni fakulteta Univerziteta u Beogradu, str.298-309.

22 Law on Contentious Procedure (“Official Gazette of the Republic of Macedonia”, No. 79/2005, 110/2008, 83/2009, 116/2010, 124/2015) - hereinafter referred to as the LcP.

23 Law on Obligations (“Official Gazette of the Republic of Macedonia” No. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009, 161/2009 and 123/2013); - hereinafter referred to as the LO.

damages exceeding the normal limits may be required (excessive damage). In this case, socially justifiable measures may be requested to prevent the occurrence of damage or to reduce it. It can be concluded that it is a matter of collective redress – regarding his/her rights or the rights of an indefinite number of people. The court may be requested to: a) order appropriate measures to prevent the occurrence of damage or harassment; b) to remove the source of risk, at the expense of the possessor of the source of risk, if he/she him/herself fails to do so.

In addition, in the Republic of Macedonia, some specific procedures related to the protection of certain specific rights and interests – such as the provisions entitled “Consumer Collective Redress” of the Law on Consumer Protection²⁴ and the Law against Unfair Competition,²⁵ the provisions governing the environmental damage (Article 157-159) of the Law on Environment,²⁶ or the provisions governing class action for protection against discrimination of the Law on Prevention and Protection against Discrimination have been fragmentarily regulated (or at least have been attempted to be regulated).²⁷

2. Legal framework for collective redress

2.1. General description

There is no general legal framework in Macedonian legal system that regulates collective redress. Collective redress can be differentiated depending on the specific request for action in the different legal areas, i.e. different situations. The procedure for protection of certain rights is regulated by the special procedural laws in the field of civil, administrative and criminal law. The general assessment is that the basis for collective redress, in the civil (contentious) procedure, lies in the substantive law which regulates the rights of consumers, but there are no procedural rules for its implementation. A defined form of collective redress can be identified in the administrative procedure related to consumer protection and environmental protection.

Civil law protection is regulated by the Law on Contentious Procedure,²⁸ which, in accordance with Article 1, regulates the rules of procedure on the basis of which the court discusses and decides in disputes about the basic rights and obligations of the individual and the citizen, the personal and family relations of the citizens such as labour, trade, property and other civil law disputes, if it is not stipulated by law for some of these disputes the court to decide under the rules of another procedure. The civil procedure involves the existence of one plaintiff against one defendant (although the parties may be complex, that is, may consist of several accurately identified entities, which we will address later). The LcP in Article 70, paragraph 1, stipulates that any

24 Law on Consumer Protection (“Official Gazette of the Republic of Macedonia” No. 38/2004, 77/2007, 103/2008, 24/2011, 164/2013, 97/2015 and 152/2015).

25 Law Against Unfair Competition (“Official Gazette of the Republic of Macedonia” No. 80/99).

26 Law on Environment (“Official Gazette of the Republic of Macedonia” No. 53/2005; 81/2005; 24/2007; 159/2008; 83/2009; 48/2010; 124/2010; 51/2011; 123/2012; 93/2013; 187/2013; 42/2014; 44/2015; 129/2015 and 192/2015).

27 Law on Prevention and Protection against Discrimination (“Official Gazette of the Republic of Macedonia” No. 50/2010, 44/2014 and 150/2015).

28 Law on Contentious Procedure (“Official Gazette of the Republic of Macedonia”, No. 79/2005, 110/2008, 83/2009, 116/2010, 124/2015) - hereinafter referred to as the LcP.

natural or legal person may be a party to a proceeding. The proceeding is initiated by a person who has a legal interest or whose right has been violated or endangered by an act of a person against whom the claim has been filed (active, i.e. passive legitimation). It should be plausible that by means of a court action, the violation against the person appearing as a plaintiff (having an active legitimation) may be removed or that the action of the court is necessary for this person to exercise his/her subjective right. Pursuant to Article 2, paragraph 1 of the LcP, the court decides within the scope of the claims put forward in the proceeding. Moreover, the final decision to be adopted has legal effect only among the parties to the dispute and shall constitute a source of law, that is, it shall regulate the relations only between the particular litigants.²⁹

Administrative procedure is a procedure in which decisions on the rights, obligations and legal interests of the natural and legal persons in the Republic of Macedonia are made by the administrative bodies. It is initiated at the request of the party in order to fulfill some of its legally guaranteed right or ex officio by the administrative bodies. The aforementioned rights, obligations and legal interests are subject to individual legal acts adopted in administrative procedure of the first instance before the state administration bodies, organizations and other bodies that perform public authorizations. Legal protection³⁰ has been provided against these decisions in a manner prescribed by the Law on General Administrative Procedure³¹ as a general, systemic act that regulates the actions of all public authorities.³² Thus, in Article 14, paragraph 2 of the LGAP, it is envisaged that the party has the right to appeal against the first-instance administrative acts in cases determined by law. This means that the citizens (or legal persons, or persons who are entitled to such a right by law) have the right to file an appeal whenever expressly prescribed by the law regulating a certain administrative procedure (special law). If, however, the appeal is not provided for in the special law, the person has the right to file a lawsuit directly before the Administrative Court of the Republic of Macedonia (Article 14, paragraph 5 of the LGAP). The citizen may also file a lawsuit before the Administrative Court in cases in which the right to appeal is provided and the appeal has been filed, but unsuccessful (it has been rejected). The deadline for processing an appeal is 60 days from the date of filing. As a rule, the appeal has a suspensive effect – it must not be executed before the adoption of the decision by the second-instance authority. Pursuant to the Law on Establishment of the State Commission for Decision-making in Administrative Procedure and Labor Relations Procedure in Second Instance,³³ an appeal against any decision is submitted to the same commission.³⁴ Pursuant to the Law on Consumer Protection, the State Commission for Decision-making in Second Instance

29 A. Јаневски, Т. Зороска Камиловска (2012) Граѓанско процесно право, Парнично право, Второ изменето и дополнето издание, Скопје: Првен факултет „Јустинијан Први“ – Скопје, р. 19.

30 The right to protection against individual legal acts adopted in an administrative procedure in the most general terms is regulated by the Constitution of the Republic of Macedonia, that is, with Amendment XXI; “Official Gazette of the Republic of Macedonia” No. 107/2005.

31 Law on General Administrative Procedure (“Official Gazette of the Republic of Macedonia” No. 124/2015) – hereinafter referred to as LGAP.

32 The LGAP refers to all administrative bodies, other state bodies and organizations that perform public authorizations under the generic term “public bodies”.

33 Law on Establishment of the State Commission for Decision-making in Administrative Procedure and Labor Relations Procedure in Second Instance (Official Gazette of the Republic of Macedonia No. 51/2011; 148/2013; 41/2014; 130/2014 and 53/2016).

34 The provisions regulating the appeal in detail are contained in the LGAP in Articles 105 – 113.

rules against the decisions of the competent inspectorate in the area of inspection supervision and misdemeanour procedure.³⁵ The action before the Administrative Court (when an appeal is not allowed or when it is rejected), as well as its competence in general, are contained in the Law on Administrative Disputes.³⁶ The action is filed either against the State Commission for Deciding in Administrative Procedure and Labor Relations Procedure in Second Instance (if there has been an appeal) or against the first instance body (if there has been no appeal). What should be paid attention to is that, as a rule, the action does not postpone the enforcement of the administrative act against which it has been filed. At the request of the plaintiff, however, the enforcement may be postponed, i.e. an interim measure may be imposed (Article 14 and Article 15 of the LAD). Both the person and the respondent authority may file an appeal against the ruling of the Administrative Court to the Higher Administrative Court.

2.2. Applicable areas for collective redress

The analysis of Macedonian legislation shows that collective redress is possible only in terms of protection of the rights of consumers (in accordance with the LCP and the Law against Unfair Competition), protection of the rights to a healthy environment and protection of the rights to equality (protection against discrimination), which will be analyzed separately in the text below.

In other areas, which in comparative law appear as areas where certain interests and rights are collectively protected, there is no legal framework for implementing such procedures. Indirectly, there are possibilities in the national legislation for collective representation of the rights of certain groups (patients), but this is reduced to participation in the process of designing protection policies, while in the event of a violation of rights, only individual protection is foreseen.

2.3. Applicable procedures for collective redress according to the national legislation

We are referring to collective interests when in a certain case of violation of rights there is no individual claim in terms of civil or administrative law (narrower understanding of the term) or there is an individual claim but it is too limited in scope to expect realistically that it can be realized through a proceeding (broader understanding of the term).

Macedonian legislation with regard to the realization of collective interests of the persons in the field of property relations provides for the possibility of collective redress, but does not provide for mechanisms for its realization. Namely, the procedural legislation does not envisage a separate procedure for collective redress.

Indirectly, this is possible only through the traditional procedural instruments of the Law on Contentious Procedure, such as co-litigation, intervention and joinder of lawsuits for joint dispute.

Co-litigation provides for two or more persons as procedural parties to be able to appear in the same role – the role of a plaintiff or the role of a defendant in a

³⁵ Article 131 of the LCP.

³⁶ Law on Administrative Disputes (“Official Gazette of the Republic of Macedonia” No. 62/2006 and 150/2010) – hereinafter referred to as LAD.

litigation.³⁷ Pursuant to Article 186 of the LcP, several persons may sue, i.e. be sued (co-litigants) with one lawsuit, if: 1) in terms of the subject of the dispute, they are in a legal community, or if their rights or obligations arise from the same factual and legal basis (substantive co-litigants) 2) the subject of the dispute are claims i.e. obligations of the same kind based on a substantially identical factual and legal basis and if there is a real and local competence of the same court for each claim and for each defendant (formal co-litigants) and 3) it is determined by other law. If these conditions are fulfilled, in accordance with paragraph 2 of the same article, until the conclusion of the main hearing, a new plaintiff may join in addition to the existing plaintiff or the lawsuit may be extended to a new defendant with his/her consent.³⁸ Co-litigation is an optional instrument, which means that it depends on the will of the affected parties whether they will individually protect their rights or the protection of their rights will be grouped into one procedure. In terms of co-litigation, and in line with collective redress, one should bear in mind that co-litigation implies simple grouping into one procedure, and collective redress requires different procedural mechanisms to protect collective or diffuse interests. Namely, Macedonian legislation implies the existence of co-litigation which is based on the principle of procedural solidarity or the principle of procedural autonomy.

The principle of procedural solidarity is the basis for the single co-litigation, which occurs in situations in which according to the law or the nature of the legal relationship, the dispute can be resolved in an equal manner for all co-litigants (Article 191, LcP). The single co-litigants are considered as one litigant and have equal treatment in the proceedings. In the case of the single co-litigants, all co-litigants put forward an identical claim so that the dispute is settled in an equal manner for all co-litigants, that is, their action will be either conditioned or rejected in respect of all co-litigants. In the process of taking procedural actions with the single co-litigants, procedural solidarity applies, which means that if certain co-litigants fail to take some litigation action, the effect of the civil actions undertaken by other co-litigants extends to those who had failed to take those actions (Article 191, LcP). This also applies to the litigation deadlines. Thus, according to Article 192 of the LcP, if the time periods for the execution of a certain litigation action for certain single co-litigants expire at different times, any litigant may take that litigation action until the time period for taking that action is still running at least for one of them. On the other hand, in both substantive and formal co-litigation, there is a principle of autonomy of each of the co-litigants. Namely, pursuant to Article 190 of the LcP, each co-litigant in the litigation is an autonomous party and his/her actions or failure to take actions are neither beneficial nor harmful for the other co-litigants, and at the same time, pursuant to Article 193, each co-litigant has the right to submit proposals referring to the course of the litigation. Unlike this, in collective redress, such autonomy does not exist.

The effects of co-litigation are in some way identified with the goals achieved through the procedural mechanisms used for collective redress. With co-litigation, an

37 А. Јаневски, Т. Зороска Камилевска (2012) Граѓанско процесно право, Парнично право, Второ изменето и дополнето издание, Скопје: Првен факултет „Јустинијан Први“ – Скопје, p. 211.

38 In this case, the person who joins the lawsuit or the person to which the lawsuit is extended shall receive the litigation in the state in which it is when he/she joins it (Article 186, paragraph 3, LcP).

increase in legal certainty is achieved by reducing the possibility of contradictory decisions for identical legal situations, higher procedural efficiency due to the concentration of the proceedings before the court, as well as a reduction of the costs and the duration of the procedure, bearing in mind that one proceeding is conducted for the claims of several entities before one court. However, co-litigation cannot and must not be equated with collective redress.

The Law on Contentious Procedure recognizes and regulates the instrument *intervention* in the proceeding as a form of participation of a third party in a certain proceeding.³⁹ Pursuant to Article 194, paragraph 1, a person who, in an ongoing litigation between other parties, has a legal interest one of the parties to succeed, he/she may join that party. Moreover, the intervenor may enter the litigation during the entire proceeding until the decision on the claim is final, as well as within the deadlines for submitting an extraordinary legal remedy (paragraph 2 of the same article).⁴⁰ The right of the intervenor to participate in the proceeding may be challenged by each party and each party may propose that the intervenor is rejected, and the court may reject the participation of the intervenor, even without the parties stating their opinion on the matter, if the court finds that the intervenor has no legal interest (Article 195, paragraph 1).⁴¹ Pursuant to Article 196, the intervenor receives the litigation in the state in which it is at the moment when he/she intervenes in the litigation. In the further course of the litigation, he/she is authorized to put forward proposals and to take all other litigation actions within the deadlines in which those actions could be taken by the party he/she has joined. He/she, when entering the litigation, until the decision on the claim is finalized, is authorized to file an extraordinary legal remedy as well, and if he/she does so, a copy of the submission shall be submitted to the party which he/she has joined. It is important to note that the litigation actions of the intervenor have a legal effect for the party which he/she has joined, unless they are contrary to the actions of that party. Upon consent of the two litigants, the intervenor may enter the litigation as a party in place of the party which he/she has joined. The intervenor, if the legal effect of the judgment is to apply to him/her too, has the status of a single co-litigant (Article 197). In this case, he/she may also file an extraordinary legal remedy in the litigation in which he/she did not participate as an intervenor until the decision on the claim was final.

As procedural instruments, co-litigation and intervention could be used in cases where there is a need to provide collective redress. However, this would only be possible if certain conditions were met. Thus, if the nature of the disputed relationship is such that all affected persons may appear as single co-defendants, then they will exercise their rights in the procedure as co-litigants. Another possibility is that if a special law explicitly stipulates that the co-litigation instrument shall apply for collective redress and determines in which cases it shall apply. In addition, from a procedural aspect, the

39 А. Јаневски, Т. Зороска Камиловска (2012) Граѓанско процесно право, Парнично право, Второ изменето и дополнето издание, Скопје: Првен факултет „Јустинијан Први“ – Скопје, р. 213.

40 Pursuant to Article 194, paragraphs 3 and 4, the intervenor may give his/her statement to join the lawsuit at the hearing or with a written submission. The submission of the intervenor shall be submitted to the two litigants, and if the statement of the intervenor is given at the hearing, the transcript of the respective part of the record i.e. the audio recording shall be submitted only to the party absent from the hearing.

41 Pursuant to Article 195, paragraphs 2 and 3, until the decision rejecting the participation of the intervenor is legally valid, the intervenor may participate in the procedure and his/her litigation actions can not be excluded. A separate appeal is not allowed against the decision of the court accepting the involvement of the intervenor.

proceeding would be conducted between one representative of the group of persons whose rights are to be protected and the defendant, while all other members of the group would join the plaintiff as intervenors (which would actually mean opt-in in the proceeding for collective redress).⁴² Through these procedural mechanisms, the members of the group would also have control over the litigation because their participation in the litigation would imply limiting the actions that the plaintiff is taking (as a representative of the group), and for which he/she needs adequate consent from the other persons. In such a proceeding, the group, organized in this way, could file a claim for establishing the liability for a committed violation of the rights for which collective redress may be provided, while for the exercise of certain remedies, such as compensation for the damage incurred, each of the members of the group would be subject of a litigation in which the extent of the damage and the manner of its compensation shall be determined.

When more than one litigation is conducted before the court with the same factual or legal basis, in accordance with the LcP, it is possible that those litigations be *joined for the purpose of joint dispute*. Thus, if several litigations between the same persons are conducted in the same court, or in which the same person is an adversary of various plaintiffs or various defendants, all of these litigations may be joined with a decision of the council for the purpose of joint dispute (Article 299, paragraph 1). The decision to join the litigations is adopted by the council, which assesses whether in the concrete case there is a need to join the litigations in order to achieve greater procedural economy and greater system efficiency. The parties may propose a joinder, but the council shall not be bound by that proposal and shall decide on it *ex officio*. Given that the decision to join litigations for a joint dispute is a decision regarding the management of the proceeding, the court is not bound by such a decision, and in the further course of the proceeding it may decide to separate the proceedings that were previously joined for a joint dispute, if the joining of litigations is no longer purposeful for the development of the proceeding. According to the LcP, the court may reach a joint judgment for all joint litigations (Article 299, paragraph 1 of the LcP). However, this does not mean that the court will rule in the same way for each of the claims. Namely, the claim of each of the parties remains autonomous and the court is to address each of them. Therefore, different types of decisions could be adopted for different claims. Because of the above-mentioned joining of the litigations, although there are similarities with collective redress regarding the grouping of the parties and the dispute before the same court, it cannot be considered identical.

In the field of civil law relations, more precisely, in the protection of consumers, as we have stated, the LCP regulates, albeit not very successfully, the collective redress in a separate chapter. The action upon proposals for collective redress will be explained in detail in section 2.6. of this report.

However, in the analysis of the forms of collective redress and the proceedings of the courts, one should take into consideration the provision of the LCP which provides consumer protection organizations the right to initiate a proceeding for declaring the nullity of contractual terms which according to the LCP are considered unfair. Namely, pursuant to Article 83 of the LCP, anyone with a justified interest in the protection of

42 Т. Штерцова (2017), Ефикасност на постапките за колективна заштита на правата, Докторска дисертација, Универзитет „Св. Кирил и Методиј“, Правен факултет „Јустинијан Први“ – Скопје, Скопје: необјавен труд, p. 325.

consumers, as well as consumer protection organizations, may require from the court to declare the contractual term null and void if it is determined that such term under the LCP is considered unfair. In addition, such a proceeding can be initiated against one trader, against several traders of the same economic activity, as well as against the associations of the traders who use unfair contractual terms. This provision in the Law is, in fact, transposition of the Directive on Unfair Terms in Consumer Contracts.⁴³ However, the transposition is inconsistent, and even though according to the provisions of the LCP, organizations may protect consumers by means of declaring the unfair terms of the contracts null and void, these provisions seem to be difficult to apply taking into consideration the structure of the entire system. Namely, as we have stated earlier, the organization of the procedural mechanisms in the Republic of Macedonia is such that it provides for a litigation between a person whose legal interest has been violated or threatened, and a person who is responsible for it. The litigation is conducted between these two persons and the judgment gives legal effect only between them. In this case, the legal interest of the consumer organization is recognized by the LCP. However, the provision of Article 128, paragraph 1, line 11, which determines that associations can represent the interests of consumers in collective disputes before the competent courts, opens the question as to the role that the legislator wanted to give to the associations, that is, whether they will appear in a litigation as a plaintiff or as a representative (proxy) of the consumers whose rights have been violated.⁴⁴ Even if the issues about the position of the organization in the dispute are clear, the issue of the legal effect of the verdict, i.e. the scope of validity remains unresolved. The validity in the current system of procedural mechanisms indicates that the court decision regulates the relations of the parties in that relation in an authoritative way, i.e. it becomes a source of law for the particular legal relation. In disputes that could possibly be led by the organization of consumers against a trader, a group of traders or their association, the court could possibly declare the disputed terms as unfair in terms of the LCP and null and void. However, the fact that the Directive is not fully transposed hinders the court from prohibiting further use of the unfair terms in the business activity, hence it remains for the defendant, under the threat that he/she would lose all future individual disputes and thereby generate costs for the proceedings, to independently remove the unfair term from the contracts.

In the field of public legal relations, the Law on Environmental Protection stipulates actions on the part of the state bodies in the field of environmental protection at the request of the environmental associations of citizens. The procedure that is being conducted before these bodies is an administrative procedure, which we have already discussed. The law provides for the right to claim compensation for the damage, which is conducted in a contentious (civil) procedure, but the manner in which this is regulated

43 Article 7, paragraph 2 and 3 of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993 [Directive 93/13/EEC (21.4.1993)] require Member States to ensure that in the interests of consumers and competitors there are adequate and effective means of preventing the continued use of unfair terms in contracts concluded with consumers by vendors or service providers. These means include terms according to which persons or organizations which, according to national law, have a legitimate interest in protecting consumers, may take action under national law before the courts or the appropriate administrative bodies to decide whether the contractual provisions for general use are unfair so that they can apply appropriate and effective means to prevent the continued use of such terms.

44 J. Дабовић-Анастасовска, Н. Гавриловић (2015), „Заштите „слабије“ стране код уговора о услугама у новом европском уговорном праву: модалитети, дилеме и перспективе“, Услуге и заштита корисника (ур. М. Мићовић), Крагујевац: Правни факултет Универзитета у Крагујевцу, р. 53-57.

in the law has inconsistencies, making such actions uncertain. These issues will be discussed in more detail in point 2.6.

The situation with regard to the claims for the protection of the right to equality is similar, where groups of interested persons and associations are given the opportunity to participate in proceedings. This law probably regulates the issue most consistently, and the proceeding is based on the existing procedural institutes. It is typical, however, that collective redress is, in a certain way, enabled before the judicial bodies, but not before the administrative bodies competent for acting in the field of anti-discrimination. This will also be further elaborated in point 2.6.

2.4. Available remedies for collective redress according to the national legislation

Since there is no single mechanism/procedure for collective redress, instead, they are (partially) regulated in separate areas, the question of what the arising rights are for the persons whose rights have been violated and can be subject to collective redress will be analyzed in point 2.6.

2.5. Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organisations to initiate the procedure

The basic principle in the civil litigation (contentious is that the entity that requires adequate protection of its rights and interests has the obligation to provide the funds needed to initiate and lead the proceedings. According to the LcP, the litigation costs consist of expenses incurred during or as a result of the proceeding⁴⁵ and include the lawyer's fee⁴⁶ and the fees for other persons who have the right to a fee according to the law (Article 145, LcP). In addition, pursuant to Article 146 paragraph 1 of the LcP, each party itself previously bears the expenses it has incurred with its action.

It is important to note that the court will not act upon a lawsuit nor take any another action for which the court fee has not been paid, and if the plaintiff does not pay the court fee within 15 days from the day the lawsuit was filed, the lawsuit will be considered to be withdrawn (Article 146, paragraphs 2 and 3, LcP).

The basic rule of the LcP is that the party who fully loses the litigation is obliged to compensate the opposing party and his/her intervenor for their costs (Article 148, paragraph 1, LcP). In case the party partially succeeds in the litigation, the court may, given the achieved success, determine each party to bear its costs or one party to compensate the other and the intervenor a proportionate share of the costs.⁴⁷ Also, the court may decide that one party compensate for all costs that the opposing party and his/her intervenor have incurred, if the opposing party has failed to succeed only in a proportionally insignificant part of his/her claim, and no separate costs have been incurred due to that part of the claim.⁴⁸ Based on the result of the hearing, the court will decide whether the costs of the presentation of evidence determined ex officio will be

45 Law on Court Fees ("Official Gazette of the Republic of Macedonia" No. 114/2009, 148/2011, 106/2013 and 166/2014).

46 Tariff for the fee and reimbursement of expenses for lawyers' work [<http://www.mba.org.mk/index.php/mk/akti/advokatska-tarifa> (13.05.2017)].

47 Article 148, paragraph 2, LcP.

48 Article 148, paragraph 3, LcP.

borne by one or both parties or the costs will be covered by the court funds.⁴⁹ The lack of procedural mechanisms for collective redress means that there are no mechanisms that specifically regulate the financing of proceedings for collective redress. Even if we accept that Article 83 of the LCP provides for the organization of consumers to conduct such disputes, or the inspectorate to bring a dispute before the (civil) court, the funds for its execution would be provided by the organization funds, or from the budget of the Republic Macedonia.

In administrative procedures which can be carried out by organizations, they do not bear any costs.

The Law on Consumer Protection is one of the few laws that regulates the matter of establishing and organizing forms of the civil sector for protection of the rights that it regulates. In this way, the state highlights the role of consumer organizations, but unfortunately, the reality and treatment of these organizations in practice does not show the same level of care. Namely, although organizations provide everyday assistance not only to consumers, but also to the state administration bodies and consistently achieve the goals for which they have been founded, they are left alone to provide financial resources and their sustainability is in doubt. Undoubtedly, consumer protection organizations are the best connoisseurs of the situation in this field, they are recognizable in the public and enjoy its trust. This makes them legitimate representatives of consumers' interests which supports the thesis that they would be most appropriate for initiating and conducting proceedings for consumer collective redress. The Consumer Protection Programme 2017-2018 is aimed at enhancing the protection of consumer rights and improving education and consumer awareness. However, the overall budget for the Ministry of Economy for this area is still 550,000 MKD per year. However, the need for in-depth and systemic analysis of possible violations of the rights for which human and financial resources are required, as well as the high costs of conducting proceedings prevent the organizations from acting effectively and efficiently. The adoption of sustainable models of funding these organizations and the provision of funds from the budget of the Republic of Macedonia for their operation, as well as adequate resolution of the issue of costs of collective redress proceedings is necessary in order to strengthen the role of consumer organizations in the system of collective redress.

2.6. Sectoral collective redress mechanisms

a. Consumer Law

As already stated in this report, the Law on Consumer Protection sets the basis for consumer collective redress.

Initiating proceedings

In accordance with Article 31-h of the LCP, any authorized body may propose to the competent inspectorate⁵⁰ to initiate proceedings before the competent court for

⁴⁹ Article 148, paragraph 4, in connection with Article 147, paragraphs 3 and 4, LcP.

⁵⁰ The law does not determine which inspector is exactly concerned. In the definitions, the State Market Inspectorate, the State Agriculture Inspectorate, the State Sanitary and Health Inspectorate, the State Inspectorate for Environment and the Food and Veterinary Agency are determined a "competent inspectorate"; hence, depending on the case in question, the authorized body shall determine which inspectorate to address.

termination of the actions contrary to the provisions of Articles 53 to 117 of the LCP (paragraph 1). The proceedings before the competent court may be initiated against a trader or group of traders of the same economic activity who act contrary to the provisions of this Law and the Law on Obligations, the Chamber and other associations of traders who have acted contrary or against those who have prescribed the rules for the conduct of traders concerning unfair commercial practices⁵¹ (paragraph 2). An authorized body may also propose to the competent inspectorate to initiate proceedings before the competent court against the operators of a means of distance communication⁵² who do not act in accordance with the LCP and another law (paragraph 3).

Article 31-h of the LCP implies that there is a wide spectrum of consumer rights that enjoy collective redress.

Primarily, it concerns the rights protected by the LCP, more specifically the rights in: unfair contractual terms (Articles 53-83 of the LCP),⁵³ concluding contracts outside the business premises and distance contracts, informing the consumer in contracts that are not distance contracts and contracts outside the business premises of the trader, informing the consumer about the right to withdraw from distance contracts and contracts concluded outside the business premises and other rights (Articles 84-103) and consumer contract for time-limited right to use certain real estate, time sharing (Articles 107-117 of the LCP); unfair commercial practice⁵⁴ (Articles 31-a to 31-g of

51 In accordance with the provisions regulating unfair market behavior (Articles 31-a, 31-b, 31-c, 31-d, 31-e, 31-f and 31-g from the :CP).

52 The law does not provide a definition of an operator of a means of distance communication. The provisions of the law relating to distance contracts (“distance contract” means any contract concluded between the trader and the consumer as part of an organized scheme for the sale or provision of distance services without the physical and simultaneous presence of the trader and the consumer, through exceptional use one or more means of distance communication until the conclusion of the contract, including the moment of concluding the contract) regulate obligations for the trader offering goods or services at a distance. Law on Distance Provision of Financial Services (“Official Gazette of the Republic of Macedonia” No. 158/2010 and 153/2015), Article 5, paragraph 1, item 7.”Operator or Provider of a means of distance communication” is any legal entity or natural person whose commercial or professional activity includes making available one or more means for distance communication.

53 For unfair terms in consumer contracts, see more and compare: N. Zdraveva, N. Gavrilović, B. Tuševska (2012), „Nepoštene ugovorne odredbe u ugovornom pravu Republike Makedonije“, Forum za građansko pravo za Jugoistočnu Evropu: Izbor radova i analiza, knjiga II (ur. A. Nuni et al.), Skoplje: Centar SEELS-a, str.205; N. Gavrilovic (2013), „Unfair Consumer Contract Terms Under Macedonian Law: How the Old and the New Function in Practice“, Journal of Consumer Policy 36(3)/2013b, p. <318 ml318; M. Karanikić-Mirić (2012), „Nepoštene ugovorne odredbe u ugovornom pravu Republike Srbije“, Forum za građansko pravo za Jugoistočnu Evropu: Izbor radova i analiza, knjiga II (ur. A. Nuni et al.), Skoplje: Centar SEELS-a, str. 223-224; Z. Meškić, A. Brkić (2006), „Zaštita potrošača od nepravednih ugovornih odredbi: Uskladiavanje obligacionog prava BiH sa Direktivom 93/13/EEZ“, Anali Pravnog fakulteta u Zenici 5(3)/2006, Zenica> Pravni fakulteta u Zenici, str. 80; Z. Čadjenović (2012), „Nepoštene ugovorne odredbe u ugovornom pravu Crne Gore“, Forum za građansko pravo za Jugoistočnu Evropu: Izbor radova i analiza, knjiga II (ur. A. Nuni et al.), Skoplje: Centar SEELS-a, str. , 216-217. E. Mišćenić, „Nepoštene ugovorne odredbe u ugovornom pravu Republike Hrvatske“ (2012), Forum za građansko pravo za Jugoistočnu Evropu: Izbor radova i analiza, knjiga II (ur. A. Nuni et al.), Skoplje: Centar SEELS-a, , str. 192-193.

54 For unfair commercial practices see more: .M. Lončar Velkova, J. Dabović Anastasovska (2013) Nepoštena poslovna praksa: Iskustva EU u primeni Direktive 2005/29/EC / The unfair business practice: EU Experiences in the application of Directive 2005/29/EC Strengthening consumer protection in Serbia/Jačanje zaštite potrošača u Srbiji-Liber amicorum Svetislav Taboroši urednici Prof. dr Thierry Bourgoignie Doc. dr Tatjana Jovanić, Beograd: Pravni fakultet Univerziteta u Beogradu p.154-169.

the LCP).⁵⁵

The question arises as to whether consumer collective redress in consumer credit contracts is possible. Namely, the Law on Consumer Protection in Consumer Credit Contracts⁵⁶ regulates the protection of consumers when concluding and executing consumer credit contracts,⁵⁷ in scope and for the purposes envisaged with it (Article 1, paragraph 1). In addition, in paragraph 2 of Article 1, it is stipulated that for everything not regulated by this Law, the provisions of the Law on Obligations shall apply to the consumer loan agreement, and the provisions of the Law on Consumer Protection shall apply to the protection of consumers. Given that this Law does not contain specific provisions for consumer collective redress, and the LCP does not specifically refer to the protection of the rights of these agreements, unless the rights are covered by Articles 53-117, we consider that collective redress, in the system as it is organized at the moment, is not provided for consumer protection in these contracts.

Basis for consumer collective redress is also provided by Article 17 of the Law on Distance Provision of Financial Services that stipulates that consumer protection organizations undertake activities before courts or competent institutions for the protection of consumers from non-implementation of this Law. Since the Law does not define neither what kind of activities it refers to or what kind of procedure and under what conditions, except that the burden of proof is transferred to the operator (Article 15), we believe that the undertaking of these activities will be carried out according to the LCP. The provision of Article 31-h, paragraph 3 of the LCP is in support of this.

The next group of rights which are protected are those arising from the Law on Obligations.⁵⁸ The Law regulates the bases for obligatory relations, contractual and other obligatory relations in the supply of goods and services. Pursuant to Article 12 of the LO, in establishing the obligatory relations and exercising the rights and obligations from those relations, the entities are obliged (when with the performance of their activities directly satisfy the needs of the citizens), to regulate and perform their rights and obligations in a manner which ensures respect for the basic rights of consumers and users of services determined by this Law, other law and international agreements ratified by the Republic of Macedonia.

55 According to the provisions regulating unfair market behavior. In addition, according to Article 31-a of the LCP, market behavior is considered unfair if: a) it is contrary to the requirements for professional conduct; and b) significantly impairs or is likely to significantly impair the economic behavior of the average consumer in terms of the product and the service to whom the product or service is intended or received by, or to the average consumer of the group when the market behavior is directed to a particular group of consumers. Market behavior that is likely to significantly impair the economic behavior of only a clearly defined consumer group, which is particularly vulnerable to the behavior or to the product and service concerned because of its mental or physical vulnerability, age or credulity in a way predictable by the trader is estimated from the perspective of the average consumer of that group, which is not contrary to the usual and legal advertising, and involves giving exaggerated statements or statements that should not be interpreted literally. Market behavior is considered particularly unfair if: a) is false (as defined in Articles 31-b and 31-c of the LCP); or b) is aggressive (in accordance with Articles 31-d and 31-e of the LCP).

56 Law on Consumer Protection in Consumer Loan Agreements ("Official Gazette of the Republic of Macedonia" No. 51/2011, 145/2015 and 23/2016).

57 Pursuant to Article 2, paragraph 1, line 3 of this Law, "Consumer Loan Agreement" is an agreement by which the creditor approves or promises to approve the consumer a credit in the form of a loan, overdraft, deferred payment of products and services, financial leasing or other similar financial service, other than contracts for the provision of services on an ongoing basis or for the supply of products of the same type where payment is made in installments during the period of service provision and supply.

58 Law on Obligations ("Official Gazette of the Republic of Macedonia" No. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009, 161/2009 and 123/2013).

Considering that the participants in the obligatory relations are natural and legal persons, whenever a consumer participates in an obligatory relation in the sense of the LCP⁵⁹ and his/her rights are not respected, the authorized body can propose to the competent inspectorate to initiate adequate proceeding.

However, in the numerous provisions, that is, dispositive provisions that regulate the rights and obligations of the entities in the supply of goods and services, in terms of collective redress, more prominent are the provisions of the Law that refer to the conclusion of contracts (in particular the offer and its acceptance), the nullity of contracts (Articles 95-102), the general terms of the contract (Articles 130-131), the liability for a defective product (Articles 165- 165-g), the seller's liability for material defects and the guarantee for the proper functioning of the item and related rights (Articles 466 - 495) and other rights.⁶⁰

Considering the laws in the field of electronic communications, the provisions on the rights of end users determined by the LEC also come into consideration, when a consumer appears as an end user (Articles 107-120). This particularly applies to the rights regarding the elements and information to be provided in connection with the contract for the connection and use of a public communications network and/or publicly available electronic communication services (Article 107 of the LEC), provision of value added services (Article 113), limitation and termination of access (Articles 114-115) and the right to an objection and lawsuit (Article 121).

When it comes to initiating the proceeding for the protection of these rights, it is important to note that regardless of whether an authorized body has submitted or has not submitted a proposal to the inspectorate for initiating a proceeding, it is authorized to initiate, on its own initiative, such a proceeding against a particular trader or group of traders of the same economic activity who act contrary to the provisions of the LCP and the Law on Obligations, the Chamber and other associations of traders who have acted contrary or against those who have prescribed the rules for the actions of the traders that refer to unfair commercial practices, as well as against operators of a means of distance communication who do not act in accordance with the LCP and other law.

It should also be noted that the bodies authorized to propose to the inspectorate to initiate a proceeding, or initiate a proceeding before the inspectorate themselves, are also authorized to initiate a proceeding before the possessors of the code of conduct when it comes to the control of unfair commercial practices, which arises from Article 31-r of the LCP. Namely, if the proceeding referred to in Article 31-h of the LCP is initiated due to a violation of the provisions of Articles 53 to 117 of the Law, the initiation of those proceedings does not preclude the possibility of control of unfair commercial practices by the possessors of the code of conduct, nor does it exclude the possibility for the bodies authorized to initiate the proceedings referred to in Article 31-i of this Law to initiate an appropriate proceeding before the possessor of the code of conduct against those traders who have acted contrary to the rules on commercial practices.

59 Pursuant to Article 4, paragraph 1, line 1 - "consumer" is any natural person who buys products or uses services for his/her own direct consumption in the business premises of the trader, outside the business premises, as well as by means of distance contracts, for purposes that do not fall within his/her trade, business, craft or professional activity.

60 For this see more: Г. Галев, Ј. Дабовиќ Анастасовска (2012) *Облигационо право Трето изменето и дополнето издание*, Скопје: Просветно Дело р. 450-463.

Bodies authorized to initiate proceedings

The regulation of the authorized bodies that have the right to submit a proposal for initiating proceedings in the LCP is not fully consistent.

In the definitions given in the Law (Article 4, paragraph 1, line 17), it is determined that the “bodies authorized to initiate proceedings” are bodies and organizations established by the regulations governing the establishment of the activity of those bodies and which have a common interest in consumer protection, such as consumer protection organisations (associations of citizens), chambers and other specific bodies that have a common interest in consumer protection.

On the other hand, Article 31-i defines that the Government of the Republic of Macedonia, upon a proposal by the Minister of Economy, shall determine by an act the authorized bodies that have a common interest in consumer protection.⁶¹ It remains unclear whether consumer protection organizations are authorized to initiate proceedings under the Law or they shall be authorized to do so only if they are included in the Government’s act which determines the authorized bodies. The other contentious issue which arises is the difference in the rights of the bodies in accordance with the definition of authorized bodies and in accordance with the definition of the procedure stipulated in Article 31-h. Namely, while the definition entitles them to initiate proceedings, Article 31-h reduces them to a proceeding only before the authorized inspectorate, which entails bringing forward a motion for initiating a proceeding before the competent court.

Pursuant to Article 31-i, foreign associations also have the right to submit a proposal to the competent inspectorate. Namely, if the actions of certain traders or a group of traders established in the Republic of Macedonia are contrary to the provisions of this Law and other regulations specified in Article 31-h of this Law and affect or may affect the position of consumers in a Member State of the European Union, the procedure referred to in Article 31-h of this Law may be proposed by an association for the protection of consumers from that state or any other independent body which, according to the regulations of that state, has been established in order to protect the common interests of consumers. They shall prove their authorization to initiate a proceeding with a list of authorized bodies that have a common interest for consumer protection compiled by the European Commission, in which they are also included.⁶²

Articles 83 and 128, paragraph 1, line 11 of the LCP create an additional dilemma. As we have seen, according to Article 83 of the LCP, anyone with a justified interest for the protection of consumers, as well as consumer protection organizations, may require the court to declare null and void the contractual term⁶³ if it is established that this term under the LCP is considered unfair. The article, however, does not require that these persons are on the list of authorized bodies in order for them to initiate this proceeding. Furthermore, the provision in article 128, paragraph 1, line 11 stipulates that associations may represent the interests of consumers in collective disputes before the competent

61 This act shall be submitted for inclusion in the list of authorized bodies of the European Commission (paragraph 2 of Article 31-i).

62 This list shall be submitted by the authorized body at the same time as the proposal for initiating the procedure to the competent inspectorate in the form of a copy of the official publication of the European Community in which it is published, with a certified translation in Macedonian language.

63 Compare: J. Dabović-Anastasovska, N. Gavrilović (2007), „Nevažnost ugovora u makedonskom pravu“, *Pravni život* 11/2007, Beograd: Udruženje pravnika Srbije, str. 777-781.

courts. Such inconsistencies in the Law only make it difficult to apply it in practice and put the court in a position to assess the procedural legitimation of the associations, which additionally complicates the otherwise complicated position of the associations or all individuals who have a legitimate interest in protecting consumer rights.

Evidentiary hearing

The law regulates the matter of presenting evidence, but it is not clear in which procedure these rules shall apply. Namely, as we have seen, according to Article 31-h, the inspectorate may initiate proceedings before a court, but at the same time Article 31-m authorizes the inspectorate to carry out inspection supervision of the observation of the same rights that are also subject to judicial protection by means of collective redress. If the assessment is made from the aspect of the provisions regulating the presentation of evidence and their reference exclusively to Article 31-h, then it can be concluded that they refer to the proceeding that would possibly be conducted before the court and initiated by the inspectorate. On the other hand, the articles, especially Article 31-k, also suggests that the evidence should be presented in the same way during the inspection supervision as the obligation to collect evidence is borne by the inspectorate. Such inconsistency, which probably arises from the inconsistent transposition of the Directive, further complicates the application of the rules. Moreover, the repeated reference to Article 31-h and the “violation of the provisions of Articles 53 to 117 of the LCP” which by their contents are heterogeneous and regulate various rights and obligations, as well as the omission of references to other possible violations of rights determined by this Law (like those for unfair commercial practices) and other laws, not only is nomotechnically unjustified, but also influences the essence of the instrument and its practical application.

The basic rule of the evidentiary hearing in terms of collective redress is that the burden of proof is transferred to the trader, i.e. the operator of a means of distance communication. Pursuant to Article 31-j, if the proceeding referred to in Article 31-h of the LCP is initiated due to the violation of the provisions of Articles 53 to 117 of the LCP, the trader or the operator of a means of distance communication shall be obliged to prove that he/she has provided the consumer with prior notification, or confirmation in writing for prior notification, that he/she has complied with the deadlines for fulfilling the contract, or the contract concluded by means of distance communication, that is, the trader/service provider is obliged to prove that he/she has fulfilled his/her obligations referred to in the prior notice to the consumer and that the consumer has agreed to conclude a contract, i.e. the service provider has agreed to provide the agreed services before the expiry of the deadline for unilateral termination of the contract. Article 31-j explicitly defines that in the initiated evidence hearing, the burden of proof is an obligation borne by the trader, i.e. the operator of a means of distance communication, but at the same time, this Article omits the service provider, although he/she is being referred to in paragraph 2 of the same Article.

Pursuant to Article 31-k,⁶⁴ when deciding whether the commercial practices is unfair, it shall not be taken into consideration whether this practice has caused someone damage, i.e., whether it is likely that someone will be harmed, as well as whether the

⁶⁴ Article 31-k refers to the procedure referred to in Article 31-h of the LCP, which has been initiated due to the violation of the provisions of Articles 53 to 117 of this Law, but it essentially regulates the violation of the rules referred to in Articles 31-a to 31-g of the Law.

entity against whom the proceeding is being conducted is guilty of unfair commercial practices. In addition, pursuant to Article 31-l, the competent inspectorate, if possible, due to the circumstances of the case, taking into account the justified interests of the trader, or service provider, may request the trader, or the service provider against whom the proceeding is being conducted, within seven days, to provide evidence confirming the truthfulness of the facts stated as being part of the commercial practices. If this evidence is not submitted to the competent inspectorate, it is considered that the submitted evidence is incomplete or insufficient, that is, untruthful.

Legal protection (remedies)

By regulating what kind of a decision can be adopted by the competent inspectorate, the Law actually regulates which remedies are available in the collective redress, but only in the inspection supervision (surveillance) proceeding, and not the proceeding that would possibly be conducted in court. The provisions stipulate that the remedies available are: a prohibition of further actions with which a violation is made, removal of established irregularities and public announcement of the decision, prohibition of exhibiting commercial practices which is considered unfair. Measures shall be imposed upon a decision of the inspectorate. The LCP provides for individual protection of the rights that are subject to collective redress, in particular, compensation for damages.

Thus, in accordance with Article 31-m, if the competent inspectorate, in conducting the inspection supervision, determines that the trader, that is, the service provider against whom the proceeding is being conducted has acted contrary to the provisions of Articles 53 to 117 of the LCP and the provisions referred to in Article 31-h of this Law, it shall order with a decision that the trader, that is, the service provider **cease such action**, that is, to **remove the identified irregularities** within the determined period in which the irregularities must be removed (paragraph 1). If the proceeding is conducted due to unfair commercial practices,⁶⁵ and the trader, that is, the service provider against whom the proceeding is being conducted has not yet begun with certain commercial practices, and the commencement of this commercial practice is certain, if the competent inspectorate determines that this commercial practice is unfair,⁶⁶ it shall prohibit with a decision that the trader, that is, the service provider against whom the proceeding is conducted **to use that commercial practice**.

The trader, that is, the service provider against whom the proceeding is conducted upon order of the inspectorate in accordance with Article 31-n, shall publish at his/her own expense in at least two daily newspapers, the decision by which the inspectorate orders to stop the actions that are contrary to the provisions of the LCP or other regulations referred to in Article 31-h, or correction of inaccurate notifications.

In the course of the decision-making, pursuant to Article 31-p, paragraph 1, the competent inspectorate may take **temporary measures**, that is, it is authorized by a decision, temporarily, until the adoption of the final decision, to order the termination

⁶⁵ In this case, it can be deduced from the content of the decision that it refers to this procedure because Article 31-m, paragraph 2 begins with "If the procedure referred to in Article 31-h of this Law is conducted due to the violation of the provisions of Articles 53 to 117 of this Law," and these articles, as we have seen, do not include market behavior.

⁶⁶ This implies that the behavior should be unfair "in the sense of the provisions of Articles 31-h, 31-i, 31-j, 31-k and 31-l of this Law", although these provisions do not define what is considered unfair behavior but only regulate certain aspects of the procedure.

of certain actions for which there is a reasonable doubt that they are contrary to the provisions LCP and other regulations referred to in Article 31-h of the LCP. The appeal against the temporary measures decision does not delay its execution.⁶⁷⁶⁸

Pursuant to Article 31-l, paragraph 2, against the decision of the inspectorate imposing the remedies, the trader, that is, the service provider against whom the proceeding is conducted, within eight days from the day of delivery of the decision, may file a complaint through the competent inspectorate to a special commission established in accordance with the Law on the State Market Inspectorate. Moreover, the complaint does not postpone its enforcement.

Pursuant to Article 31-q of the LCP, initiating or conducting proceedings on the basis of Article 31-h does not prevent the person to whom the actions of traders contrary to this LCP and other regulations referred to in Article 31-h of the LCP have caused damage, to initiate a compensation procedure before the competent court against the trader, that is, the service provider who has caused the damage by illegal actions, to initiate before the competent court the proceeding for annulment or verification of the invalidity of the contract that has been concluded under the influence of the illegal actions, or to initiate any other proceeding before the competent court that requires the exercise of the rights that belong to him/her based on the rules contained in this or another law.

b. Competition Law

Although the Law on Protection of Competition aims at protecting, *inter alia*, consumer rights,⁶⁹ there are no explicit mechanisms in the legislation for consumer collective redress in the field of competition law.

Implicitly, by regulating the right to instigate a misdemeanour procedure before the Misdemeanour Commission of the Commission for Protection of Competition,⁷⁰ such a right could be recognized and assigned to the associations for consumer protection. However, this is only in relation to establishing misdemeanour liability of an enterprise, that is, association of enterprises for violation of the rules of competition in a manner and procedure determined by the Law. Namely, pursuant to Article 32, a misdemeanour procedure before the Misdemeanour Commission is initiated, *inter alia*, upon a request by a natural person or a legal entity which has a legitimate interest in establishing the commission of a misdemeanour. The law determines the content of the request and the

67 The nomotechnical error has been made in the law so that the same provisions from Article 31-n are moved as paragraphs 3, 4 and 5 of this article. In this way it is not defined which will be the second instance body for acting upon the appeal of the decision on temporary measures.

68 Pursuant to Article 18 of the Law on Amending the Law on Consumer Protection (“Official Gazette of the Republic of Macedonia” No. 24/2011), the provision of this Article shall apply with the commencement of the implementation of the Law on Inspection Supervision (Law on Inspection Supervision (“Official Gazette of the Republic of Macedonia” No. 50/2010, 162/2010, 157/2011, 147/2013, 41/2014, 33/2015, 193/2015 and 53/2016), i.e. from 1 April 2011. On the other hand, in accordance with Article 16 of the same Law, Articles 31-h, 31-i, 31-j, 31-k, 31-l, 31-m, 31-n, 31-o 31-p, 31-q, 31-r and 31-g of this Law shall enter into force within one year from the date of its entry into force on 5 March 2012.

69 See more about the relationship between competition law and consumer law: В. Ефремова (2010), Комплементарноста на конкурентското и потрошувачкото право во интеграцијата на земјите од Југоисточна Европа во Европската унија со посебен осврт на Република Македонија, докторска дисертација, Универзитет „Св. Кирил и Методиј“, Правен факултет „Јустинијан Први“ Скопје, Скопје: необјавен труд, p.104-114.

70 (2) The Misdemeanor Commission is composed of the president and two members of the Commission for Protection of Competition who are professionally engaged in the work of the Commission for Protection of Competition.

way it is handled from a formal aspect. However, in respect of the procedure, the Law only provides for the enterprise or association of enterprises to be held accountable by paying a fine.

The Law against Unfair Competition⁷¹ regulates the liability of persons who, when conducting the business, for the purposes of competition, commit an act or action contrary to the good business practices or contrary to the principle of conscientiousness and honesty. Liability is reflected by the prohibition of further performance of those acts and actions and liability for the damage caused by such acts and actions, under conditions determined by this Law. The Law, in Article 18, provides for associations established for the protection of the interests of consumers, in the capacity of a legal entity, to propose to the court to impose a ban against a person who:

- when conducting the business, for the purposes of competition, commits an act or activity contrary to the good business practices or contrary to the principle of conscientiousness and honesty.
- will give untruthful statements about the business (Article 3),⁷²
- improperly refers to direct sales (Article 4),⁷³
- improperly issues purchase licenses, warrants, cards or other similar documents for the purchase of products (Article 5),⁷⁴
- limits the offers in quantity (Article 6),⁷⁵

71 Law against Unfair Competition (“Official Gazette of the Republic of Macedonia” No. 80/99).

72 Article 3, Untruthful statements: Those who, when conducting the business, for the purpose of competition, give untruthful statements regarding the business, and in particular with regard to: the nature or origin of the products, the manner of production, the prices or the manner of determining the prices of certain products or trade services or the offer as a whole, the price lists, the manner or the person from whom the products are procured, the acquisition or possession of certain awards and recognitions, the occasion or goals of the sale and the amount the available stocks, shall be prohibited from giving such statements.

73 Article 4, Reference to direct sales: (1) Those who, in the course of their regular operations in the sale of products, refer to the fact that they are the manufacturer of the product they sell, may make such a reference only if: 1) they sell the respective product exclusively to end consumers; 2) the price charged for the sale of the product to the end consumers is the same as the price that they charge to wholesalers, retailers and consumers of the product, if making the respective product available for use is a trade deal and 3) the selling prices for the end consumers are higher than the prices charged for the same products by wholesalers, retailers or merchants, or if this fact in some other way is obvious to the end consumers. (2) Those, who in the course of their regular work in the sale of products to end consumers refer to the fact that they sell the respective products as a wholesaler, may make such a reference only if they mainly supply retailers or merchants and if the conditions referred to in paragraph 1 items 2) or 3) of this Article are fulfilled.

74 Article 5, Purchase licenses: Those who, during their regular operations and for the purposes of competition, issue to end consumers purchase licenses, warrants, cards or other similar documents for the purchase of products, or sell the products only to the holders of such documents, may do so only if the documents permit the purchase on one occasion (on one visit) and if such documents are issued separately for each visit to the consumer in the business premises where the respective products are sold.

75 Article 6, Limited quantity offers: (1) A person who, in the course of his/her regular work with end consumers, issues a public announcement, advertisement or correspondence available for a wider circle of people, shall be forbidden to use such type of advertising if: 1) limits the quantity available to any individual buyer for products particularly emphasized in the total offer or explicitly states that those products will not be sold to wholesalers or retailers or 2) by means of some price indicators or other types of visible indicators creates the impression that it is a particularly favorable offer of the products which are particularly emphasized in the total offer, and limits the quantity of their sale per customer or explicitly states that those products are not to be sold to wholesalers or to retailers. (2) The provisions of paragraph 1 of this Article shall not apply to cases when the announcement, advertisement or correspondence are completely and exclusively aimed at the persons that use such products in the performance of their independent professional or trade activity or in the performance of the entrusted public authorization.

- makes a comparison of prices when advertising (Article 7),⁷⁶
- conducts special sales and special offers (Article 8),⁷⁷
- advertises the sale of objects from the bankruptcy estate (Article 9), if with the respective action the essential interests of the consumers are affected,⁷⁸
- carries out sales of stocks although there is no urgent necessity for sales (Article

76 Article 7, Comparison of prices: (1) A person who, in the course of his/her regular work with the end consumers through a public announcement, advertisement or correspondence intended for a wider circle of people, compares the prices he/she currently charges for certain products or trade services which are emphasized in his/her total offer, with some higher prices, or advertises price reductions for a certain amount or a certain percentage, giving the impression that he/she has previously charged higher prices for those products or trade services, shall be forbidden to carry out such advertising. (2) The provision of paragraph (1) of this Article shall not apply: 1) to inconspicuous price tags; 2) if reference is made to the higher prices given in the previous catalog or other similar sales booklet that refers to the products or services offered in a particular economic sector, where such price differences are not prominently evident, and 3) If the announcement, advertisement or correspondence is entirely and exclusively intended for the persons who use those products or trade services in the performance of their professional or trade activity, as well as in the performance of the entrusted public authorizations.

77 Article 8, Special Sales and Special Offers: (1) A person who advertises or sells products or trade services to end users outside his/her usual business premises, striving to speed up the sale of products and create the impression of the existence of some special benefits or advantages for the buyers (special sales), shall be prohibited from performing such advertising or sale. (2) There is no special sale in the sense of the Paragraph 1 of this Article if the particular products, designated by their class or price, are offered for an unlimited period of time and if such offers are integral part of the regular daily business of the trading company or other legal entity (special offers). (3) The provision referred to in paragraph (1) of this Article shall not apply to special sales with duration of 12 working days: 1) Starting from the last Monday of January and the last Monday of July, when there are sales of textiles, clothing, shoes, leather goods or sports equipment (winter and summer seasonal sales) and 2) which mark the jubilee of the existence of the trading company or other legal entity in a particular field of business after the expiration of the period of 25 years of existence or manufacture, or the sales of a particular product or trade service (anniversary sales).

78 Article 9, Sale of items from the bankruptcy estate: When in a public announcement or through correspondence intended for a wider circle of people, the sale of items or products that originally belonged to the property of a person subject to a bankruptcy procedure (sale of items that originally belonged to a bankruptcy estate) is advertised, any reference to the fact that the respective items originate from a bankruptcy estate is prohibited, if the items themselves are no longer an integral part of that bankruptcy estate.

10),⁷⁹

- Gives and receives a bribe for the purposes of competition (Article 13),⁸⁰ if with the respective action the essential interests of the consumers are affected
- Sells under the system of avalanche (Article 14),⁸¹ if with the respective action the essential interests of consumers are affected

79 Article 10, Special sales of stocks: (1) The sale of the existing stock of products may be performed in the event of certain circumstances that force it (urgent need for sale), namely: 1) due to damages caused by fire, flood, storm or similar events for which there is no fault and 2) before the construction, extension, upgrade or similar reconstruction of the business premises is started, if the prescribed construction documentation has been obtained. (2) The sale of existing stocks may be carried out to the extent necessary to eliminate the urgent need for a sale within a deadline of not more than 12 working days.

(3) The sale of the existing stock of products may also be carried out in the event of closure (liquidation) of the entire business venture, and provided that the organizer of the liquidation sale, in the previous three years, had not pursued liquidation sales of the same business venture, unless there are certain circumstances for such a sale before the expiry of the three-year period.

The sale may be carried out within a maximum of 24 working days. (4) The provision referred to in paragraph (3) of this Article shall not apply to the liquidation sale of stocks in the bankruptcy proceedings. (5) The advertisement for the sale of stocks, in accordance with the provisions of this Article, must state the reasons for the sale of the existing stocks.

(6) The organizer is obliged to inform the competent chamber or association and the Ministry of Trade of executing the sales stipulated in paragraph (1) item 1 of this Article, at least seven days prior to the sales announcement (public announcement or other public advertisement), while in the cases stipulated in paragraph (1) item 2 of this Article, such notification is to be provided at least fourteen days prior to such announcement. The provided notification must be enclosed with documented evidence of the reason for the sales, and in case sales of the type referred to in paragraph (1) item 2 of this Article, the prescribed construction documentation must be submitted. The notification must contain the following data: 1) the reason for conducting the sale; 2) the start date and the end date of the sale and the place where it is to be carried out; 3) the type, quality and quantity of the products covered by the sale, 4) in case of a sale of the type referred to in paragraph (1) item 2 of this Article, a description of the sales object and the area covered by the construction works, and 5) in case of sales of the type referred to in paragraph (3) of this Article, the period of activity of the business venture under liquidation is to be stated. (7) The competent chamber or association that received the notification referred to in paragraph (6) of this Article and the Ministry of Trade may verify the reliability of the data specified in the notification and for that purpose may appoint their representatives. To verify the reliability of the data, the designated representatives can enter the business premises of the sales organizer during the regular working hours, inspect the business books and other documents, and make copies. (8) The potential organizer shall be prohibited from advertising or the sale of the sale if he/she: 1) does not comply with the provisions of paragraphs (1) to (7) of this Article; 2) sells products previously purchased exclusively for the purpose of such sale; 3) in the case of a sale of the type referred to in paragraph (1), item 2 of this Article, continues to trade in the corresponding point of sales before the completion of the construction facility for which he/she has submitted notification; 4) he/she caused the reason for the sale or otherwise inappropriately uses the possibility of carrying out the sale; and 5) directly or indirectly continued to manage the business whose liquidation has been advertised, or despite being the organizer of the liquidation sales, within three years of its completion, in the same city or in its immediate vicinity, he/she begins to trade with the same kind of products unless there are reasons to justify such continuation or commencement.

80 Article 13, Granting and Receiving Bribery for Competition Purposes: 1) A person who, in the course of his/her business and for the purposes of competition, offers, promises or gives a gift or other benefit to an employed person or to a representative of a trading company, or other legal entity, in order to obtain preferential treatment for him/herself or for a third party in connection with the acquisition of certain products or trade services in an unfair manner, shall be punished for a criminal offense with a fine ranging from 200,000 to 1,000,000 MKD or with up to three years of imprisonment. (2) An employee or representative of a trading company or other legal entity that requests or receives a gift or another benefit for the purposes stated in paragraph (1) of this Article, shall be charged with a criminal offence and face imprisonment of three months to three years. The received gift or proceeds shall be confiscated.

81 Article 14, Sale under the system of avalanche: A person who, during his/her regular work tries him/herself or through other persons to encourage persons who do not have the capacity of a trader to buy some products, trade services or rights, and promises such buyers special benefits or advantages in case they themselves encourage some other persons to purchase those products, services or rights, who, in turn, by maintaining this method of finding future buyers, acquire the same benefits or advantages if they themselves find buyers, shall be charged with a criminal offence and face a fine of 30,000 to 150,000 MKD or up to two years of imprisonment.

- Gives untruthful statements (Article 15),⁸² if with the respective action the essential interests of consumers are affected.

What is typical of this Law is that it explicitly authorizes consumer protection organizations to file a claim for compensation for damages that have arisen as a consequence of the violation (Article 18, paragraph 10). The Law stipulates that the claim is processed in an urgent contentious procedure. The right to compensation for damage and the right to seek a prohibition of a particular action shall become obsolete in a subjective period of 3 years or an objective period of 5 years. Although the Law against Unfair Competition explicitly provides for collective redress in terms of exercising the right to compensation for damages due to an act of unfair competition, the practical exercise of this right from the point of view of the existing procedural mechanisms is limited.

c. Financial Market Law

There are no mechanisms for collective redress in the field of financial market law in the national legislation.

d. Patients' Rights

The Law on Protection of Patients' Rights⁸³ regulates the protection of the rights of patients⁸⁴ in the use of health care, the duties of health institutions and healthcare workers and associates, the municipalities and the health insurance fund in the promotion and protection of patients' rights, the procedure for protection of patients' rights, as well as the supervision over the implementation of the Law.

The Law envisages forms of advocating the collective interests of patients through associations of patients in different bodies in the adoption and implementation of health care policies, but does not envisage collective redress. The Law, explicitly in Article 53 stipulates that the patient, as an individual, has the right to judicial protection for a violation of his/her right in a manner and in a procedure established by law.

82 Article 15, Untruthful statements: (1) A person who, with the intention of creating the impression that he/she gives a particularly favorable offer, through a public announcement or other means of communication, gives a statement intended for a wider circle of people in relation to his/her business, and in particular related to: the nature and origin of the products or services; the manner of production; prices or manner of determining the prices of certain products or trade services; the manner or person from whom the products are acquired, the acquisition or possession of certain awards or recognitions; the occasion or the goals of the sale and the amount of the available stocks, whereby such statements contain untruthful information whose untruthfulness is known to him/her, and the statements may deceive or mislead the public, shall be charged with a criminal offense and face a fine of 50,000 to 250,000 MKD or up to two years of imprisonment. 2) If the offence referred to in paragraph (1) of this Article has been committed by an employed person, a representative or a proxy of the trading company, both the owner and the members of the company's management or supervisory body shall be punished for the same offense if they knew or had to know about the undertaking of the actions referred to in paragraph (1) of this Article.

83 Law on the Protection of Patients' Rights ("Official Gazette of the Republic of Macedonia" No. 82/2008, 12/2009, 53/2011 and 150/2015).

84 Pursuant to Article 2, paragraph 1, line 1, "Patient" is a person, ill or healthy, who will ask for or is undergoing a certain medical intervention in order to preserve and promote his/her health, prevent diseases and other health conditions, treatment or health care and rehabilitation.

e. Food Safety

There are no special provisions in the special laws in this area which provide for consumer collective redress.

f. Product Safety

Except for the provisions of the Law on Consumer Protection, which regulate the issue of product safety, there are no special provisions in the special laws in this area which provide for collective redress.

g. Right to Environmental Protection

The Law on Environment⁸⁵ regulates the rights and duties of the Republic of Macedonia, the municipality, the City of Skopje and the municipalities in the City of Skopje, as well as the rights and duties of the legal entities and natural persons, in providing conditions for protection and promotion of the environment, for the purpose of exercising citizens' right to a healthy environment.

The Law, indirectly, through the recognition of the right of environmental protection associations to participate in certain procedures that are carried out before the competent environmental protection bodies⁸⁶ and the compensation procedures, provides for collective redress.

Thus, the Law enables Associations of citizens in the field of environment to act in an administrative procedure on the following issues:

- To notify the state administration body responsible for environmental affairs in case of identified negative effects from the implementation of a planning document (Article 75),
- To appeal against the decision by which the state administration body responsible for environmental affairs informs the investor about the need for environmental impact assessment of the project, before the State Commission for Decision-making in Administrative Procedure and Labor Relations Procedure in Second Instance, within eight days from the day of its announcement (Article 81),
- To appeal against the decision with which the request for the project implementation is accepted or rejected,⁸⁷ before the State Commission for Decision-making in Administrative Procedure and Labor Relations Procedure in Second Instance, within 15 days from the day of its announcement (Article 87)
- To appeal against the decision of the state administration body responsible for environmental affairs with which A - an integrated environmental permit is issued or granted (Article 108, or Article 118), as well as the decision for issuing B –

⁸⁵ Law on Environment ("Official Gazette of the Republic of Macedonia" No. 53/2005; 81/2005; 24/2007; 159/2008; 83/2009; 48/2010; 124/2010; 51/2011; 123/2012; 93/2013; 187/2013; 42/2014; 44/2015; 129/2015; 192/2015 and 39/2016).

⁸⁶ Pursuant to Article 1, paragraph 2 of the Law, the Law on General Administrative Procedure shall apply to the procedures determined by this Law, unless otherwise stipulated by this Law, and according to paragraph 3, in the procedures during the inspection supervision, the provisions of the Law on Inspection Supervision shall apply, unless otherwise stipulated by this Law.

⁸⁷ This decision contains an assessment as to whether the environmental impact assessment study of the project meets the requirements prescribed by the Law and the conditions for issuing the permit for the implementation of the project, as well as measures for prevention and reduction of the harmful effects, hence the interest of associations.

integrated environmental permit (Article 126), before the State Commission for Decision-making in Administrative Procedure and Labor Relations Procedure in Second Instance, within 15 days from the day of its adoption;

In addition to the administrative procedures, in accordance with Article 159 of the Law, associations also have the right to participate in procedures for restoration of environmental damage.⁸⁸ The Law stipulates that a citizens' association established for the purposes of environmental protection, apart from a legal entity or a natural person, which is directly threatened or is affected by the caused environmental damage,⁸⁹ has the right before the competent court to require the operator⁹⁰ to: 1) restore the environment to its original state or 2) compensate for the occurred environmental damage, in accordance with the general regulations on compensation for damage, if restoration to original state is not possible. During this procedure, the evidence is provided by the state administration body responsible for environmental affairs⁹¹ and the defendant.⁹² Taking into consideration that the Law refers to the general regulations for compensation for damages, the request would be processed in a contentious (civil) procedure. Moreover, as we have seen, there is a wide circle of people who will have active legitimation in terms of procedural law.⁹³ The request for imposing (monetary) compensation for environmental damage is conditioned by the inability to restore the state as it has been

88 According to Article 5, paragraph 1, item 51 of the Law, environmental damage is "any damage caused to:

- protected species and natural habitats, which have significant adverse effects on the achievement and maintenance of favorable conservation status of these habitats or species. The significance of the adverse impacts shall be assessed on the basis of the original state, taking into account the criteria determined in accordance with the regulation referred to in Article 157 paragraph (3) and Chapter XVI of this Law – waters, which have significant adverse effects on the ecological, chemical and/or quantitative status and/or ecological potential of the waters, in accordance with the Law on Waters and the regulations adopted on the basis of that Law, and - the soil with its contamination, which causes a significant risk to human health as a result of direct or indirect use of substances, preparations, organisms or micro-organisms in, on or under the soil." Article 157, Liability for Environmental Damage: (3) The Minister managing the state administration body responsible for environmental affairs shall prescribe the professional activities of paragraph (2) of this Article, the performance of which may incur responsibility for environmental damage. The regulation determines the criteria for determining the existence of environmental damage, as well as the cases in which, as an exception, the liability for environmental damage will not occur; Chapter XVI Liability for Damage Caused to the Environment.

89 Pursuant to Article 159, paragraph 2, the Republic of Macedonia reserves the right to request restoration of the environment to its original state and compensation for environmental damage caused, if there are no other persons who, according to the provisions of this Law, have the right to it, and if the environmental damage is caused to a good of general interest for the Republic, which enjoys special protection determined by law, restoration to the original state, or compensation for environmental damage caused, may be requested by the Republic of Macedonia or the municipality, the City of Skopje and the municipalities in the City of Skopje on whose area the good is located (Article 159, paragraph 3).

90 Pursuant to Article 5, paragraph 1, item 40, an operator is any legal entity or natural person who performs professional activity and/or performs activities through the installation and/or controls, or a person entrusted with or delegated authorizations to make economic decisions in relation to the activity or technical operation, including the holder of the license or authorization for such activity, that is, the person in charge of registering or alerting the activity.

91 Article 159, paragraph 4: In the case referred to in paragraph (1) of this Article, the state administration body responsible environmental affairs shall be obliged to submit to the competent court all the data necessary for determining the liability for the environmental damage, the scope of the liability, as well as for determining the restoration to the original state, i.e. the amount of compensation for the damage.

92 Article 159, paragraphs 5 and 6: The holder of the right to a lawsuit referred to in paragraph (1) of this Article may request the court to instruct the defendant to provide information or to enable the collection of information from the source of pollution, necessary for determining the liability for the environmental damage and the scope of liability. If, despite the court order, the defendant fails to enable the collection of the information, i.e. does not provide the necessary information, the information is collected ex officio at the expense of the defendant.

93 This, in some way, conflicts with the rules of the indemnity law that define who is the injured party, but since the Law on Environmental Protection in relation to the Law on Obligations appears as a special law, it derogates the rules of the general law.

before. The scope of the damage and the amount of the compensation shall be determined in accordance with the rules of the LO, but the question arises, if a monetary compensation is awarded, what a citizens' association can use it for. Taking into consideration that the Law determines that the purpose of the liability for environmental damage, based on the "polluter pays" principle, is: - prevention and remediation of the overall environmental damage (hereinafter: environmental damage), - restoration of the environment and - introducing measures and practices for minimizing the risk of environmental damage, we believe that the court may order the plaintiff to use the amount awarded for these purposes.

h. Other areas

Collective redress is envisaged in the area of protection of the right to equality. The Law on Prevention and Protection against Discrimination⁹⁴ aims to provide prevention and protection against discrimination in exercising the rights guaranteed by the Constitution of the Republic of Macedonia, the law and ratified international agreements.⁹⁵ The Law, except for the possibility of individual protection of the right to equality⁹⁶ when it is violated by means of discrimination,⁹⁷ with Article 41 also provides for class action for protection against discrimination which is by its very nature close to the mechanisms of collective redress. This lawsuit may be filed before the civil court as co-litigants, associations and foundations, institutions or other civil society organizations that have a legitimate interest⁹⁸ in protecting the collective interests of a particular group or within the scope of their activity deal with protection of the rights to equal treatment. The procedure is initiated against the person who has violated the right to equal treatment. The prerequisite for a class action is that these individuals make it plausible that the actions of the defendant have violated the right to equal treatment of a large number of persons. In addition, the lawsuit is allowed only if there is consent from the person who claims to have been discriminated against. This suggests that the application of this mechanism for (collective) redress implies that any person who is discriminated against should give consent for inclusion in the class action, which is appropriate application of the principle of opt-in.

The lawsuits that may be filed by a class action are more limited in scope than those that may be filed by means of an individual lawsuit. Thus, in accordance with Article

94 Law on Prevention and Protection against Discrimination ("Official Gazette of the Republic of Macedonia" No. 50/2010, 44/2014, 150/2015 and 31/2016) – hereinafter referred to as LPPD.

95 Article 1, paragraph 1 of the LPPD.

96 Pursuant to Article 5, paragraph 1, item 6 of the LPPD, equality is a principle under which all people are equal, i.e. have the same obligations and rights. Equality implies diversity, that is, the existence of nonidentical persons who need to be treated equally.

97 According to Article 5, paragraph 1, item 3 of the LPPD, discrimination is any unjustified legal or factual, direct or indirect discrimination or unequal treatment, i.e. omission (exclusion, limitation or giving priority) in relation to persons or groups based on sex, race, color of skin, gender, belonging to a marginalized group, ethnicity, language, citizenship, social origin, religion or religious belief, education, political affiliation, personal or social status, mental and physical disability, age, family or marital status, property status, health status or any other basis.

98 The law does not define what will be considered a justified interest. However, Article 5, paragraph 1, item 10 defines the term legitimate interest and it is a justification for the interest and active involvement of a particular person in the undertaking of specific activities, because of his/her own interest in the consequences of those activities, because of a wider predetermined interest in certain social events, that is, because of an authorization determined by law for dealing with certain activities. Given that the Law does not use the term "legitimate interest" elsewhere except in the definitions, we believe that it refers to the term "justified interest".

41, paragraph 2, the lawsuit may include a request: 1) to establish that the actions of the defendant have violated the equal treatment in relation to the members of the group; 2) to prohibit taking actions that violate or may violate the equal treatment, that is, perform actions that eliminate discrimination or its consequences in relation to the members of the group; and 3) the verdict establishing violation of the rights to equal treatment to be published in the media at the expense of the defendant.⁹⁹ It follows that the members of the group who have brought a class action, upon the grant of the aforementioned claims, would individually exercise the right to compensation for damages. It should be noted that the LPPD enables the associations with a justified/legitimate interest to engage as intervenors in individual proceedings before the court (Article 39, LPPD).

What is typical of the Law is that although it provides for collective judicial protection of rights, collective redress is not provided in the proceedings before the Commission for Protection against Discrimination.¹⁰⁰ Namely, in accordance with Article 25 paragraph 1 of the LPPD, only the person who believes that he/she has suffered discrimination can submit a complaint to the Commission.

Our legislation does not envisage a class action for abstract situations using methods to demonstrate the existence of discrimination, as it is the case in comparative law. For this reason, and because of the specific social circumstances and the stigmatization that discrimination is most often accompanied with, it is difficult to expect that this mechanism will soon be implemented.

2.7. Legislative consultations and reform proposals

a. Legislative proposals

At this point, there are no active proposals of laws that amend or supplement the legal framework for collective redress.

3. Institutional framework for collective redress

3.1. Overview of legal provisions determining stakeholders in implementing collective redress

The Law on Consumer Protection of the Republic of Macedonia (LCP)¹⁰¹ was enacted in 2004 and since then it has been amended seven times,¹⁰² and with the

⁹⁹ Pursuant to Article 36 of the LPPD, the individual lawsuit may require: 1) to establish that the defendant has violated the plaintiff's right to an equal treatment, that is, the action he/she has undertaken or failed to undertake could directly lead to violation of the rights to equality in the proceeding, 2) to prohibit undertaking activities that violate or may violate the plaintiff's right to equal treatment, that is, to perform actions that eliminate discrimination or its consequences, 3) to compensate for the pecuniary and non-pecuniary damage caused by violation of the rights protected by this Law; and 4) to publish in the media at the expense of the defendant the verdict that establishes the violation of the rights.

¹⁰⁰ See Article 1, paragraphs 1 and 2, in relation with Articles 17 to 24 of the LPPD.

¹⁰¹ Law on Consumer Protection ("Official Gazette of the Republic of Macedonia" No. 38/2004, 77/2007, 103/2008, 24/2011, 164/2013, 97/2015 and 152/2015).

¹⁰² Compare: H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers (eds.) (2008), *EC Consumer Law Compendium: The Consumer Acquis and its transposition in the Member State*, Munich; Sellier, p.008, 197.

amendments of the LCP in 2011,¹⁰³ the collective representation of consumer interests has been moved in section 3-6 of the LCP, entitled: “Consumer Collective Redress”.

Directive 2009/22/EC should be transposed into the LCP, or in a separate law, and the European Commission Recommendation¹⁰⁴ (2013/396/EU) should be taken into account for the harmonization of the legal framework for the application of mechanisms for consumer collective redress. In the further analysis, when comparing the provisions of the LCP with the EU law, we will take into account Directive 2009/22/EC and the Recommendations adopted by the EC for better implementation thereof. According to this Directive, the procedural legitimation for initiating a proceeding for consumer collective redress should be given to public legal entities, or to consumer organizations for the purposes of protection of the collective interests of consumers, and such protection can be exercised in administrative or court proceedings. States may use the two procedures, which are an opportunity to protect the rights in administrative proceedings (through inspection supervision bodies) on the one hand, and through the protection of rights in a regular contentious (civil) procedure, on the basis of a lawsuit filed by authorized persons.

Although the Directive only applies to collective interests, it seems that our LCP does not distinguish between collective and individual consumer interests. In the LCP, there is no definition of what collective interests of consumers are and what collective redress is. The active legitimation of the bodies that are supposed to be responsible for consumer collective redress is also imprecisely determined. Pursuant to Article 31-i of the LCP, the Government of the Republic of Macedonia, upon a proposal by the Minister of Economy, with a special act, determines the authorized bodies that have an interest in protecting the collective interests of consumers. According to the definition given in the LCP, the bodies authorized to initiate proceedings are “bodies and organizations established by the regulations governing the establishment of the activity of those bodies and which have a common interest for consumer protection, such as consumer protection organizations, chambers and other specific bodies that have a common interest in consumer protection”. Pursuant to Article 31-h of the LCP, *any authorized body may propose to the competent inspectorate to initiate a proceeding before a competent court for the termination of actions contrary to the provisions of Articles 53 to 117 of this Law* (in the domain of unfair terms in consumer contracts, concluding contracts outside the business premises of the trader and distance contracts, and a consumer contract for a time-limited right to use a particular real estate - time sharing).

These provisions indicate that **the authorized bodies are only authorized to**

103 Instead of fully transposing Directive 2009/22/EC into the LCP, it appears that the transposition involved compiling Directive 2009/22/EC with Directive 98/27/EC on injunctions, but given the small differences between the two Directives, no major concessions are made in the analysis of the LCP in this area. In this analysis, therefore, we refer to Directive 2009/22/EC.

104 In 2013, the European Commission adopted a Recommendation on the Advancement of National Mechanisms for Consumer Collective Redress (especially when they are victims of mass violation). Due to the large differences in the Member States’ legal systems for achieving equity in the access to justice in the event of mass violations, the Recommendation, which is a non-binding horizontal document with regard to collective redress, recommends that Member States at national level establish two mechanisms for consumer collective redress, as follows: claim for damages which is pursued in the civil procedure and a claim for injunction which is pursued in an administrative or civil procedure. In cases of mass damage caused, collective redress should be requested by two or more natural or legal persons, or by the person authorized to initiate disputes for collective redress. The cessation of the illegal behavior can be requested by two or more natural or legal persons, or by the body authorized for collective representation.

submit a motion to initiate a proceeding, and not to initiate a proceeding themselves.

Article 31-m indicates that it is *a proceeding before a competent inspectorate, i.e. a misdemeanour body and not before a competent court.*¹⁰⁵ Such a proceeding may also be initiated (Article 31-h paragraph 2 of the LCP) against a single trader or a group of traders of the same economic activity who act contrary to the provisions of this Law and the Law on Obligations, chambers and other associations of traders that have acted contrary, or against those who have prescribed the rules for the actions of traders concerning unfair commercial practices (Articles 31-a, 31-b, 31-c, 31-d, 31-e, 31-f and 31-g) of the LCP. *In accordance with Article 103 paragraph 2, the authorized bodies may propose to the competent inspectorate to initiate a proceeding before the competent courts for termination of the actions* contrary to the provisions of Articles 84-102 of the LCP.

The analysis of this part of the LCP enables us to conclude that in Articles 53 to 104 (Unfair contractual terms and concluding contracts outside the business premises of the trader and distance contracts) of the LCP, there already are provisions enabling filing lawsuits by consumer protection organizations, and Article 83 of the LCP specifies that *“anyone with a justified interest in protecting consumers, as well as consumer protection organizations, may apply for the prohibition of unfair terms.”*

Hence, we can conclude that the authorized bodies based on Article 31-h and Article 31-i of the LCP may propose or initiate a proceeding; however, in accordance with Article 83, everyone is authorized to initiate a proceeding, thus raising the issue of legal dualism in the domain of active procedural legitimation.

The Government of the Republic of Macedonia, upon a proposal by the Minister of Economy, has not yet defined a list of authorized bodies for initiating proceedings for collective redress with a separate act. There are also no legal provisions in the LCP whereby these persons can file a lawsuit before a competent court in the interest of all consumers against all traders or their associations, when their actions are contrary to consumer protection regulations, and the verdict to affect all consumers. Some kind of derogation from the mandatory list of authorized bodies is the provision of Article 128 paragraph 1 line 11, stating that: *“consumer associations may represent the interests of consumers in collective disputes before the competent courts”*, but on the other hand, the legislator has not identified consumer associations as authorized bodies for collective consumer representation with a separate legal act, except that it is implied that they should be included in the list in accordance with the definition given in Law, and refers to *“authorized bodies”*. If the list of authorized bodies including consumer organizations is adopted, the question arises as to the financing of consumer organizations for initiating proceedings, their staff structure and spatial conditions for admission of clients (in opt-in procedure), the way of financing campaigns for inviting consumers who have sustained damage, providing funds in case of a lost dispute against the defendant, as well as other issues related to the proceeding and the authorized persons who may have active legitimation to initiate it. These issues are important not only for consumer

¹⁰⁵ If the competent inspectorate, in conducting the inspection, determines that the trader, that is, the service provider against whom the procedure is being conducted has acted contrary to the provisions of Articles 53 to 117 of this Law and the provisions referred to in Article 31-h of this Law, it shall order with a decision that the trader, that is, the service provider cease such action, that is, to remove the identified irregularities in the determined deadline in which the irregularities must be removed.

associations, but for all other authorized bodies. It should be taken into consideration that in the Republic of Macedonia there are no horizontal rules for consumer collective redress including all aspects that are currently being discussed in the EU. The legislator may decide to regulate this area with a separate law,¹⁰⁶ but it can also remain regulated in the LCP.

In terms of the title, other laws also indicate the interested parties for collective redress. Thus, in the Law on Distance Provision of Financial Services in Article 17, consumer protection organizations are foreseen to undertake activities before courts or before competent institutions for non-implementation of the Law.¹⁰⁷ Paragraph 2 of this article states that in the resolution of border disputes, consumer protection organizations cooperate with appropriate bodies in other countries.

Similar provisions can be found in the Law against Unfair Competition¹⁰⁸ (Article 18, paragraph 10) by which this law authorizes consumer protection organizations to file a claim for damages. However, it should be noted that while this Law provides for collective redress in terms of exercising the right to compensation for damage due to an act of unfair competition, the exercise of this right in practice is limited due to inadequate procedural mechanisms.

An additional problem is that the Law on Contentious Procedure of the Republic of Macedonia¹⁰⁹ does not contain provisions for consumer collective redress. Article 178 stipulates that multiple claims against one defendant may be filed when they are linked to the same factual and legal ground in one lawsuit against the same defendant, in cases where the court has a subject-matter jurisdiction for the particular claims. This provision does not envisage initiation and implementation of a proceeding for consumer collective redress and/or collective redress for other entities when their rights have been violated through illegal actions. There is a possibility for everyone separately to file a claim for compensation for damages or plaintiffs who have a common interest and similar violations of their rights to appear as co-litigants. For these reasons, it is necessary to amend the Law on Contentious Procedure and to enable the initiation of a proceeding in all cases in which collective redress is envisaged by law, so that the authorized bodies envisaged in the LCP, and are not yet appointed, request (apart from administrative) judicial protection as well.

3.2. Stakeholders responsible for putting collective redress into practice

Directive 2009/22/EC, recital 10, sets out the possibilities to authorize one or two independent public bodies specifically responsible for consumer collective redress. Another possibility provided by this Directive is for the organizations dealing with protection of the collective interests of consumers on the basis of the criteria set out in the national law to appear as authorized bodies. Recital 11 of this Directive refers to the possibility for Member States to combine these two options. The list of authorized bodies in the EU countries indicates a combination of public/legal and private bodies.

¹⁰⁶ As is the case with the EU countries (Slovenia, the Netherlands, Germany and other EU Member States).

¹⁰⁷ Law on Distance Provision of Financial Services ("Official Gazette of the Republic of Macedonia" No. 158/2010 and 153/2015).

¹⁰⁸ Law against Unfair Competition ("Official Gazette of the Republic of Macedonia" No. 80/99 of 17.12.1999).

¹⁰⁹ Law on Civil Procedure of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", No. 79/2005, 110/2008, 83/2009, 116/2010, 7/2011 and 124/2015).

In some EU Member States, consumer organizations and other organizations operating in specific areas of consumer law have been given priority as authorized bodies,¹¹⁰ and there are places where such a priority is given to chambers of commerce.¹¹¹ Some EU Member States have fewer bodies,¹¹² while others have a fairly large number of authorized bodies organized by areas which are of interest to consumers.¹¹³ In such a variety at European level, the question arises as to what would be the authorized bodies for collective consumer representation in our country and whether to authorize one body for several areas,¹¹⁴ or to authorize several bodies competent in individual areas, which in the Republic of Macedonia have authorizations to protect consumers. The definition in the LCP of “authorized bodies to initiate proceedings” indicates that it can be consumer organizations, chambers or other specific bodies, which gives space to authorize a number of bodies in a number of areas of importance to consumers. With regard to specific bodies and their identification, Annex 1 to Directive 2009/22/EC should be taken into account, where, based on the indicated Directives, it is possible to determine the areas that govern them, and therefore the competencies of certain bodies in these specific areas provided for by the LCP and the specific laws. *If we adopt this approach, then more public bodies competent in specific areas, consumer organizations and business associations could be authorized.* Bearing in mind that class actions may affect the rights of consumers in distance contracts and contracts outside the business premises, consumer credit, tourist travel, unfair commercial practices, unfair terms in consumer contracts, product sales and associated guarantees, the list of authorized bodies may be quite large.

In our opinion, in collective consumer representation, authorized bodies for initiating administrative and judicial procedures should be: the Directorate for Personal Data Protection (when violating personal data rights), the National Bank of the Republic of Macedonia (for collective redress in the area of financial services of banks and savings banks), the Insurance Supervision Agency (in the domain of violations of the rights of the insured), the Ombudsman of the Republic of Macedonia (the domain of public services), the Commission for Protection of Competition (consumer collective redress in case of violations arising from abuse of monopolistic or dominant position or restrictive market practices),¹¹⁵ consumer organizations, Chambers of Commerce, inspection bodies and other organizations and institutions. Article 135 of the LCP specifies the misdemeanour bodies for conducting misdemeanour procedure, which are in fact competent inspectorates, and according to the LCP those are: the State Market Inspectorate, the State Inspectorate for Agriculture, the State Sanitary and Health Inspectorate, the State Inspectorate for Environment and the Food and Veterinary Agency, which decide on the misdemeanours pertaining to this Law within the limits of their powers provided by

110 Austria, Denmark, Czech Republic.

111 Republic of Greece, where according to the Greek Law on Consumer Protection, the Chamber of Commerce and Industry can initiate a court proceeding for consumer collective redress.

112 Belgium or Estonia.

113 In some countries, institutions responsible for public transport, postal services, financial services, real estate, housing, competition, tourism, broadcasting, drugs, telecommunications, civil aviation, gas and electricity, water management services, metrology, etc. are also authorized.

114 If it is assumed that the new Law on Consumer Protection, through preliminary discussion with all interested parties, foresees the establishment of a Consumer Protection Agency.

115 For this role of the CPC, the Law on Protection of Competition should be amended and a new role of the Competition Commission should be established.

law. This list of inspection bodies should be extended to the Agency for Medicines, the Agency for Electronic Communications, the Agency for Audio and Audiovisual Media Services, and, possibly, the State Inspectorate for Technical Inspection, the communal inspectorates within the municipalities (due to the part of the LCP relating to public services and where disputes may also be conducted when it comes to mass damages inflicted on consumers).

3.3. Mapping the cooperation among stakeholders

The bodies which will be identified by the line ministry and authorized by the Government of the Republic of Macedonia for consumer collective redress, with a separate act, in accordance with EU law, should be able to directly or indirectly implement or initiate through other competent institutions¹¹⁶ the two basic procedural mechanisms whose introduction is recommended in the EC Recommendation, and those are: injunctive collective action¹¹⁷ and compensatory collective action.¹¹⁸ The injunctive collective action is a special type of condemnatory action,¹¹⁹ aimed at prevention or cessation of the unlawful conduct, requiring that the defendant is prohibited to take the action which poses a risk of violation, that is, to repeat the action which violates the right of a large number of entities (it is aimed at achieving preventive protection).¹²⁰ In order to exercise the right to file a class action, our law will have to be amended not only in the LCP, but also in the Law on Contentious Procedure, making possible to exercise the rights of entities by filing a class action. Also, courts should have separate departments that will be responsible for conducting proceedings upon class actions for collective redress claims.

Pursuant to Regulation 2006/2004,¹²¹ it is necessary to revise and then to link the competencies of the institutions that have responsibilities for consumer protection. Recital 4 of the Regulation states that in order to protect consumers and their economic interests, not least where health is concerned, consumer protection bodies should exchange best practices in accordance with this Regulation. In the Republic of Macedonia, the Ministry of Economy determines and implements the consumer protection policy. One of the tasks besides the comprehensive regulation of collective redress (whether it will be done through the LCP or with a separate law) is to launch an initiative for an adequate amendment to the Law on Contentious Procedure, as well as to identify the interested parties in consumer collective redress. Given the fact that the institutions do not cooperate as expected in the process of application of the Law on Consumer

116 As this issue is currently regulated in the LCP of the Republic of Macedonia, any authorized body “*may propose to the competent inspectorate*” to initiate a proceeding before the competent court for termination of the actions contrary to the provisions of Articles 53 to 117 of this Law.“

117 In the EU law known as “*injunctive collective action*”.

118 In EU law known as “*compensatory collective action*”.

119 A condemnatory action is a lawsuit for denouncement, which requires the court to order the defendant, to obligate the defendant on the basis of a certain regulation contained in the substantive law, to take certain actions, to undergo certain actions, or to omit certain actions, etc.

120 In the Republic of Macedonia, these rights are exercised in an administrative proceeding, that is, by taking measures by the inspection bodies independently or upon request by organizations of consumers, traders and other legal entities that have an interest to initiate a procedure before a competent inspectorate.

121 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), *OJ L 364*, 9.12.2004 [Regulation (EC) No 2006/2004 (9.12.2004)].

Protection, especially in combating unfair commercial practices, which is one of the basic challenges for collective redress (Annex 1 of Directive 2009/22/EC),¹²² there is a need for greater strengthening of their mutual cooperation and education, as well as joint actions in combating deviant market phenomena and greater protection of consumer interests and rights.

Having in mind the 2013 Communication from the Commission,¹²³ it can be concluded that certain aspects of collective redress will cause problems in the implementation, such as the way the opt-in and opt-out mechanism for collective redress will be put into practice, the costs of the procedure, the manner of conducting the procedure, the risk of a procedure that can lead to financial damage and damage to the trader's reputation, causing great costs for smaller economic operators, settlement of expenses for legal representation in complex cases, etc. The argument that this new legal area is complex and requires analyzes and studies is further reinforced by the fact that it needs to be revised four years after the adoption of the EC Recommendation so that new normative solutions are offered, for the purpose of which the questionnaire¹²⁴ which has been recently put on the EC website will be used, in order to investigate collective redress procedures following the adoption of the 2013 EU Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms.

4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress

4.1. The role and competencies

- Competent inspection bodies

Certain competent inspection bodies according to the LCP have powers in the field of consumer collective redress when dealing with violation of consumer rights, in the sale of products and services and guarantees, sale of products, advertising, unfair commercial practice, the right to a time-limited use of real estate, contracts concluded outside the business premises and distance contracts, long-term holiday products, tourism and catering, etc.

Inspection supervision of the implementation of the provisions of the LCP is carried out by: the State Market Inspectorate, the Food and Veterinary Directorate, the State Sanitary and Health Inspectorate and the State Inspectorate for Environment through inspectors, in accordance with the powers determined by law. Misdemeanour bodies for conducting a misdemeanour procedure in accordance with this Law are the State Market Inspectorate, the State Inspectorate for Agriculture, the State Sanitary and Health Inspectorate, the State Inspectorate for Environment and the Food and Veterinary Agency, which decide on the misdemeanours referred to in this Law within their powers provided by law.

Based on Articles 53 to 117 of the LCP (concerning unfair terms in consumer

122 М. Лончар Велкова, И. Костовски (2017) Поттикнување на фер конкуренција на пазарот, Детектирање и анализирање на проблемите со заштитата на потрошувачите и сузбивање на нечесната пазарна пракса, Скопје: ОПМ, p.30.

123 COM(2013) 401/2, Communication from the commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the regions, "Towards a european horizontal framework for collective redress".

124 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59539, (10.06.2017).

contracts, concluding contracts outside the business premises of the trader and distance contract, and a consumer contract for a time-limited right to use a particular real estate - time sharing), **any authorized body may propose to the competent inspectorate** to initiate a proceeding before a competent court for termination of actions contrary to the provisions.

In the LCP, even before the transposition of the Directive 2009/22/EC (Article 31-h, Article 31-r), there are provisions that give legal authority to the competent inspection body to terminate the misleading or illegal comparative advertising with a decision and to order the trader to publish the decision to terminate, i.e. prohibit the misleading or comparative advertising, or to correct the advertisement at the expense of the advertiser, if within a specified period the advertiser fails to submit proof of the accuracy of the factual claims stated in the advertisement. **The traders, their associations and consumer associations have the right to require the competent inspection body to order that the misleading or illegal comparative advertising be terminated** if they have evidence of the accuracy of the factual claims in the advertisement. This right is also used by traders and consumer associations in situations where the advertisement has not yet been published, and its publication is inevitable. Article 132 stipulates that during the inspection supervision the inspector, by means of decision, shall prohibit the legal entity and natural person from advertising content which is suspected of being misleading or unauthorized comparative advertising. However, collective redress for consumers who have purchased a product on the basis of an untruthful or misleading advertisement in the above-mentioned cases may not be sought in a judicial procedure due to lack of proper regulation. Instead, every person in an individual lawsuit or several injured parties in a co-litigation may ask for the termination of the contract and compensation in a contentious (civil) procedure.

The EC Recommendation stipulates that in cases in which the public body is competent to determine the violation, collective redress action may be filed only after the final conclusion of the proceeding before that body. If, however, the proceedings before the public body have begun after filing a collective redress action, the court should temporarily suspend the proceeding until the completion of the proceeding before the public body in order to prevent the adoption of contradictory decisions.

According to the Recommendation, the injured parties should be guaranteed that they will have the opportunity to exercise their right to collective redress before the court even in case of expiry of limitation and prescription periods before the conclusion of the proceedings before the public body.

This rule applies to our legal system too, but it cannot be practiced for all injured consumers against all traders in a single proceeding initiated by filing a collective redress action, whereby the verdict will apply *erga omnes*, but only in individual litigation or co-litigation initiated in such disputes.

- Agency for Electronic Communications (AEC)

AEC's operation is regulated by the Law on Electronic Communications (LEC), which also regulates, *inter alia*, the rights of users, including end users with disabilities and end users with special social needs, *ensuring efficient and sustainable competition in the electronic communications market*, providing universal service, etc. The right to truthful and transparent information of consumers is regulated in *Article 108 of*

this Law, which is more closely regulated by a Rulebook. In Article 182 of the LEC, misdemeanours are foreseen, i.e. a fine for a misdemeanour is envisaged, which shall be imposed on a legal entity i.e. single trader if he/she does not publish transparent, appropriate or updated information.

AEC resolves consumer disputes with operators in general administrative proceedings, which also provides for amicable dispute resolution through the involvement of both parties (the operator and the end user), mediated by the AEC, if both parties agree to such resolution. Collective consumer representation in administrative procedure before the AEC is not envisaged, but consumer organizations may submit a request to the AEC to review information, contractual provisions or certain irregularities affecting larger consumer groups. Given that AEC is not part of the competent inspection bodies in accordance with the LCP, the articles of the LCP where the provisions on consumer collective redress are moved (Article 31 – h to 31-r) cannot be applied; however, the LEC regulates the relations between operators and consumers, as well as the role of the AEC in the event of a dispute. It should be taken into consideration that in accordance with the amendments to the Law on Electronic Communications, the AEC no longer has inspectors, but employed persons with authorization to perform expert supervision.

- Food and Veterinary Agency (FVA)

The establishment and the competencies of the Food and Veterinary Agency is regulated by the Law on Food Safety, which aims to ensure a high level of protection of human life and health, and protection of the interests of consumers, animal health protection and well-being, plant health and environmental protection. Among other things, this Law should prevent deceiving and misleading the consumer.

The food operator shall be held responsible for the information relating to the food and, within the framework of the business, it must not alter the information on the labelling attached to the food, if such changes would mislead the consumer or otherwise reduce the level of consumer protection and the ability of the end consumer to make a choice. Food operators are obliged to provide compulsory food information such as the name of the food, the date of minimum durability or the expiration date, any special storage conditions and/or conditions of use and the name or business name and address of the food operator referred to in Article 29-d, paragraph 1. For the misdemeanours referred to in this Law, the misdemeanour procedure shall be conducted and a misdemeanour sanction shall be pronounced by the Agency (the Misdemeanour Authority). The misdemeanour procedure before the Misdemeanour Authority is conducted by the Misdemeanour Commission established by the Director. The Misdemeanour Commission is composed of authorized officials employed in the Agency, one of which is the President of the Misdemeanour Commission. The Director of the Agency shall prescribe the manner of operation of the Misdemeanour Commission, the conditions that the members of the Commission should fulfil and the duration of the term. Against the decisions of the Misdemeanour Commission, which impose a misdemeanour sanction, an appeal may be filed to the State Commission for Decision-making in Second Instance in the Field of Inspection and Misdemeanour Procedure within eight days from the day of receipt of the decision through the misdemeanour authority.

Collective consumer representation in an administrative procedure before the FVA is not foreseen, but consumer organizations and other stakeholders may put forward

an initiative to the FVA to initiate a procedure by delivering requests from individuals or a group of consumers in order to prevent abuses or mass violations of the rights of consumers, when it comes to food safety. According to the provisions of the LCP, the FVA is part of the competent inspection bodies, and accordingly, articles of the LCP where the provisions for consumer collective redress are placed (Articles 31-h to 31-r) may be applied in the administrative procedure in order to achieve prevention of unlawful actions by food operators.

- Courts

According to the LCP, courts act in cases where consumer protection organizations and anyone with a legitimate interest in protecting consumers may require the court to declare null and void the contractual term if it has been established that this term is unfair under the LCP. The proceeding may be initiated against an individual trader, against several traders of the same economic activity, as well as against the associations of those traders who use unfair contractual terms. Under the LCP, claiming judicial protection is foreseen in the event of damages caused by an unsafe product, compensated in accordance with the rules laid down in the Law on Obligations. Directive 2009/22/EC envisages giving procedural legitimation to a public/legal entity or a consumer organization, and the Macedonian LCP in the domain of unfair contractual terms enables “anyone with a legitimate interest” to file a lawsuit (which means an individual as well). Perhaps, it is also a matter of misunderstanding as to what the collective interests of consumers are. Enabling an unlimited number of entities to file lawsuits for consumer collective redress (anyone with a legitimate interest) causes procedural complications, unnecessary costs, and so on, and therefore, it is necessary to define the concept of collective interests in the LCP, and the persons authorized to initiate proceedings for consumer collective redress before the courts with subject-matter and local jurisdiction to be identified by the Government of the Republic of Macedonia in a separate list which would, naturally, be publicly announced and made known in the EU. Judicial protection by means of collective redress should be regulated not only by the LCP, but also by the Law on Contentious Procedure. In that way, citizens could feel empowered by being able to receive collective redress through organized action. The establishment of an effective system for judicial protection by means of consumer collective redress can also encourage amicable dispute resolution. Naturally, this could contribute to the reduction of the number of unnecessary court proceedings, as well as reduction of the costs of conducting court proceedings. In the future, consideration should be given to the application of alternative collective methods for amicable dispute resolution as a possibility as part of the proceedings upon a class action (if our legal system complies with the European legislation on these issues too).

- Ombudsman of the Republic of Macedonia

The proceeding before the Ombudsman is initiated by submitting a complaint (a petition, an appeal) that can be submitted personally at the Ombudsman’s office, by mail, recorded orally at the Ombudsman’s office, by fax or by e-mail. The Ombudsman may initiate a proceeding on his/her own initiative, but for continuation of the proceeding consent of the citizen whose constitutional or legal right has been violated is required.

According to the scope of work, the Ombudsman manages four groups of areas, of which the fourth refers to: labor relations, consumer rights, the environment and other areas.¹²⁵ From the annual report of the Ombudsman for 2016, it can be seen that the highest number of complaints from consumers were filed against public service providers (public enterprises and other companies) due to violation of their rights, that is, the inability to exercise their rights. Citizens mostly submitted complaints about the operation of public utility enterprises for water supply and drainage of urban waste water. The Ombudsman acted on each case by pointing out irregularities and requesting the public enterprise to stop such practice and to harmonize the procedures with the laws. The Ombudsman can prevent violations of the rights of many consumers by public service providers, as well as in case of mass consumer rights violations, but has no jurisdiction to initiate litigation for collective redress. The protection of collective interests may also be applicable to legal relations in labor rights, environmental protection, discrimination against certain groups, etc., and hence arises the idea of granting greater authorizations to the Ombudsman for initiating proceedings for judicial protection in the form of consumer collective redress. For now, the authorizations of the Ombudsman involve giving recommendations, suggestions, opinions and indications on the manner of removing the established violations; proposing reinitiating a certain proceeding in accordance with the law; initiating a disciplinary proceeding against an official or a responsible person and submitting a request to the competent public prosecutor for initiating a proceeding for the purpose of determining penal liability.

4.2. Case law and best practices in collective redress

1. In online sales, the trader's website must have a separate form whereby the buyer can cancel the product in a period of 14 calendar days, and receive a refund.

Traders do not respect this obligation, although the Ministry of Economy has adopted regulations regarding a separate distance contract withdrawal form, which must be provided by anyone who sells products and services remotely (online). With that form, the buyer can cancel the product in a period of 14 calendar days. It has been noted that this procedure cannot be initiated for online stores registered in another country. However, this trend also occurs in Macedonian stores which have not yet complied with the legal obligation. In order to stop this practice, the Consumer Organization of Macedonia (COM) has addressed the State Market Inspectorate to initiate a procedure for preventing this type of sale, providing information that is important for the consumer on the website, more specifically, the period during which the consumer may cancel the concluded agreement. For the actions undertaken, the inspectorate has informed the organization within a legal deadline of 15 days with an explanation of the further procedures under its jurisdiction. The consumer(s) have the right to terminate the contract after 14 days if they have not been informed of the contract withdrawal period. Based on Article 90 of the LCP, "in the event of non-compliance with the provision, if the trader does not provide the consumer with information regarding the right of withdrawal,

¹²⁵ Directive 2009/22/EC also applies to these relations in protecting collective interests, and therefore, the issue is raised of redefining the role of the Ombudsman in terms of his/her competencies - from giving indications, to be able to provide judicial protection of the rights of consumers.

the withdrawal period expires 12 months after the completion of the initial withdrawal period.”

2. Traders who make presentations and sales of their products at organized lunches or dinners in restaurants and hotels actually enter into contracts outside the business premises. Most often, in the contracts they conclude outside the business premises, they have fraudulent clauses stating that the buyer can cancel the order within three days, although the legal deadline is 14 days; however, they fail to give this piece of information to the consumer.

They usually invite one target group, older and elderly people, who, in some way, relatively speaking, will be forced to sign a contract. In such cases, COM publicly informs the consumers through the media not to succumb to such sales, but it also addresses the State Market Inspectorate (SMI) regarding the violation of their rights, requesting to initiate a procedure against a particular trader. The Inspectorate, in turn, informs the COM of the way these cases are handled, and it usually requires traders to stop such practices and comply with the law, and consumers remain satisfied by the fact that upon the intervention by the SMI, the contract does not have legal effect. Consumers are usually demotivated to claim damages individually or through a group lawsuit after they have succeeded to terminate the contract.

3. Operators who simultaneously sell mobile phones through a tying service (a condition of a 24-month contract with the consumer) and place their offers in promotional material in the shops where they offer their services, in their offers have different letter size when offering a phone at 0 MKD (large letters) and when they indicate a 24-month binding contract with the consumer (small letters).

The Consumer Organization of Macedonia has informed the Council of the City of Skopje on Consumer Protection and jointly put forward an initiative to the AEC with a request that these tying offers be clearly and in an evident and unambiguous way presented in the promotional materials. The AEC has acted in accordance with the request and instructed the operators to align the letter size as well as the visibility of the tying offer, thus stopping such unlawful actions against consumers, which fall into fraudulent market practices.

Moreover, on the website of the Commission for Protection of Competition (CPC) there are numerous examples that can serve as a basis for consumer collective redress, when after an appeal against a decision adopted by the CPC in a procedure before the Misdemeanour Commission, a verdict by the Higher Administrative Court has been adopted confirming the abuse of a monopolistic or dominant position of the trader, inflicting damage on a large number of consumers. Due to the fact that CPC’s legal notice on its website can be interpreted as a means to prevent the use of examples, we recommend examining these examples¹²⁶ in more detail in order to determine how many unrealized claims through a class action have not been realized in a court proceeding.

The conclusion is that after the announcement of the final judgments regarding

126 The use, reproduction, transmission, distribution, transformation or preservation of the contents of the website in any form, in whole or in part, is prohibited without the prior written permission of the Commission. However, as a means of free use, the Commission allows you to save the contents of this website or print them from your computer for your personal use.

the cases for which the proceedings were conducted in front of the CPC, there is no reference to authorized persons (who, in fact, according to the LCP, have not been identified by the competent authorities, primarily by the Government of the Republic of Macedonia), who would be able to initiate collective redress by means of class action. These rules should be changed in the interest of strengthening consumer collective protection, and the CPC should be one of the bodies that would be authorized for wider campaign and informing consumers in all cases where their interests have been violated (mass violations), so that they can exercise their rights.

In this role of the CPC, assistance can be obtained from consumer organizations that have the legal right to inform consumers when their interests have been violated, as well as to educate them about the way they should initiate a proceeding in order to obtain legal protection. Naturally, this should be done in court proceedings, by means of mediation or through the expected transposition of the Directive on Alternative Dispute Resolution for Consumer Disputes 2013/11/EU amending the Regulation 2006/2004 and Directive 2009/22/EC.¹²⁷

5. The role of consumer organizations in collective redress

5.1. Legal precondition for consumer organisations' activities to represent consumer rights in collective redress

The Law on Consumer Protection (LCP) defines with only one sentence the role of consumer associations, that is, it reads that they are “established by consumers for the protection and realization of their rights”. Article 127 of the LCP defines the rights of consumer associations, of which the following are important for the activities in the field of collective redress:

- To examine consumers' complaints directly or in cooperation with the competent inspection bodies and other state administration bodies that have competencies related to consumer protection;

In practice, consumer organizations use the application of this provision and the right to act through their advisory bureaus where by telephone, mail, personally or by e-mail, they receive consumer complaints, advise them and direct them regarding way to resolve a dispute with a trader or service provider. If it is a serious problem that arises from an individual, and there are indications that it refers to a large number of consumers (the price and manner of its establishment, distance contracts or contracts outside the business premises, product warranty, sale, unfair commercial practices, etc.) consumer organizations shall send a request to the appropriate *competent inspection body* to check the allegations and take measures and proceedings laid down by law in order to prevent certain practice of a trader or service provider (which may entail administrative measures and injunctions), i.e. the competent inspection body to order the trader or service provider to stop a certain practice, impose an administrative measure and impose a fine determined by law). The competent inspection body may instruct

¹²⁷ Directive 2013/11 / EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22 / EC, OJ L 165, 18.6.2013 [Directive 2013/11 / EU (18.6.2013)].

the trader with a decision to pay back the paid amount, replace the purchased product, etc. to any consumer who appears independently or through a motion by the consumer organization, or to a group of consumers, but it is not within its competence to determine compensation for damages (which is determined in court proceedings).

- To mediate between consumers and traders of goods and service providers in order to resolve disputes;

Consumer organizations do not have the opportunity to use this right when it comes to a single consumer, because, in practice, they have a large number of individual claims,¹²⁸ and mediation with traders to address each individual request requires human and material resources, which are lacking in these organizations. They receive funds from the state budget only for counselling, information and education. According to Article 128 of the Law on Consumer Protection, consumer associations are provided with financial support from the Ministry of Economy for realization of the activities of informing and advising consumers through organizing advisory bureaus, prevention and education of consumers and raising consumer awareness and culture, which does not include amicable dispute resolution and participation in such procedures. In the meantime, while transposing the Directive on Alternative Dispute Resolution¹²⁹ into our legal system, which has an impact on Directive 2009/29/EC, it is unlikely that consumer organizations can work in this area.

- To represent the interests of consumers in collective disputes before the competent courts.

In Section III-b Collective Consumer Protection of the Law on Consumer Protection (Articles 31-h, 31-i, 31-p, 31-q), the legislator does not fully regulate the issue of *collective consumer representation* by consumer organizations (associations). According to Article 31-h, the Government of the Republic of Macedonia, upon a proposal by the Minister of Economy, shall determine by an act the authorized bodies that have a common interest in consumer protection.¹³⁰ Such an act has not been enacted, and hence, the applicability of line 10 of Article 128, which determines the right of consumer associations to advocate the interests of consumers in collective disputes before the competent courts, is questionable. In addition, the above line does not cover the possibility for consumer associations to advocate the collective interests of consumers before the administrative bodies, as well as in procedures for amicable dispute resolution for collective redress. The law does not determine the subject-matter and local jurisdiction of the court in disputes for collective redress, nor the way of financing these activities.

Consumer organizations can also act in the domain of *Prohibited Advertising*.

128 See the website of the Consumers Organization of Macedonia, <http://opm.org.mk/godisni-izvestai/>.

129 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), OJ L 165, 18.6.2013, [Directive 2013/11/EU (18.6.2013)].

130 See in the EU: 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, 2014/C115/01 HYPERLINK "[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0415\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0415(04)&from=EN)" (02.06.2017). Such competent bodies in each EU Member State are included in a list of qualified bodies, and as a rule, they include consumer associations.

The legislator has envisaged that traders, their associations and consumer organizations who have interest have the right to require the competent inspection body to order the cessation of the misleading or illegal comparative advertising if they have evidence of the accuracy of the factual claims in the advertisement (Article 30). When consumers need to be protected from unfair contractual terms, the legislator has also foreseen that “consumer protection organizations and everyone else with a justified interest in protecting consumers” have the right to file a claim for the prohibition of unfair contractual terms (Article 83). Associations may require the court to declare null and void the contractual term if it is established that such term is unfair in accordance with the provisions of the Law on Consumer Protection.¹³¹ The procedure may be initiated against an individual trader, against several traders of the same economic activity, as well as against the associations of those traders who use unfair contractual terms.

For example, LCP provides for the possibility to initiate a procedure for injunctions (prohibitions) that can certainly put an end to fraudulent practices, but consumers cannot demand collective redress for the damage suffered (each individually should sue and seek compensation with individual lawsuit or to organize and seek compensation through a group lawsuit). But despite the decision for an injunction, if an individual consumer wants to go to court and seek compensation for damages, he/she will need to argue his/her case again, and evidence to be presented in court. Thus, in most cases, consumers remain empty-handed, having limited benefit from procedures for injunctions. In addition to consumer collective redress by means of injunctions (prohibitions) that put an end to unfair trading practices, consumers should also be able to successfully obtain compensation for damages when traders behave contrary to their obligations, and the injunctions (prohibitions) have been successfully implemented.

The Law on Consumer Protection does not define the category of *vulnerable consumers* that need to be separately protected because of their particular vulnerability to practice or product, due to their age (children or the elderly), economic and social status (low-income consumers, consumers from marginalized groups, etc.), gullibility, mental or physical impotence (persons with disabilities). Collective redress for these consumer groups is of great importance, but it is not foreseen by the LCP.

5.2. Assessment of the environment for consumer organisations to deal with collective redress

Despite the existing provisions in the legal framework that give active procedural legitimation to consumer protection organizations in the Republic of Macedonia (but not in the domain of collective redress), they cannot use these opportunities for the following reasons:

- they do not have adequate spatial conditions and are not sufficiently technically equipped,
- they do not have internal expert capacities and staff, nor do they have financial means to hire a lawyer/law firm in order to be able to initiate a procedure before the courts,
- the budget funds are insufficient for the basic work of these organizations in terms

¹³¹ PART V - Special Provisions for Consumer Contracts, CHAPTER 1, Unfair Provisions in Consumer Contracts.

of informing and counselling consumers, and they fail to increase year after year in order to be able to finance the organizations and initiate consumer protection procedures before the courts.

On the other hand, if a legal framework for consumer collective redress in the Republic of Macedonia is to be established, funds for the consumer organizations should be envisaged, which would be intended primarily for initiating the proceeding, increasing the professional staff, informing consumers that a procedure for collective redress is being initiated (which is a kind of campaign), improving the spatial conditions and adequate technical equipment for receiving a large number of consumers during the procedure (opt-in) as well as funds that would cover the risk of losing the litigation.

From the above reasons, consumer organizations are now demotivated to take initiatives for consumer protection before the courts, and if the situation remains unchanged, i.e. the conditions for their sustainable operation in all areas in which consumers and the general public expect legal protection from these organizations, they will not be able to expand their workload, and the question arises as to how they will persist or achieve sustainability if budget funds remain on this level.¹³²

5.3. Prerequisites for awareness raising toward consumers in collective redress

The LCP does not provide a basis for financing the activities of consumer associations when it comes to identifying them as authorized bodies for collective consumer representation.

We would like to reiterate that there is no adequate legal framework for collective redress in the Republic of Macedonia, and hence the policies currently envisaged, including the Consumer Protection Program 2017-2018, do not provide for raising the awareness of collective redress among consumers by providing adequate information. Conditions for educating, informing and counselling consumers are in place, but there are not enough funds allocated from the budget for this purpose, i.e. there is insufficient state support which jeopardizes the staffing and technical equipment of consumer associations, and leaves no room for these organizations to initiate the expansion and promotion of their work, or to implement systematic and comprehensive information and education programs. The main available permanent source of financing consumer associations, the Budget of the Republic of Macedonia, allocates the modest funds for this purpose among six organizations - the Consumer Organization of Macedonia and the five local consumer associations. However, the total annual amount of these funds, which amounts to 14-17,000 EUR, is insufficient to cover the existential minimum of even the national consumer organization.

In the domain of consumer collective redress, there are no opportunities for quality and continuous education of consumers in the Republic of Macedonia due to the reasons that were stated in this analysis. In terms of informing about collective redress and the need for education of consumers in this domain, we emphasize that preconditions should be met first, that is, there should be harmonization with the EU law, taking into account not only Directive 2009/22/EC and the Recommendation for the implementation of this Directive, the need for transposition of Directive 2013/11/EC, Regulation 2006/2004

¹³² Compare: T. Josipović (2013), „Enforcement Activity in Consumer Protection Regulation in Croatia“, *Journal of Consumer Policy* 36(3)/2013, p. 300-304.

on cooperation between stakeholders, but also the positive practice from EU member states. Consumer organizations cannot appear in the role of a protector of the collective interests of consumers for many reasons, which have already been discussed, but they should, if properly identified as authorized bodies, have active procedural legitimation, and the Law on Contentious Procedure should undergo appropriate amendments in order to allow for the initiation of a class action. An extremely important step for the successful exercise of rights through a class action is to inform the consumers who have suffered damage about the possibility of filing it, and for consumers to be appropriately organized. When standardizing and introducing the class action in the Macedonian legal system, the legislator should start from its importance in situations of mass damage, when consumers are not motivated to file an individual lawsuit for a compensation for a small amount, mostly because it is not worthwhile to put so much effort for a small amount. Therefore, the European Commission insists on applying the rules for class action in the legislation, thus making the information for strengthening the awareness of protection of consumers' rights an integral part of the successfulness of the procedure. It should be taken into consideration that it entails certain costs for the proceeding that, under the law, should be covered by the organization of consumers, if the organization takes over the conduct of the class action, as well as the costs in case of refusal of the claim. This would be an important part in regulating the activities of consumer organizations if they appear as authorized persons for conducting proceedings upon class actions. In the EU countries, there is a great deal of discussion on how to enable organizations to be trained to conduct such procedures.

According to the EC Recommendation, in the Republic of Macedonia, it should be regulated by law which organizations and under which conditions they will be considered authorized persons for filing class actions on behalf of and for the account of two or more persons whose rights have been violated in situations of mass violations. Moreover, the financial situation and the human resources of these organizations need to be taken into account, which, by the way, should be non-profit. The Law on Associations and Foundations¹³³ explicitly states consumer protection as an activity of public interest (Article 74), which should be considered as a prerequisite for an organization to acquire the status of an organization of public interest, which, on the other hand, may be the basis for acquiring the status of an authorized person for initiating class actions, i.e. obtaining a procedural legitimation. In addition to specifying that the main income code in the operation of the association or foundation should be the activity of public interest, an important prerequisite is that the goals of operation and acting be directed to the general public and to the interests of the community, have an oversight body and rules for the prevention of conflict of interest, publicity and transparency in the operation, the required staffing capacities, as well as that the property or annual income be at least 1,500 EUR.¹³⁴ In order to recognize class actions in several areas in which civil associations act (discrimination, human rights, labor rights, consumer rights, environmental protection, etc.), it is necessary to establish dialogue with the non-governmental sector on joint

133 Law on Associations and Foundations ("Official Gazette of the Republic of Macedonia" No. 52/2010 and 135/2011).

134 We would like to note that the funds envisaged are too limited to take on the competencies and risks in the field of collective protection in case of mass violations in several areas in accordance with Directive 2009/22/EC and the EU Recommendation of 2013.

action in identifying organizations for the collective consumer representation, on the conditions they need to fulfil in order to gain that status, and joint action in amending the Law on Consumer Protection, other laws and the Law on Contentious Procedure. Naturally, one of the procedural assumptions is to have the plaintiff acquire the status of a representative organization to initiate proceedings in the event of mass violations of rights in more than one of the areas listed, including the protection of consumers in cross-border disputes, which is a separate section for analysis in the domain of eligibility, but prerequisites for such action will need to be provided as well.

6. Recommendations and conclusions

The overall analysis of the legal framework for collective redress shows that there is a vertical and horizontal non-compliance with the substantive and procedural laws that provide the basis for collective redress. If the idea is to achieve the maximum effects of collective redress in terms of efficiency, cost-effectiveness and legal certainty in the protection of the rights, which could not be individually achieved, a systemic reform is required in the legal system of the Republic of Macedonia.

The Law on Consumer Protection requires urgent and thorough amendments. The numerous amendments that partly and inconsistently transpose consumer protection directives have rendered the law incomprehensible to the extent that its application has become largely questionable. Therefore, it is necessary to adopt a completely new Law on Consumer Protection, in which the rules on consumer protection set out in the EU Directives will be transposed consistently in order to achieve vertical harmonization. The adoption of a new Law on Consumer Protection will also require amendment to the laws regulating special consumer rights in certain areas (competition, food and product safety, electronic communications, etc.), as well as achievement of full horizontal harmonization.

Regarding consumer collective redress in the Law on Consumer Protection, the legislator should first decide which is most appropriate for the Macedonian legal system regarding consumer collective redress - a procedure before administrative bodies or before the civil court. This does not preclude the possibility of collective redress being exercised both before the administrative bodies and the courts, but it will be necessary to clearly distinguish the role of the authorized bodies in these various procedures. In assessing which approach is most appropriate given the legal tradition, opportunities and needs, it is necessary to carry out a comparative analysis of the legislation and practices in the Member States of the European Union, as well as in the countries in the region of Southeast Europe, due to the similarities in the legal systems and the legal culture. In any case, the (new) Law on Consumer Protection should be designed in such a way that:

- It determines clearly and accurately which consumer rights will be subject to collective redress;
- It defines what will be the role of consumer protection organizations before the appropriate bodies that will provide collective redress (inspection bodies and/or courts, that is, before the possessors of a code of conduct), that is, whether the associations will have this role under the law or special authorization will be required, as well as whether they will appear as independent applicants/claimants of protection or advocates of groups of consumers whose rights have been violated

by the action of a particular trader or group of traders;

- It specifically determines the legal remedies which will be provided, that is, what will be the legal fate of the actions and procedures that will be considered contrary to the regulations governing the rights of consumers

If it is determined that consumer collective redress is possible before the court as well, a number of procedural mechanisms need to be envisaged in order to enable it. According to comparative experiences, it is best in the Law on Contentious Procedure to introduce a new chapter that will completely regulate the procedure for collective redress before the civil courts. According to the rules of the European Union for specialization of the courts, but also because of the requirements of procedural economy, it would be opportune in the Republic of Macedonia to provide for subject-matter jurisdiction of a limited number of courts, and it would be best if it was reduced to one court. The procedure should envisage the manner of obtaining evidence and how the findings of the inspection bodies and the administrative judiciary regarding the violation of the rights that shall be collectively protected shall be addressed.

The new system of procedural mechanisms should address the **issue of the limits of the validity of the decision** adopted in the proceeding for collective redress. Thus, in the proceeding for collective redress, the legal effect of the adopted decision should extend beyond the entities that have been party to the dispute (*ultra partes*), that is, to all entities whose rights and interests have been represented in that procedure, regardless of whether they have taken part in it. This rule would be an exception to the basic rule applied in the general civil procedure. The procedural mechanism for collective redress should particularly regulate the *funding rules and costs of the proceeding*. Comparatively, there are various mechanisms for funding the collective redress proceedings and they need to be re-examined in a way that will allow legal protection of the parties on the one hand, but on the other hand, the persons whose rights have been violated will be encouraged to conduct such procedures. Such a mechanism, for example, may enable that the other party bears the costs if the parties who seek collective redress win the dispute (which now exists as a rule in the system), but if they lose the dispute, each party shall bear only its own costs. Furthermore, the state should establish a clear system for financing consumer organizations as a legitimate advocate of consumers and their advocate in collective disputes.

It can be expected that the high costs of conducting such proceedings would be avoided if mechanisms for alternative resolution of consumer disputes are introduced in the legal system. This would be achieved if all laws that regulate certain consumer rights envisage that in case of a dispute, the parties shall endeavour to try to resolve it in a peaceful manner first. A separate law on alternative consumer dispute resolution would regulate the different forms of alternative dispute resolution (reconciliation, mediation, arbitration, etc.), the bodies before which disputes will be resolved in an alternative manner, as well as the procedure to be applied.

From an institutional point of view, more inconsistencies can be noted arising from the structure of the legal framework at the moment. Thus, the Law on Consumer Protection stipulates that the Minister of Economy should establish a list of authorized bodies that would represent the collective interests in the collective redress proceeding; in fact, they would initiate it. This task has not been fulfilled, i.e. such a list of bodies has

not been established. Therefore, it is necessary that the competent institutions carry out an analysis of the sector and envisage the best solutions for identifying the bodies and their authorizations, as well as financing the proceeding.

The institutions do not cooperate sufficiently in the application of the Law on Consumer Protection, especially in the implementation of the provisions in the laws transposed from the directives in Annex 1 of Directive 2009/22/EC. There is a need to strengthen the co-operation between institutions in this domain and joint actions in dealing with illegal actions committed by traders and service providers, and it can be achieved through the transposition of Regulation 2004/2006 into our legislation.

From the overall analysis of the system, it appears that consumer protection organizations do not have a precisely defined role in protecting the collective interests of consumers, do not have enough financial resources, spatial and other resources in case they are identified as authorized persons to act in collective disputes. For this reason, the funding modalities for consumer protection organizations should be reconsidered so that their role in collective redress proceedings can be fully accomplished, which means they also need to have sufficient resources to cover the risk of such proceedings. In this respect, it can be concluded that the position of consumer organizations in informing consumers about collective dispute resolution procedures, the application of alternative methods or mediation is not sufficiently encouraged by policy makers. It is recommended to create an appropriate legal framework, but also practical mechanisms that will enable consumer organizations, through cooperation with all competent institutions, to monitor violations of the rights of consumers, inform them about the possibilities for protection and possibly organize them for the realization of collective redress.

The authorizations of the Ombudsman include providing recommendations, suggestions, opinions and indications on the manner of removing the identified violations; proposing the re-implementation of a certain procedure in accordance with the law; initiating a disciplinary proceeding against an official or responsible person and submitting a request to the competent public prosecutor for initiating a proceeding for determining penal liability. For this reason, consideration should be given to the possibility to give greater powers to this institution in the protection of collective interests, particularly in the event of mass violations of consumer rights and in other areas covered by Directive 2009/22/EC.

The Commission for Protection of Competition (CPC) is not obliged to inform consumers who have suffered damage in proceedings in cases of violation of their rights when there is a valid court decision for abuse of monopolistic position or application of restrictive practices by certain traders or service providers, in order for consumers to be informed about the possibility to file lawsuits (apart from publishing the decisions on the CPC website). Therefore, the CPC should be authorized in the domain of consumer protection and be one of the bodies authorized for wider campaign and informing consumers in all cases of mass violations, so that they can exercise their rights.

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COLLECTIVE REDRESS IN CONSUMER PROTECTION IN MONTENEGRO

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Executive summary

Montenegro is not just a candidate country for EU membership. In this moment, it has made far more progress in accession negotiations with EU than any other candidate country, which implies that Montenegro may be considered as the favorite for becoming the next Member State. In relation to this, in June 2012, when accession negotiations started, a comprehensive process of the reform of Montenegrin legal and institutional system had commenced which should result with full alignment of Montenegrin legal system with that of the EU by the end of accession negotiations. Among others, this process includes the accession negotiations in Chapter 28 – Protection of Consumers and Health, which is both a chapter and a part of regulatory framework to which traditionally great importance is attached in the EU.

There are no horizontal rules on collective redress in Montenegrin legal system, such as in Croatia, or Serbia before the decision of the Constitutional Court that had declared these rules unconstitutional, which are both countries sharing similar legal heritage with Montenegro. Like in many other European countries, the rule of collective redress in Montenegro exists in certain parts of legal system that have been developed under the strong influence of European law and best international legal practices.

Bearing in mind the specificities of the Montenegrin society, we believe that Montenegrin approach to avoid directly introducing horizontal rules on collective redress for the time being is a sound one. Namely, Montenegro's political and legal system is undergoing comprehensive, intensive and often radical reform process, which will eventually result with creation of a modern legal system and effective institutions. This, however, means that Montenegrin legal system, which is generally a conventional one, is currently being changed much more dynamically and much more radically than most other legal systems by constantly being “enriched” with completely novel legal notions and concepts. Such transplantation of new legal concepts and notions presents great challenge not only to national regulators but to Montenegrin professional community as a whole. Therefore, the explained gradual approach seems to be justified. However, up until the moment in which this report is finalized, the mechanisms for collective redress are present only in two fields of law in Montenegro. These are consumer protection and antidiscrimination law.

The existing regulatory concept of collective consumer protection in Montenegro was introduced in 2014 with the Law on Consumer protection 02/14 (14.01.2014). Today, however, although it is substantially harmonized with the standards of consumer protection in the European Union, this law and its by-laws are not fully aligned with all relevant sources of European Union consumer law. This is partially due to the fact that preparation of this legal text had begun in 2011 and for the most part ended during 2013.

As for the particularities of alignment, following is established in this report.

Montenegrin legislative framework, i.e. Law on Consumer Protection is completely aligned with the Directive 2009/22/EU (26.4.2009).

Montenegrin law is for the most part aligned with the Directive 2013/11/EU (21.5.2013). This is something that Montenegrin Government had also taken into consideration, since in its Accession Program for the 2017-2018 period, exclusively for the purpose of fully aligning with Directive 2013/11/EU (21.5.2013), it had envisaged

the enforcement of the Law on Amendments to the Law on Consumer Protection, as well as Rules on Out-of-Court Settlement of Consumer Disputes.

Generally speaking, Montenegrin law is not aligned with the Directive 2014/104/EU (26.11.2014). Of course, regarding the significance of the Directive 2014/104/EU (26.11.2014) for the subject of this analysis/report, one should have in mind the fact that it does not directly impose obligations on Member States to introduce collective redress mechanisms (Preamble - point 13). Therefore, it remains to be seen how much its ongoing implementation will eventually affect the systems of collective redress throughout Europe.

Regarding the implementation of Recommendation 2013/396/EU (11.6.2013) it should be reiterated that, unlike this legal instrument, Montenegrin law does not recognize compensatory collective redress in consumer protection as the key type and the only comprehensive system of collective redress in Montenegro. It only recognizes injunctive collective redress in consumer protections. Therefore, there can be no debate over the implementation of the Part V of Recommendation 2013/396/EU (11.6.2013), since it elaborates standards with regard to the latter type of collective redress. With regard to other standards promoted in this formally non-binding legal instrument, partial alignment of Montenegrin law is observed.

As for the details of regulatory framework regarding the two existing types of collective redress in Montenegrin legal system, which are given in the main part of the report, it should only be reiterated here that it is mostly in line with European and best international standards. However, as elaborated in more detail in the main part of this report, there is room for improvements of certain specific regulatory solutions, as well as for introduction of the ones recommended with certain non-binding regulatory instruments.

Institutional framework for injunctive concept of collective consumer protection is set by the Law on Consumer Protection 02/14 (14.01.2014). Protection of collective consumer interests is the jurisdiction of the courts under the rules of civil procedure. Representative entities authorized to bring representative actions are: the state authority responsible for consumer protection and other ministries and state administration bodies responsible for enforcement of laws protecting consumers' rights; consumer organization that meet the requirements set by the Law on Consumer protection and chambers and interest trade associations (economic, trade, etc.).

Law on Consumer protection 02/14 (14.01.2014) entrusted the Ministry of Economy with the task of assessment of fulfillment of objective conditions set by the Law, which consumer organizations have to meet in order to receive a status of the representative entity authorized to bring representative actions.

Since the introduction of the existing Law on Consumer Protection which introduced collective consumer protection representative entities didn't file a single representative action.

In the field of antidiscrimination institutional framework for collective redress is set by the Anti-Discrimination Law. Persons who consider themselves members of a group that is or has been discriminated can chose between two models of protection. The first model of protection is through the administrative procedure before the Montenegrin Protector of Human Rights and Freedoms of Montenegro (hereinafter: Ombudsman).

Representative entities authorized to bring representative actions in these proceedings are: organizations or individuals involved in the protection of human rights.

Another model of protection is provided through the civil court proceedings when representative actions can be brought by organizations or individuals involved in the protection of human rights with explicit consent of the discriminated individuals, or by Montenegrin Ombudsman. As in the case of consumer protection, there are no recorded representative actions in the field of antidiscrimination, either in the administrative or civil law proceedings.

Since there are many stakeholders responsible for putting collective redress into practice special attention is given to their cooperation. Continued cooperation with consumer organizations is reported by Ministry of Economy and Inspection Directorate (and their division of Market Inspection) through daily communication regarding consumer complaints for the effective and efficient protection of consumer rights, which is a basic prerequisite for effective consumer protection, but with nonexistent results in the area of collective redress.

Different stakeholders pointed out some common and some specific problems. The apparent lack of financial resources was a common problem reported, including the public entities, which can affect the ability of the consumer organizations that can provide adequate collective protection of consumers' interest. Some of them reported the problem of adequate training of the personnel that will be directly involved in the collective redress. Public entities didn't have funds designated exclusively for the purpose of proceedings costs. This problem was even more evident in the case of consumers' organisations, which feared bankruptcy in case that they lose a collective dispute, especially since their financial potential is limited.

Others insisted on inconsistency of case law in the field of consumer protection, as well as the reluctance of the courts in the application of special regulations consumer protection, to be the main reason for the inactivity in the collective redress.

Given that the Montenegrin legal system showed and is still showing signs of considerable openness to regulatory trends, and even formally non-binding suggestions received from the European Union, it may be expected that in the coming period a system of compensatory claims in the collective consumer protection will be introduced. This will certainly have to wait, since the next amendments to the Law on Consumer protection, which are currently being drafted, are intended predominantly for further the harmonization with Directive on Consumer Rights 2011/83/EC (25.10.2011).

1. National compliance with the relevant EU acquis

1.1. Introduction

Montenegro is not just one among the many candidate countries for membership in the European Union. At the time of the report, Montenegro has made a far more significant progress in accession negotiations with the European Union than any other candidate country and may therefore be considered the next Member State.¹ In connection with this, a comprehensive process of Montenegrin legal and institutional system reform was launched in June 2012, with the start of accession negotiations, which should result in full alignment of Montenegrin law with the EU acquis until the end of accession negotiations with the European Union. Such process of regulatory and institutional upgrading of Montenegrin society, among other, also involves the subject of accession negotiations contained in Negotiation Chapter 28 - Consumer and Health Protection, the segment of the EU acquis that has traditionally been given priority in the European Union.

Finally, the key aspects of the concept of consumer collective redress in the *acquis communautaire*, i.e. their transposition to Montenegrin law, are already or will be covered by the negotiations as well as corresponding reform processes carried out by competent institutions and expert bodies under this Chapter. The most important transposition instrument for various aspects of consumer collective redress mechanism is certainly the Consumer Protection Law 02/14 (14/01/2014),² to which certain other statutory and secondary legislation referred to above rely on. A likely exception in this context is Directive 2014/104/EC (26/11/2014),³ as it is still uncertain in the context of which negotiation chapter it will be transposed, and what state authorities and expert bodies will be transposing it. The reason for this lies in the fact that it is not only new, but a regulatory instrument affecting a number of important legislative acts and, therefore, subject to negotiations under several negotiation chapters, including Negotiation Chapter 8 - Competition Policy.

1.2. Directive 2009/22/EC of the European Parliament and of the Council of 26 April 2009 on injunctions for the protection of consumers' interests

Montenegrin law, i.e. the regulatory framework governing consumer rights protection, is fully in line with Directive 2009/22/EC (26/4/2009). More specifically, the provisions of this Directive have been transposed into Montenegrin legislation under

1 Since the start of accession negotiations with the European Union, in June 2012, Montenegro opened negotiations in 26 out of 35 negotiation chapters and temporarily closed negotiations on two of the above mentioned 26. Unofficially, by the end of 2017, negotiations are expected to open under several other chapters, which, considering the fact that the negotiations in chapters 34 and 35 will form a bulk of formalities, will create a realistic possibility for Montenegro to conclude accession negotiations with the European Union by the end of the current decade.

2 Consumer Protection Law, Official Gazette of Montenegro, Nos. 02/14 (14/01/2014), 006/14 (04/02/2014) and 043/15 (31/07/2015). In addition to this law, it should be emphasized that there are some other laws enabling collective redress, which cover the protection of rights and interests of consumers. The same are subject of more detailed analysis in the next part of the paper.

3 Directive 2014/104/EC of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law in respect of infringements of the competition law provisions of the Member States and of the European Union.

the Consumer Protection Law of 2014, as part of the regular activities undertaken in the process of Montenegro's accession to the European Union under the 2014-2018 Montenegro's Program of Accession to the European Union⁴. By doing so, Montenegrin law has incorporated key standards of protection of collective consumers' interests as the object of protection which has an added value compared to the mere cumulation of individual interests.⁵

A simplified transposition table (table of concordance) for the transposition of this regulatory instrument of the European Union acquis into the Montenegrin legal system, namely the Consumer Protection Law⁶, is presented below:

Table 1: Transposition of the provisions of Directive 2009/22/EC (26/4/2009) into the Consumer Protection Law

Directive 2009/22/EC	Consumer Protection Law
Article 1	/ ⁷
Article 2	Article 118 Paragraph 3; Article 123 Paragraphs 1 and 2; Article 128
Article 3	Article 118 Paragraphs 1 and 2
Article 4	Article 118 Paragraph 3; Article 130
Article 5	Article 120
Article 6 - 11.	/

1.3. Directive 2013/11/EC of the European Parliament and of the Council of 21 May 2013 on alternative dispute settlement

Montenegrin law, i.e. the regulatory framework governing consumer protection matters, is mostly aligned with Directive 2013/11/EC (21/5/2013). Namely, in Part IV, Chapter II, Section B – Out-of-Court Consumer Protection, the Consumer Protection Law (Articles 133-153) stipulates alternative dispute resolution procedure in a relative detail. In connection to this, the organizational principles of the Committee for Out-of-Court Settlement of Consumer Disputes at the Montenegrin Chamber of Commerce

⁴ Montenegro/Government of Montenegro (2013) 2014 – 2018 Montenegro's Program of Accession to the European Union.

⁵ Count 3 of Preamble to Directive 2009/22 /EC (26/04/2009).

⁶ In course of preparation of this table, the authors used documents from the negotiation process that were available to them, but the accuracy stated therein as well as other data presented in this report are the sole responsibility of the authors.

⁷ The “/” tag in this and other places in the table means that the transposition of the corresponding article of the Directive has not been carried out, as it was unnecessary or impossible.

significantly overlap with the principles of the Directive 2013/11/EC (21/5/2013). It is similar with the principles of efficiency and transparency of work of this body, as well as the principle of independence, impartiality and expertise of the members of such Committee, who are empowered to resolve out-of-court consumer disputes. The very way in which members of the Committee are elected, the procedure for initiating and maintaining the entire procedure electronically through the Committee's web platform, as an entity in charge of alternative dispute resolution, has been further elaborated under the Rulebook on the Arbitration Committee for Out-of-Court Settlement of Consumer Disputes⁸, which has been adopted as a by-law by the Ministry of Economy.

On the other hand, for example, the concept of transparency of alternative dispute resolution entity under the Directive 2013/11/EC (21/5/2013) has not been fully transposed into the Consumer Protection Law 02/14 (14/01/2014) or the Rulebook on the Arbitration Committee for Out-of-Court Settlement of Consumer Disputes, 014/15 (26/03/2015). Thus, there is no obligation to publish on the website of the Committee data on languages in which the procedure is conducted, the types of rules used in the dispute resolution procedure, the average length of the procedure before that entity, the costs, and some other information required to be posted at the website of the entity in charge of alternative dispute resolution (Article 7 of Directive 2013/11/EC (21/05/2013)).

Without going any further into all aspects of the non-conformity of Montenegrin law and the Directive in question, it is particularly important to emphasize in this context that the Government of Montenegro obviously had aforementioned circumstances in mind also, since in the 2017-2018 Montenegro's Program of Accession to the European Union⁹, for the purpose of full compliance with this Directive, it envisaged the adoption of the Law on Amendments to the Consumer Protection Law (for Q3 2017) and the Rulebook on Out-of-Court Resolution of Consumer Disputes (Q2 2018). This will certainly provide for the full alignment with Directive 2013/11/EC (21/5/2013).

1.4. Directive 2014/104/EC of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Generally speaking, Montenegrin legislation is not aligned with Directive 2014/104/EC (26/11/2014). The main objective of the Directive, transposition of which is still in progress in most EU Member States¹⁰, is to create a precise and effective legal basis so that anyone who has suffered damage as a result of a violation of competition rules can request and compensate the damage suffered. Of course, this right is guaranteed to everyone under the jurisdiction of the Member States of the European Union, both under the EU acquis¹¹ and the national civil law rules concerning compensation of damages. However, the reason for the adoption of the Directive in question is the need

⁸ Rulebook on the Arbitration Committee for Out-of-Court Settlement of Consumer Disputes, Official Gazette of Montenegro, 014/15 (26/03/2015).

⁹ Montenegro/Government of Montenegro (2017) 2017-2018 Montenegro's Program of Accession to the European Union, p. 640.

¹⁰ http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html (21/04/2017).

¹¹ L. Havelka (2014), "Escaping the Trap: The Simplified Application of the EU Law", in: Croatian Yearbook of European Law, Vol. 10, pp. 133 - 135.

to, at the level of Member States where this is not the case, explicitly establish the right to compensation for damages caused by violation of competition rules for the benefit of all injured private and public entities. Equally, the goal is also to harmonize primarily the procedural rules that are applicable in the process of exercise of such right, in particular the rules for mutual coordination of the bodies responsible for the protection of competition.¹²

Of course, with regard to the importance of Directive 2014/104/EC (26/11/2014) for the purposes of this report, it should be borne in mind that the Directive does not impose an obligation on EU Member States to introduce any mechanisms for collective protection of rights.¹³ With this in mind, it remains to be seen through the monitoring of the transposition process in the national legislations what will be its impact on the development of consumer collective redress systems.

With regard to the plans for the implementation of Directive 2014/104/EC (26/11/2014), relevant documents of the Government of Montenegro, whose negotiating structure is leading the accession negotiations with the European Union, still contain no concrete data on the planned time frame or the manner of transposition. Nevertheless, it is to be expected that Montenegro will follow the trends in the Member States of the European Union, and adopt a special law.¹⁴

1.5. Commission Recommendation 2013/396/EC of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

Recommendation 2013/396/EC (11/6/2013) refers not only to collective redress mechanisms for consumers, but also to mechanisms for the collective redress for holders of other rights established by the European Union *acquis*. In that sense, it seems that the implicit goal of Recommendation 2013/396/EC (11/06/2013) is to promote the idea of a unique, i.e. horizontal regulatory framework for collective redress at the national level, which would have common key principles in all EU Member States. In this respect, however, one may not discuss the compatibility of Montenegrin law with Recommendation 2013/396/EC (11/6/2013), as such a regulatory framework in Montenegro does not exist and is not planned to date.¹⁵

As regards the application of principles promoted under the Regulation 2013/396/EC (11/6/2013) to the regulatory collective redress framework in Montenegro, first of all, unlike the European legal instrument, the Montenegrin consumer protection legislation does not recognize collective actions for compensatory damages (i.e. compensatory collective actions), but only those for the prohibition of unlawful conduct or the elimination of harmful consequences of the same (i.e. injunctive collective actions). Therefore, we cannot speak of the application of Part V of Recommendation 2013/396/EC (11/06/2013), which recommends principles exclusively in respect of compensatory collective redress.

On the other hand, we note that as concerns collective redress against

12 See: Article 1 of Directive 2014/104/EC (26/11/2014).

13 See: Count 13 of the Preamble to Directive 2014/104/EC (26/11/2014).

14 See: *supra* footnote no. 11.

15 See: *infra* 2.1. Overview of the state of the regulatory framework of the collective redress in Montenegro.

discrimination, as the only segment of the Montenegrin law in which the protection of collective interests exists as a concept, besides the protection of collective interests of consumers, compensatory actions exist as a possibility together with injunctive ones. A significant number of standards provided for under Part V of Recommendation 2013/396/EC (11/6/2013) has been implemented concerning compensatory collective redress for the protection against discrimination.¹⁶

The other two key parts of Recommendation 2013/396/EC (11/06/2013) concerning the principles promoted by this regulatory instrument relate to standards that are common to collective actions for the prohibition of unlawful conduct and collective compensation of damages (Part III), and standards that relate solely to collective actions for the prohibition of unlawful conduct (Part IV).

Regarding Part III of Recommendation 2013/396/EC (11/06/2013), Montenegrin law (Consumer Protection Law 02/14 (14/01/2014)) is in line with five of the six segments of this section, namely:

- Standing to bring a collective redress (points 4 - 7);¹⁷
- Verification of the admissibility of a collective lawsuit (points 8 - 9);
- Informing the public about the initiated and completed procedures (points 10 - 12);
- Reimbursement of legal costs of the winning party (point 13);
- Rules of cross-border cases (points 17 - 18).

Regarding the rules of Part III on the funding of proceedings under a collective action by the claimant party or third parties (Counts 14-16), the Montenegrin Consumer Protection Law is not harmonized with Recommendation 2013/396/EC (11/06/2013).

Regarding Part IV of Recommendation 2013/396/EC (11/06/2013), which recommended principles relating exclusively to injunctive collective redress, the Consumer Protection Law 02/14 (14/01/2014) and the Montenegrin consumer protection legislation do not contain special rules regarding the expediency and summary of such procedures (point 19), or special rules for ensuring more efficient compliance with the injunctive order (point 20), rather the Consumer Protection Law 02/14 (14/01/2014) provides for the appropriate application of the regulations governing civil procedure (Article 129).

Finally, at this point, we would also like to underline that Montenegrin law, that is, the Consumer Protection Law 02/14 (14/01/2014) is as a whole in accordance with Part VI of Recommendation 2013/396/EC (11/6/2013) concerning the establishment of the Registry of Collective Redress Actions for the Protection of Consumer Rights (points 35-37).

¹⁶ See: *infra* 2.6. Other areas of application of the collective redress system in Montenegro - Collective redress for discrimination.

¹⁷ Moreover, the Consumer Protection Law 02/14 (14/01/2014) provides for the standing to sue to both consumer protection organizations and the relevant ministry (Ministry of Economy) and other ministries and public administration bodies in charge of enforcing laws protecting consumers' rights (Article 119), which raises the quality of consumer protection beyond the minimum standard established by the Recommendation.

2. Legal framework for collective redress

2.1. General description

Firstly, it is necessary to underline once again that there are no rules on collective redress of horizontal character in Montenegrin legal system, as is, for example, the case today in Croatia,¹⁸ or the rules as existed at one point in Serbia,¹⁹ the two countries that are relatively comparable with Montenegro.²⁰ In Montenegro, as well as many others countries across Europe,²¹ these rules exist in certain sectors at present, i.e. in some segments of the national legal system. The characteristic of this field of Montenegrin legislation is the strong influence of European law on regulatory policy, and accordingly a high level of harmonization of national with European law and the best international regulatory practices. However, in essence, the collective redress mechanism in Montenegro, in addition to the standard domain of consumer protection, exists only in the area of prevention and fight against discrimination.

Prior to analyzing the above-mentioned collective redress mechanism, i.e. actions for the protection of collective interests, it is of particular importance to underline the following. For the purposes of the preparation of this report, its authors rely on the definition of collective redress, i.e. action for the protection of collective interests under point 3 of Recommendation 2013/396/EC (11/06/2013). In that sense, notwithstanding the fact that this definition is certainly subject to different interpretations, we consider that the same in no way equalizes the notion of action for the protection of collective interests with the concept of popular action (*actio popularis*)²². Therefore, certain legal remedies available in Montenegrin law that are available to every person from the interested public, such as those referred to in Article 73 of the Environmental Law,²³ cannot in any way be treated as a form of collective protection, or an action for the protection of collective rights and interests in the context of the prevailing understanding of such concept, regardless of the fact that the subject to protection in the above and similar examples often overlap partly.

The Montenegrin system protecting the collective interests of consumers is presented below, as the main subject of analysis in the report, and along with it the collective redress mechanism in discrimination cases – currently the only system of collective redress existing in Montenegro besides that in the area of consumer protection.

18 M. Pavlović (2015), “Značaj tužbe za kolektivnu zaštitu interesa i prava”, Zbornik radova Pravnog fakulteta u Splitu, Vol. 52, No. 3, pp. 799 – 818.

19 M. Karanikić (2014), “Kolektivna zaštita potrošača u srpskom pravu”, Zbornik radova Pravnog fakulteta u Zenici, Vol. 7, No. 14, pp. 58 - 83.

20 Apart from being a country that originated from the same state and legal system of the former Yugoslavia, Croatia is the last country to join the European Union, while Serbia, although behind Montenegro in the accession process, is de facto the only country actively negotiating with the European Union about the conditions of accession.

21 <https://www.collectiveredress.org/collective-redress/member-states> (21/04/2017).

22 Namely, while the popular action (*actio popularis*) is accessible to all persons, irrespective of their interest in the final outcome of the proceedings, it seems that the European legislator nevertheless limits collective redress under point 3(a) of Recommendation 2013/396/EC (11/06/2013), regardless of the width of the definition and the susceptibility to various interpretations, to a certain circle of natural and legal persons, or to specifically authorized organizations (“entities”).

23 Official Gazette of Montenegro, No. 052/16 (09/08/2016).

2.2. From the principle *in dubio contra proferentem* to the action for the protection of the collective interests of consumers - a review of the development of the system of consumer protection in Montenegro since independence in 2006

Since collective consumer protection is the key subject of the report, its various aspects have been thoroughly analyzed through different, and in particular, the following segments of this report. Therefore, we will focus here only on the key aspects of the development of regulatory concept and the culture of consumer protection in Montenegro in general.

Prior to 2007, when the first Consumer Protection Law was passed in Montenegro²⁴, there were no special regulations in the field of consumer protection in the national law. Moreover, the provisions that existed in the then applicable Law on Obligations did not even explicitly recognize the category of consumers, so the greatest achievement in this regard were the provisions on the protection of the weaker party, first of all, the rule *in dubio contra proferentem* (*in dubio contra stipulatorem*).²⁵ Following the adoption of the Consumer Protection Law 26/2007 (16/05/2007), in the context of the obligations undertaken by Montenegro through the Stabilization and Association Agreement,²⁶ a number of legislative acts and even a number of by-laws have been adopted, which are in the function of consumer protection in Montenegro in their entirety or to a large extent.²⁷ Some of the key laws in this regard are:

- Consumer Credit Law;²⁸
- Law on Protection of Financial Services Consumers;²⁹
- Law on General Product Safety;³⁰
- Law on Market Product Control;³¹
- Electronic Commerce Law;³²
- Electronic Communications Law;³³
- Environmental Law;³⁴
- Energy Law;³⁵

24 Consumer Protection Law, Official Gazette of the Republic of Montenegro, No. 26/2007 (16/05/2007) and Official Gazette of Montenegro, Nos. 073/10 (10/12/2010), 040/11 (08/08/2011), 035/13 (23/07/2013), 001/14 (09/01/2014) 014/14 (22/03/2014).

25 Article 100 of the Law on Obligations, Official Gazette of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 45/89 and 57/89, Official Gazette of the Federal Republic of Yugoslavia, No. 31/93 and Official Gazette of Serbia and Montenegro, No. 1/2003. After the entry into force of the Consumer Protection Law in 2007, Montenegro has adopted its own Law on Obligations, Official Gazette of Montenegro, Nos. 047/08 (07/08/2008), 004/11 (18/01/2011), 022/17 (03/04/2017), by which the category of consumers is recognized solely in the contracts of sale, in Article 489, Paragraph 4. Therefore, the focus of the Montenegrin legislator, when consumer protection is concerned, remained on special laws in this area.

26 Consumer Protection Law, Official Gazette of Montenegro, No. 007/07 (20/11/2007).

27 More details on the emergence and development of the regulatory framework for consumer protection in Montenegro, N. Dožić (2015), „Zaštita potrošača u Crnoj Gori-Najvažnije novine u potrošačkom pravu Crne Gore“, brochure Consumer Protection and Consumer Credit, European Movement in Montenegro.

28 Consumer Credit Law, Official Gazette of Montenegro, No. 035/13 (23/07/2013).

29 Law on Protection of Financial Services Consumers, Official Gazette of Montenegro, No. 043/15 (31/07/2015).

30 Law on General Product Safety, Official Gazette of Montenegro, No. 045/14 (24/10/2014).

31 Law on Market Product Control, Official Gazette of Montenegro, No. 033/14 (08/04/2014).

32 Electronic Commerce Law, Official Gazette of Montenegro, No. 80/04 (29.12.2004), Official Gazette of Montenegro, Nos. 41/10 (23/07/2010), 40/11 (08/08/2011), 56/13 (06/12/2013).

33 Electronic Communications Law, Official Gazette of Montenegro, No. 40/2012 (13/08/13)

34 Environment Law, Official Gazette of Montenegro, No. 052/16 (09/08/2016).

35 Energy Law, Official Gazette of Montenegro, 28/2010 (14/05/2010).

- Standardization Law.³⁶

However, only with the passing of the Consumer Protection Law 02/14 (14/01/2014) in 2014, the Montenegrin consumer protection system and the Montenegrin legal system introduced a comprehensive regulatory concept of collective consumer protection. The provisions of this law that refer to the collective consumer protection are predominantly grouped in Chapter I of Part 4 of the Consumer Protection Law 02/14 (14/01/2014).³⁷ The mechanism of collective consumer protection established by the Consumer Protection Law 02/14 (14/01/2014) - as expressly provided for by this Law - refers to cases in which the defendant “in any way infringes the rights of consumers established by this or other law, thereby violating the collective interests of consumers” (Article 118, Paragraph 2). More specifically, the Montenegrin legislator has opted to regulate the procedure of collective protection of consumers’ interests in a uniform manner, with no distinct specificity or significant variations in subsidiary legislation recognizing certain specific types of consumer contracts and regulating the protection of certain categories of consumers.

The described approach aimed at establishing collective consumer redress mechanism and collective redress in general, except essentially being in line with the standards of consumer protection in the EU *acquis*, is justified in a given moment and circumstances, bearing in mind all the specifics of the Montenegrin society. Namely, Montenegro is a political and state system where comprehensive and often radical reform processes are underway, primarily in the context of the construction of a modern legal system and efficient institutions in charge of the functioning thereof. Therefore, Montenegrin legal system that has been exceptionally conventional until recently is currently being changed much more dynamically and much more radically than most other legal systems by constantly being “enriched” with completely novel legal notions and concept, which poses a challenge for the national regulators and the Montenegrin legal audience and lay public as a whole. In this context, consideration should be given to the concept of collective redress for consumers, which is in many ways specific as compared to the concept of traditional collective action,³⁸ as well as to the described approach to be used for its introduction into Montenegrin law.

2.3. Applicable areas for collective redress

2.3.1. In general

Consumer Protection Law 02/14 (14/01/2014), as already emphasized, in Part IV Chapter 1 - Protection of collective consumer interests, includes the provisions

³⁶ Standardization Law, Official Gazette of Montenegro, No. 13/08 (18/03/2008).

³⁷ Of course, apart from the fact that these provisions have to be interpreted in the context of systemic connection with other articles of the Consumer Protection Law and the regulatory framework for consumer protection in general, certain provisions relating solely to the realization of collective protection of consumers were moved out of that part of the Consumer Protection Law, which will be discussed further in the text below.

³⁸ For example, in point 3 of the Preamble to Directive 2009/22/EC (26/04/2009), which is *sedes materiae* of collective redress, the European legislator stresses that “collective interests means interests which do not include the cumulation of interests of individuals who have been harmed by an infringement.” From such a relatively abstract understanding of the collective interests of consumers - which is also the object of protection - also arise certain specificities of the action itself to protect the collective interests of consumers.

regulating the concept of collective redress of consumers in general and the procedure itself on the action for the protection of collective interests of consumers in particular. Just as is the case with the action for the protection of collective interests of discriminated persons, that is, the Montenegrin antidiscrimination legal framework,³⁹ so the Consumer Protection Law (Article 129) provides that unless otherwise determined by law, the competent court shall accordingly apply the provisions of the law regulating the civil procedure,⁴⁰ as well as the provisions of the law governing enforcement and security.⁴¹ However, regardless of this regulatory i.e. statutory solution, action for the collective protection of consumers' interests was "upgraded" by a number of specific procedural and legal rules making it a special litigation procedure increasingly present not only in Montenegro, but also in comparative national legal systems.

Finally, the following segment of the paper presents those procedural rules in the collective consumer redress action, which "deserve" to be regulated separately by the Consumer Protection Law 02/14 (14/01/2014). On the other hand, the general rules of civil procedure in Montenegrin law are not presented in this report, except exceptionally, when necessary to understand the specificity and to facilitate the interpretation of the rules of procedural nature established by the Consumer Protection Law 02/14 (14/01/2014), i.e. a part of that law that regulates the issue of the protection of collective interests of consumers.

2.3.2. Special rules of procedure for actions for the protection of collective interests of consumers

According to the Consumer Protection Law 02/14 (14/01/2014) (Article 118, Paragraph 1), an action for the protection of collective interests of consumers may be brought against unfair contractual terms, commercial practices or any other infringements of consumers' rights established by this or other laws, which at the same time represent infringements of their collective interests. Standing to be sued, when it comes to such action, rests on an individual trader or a group of traders from the same economic sector who act in the manner described, then commercial and representative associations of traders that encourage such conduct, as well as the drafters of various business codes of conduct that encourage the use of unfair business practices (Article 118, paragraph 2). On the other hand, when it comes to the standing to sue, i.e. authorized claimants for actions to protect collective interests of consumers, the Consumer Protection Law 02/14 (14/01/2014) established a relatively wide range of persons authorized, which, from a comparative perspective is not a unique case among countries with similar legal systems and degree of institutional development as in Montenegro⁴².

The right to bring action for the protection of collective interests of consumers,

39 See: *infra* 2.6. Other areas of application of the collective redress system in Montenegro - Collective redress action for protection against discrimination.

40 Currently, this is the Civil Procedure Code, Official Gazette of the Republic of Montenegro, No. 022/04 (02/04/2004), Nos. 028/05 (05/05/2005) 076/06 (12/12/2006) and Official Gazette of Montenegro, Nos. 073/10, (10/12/2010), 047/15 (18/08/2015), 048/15 (21/08/2015).

41 Currently, this is the Law on Enforcement and Security, Official Gazette, Nos. 036/11 (27/07/2011), 028/14 (04/07/2014), 020/15 (24/04/2015), 022/17 (03/04/2017).

42 Z. Čađenović (2014) "Kolektivne tužbe za zaštitu prava potrošača (upravne i sudske zabrane) i Direktiva 2009/22/EZ", in: M. Radulović (ed.) Nacionalna konvencija o evropskoj integraciji Crne Gore (NKEI 2013-2014), Podgorica: European Movement in Montenegro, p. 244.

established by Article 119 of the Consumer Protection Law 02/14 (14/01/2014), rests on the ministry responsible for consumer protection⁴³, as well as other ministries and public administration bodies in charge of enforcing laws for the protection of consumer rights. In addition to the above mentioned entities, standing to sue has been provided to other consumer organizations by the provisions of this Article, as well as commercial and representative associations of traders. However, in order to prevent the possible violation of a *sui generis* legal concept such as the action for the protection of collective interests of consumers⁴⁴, Article 169 of the Consumer Protection Law 02/14 (14/01/2014) further elaborated the concept of consumer organizations entitled to bring action for the protection of collective interests of consumers, while Article 170 of the same law establishes the possibility and regulates the grounds for revoking such entitlement. Thus, the possibility of using this legal remedy is recognized only for those consumer organizations that:

- are registered in the registries of consumer organizations and associations of consumer organizations maintained by the Ministry of Economy, at least a year before the submission of a claim;⁴⁵
- have at least one lawyer employed, with at least three years of work experience;
- actually operate and have achieved results in the field of consumer protection.⁴⁶

In the context of the above requirements, the Ministry of Economy is obliged, by 30 April of the current year, to determine and publish on its website a list of consumer organizations entitled to bring action for the protection of collective interests of consumers. Within the same deadline, this Ministry must compile and publish a list of consumer organizations to which such entitlement has been revoked. In this regard, the conditions for their revoking, i.e. removal of a consumer organization from the list of those entitled to bring actions, are explicitly set out in Article 170 of the Consumer Protection Law 02/14 (14/01/2014); these cases being those in which the relevant Ministry established one of the following circumstances:

- that the consumer organization has given incorrect data of importance for the granting of the authorization;
- that the consumer organization has ceased to fulfill some of the legally prescribed requirements;
- that the consumer organization required this;
- that the organization has ceased to operate.

43 According to the current organization of the public administration and the Government of Montenegro specifically, this is the Ministry of Economy. See: *Ibid*, p. 244.

44 It is necessary, of course, to always keep in mind that such violations and accompanying adverse consequences are not only possible to the detriment of traders, i.e. sellers of goods and services, but also to the detriment of consumers themselves, especially in situations where their interests are protected or represented by incompetent persons or organizations.

45 In particular, Article 165 of the Consumer Protection Law 02/14 (14/01/2014) stipulates the conditions and procedure for the registration of consumer protection organizations in this registry, as well as cases where registered organizations have to be deleted from the records.

46 Regarding this and previous conditions, it is stipulated that the decision of the ministry competent for consumer protection, i.e. the Ministry of Economy, will be decisive concerning their fulfillment in every concrete case. In addition to this, the Montenegrin legislator has given another important guidance, prescribing that the actual performance and achieved results of the consumer organization shall be proved in particular by the annual work report, which, according to Article 166 of the Consumer Protection Law 02/14 (14/01/2014), the registered consumer organizations must regularly submit to the competent ministry no later than March 31 of the current year for the previous year.

The Consumer Protection Law 02/14 (14/01/2014), in Article 120 introduced specific procedural preconditions for bringing action for the protection of collective interests of consumers. Namely, an entity with standing to sue, intending to use this remedy to bring a representative action, is obliged to warn an entity it intends to sue in writing of its intent to bring action against such entity in case it fails to interrupt its actions in infringing consumer collective interests. Accordingly, it is also stipulated that an authorized entity may not bring collective action before the expiration of a deadline of 14 days from the date of delivery of such warning.

This specific procedural condition for admissibility of an action, of course, is not unknown in European or even in Montenegrin law. For example, in essence, the same procedural presumption in Montenegrin law exists regarding shareholder derivative suit, basic characteristic of which is that the claimant submits it in his own name, but on behalf of the company. In this way, this complaint is equal to an action to protect the collective interests of consumers in one important element. Namely, both legal concepts are used or can be used to protect the rights and interests of third parties, and not just that of the claimant.⁴⁷

On the other hand, the justification of such and similar procedural conditions are often called into question from the point of view of certain constitutional and legal principles.⁴⁸ However, having in mind the above-stated specificity of the action for the protection of collective interests of consumers, as well as a fairly wide-ranging basis of the grounds, it seems that there is a place here for such procedural condition. Particularly so because the above-mentioned deadline of 14 days from the date of the submission of the previous request (i.e. the warning) until the day of the filing of the action does not apply to any request for the issuance of interim measures, leaving the claimant free to utilize traditional means to prevent the negative consequences of already disturbed consumer interest.

Regarding the interim measures in an action for the protection of collective interests of consumers, we emphasize the following specificities. Article 127 of the Consumer Protection Law 02/14 (14/01/2014) explicitly stipulates that until the final decision is made, and under the conditions prescribed by the law regulating such measures, the acting court may issue an interim measure ordering the termination of actions that violate collective consumer interests. Moreover, the same article left the possibility for the trial court to issue an interim order even in the event that the conduct infringing collective interests of consumers did not take place yet, provided that the beginning of such conduct is certain, which is the circumstance which the claimant is primarily required to prove.

The Consumer Protection Law 02/14 (14/01/2014) also established special rules of procedure for actions to protect collective interests of consumers, concerning court jurisdiction to resolve such type of special civil procedure. Thus, under Article 121 of the Law, the jurisdiction *ratione materiae* has been established in favor of a court of general jurisdiction. The same article establishes the rule that the court shall have

47 More about derivative shareholder complaints in Montenegro, V. Savković (2004), *Derivativne akcionarske tužbe*, Faculty of Law, University of Montenegro: Podgorica.

48 M. Radovanović (2015), "Uslov za dozvoljenost tužbe protiv osiguravajućeg društva" in: *Annals of the Faculty of Law in Belgrade*, Vol. 63. No. 1, pp. 252 - 267.

territorial jurisdiction in the seat of the defendant, or its part or business unit, if the dispute arises from such part of business or business unit. However, in cases where the defendant does not have a seat in Montenegro, nor its part of business or business unit, Article 121 of the Consumer Protection Law 02/14 (14/01/2014) provides an alternative or auxiliary procedural rule, according to which the territorial jurisdiction of the court shall be determined in favor of the court with jurisdiction *ratione materiae* in the area in which the actions that infringe collective interests of consumers were taken or adverse consequences occurred.

In view of all the specificities of action for the protection of collective interests of consumers, it is understandable that in Article 122 of the Consumer Protection Law 02/14 (14/01/2014), the Montenegrin legislator has opted to explicitly confirm that, when the action has been initiated to protect the collective interests of consumers, the initiation of another procedure to protect the collective interests of consumers in respect of the same claim or against the same defendant shall not be allowed. However, in the same article, in order to create the conditions for the most effective protection of collective interests of consumers, it was left open to every person with standing to sue to join the claimant in the ongoing proceedings, in the capacity of an intervener, who, however, is not entitled to compensation of damages.

On the other hand, although we consider that, in view of the different merits of the two disputes, such case law would have emerged even without the explicit provisions of the Consumer Protection Law 02/14 (14/01/2014), the Montenegrin legislator has explicitly prescribed (Article 122 Paragraph 3) that the initiation or conduct of a proceeding for a collective protection of interests does not prevent a consumer who suffers harmful consequence from the unlawful conduct of a trader, to initiate proceedings for compensation of damages, cancellation or determination of the nullity of a contract concluded under the influence of the conduct that harms collective interests of consumers, before the competent court. The same rule has been established in respect of any other procedure for the exercise of rights of consumers under the Consumer Protection Law 02/14 (14/01/2014) or any other regulation that establishes such rights.

Finally, Article 125 of the Consumer Protection Law 02/14 (14/01/2014) provides that in cases where the action for the protection of collective interests of consumers is brought due to unfair commercial practice⁴⁹, “when deciding whether a disputed commercial practice is unfair, the acting court shall not take into account whether the practice has caused some damage, i.e. whether it is likely that someone will be harmed, or whether a person against whom the proceedings are being conducted is guilty of undertaking unfair commercial practices.” The collective interests of consumers as a subject of protection is not precisely defined in Montenegrin legislation, and therefore the quoted segment of Article 125 of the Consumer Protection Law 02/14 (14/01/2014) could particularly be significant in this regard. More specifically, since unfair commercial practice is but one of many types of infringement of consumer rights (Articles 109-117), it would be in accordance with the standard rule of logical interpretation - *argumentum a contrario* to conclude the following. While in case of unfair commercial practice the existence of damage or the possibility that such damage will occur does not represent a

⁴⁹ The concept of unfair commercial practices, i.e. prohibition thereof, has been regulated in detail in Part III of the Consumer Protection Law 02/14 (14/01/2014).

necessary element of harmed collective interest, this may be the case in other cases of infringement of collective interests of consumers.

2.4. Available remedies for collective redress according to the national legislation

First of all, according to Article 123 of the Consumer Protection Law 02/14 (14/01/2014) when it rules in favor of claimant who submitted an action for the protection of collective interests of consumers, the acting court shall establish the infringement of this or other laws regulating the rights of consumers by a decision upholding the claim, with the provision of a precise description of the manner and consequences of the infringement. In addition to establishing the infringement of consumer rights, the court may:

- order to defendant to terminate actions that violate the rights of consumers and order him, if possible, to take the necessary measures to remedy the harmful effects that have arisen from his actions;
- prohibit to the defendant such further or similar actions that infringe the collective interests of consumers;
- order the defendant to publish at its own expense a whole or a part of the decision, if it assesses that the publication thereof may contribute to alleviate or completely eliminate the harmful consequences of the actions;
- order the defendant to publish a correction of unauthorized advertising at its own expense, when applicable.

Therefore, from the statutory permissible content of the judgment upholding a claim for the protection of collective interests of consumers, we can conclude that the Consumer Protection Law 02/14 (14/01/2014), unlike the Law on Prohibition of Discrimination 46/10 (06/08/2010),⁵⁰ definitely fails to recognize compensatory collective redress. On the other hand, in the spirit of the concept of collective consumer redress, that is, in order to increase the quality of the protection of consumer interests, Article 124 of this law prescribes that, besides the claimant, any consumer who has a legal interest in the execution of the claim may require for the execution of a final court decision, which is rendered in accordance with Article 123 of the Consumer Protection Law 02/14 (14/01/2014).

However, the latter is not the only change of the traditional concepts of civil law introduced by the Montenegrin legislator in such action. Thus, Article 124 stipulates that, if the court prohibits the exercise of certain unfair provisions in the contract, the trader who was a party to the proceedings under a collective lawsuit shall lose the right to refer to such provisions from previously concluded contracts.

Finally, in terms of further analysis of the impact of the decision upholding the claim in the consumer collective redress, on the contractual and civil and legal relations between the defendant and the claimant, it is particularly important to emphasize the following. In cases where individual action was brought against the same defendant who had already been sued in the proceedings on a complaint for the protection of collective interests of consumers, provided that the claim was upheld, Article 126 of

⁵⁰ Law on the Prohibition of Discrimination, Official Gazette of Montenegro, Nos. 046/10 (06/08/2010), 040/11 (08/08/2011), 018/14 (11/04/2014).

the Consumer Protection Law 02/14 (14/01/2014) establishes the obligation of the court to decide in accordance with a final decision in the action to protect the collective interests of consumers. This essentially means that a final decision in the action for the protection of collective interests of consumers is binding in the determination of the facts and circumstances in the compensatory action, and that the role of the court in such a lawsuit is reduced to determining the existence and amount of damage suffered, while not bringing the responsibility of the perpetrator of discriminatory behavior in question.

In the context of the above-mentioned importance of the decisions in actions for the protection of collective interests of consumers for other procedures in which the individual consumer rights are protected, we also point out to the following regulatory solution. Article 126 of the Consumer Protection Law 02/14 (14/01/2014) establishes an electronic registry of submitted collective complaints and decisions made, which is established and maintained by the Ministry of Economy. To this end, the courts are obliged to submit a collective action to the Ministry of Economy immediately upon receipt, and the decision immediately after the rendering. Of importance for raising the level of consumer protection is the circumstance that it is explicitly established that this registry of decisions shall be public and available free of charge.

2.5. Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organisations to initiate the procedure

The issues of financing and the costs of collective redress actions are both sensitive and important in terms of the availability and efficiency of consumer redress system in general and the system of collective consumer redress in particular. Namely, it is persistently emphasized that the application of the principle of civil procedure in which a party that loses a case is obliged to reimburse necessary legal costs borne by itself and by the winning party should not have the effect of deterring consumers and entities authorized to bring action to protect their collective interests to expediently use mechanisms of judicial protection.⁵¹ Moreover, it is desirable that the costs of initiating and conducting court proceedings, as well as mechanisms to protect the rights and interests of consumers be minimal and the smallest possible, in order to somewhat improve the starting position of consumers in relation to businesses threatening their rights.⁵²

In the context of the above, when it comes to actions for the protection of collective interests of consumers, the provisions of Article 121 of the Consumer Protection Law 02/14 (14/01/2014) are of importance. Namely, it has already been said that procedures for the protection of collective interests of consumers in Montenegro are initiated by actions which are not compensatory but rather injunctive in nature. Therefore, the solution offered by the same article is the only logical and acceptable solution - that the court determines the value of the dispute. However, taking into account the need to improve the position of consumers, and organizations or other entities representing their interests in an action for the protection of collective interests of consumers, through the reduction of expenditures necessary for financing the litigation itself, Montenegrin

51 European Parliament - General and Internal Policy Directorate (2011), Overview of existing collective redress schemes in the EU Member State, p. 9.

52 *Ibid*, p.6.

legislators limited the value of the dispute to a maximum of 5,000 euros, regardless of the real value of the dispute (Article 121, Paragraph 5). Moreover, in Article 121, Paragraph 6 of the Consumer Protection Law 02/14 (14/01/2014), they went a step further, stipulating that when reducing the value of the matter in dispute, it is especially important to take into account the complexity and scope of the dispute, the number of defendants and the significance of the claim from the standpoint of public interest.

As there are no other provisions on the financing of proceedings and the covering of claimant's costs and the costs of defendant upon the validity of the judgment on the action for the protection of collective interests in the Consumer Protection Law 02/14 (14/01/2014), in this context one can only discuss the appropriate application of legal rules governing civil procedure in Montenegro.

The basic rule of civil procedure, typical of countries belonging to the continental European legal system, is contained in Article 152 of the Civil Procedure Code 022/04 (02/04/2004). The essence of such rule is that a party which loses a case in its entirety shall bear the costs of adverse party and his/her intervener.⁵³ Consequently, when a party only partially succeeds in litigation, the court may, in the light of the achieved success, order each party to bear own costs or order one party to bear a proportionate part of costs of the other party and the intervener. In deciding which costs shall be reimbursed to a party, the acting court is autonomous and limited only by the prescribed legal framework and the obligation to assess carefully all the circumstances. In doing so, the court shall take into account only those costs that were necessary for the purpose of litigation, including the remuneration and fees of lawyers under the applicable tariff.

Given, however, the current economic situation in Montenegro, and the financial power of consumers and their organizations as authorized initiators of proceedings for collective protection of rights, it seems that the application of the described and other rules of the Civil Procedure Code 022/04 (02/04/2004) in terms of bearing the cost of proceedings is not the most favorable solution from the point of view of encouraging the use of collective protection mechanisms for consumers' interests and improving the position of consumers in general. Namely, both consumers and their organizations in Montenegro generally have no financial potential to initiate and conduct long-term civil proceedings with uncertain outcome. Of course, one should be objective, and note that the relative inertia that characterizes the current attitude of Montenegrin consumers and their organizations towards mechanisms of collective protection of threatened rights and interests is not only caused by the current economic situation, but also underdeveloped civic culture and awareness of the need to protect wider, collective rather than direct individual interests.

On the other hand, the Civil Procedure Code 022/04 (02/04/2004) provides for the possibility of exemption from the obligation to pay the costs of the proceedings.

⁵³ Here again, however, it is necessary to once again stress the specificity of the procedure for the action for the protection of collective interests of consumers, that is, a consumer who, as an intervener, joins the claimant in the proceedings for a claim for the protection of collective interests is not entitled to reimbursement of costs (supra 2.3. 2. Specific rules of procedure for a lawsuit to protect the collective interests of consumers).

However, bearing in mind the reasons for the exemption from paying the costs,⁵⁴ it seems that there are very few situations where this possibility could be used in the proceedings on action for the protection of collective interests of consumers. In addition, given the scope of eventual exemption, there exist even rarer situations where the exploitation of this possibility would represent a significant relaxation of the financial burden on claimants in terms of initiating and pursuing the proceedings itself. Namely, Article 166, Paragraph 2 of the Civil Procedure Code 022/04 (02/04/2004), limits the exemption from paying the costs of the proceedings to exemption from payment of particular public taxes and exemption from depositing advance payment for the costs of witnesses, expert witnesses, on the spot investigations and court advertisements. In other words, exemption from the obligation to pay expenses does not apply to the obligation of the losing party to compensate the other party for the costs, nor is there any way that the claimant's representation costs could be borne by someone else instead of it.

Given the above-described segment of legislative framework, the ministries and public administration authorities responsible for the implementation of laws protecting the rights of consumers are in the best position for financing the procedure for protecting the collective interests of consumers, as authorized entities referred to in Article 119 of the Consumer Protection Law 02/14 (14/01/2014). These authorities benefit from the stable funding from the state budget, and may initiate procedures for the protection of collective interests of consumers *ex officio*. Therefore, in the described environment of Montenegrin society, their responsibility for building a functional system of protection of collective interests of consumers is even greater and more pronounced than is the case in countries with a longer tradition of civic activism.

When it comes to consumer organizations, it is necessary to stress that their role in an action for the protection of collective interests of consumers is no different from the position of any other entity that may appear as a claimant in such proceedings. However, Article 168 of the Consumer Protection Law 02/14 (14/01/2014), which regulates the issue of financing of consumer organizations, stipulates that besides own sources, consumer organizations shall be financed from the budget of the State of Montenegro for consumer protection, based on a public invitation. This means that the legislator, while recognizing the importance of providing professional protection to consumers against businesses that infringe their rights and threaten their interests by unlawful conduct, obliged the executive branch of the government to provide certain funds for the functioning of consumer organizations on a regular basis. Moreover, taking into account that the funds in question should be spent and awarded in the best interests of consumers, the legislator has restricted entitlement to their allocation only to such consumer organizations that meet the requirements of Article 165 of the Consumer Protection Law 02/14 (14/01/2014), that is:

- to be established in accordance with the law governing the operation and activities of non-governmental organizations;
- to be established to protect the rights and interests of consumers;

⁵⁴ Article 166, Paragraph 1 of Civil Procedure Code 022/04 (02/04/2004) stipulates that the acting court shall exempt the party from the payment of costs of proceedings, if according to his/her general financial position, the party is unable to bear the costs without jeopardizing the necessary support of himself/herself and his/her family, whereby the basis for the exemption of the obligation is reduced solely to the poor financial situation of the applicant for exemption from the obligation to pay the costs.

- to be independent in accordance with Article 167 of the Consumer Protection Law 02/14 (14/01/2014).⁵⁵

Therefore, there are legislative guarantees in Montenegro as regards the independence of consumer organizations, and their partial financing from public funds. With the above stated competence guarantees, solid legal i.e. regulatory basis was created for affirmation of the role of consumer organizations in Montenegro and for achieving a higher level of protection of consumer interests in general. Of course, only time may give an answer to the question of whether such a regulatory framework will produce satisfactory results and how much the Montenegrin consumer organizations will succeed in using the opportunity for positioning and affirmation created for them by the legislator.

2.6. Other areas of application of the collective redress system in Montenegro - Collective action for protection against discrimination

The first system of collective protection of rights and interests in Montenegro was established by the Law on the Prohibition of Discrimination 46/10 (06/08/2010). First of all, starting with the standardized general notion of discrimination and its special forms (segregation, hate speech, sexual discrimination, etc.), this law elaborates the principle of general prohibition of discrimination.⁵⁶ Further on, in Part IV (Articles 24 - 31) - Judicial protection, the Montenegrin legislator first introduced the right to action by anyone who considers to be injured by discriminatory treatment of a body, a company, another legal entity, an entrepreneur or a natural person (Article 24), and then extended the circle of persons entitled to bring action against discriminatory treatment in Article 30 of this Law to organizations and individuals dealing with the protection of human rights.

Article 30 Paragraph 1 of the Law on the Prohibition of Discrimination 46/10 (06/08/2010) explicitly stipulates that organizations (and individuals) dealing with the protection of human rights may bring actions under Article 24 on behalf of discriminated groups of persons, and in Article 30 Paragraph 2 stipulates that for a person referred to in Paragraph 1 to be entitled to bring action, a written consent of discriminated persons shall be required. Therefore, according to the wording of Paragraphs 1 and 2 of the Law on the Prohibition of Discrimination 46/10 (06/08/2010), stipulating that an action will be brought on behalf of discriminated persons and with their written consent, we may conclude that organizations dealing with the protection of human rights do not have a standing to bring anti-discrimination actions themselves, but they do so on behalf of and in the name of discriminated persons. Therefore, the described regulatory framework for such action may be considered one of the more typical examples of collective redress as promoted by the Recommendation 2013/396/EC (11/6/2013) in point 3(d), in conjunction with point 3 (a).

⁵⁵ For the purpose of Article 167 of the Consumer Protection Law 02/14 (14/01/2014), this implies the independence of consumer organizations and their associations from the authorities at the state and local level, the interests of traders, political parties and trade unions, which, inter alia, are expressed through the standards of independence and impartiality of persons who have a leading position in the bodies of consumer organization management and their associations and the strict conditions for the use of funds donated by traders and other market participants.

⁵⁶ Of course, as in most of the legal systems today, the Constitution of Montenegro has previously established a general prohibition of discrimination (Article 8).

Regarding the rules of procedure concerning an action brought for the protection against discrimination, Article 24 of the Law on the Prohibition of Discrimination 046/10 (06/08/2010) established the basic rule - that the law regulating civil procedure shall apply to such procedure, provided that different rules are not explicitly prescribed by a special law. Bearing this in mind, we will primarily point to the key procedural legislative specifics established by the Law on the Prohibition of Discrimination 46/10 (06/08/2010).

First of all, when it comes to the decision that a court may render in relation to an action, Article 26 of the Law on the Prohibition of Discrimination 46/10 (06/08/2010) stipulates that a court decision may:

- establish that the defendant discriminated against the claimant;
- prohibit further conduct of actions that bear a potential threat of discrimination, or prohibit the repetition of acts of discrimination;
- eliminate the consequence of discriminatory behavior;
- determine compensation of damages in accordance with the law;
- publish in the appropriate media a judgment establishing discrimination at the defendant's expense.

From the above, it follows that in Montenegro, when it comes to the collective action for protection against discrimination, compensation could also be claimed, and in that sense Montenegrin law obviously recognizes the compensatory action for collective protection of rights.

Anti-discrimination action shall be carried out in a summary procedure (Article 24, paragraph 4), while as regards interim measures, which are allowed, in particular with a view to preventing irreparable damage or serious violations of rights (Article 26, Paragraph 2), the provisions of the regulations governing the procedure of security and enforcement (Article 26, Paragraph 4) shall apply.

In the procedure for protection against discrimination, in addition to the court of general territorial jurisdiction, the territorial jurisdiction of the court in whose area of residence is the seat of the plaintiff (Article 25) is determined, while the subjective and objective deadlines for filing an anti-discrimination action are fixed to one year from the date of learning of committed discrimination, i.e. three years from the moment when the discrimination took place (Article 27).

Another important feature of action for the protection against discriminatory treatment is the one established by the provision of Article 29 of the Law on the Prohibition of Discrimination 46/10 (06/08/2010), which stipulates that when the claimant makes it probable that the defendant committed an act of discrimination, the burden of proof that, due to disputed act, an infringement of the equality in rights before the law did not occur, passes from the claimant to the defendant. The procedural legislative position of the claimant is significantly facilitated thereby, in relation to the regular one in the classical litigation procedure.

Finally, in addition to organizations dealing with the protection of human rights, the Law on the Prohibition of Discrimination 46/10 (06/08/2010) (Article 21, Paragraph 1, Point 4) explicitly establishes a competence of the Ombudsman to initiate proceedings for protection against discrimination in court or to appear in the proceedings as an intervener when the party makes it probable, and the Ombudsman estimates that

the respondent's actions have discriminated on the same basis against a group of persons with the same personal traits. However, in this case, it is not explicitly prescribed that the Ombudsman shall bring an action, nor does the Law on the Prohibition of Discrimination 46/10 (06/08/2010) explicitly or through the appropriate application of other provisions regulate procedures initiated by the Ombudsman in accordance with his competences. Nevertheless, regardless of this circumstance, i.e. ambiguity, we consider that there is room enough here for the view that this is a matter of action for collective protection against discrimination, when in addition to the grammatical, we apply to the provisions on the competences of the Ombudsman the methods of systemic and especially targeted interpretation, which is given mild primacy in the interpretation of unclear legal provisions in Montenegrin law. However, we will receive the ultimate answer to this dilemma only with the emergence of consolidated case law.

2.7. Legislative consultations and reform proposals

It was already highlighted in the report that there are no horizontal rules in the field of collective redress in Montenegro, which would allow for a unified or even harmonized application of this concept in different segments of the national legal system. According to the authors of the report, the political will to implement legal reforms and enable horizontal rules is presently non-existent or at least not publicly articulated. Moreover, the authors of the report have not noticed that that serious attempts to promote these ideas by professional associations, the civil sector or other relevant factors were made on the public scene. But this certainly does not mean that we will not see such developments in a relatively near future. The Montenegrin legislative system has shown and still shows signs of fair openness for regulatory trends and even formally non-binding suggestions coming from the European Union.

In the meantime, in the light of intensive accession negotiations with the European Union and even more intense activities of Montenegro in terms of harmonizing its own legislation with the European Union *acquis*, one can first expect that the collective redress system, which corresponds to frames set out in this report, will be created in other sectors as well, such as the environmental protection sector or protection of copyright and related rights, where there is already a system of collective exercise of certain categories of such rights in place, but not their collective redress before the judicial or administrative authorities.

Finally, as compensatory actions for the protection of collective rights have already been introduced under the Law on the Prohibition of Discrimination 46/10 (06/08/2010), in the light of the development described in the regulatory policy for the collective protection of consumers in the European Union⁵⁷, it seems realistic to expect that Montenegrin Consumer Protection Law will be enriched with this type of action for the protection of collective interests in the foreseeable future.

⁵⁷ See: *supra* 1. 5. Commission Recommendation 2013/396/EC of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law.

3. Institutional framework for collective redress

3.1. Overview of legal provisions determining stakeholders in implementing collective redress

Unlike some of the legislation of former Yugoslavia, which regulates collective redress rules in the laws governing civil litigation, i.e. legal systems that have horizontal rules on collective redress, in Montenegrin legislation, the only rules on consumer collective redress are contained in the Consumer Protection Law, which regulates the concept of collective action and persons authorized to bring actions.

In particular, we have to emphasize that the text of this law has been in preparation since 2011, and was adopted in late 2013, so that the Montenegrin legislator did not have in mind the directives and recommendations made in 2013, which national legislation was not aligned with these sources of the Union law. Although amendments to this law have already been made in 2015, the changes were made only in the part of the notifications that must be printed on the goods, given the problem that occurred during the implementation of the new provisions of the Consumer Protection Law 02/14 (14/01/2014).

In order to protect collective interests of consumers, the new Consumer Protection Law 02/14 (14/01/2014) introduced a collective action which may be brought against a trader who, through the application of unfair contractual provisions, commercial practices or in any other way infringes consumer rights determined by this or other laws (e.g. on medicines, travel services, consumer credits, e-commerce, advertising, etc.), thereby violating the collective interests of consumers, and through which cessation of such infringement may be requested. The Consumer Protection Law 02/14 (14/01/2014) provides for the appropriate application of the provisions of the law regulating civil procedure and the law regulating enforcement and security, unless otherwise provided by this law.⁵⁸

Entities with standing to sue, i.e. authorized claimants are: public administration body competent for consumer protection and other ministries and public administration bodies competent to enforce laws protecting consumers' rights; a consumer organization that meets the requirements of the Consumer Protection Law and the commercial and representative associations of traders (economic, craft, etc.).

In addition to the collective protection of consumers, collective redress is also enabled under the Law on the Prohibition of Discrimination.⁵⁹ In this field, there are two models of protection for persons who consider to be discriminated against. The first form of protection is the procedure before the Ombudsman upon a complaint by a person who considers to be discriminated against or upon a complaint by an organization or person dealing with the protection of human rights. Another form of protection is provided for in civil litigation, in cases where a person believing to be discriminated against individually files a complaint or when the proceedings with his/her explicit consent are initiated by an organization or individuals dealing with the protection of human rights.

⁵⁸ See: Article 129 of the Consumer Protection Law 002/14 (14/01/2014).

⁵⁹ Law on the Prohibition of Discrimination, Official Gazette of Montenegro, Nos. 046/10 (06/08/2010), 040/11 (08/08/2011), 018/14 (11/04/2014).

In the first case, this is a special free-of-charge procedure based on complaints before the Ombudsman of Human Rights and Freedoms of Montenegro, in accordance with a special law regulating the operations of the Ombudsman,⁶⁰ and the Rules of Procedure of the Ombudsman.⁶¹ The Ombudsman independently and autonomously, based on the principles of justice and fairness, undertakes measures for the protection of human rights and freedoms, when they are violated by a deed, act, or omission of state authorities, public administration bodies, local self-government bodies and local authorities, public services or other holders of public authority (hereinafter: authorities), as well as measures to prevent torture and other forms of inhuman or degrading treatment or punishment and measures for the protection against discrimination.⁶² A complaint may be filed by any person suspecting to be discriminated against by a deed, act or omission of an authority or other legal entity. In this proceeding, organizations or individuals involved in the protection of human rights may appear as authorized claimants, other than persons considering to be discriminated against, with the consent of a discriminated person or a group of persons.

In the second case, the Law on the Prohibition of Discrimination in Montenegro provides for the possibility of judicial protection through an individual complaint of a discriminated person,⁶³ as well as the right of organizations and individuals involved in the protection of human rights to initiate a procedure for the protection against discrimination on behalf of an individual or a group of persons.⁶⁴ Therefore, besides individual actions, it is possible to initiate collective redress actions where same persons again appear as persons authorized to bring action, as in the procedure before the Ombudsman, whereas a special paragraph envisages also the authorization of a “voluntary examiner of discrimination” to bring an action. The law stipulates a special obligation of such persons to inform the Ombudsman about the initiation of court proceedings if, prior to the filing of the lawsuit, they initiated the complaint procedure before the Ombudsman.

Given the limited competencies of the Ombudsman, the law envisaged double protection, while the Ombudsman is given the authority to initiate the procedure for protection against discrimination before the court or to appear in the proceedings as intervener when a party makes it probable, and the Ombudsman estimates that the respondent has discriminated on the same basis against a group of persons with the same personal traits.⁶⁵ Thus, it is envisaged that if the Ombudsman, in his handling of the complaint, assesses that there has been a violation of the right, he has the right to conduct proceedings on behalf of several persons, as a claimant or intervener, which can be a special guarantee of the quality of representation of persons who are discriminated against in a certain way.

60 See: Law on Protector of Human Rights and Freedoms of Montenegro 042/11 (15/08/2011).

61 See: Rules of Procedure of the Protector of Human Rights and Freedoms of Montenegro 044/12 (09/08/2012).

62 See: Article 2 of the Law on Protector of Human Rights and Freedoms of Montenegro 042/11 (15/08/2011).

63 See: Article 24 of the Law on the Prohibition of Discrimination “Official Gazette of Montenegro”, Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

64 See: Article 30 of the Law on the Prohibition of Discrimination “Official Gazette of Montenegro”, Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

65 See: Article 21, Paragraph 1, Point 4 of the Law on the Prohibition of Discrimination “Official Gazette of Montenegro”, Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

3.2. Stakeholders responsible for putting collective redress into practice

In view of the existing consumer redress mechanisms in the Montenegrin law, the following stakeholders are in charge of providing protection: the Government of Montenegro, the Ministry (the public administration body in charge of consumer protection) and other ministries and administrative bodies that are responsible for implementing the consumer protection policy, Consumer Protection Council, local self-government units, consumer organizations, commercial and representative associations of traders (business, crafts, etc.).⁶⁶ Although all these actors fail to appear as authorized claimants in collective action, the Montenegrin legislator has assigned each of them a role and certain competencies.

Public legal entities have standing to sue due to the insufficient development of non-governmental consumer organizations, so to provide the possibility that, in the absence of actions brought by non-governmental organizations, an action may be brought by public entities. The chambers and trade associations have standing to sue because the violation of the collective interests of consumers often distorts the rules of the market (competition) at the same time. The action may be brought against a trader or a group of traders, chambers or representative associations of traders (which encourage such behavior through decisions or recommendations of organizations and traders' chambers) or the owner of the code (which encourages the use of unfair commercial practices).

It is also envisaged that the Montenegrin consumer organizations are also entitled to bring action to protect the collective interests of consumers before a competent authority of an EU Member State. The same law also provides for the standing of bodies from other EU Member States in the event that the actions of a particular trader, its part or business unit or a group of traders based in Montenegro are contrary to the provisions of this law and other laws that contain consumer protection provisions, or in the event these actions originate from Montenegro and affect or may affect the position of consumers in another EU Member State.⁶⁷ However, in such cases, a delayed application of these rules is foreseen as from the date of Montenegro's accession to the European Union.

An individual consumer does not have a standing to sue for the protection, because the validity of the contracts already concluded is not to be established in this proceeding, nor is the cash compensation decided upon (reduction of the price, compensation, etc.), but the aim is to provide the cessation of certain actions.

Organizations or individuals involved in the protection of human rights, a voluntary examiner of discrimination and the Ombudsman in the procedures for protection against discrimination appear as a mechanism for the collective redress in cases concerning discrimination.

The Law provides for the actual jurisdiction of the civil court in an urgent procedure.⁶⁸ The local court has jurisdiction as a court of general territorial jurisdiction, as well as the court in whose territory the place of residence is or the seat of the claimant.⁶⁹

⁶⁶ See: Article 157, Paragraph 1 of the Consumer Protection Law 002/14 (14/01/2014).

⁶⁷ See: Article 130 of the Consumer Protection Law 002/14 (14/01/2014).

⁶⁸ See: Article 24, Paragraph 4 of the Law on the Prohibition of Discrimination "Official Gazette of Montenegro", Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

⁶⁹ See: Article 25 of the Law on the Prohibition of Discrimination "Official Gazette of Montenegro", Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

Even before the initiation of proceedings, the court has the authority to order interim measures on the motion of a party in the proceedings, if it is considered probable that the measure is necessary in order to prevent the danger of the occurrence of irreparable damage, in particular serious violations of the right to equal treatment, or to prevent violence. In this case, the court shall make a decision on an interim measure without delay. Of course, the determination of an interim measure can also be requested during the proceedings.⁷⁰

The initiation of proceedings for collective protection against discrimination under the Law on the Protection of Discrimination is entrusted to individuals or organizations dealing with the protection of human rights. Human rights organizations are regular claimants in collective redress actions in discrimination cases. Following changes to the 2014 Law, it remains unclear who is an individual dealing with the protection of human rights entitled to bring action under paragraph 1 of the Article, which regulates the matter of the entitlement of persons to bring collective actions; since the right of such individuals to bring action was envisaged by the basic text of the law, while the amendments under new paragraph 3 stipulate that a “voluntary examiner of discrimination” may also appear as a person entitled to bring action - a person who, in order to directly examine the application of the rules on the prohibition of discrimination in any way presents itself or is put in the position of a person who may be discriminated against.

As we have already pointed out, the Ombudsman appears with the standing to bring action on behalf of several persons, or appears in a dispute as an intervener, where a party makes it probable, and the Ombudsman estimates that the respondent through his actions discriminated on the same ground against a group of persons with the same or similar traits.⁷¹

Nevertheless, such competence of the Ombudsman is envisaged under the Law on the Prohibition of Discrimination in a special article regulating his competences, while in the part of the Law concerning persons entitled to bring action, only organizations or individuals dealing with the protection of human rights appear as other persons who may bring action, who are also compelled by special conditions to be met concerning the representation of such persons.

3.3. Mapping the cooperation among stakeholders

Taking into consideration the designated stakeholders in collective redress, the issue of their cooperation gets logically raised. We will first pay attention to the issue of collective consumer protection, since the Consumer Protection Law specifies the duty of these entities to cooperate with each other in order to develop consumer protection system and policies.⁷²

The Government of Montenegro is obliged to adopt a National Consumer Protection Program for a period of three years, which defines the consumer protection

70 See: Article 28 of the Law on the Prohibition of Discrimination “Official Gazette of Montenegro”, Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

71 See: Article 21 Paragraph 1 Item 4 of the Law on the Prohibition of Discrimination “Official Gazette of Montenegro”, Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

72 See: Article 157, Paragraph 2 of the Consumer Protection Law 002/14 (14/01/2014).

policy, priority activities and conditions for their implementation. In order to implement this Program, a special action plan is adopted each year that sets out the tasks, jobs, scope, stakeholders and implementation dynamics, the necessary financial resources, as well as other conditions for the implementation of the National Program.⁷³ The realization of certain tasks under the National Program may be delegated to consumer protection organizations or other legal entities or individuals, on the basis of a public invitation issued by the Ministry or other consumer protection stakeholders.

During the conducted interviews with consumer protection stakeholders, a particular question for representatives of institutions concerned the issue of cooperation with other protection stakeholders.

Representatives of the Ministry of Economy during the interview indicated that after the adoption of the Consumer Protection Law 02/14 (14/01/2014) they tried on several occasions to help other authorized entities to bring action because they consider that the implementation of collective redress in this sense rests primarily on consumer protection organizations. They pointed to potential problems in the application of legal provisions because the rules on collective redress are not yet sufficiently defined. They also emphasized the need to train their employees in order to be able to exercise their competencies, especially in countries where this form of consumer redress shows positive results.

Representatives of the Ministry of Economy and Market Inspectorate, whose representatives were also interviewed, emphasized good mutual cooperation, as well as almost daily cooperation with non-governmental consumer protection organizations. The cooperation of consumer organizations with the Ministry of Economy, as well as the Inspection Affairs Directorate (Market Inspection), takes place through daily communication regarding the complaints of consumers in order to ensure efficient and high quality protection of consumers' rights. Cooperation is also implemented with other bodies and institutions (e.g. Electronic Communications Agency, etc.). In this way, the Ministry, the Directorate and other consumer protection stakeholders through cooperation in the implementation of projects aimed at informing, educating and advising consumers, seek to increase public awareness and awareness of the need of consumers protection in Montenegro.

As collective redress in the Montenegrin legislation is present in the field of anti-discrimination, an interview was conducted also with the Ombudsman, who particularly outlined the continuous cooperation with the civil sector, and said there are no negative examples concerning any initiative for cooperation coming from the civil sector. They also touched on enhanced cooperation with judicial institutions (Center for Judicial and Prosecutorial Training) and the Bar Association, as well as other public bodies with which such cooperation is possible, without compromising the independence and autonomy of the institution. Cooperation was carried out through joint actions with the civil sector, as well as with leading international institutions and funds (OSCE, Council of Europe, European Commission, Konrad Adenauer, GIZ, etc.).

Representatives of the Ombudsman specially emphasized that the Ombudsman's inactivity in the field of collective redress is a consequence of the vagueness of laws, as well as the fact that in a large number of cases in which the Ombudsman has acted,

⁷³ See: Articles 154 and 155 of the Consumer Protection Law 002/14 (14/01/2014).

public and local self-government bodies almost always appeared as those against whom protection was sought. Thus, in the event that the Ombudsman appears as a claimant for protection against anti-discrimination, the State may appear both with standing to sue and to be sued, which, in their opinion, may be a problem in civil litigation. Thus, the Ombudsman in individual procedures for the protection against discrimination often appeared as an intervener in actions that were usually brought not to establish the existence of the grounds of discrimination but to establish the amount of compensation. Representatives of the Ombudsman have also emphasized the lack of special funds allocated for such purpose, which may be particularly problematic in cases where a party loses a dispute.

From all of the above it may be concluded that the state authorities in Montenegro do not see the filing of a collective action as their primary duty, regardless of their specific competences the Montenegrin legislator has established.

4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress

4.1. The role and competencies

Considering the commitment of the Montenegrin legislator to enable collective redress in the civil procedure, the public administration bodies that may appear with standing to sue are: state authority competent for consumer protection and other ministries and public administration bodies competent for the implementation of laws protecting consumers' rights; consumer organizations that meet the requirements of the Consumer Protection Law 02/14 (14/01/2014)⁷⁴ and commercial and representative associations of traders (commercial, crafts, etc.).

Laws regulating civil procedure and the enforcement and security procedure accordingly apply to an action for the protection of collective interests, in all cases where the Consumer Protection Law fails to provide otherwise. In this way, the Montenegrin legislator gave the participants in the proceedings the same standing as to the individual claimants in civil proceedings in case the Consumer Protection Law 02/14 (14/01/2014) does not contain special rules.

The Law provides for the subject matter jurisdiction of ordinary courts in dealing with collective disputes. The court of the seat of the claimant shall have territorial jurisdiction (its part or business unit if the dispute arises from such business part or business unit), and in the absence of such court, a territorial jurisdiction shall belong to the court in whose territory there has been a violation of the collective interests of consumers or adverse consequences.

The court has also been entrusted with the jurisdiction to determine the value of the case, but the court shall determine the value of the dispute in the amount of up to EUR 5,000, regardless of the actual economic value of the dispute. In the event of a decrease in the value of the subject matter of the dispute, the court shall especially take

⁷⁴ A collective complaint can be submitted by a consumer organization that is registered in the records of the Ministry of Economy for at least a year (for registration, special conditions are stipulated in the Law); has at least one lawyer employed, with at least three years of work experience and actually works and has achieved results in the field of consumer protection.

into account the complexity and scope of the dispute, the number of respondents and the significance of the claim from the point of view of public interest.

The jurisdiction of the court, in accordance with the law regulating the taking of security measures, in the course of the proceedings under the complaint, is also the ordering of interim measures in the event that a trader has already undertaken actions that violate collective interests of consumers, as well as in case it has not commenced with such action, but the commencement is imminent.

In case of proving the merits of the claim, the court must establish the violation in the decision, describe it precisely, determine the deadline for its execution, and order the respondent: to terminate the action for which the lawsuit was brought and order him, if possible, to take necessary measures for the elimination of the harmful consequences that have arisen due to his actions; prohibit such or similar action in the future, detrimental to the collective interests of consumers; order to publish at his own expense the entire or part of the decision if the publication thereof may contribute to alleviating or completely eliminating the harmful consequences of the action; order to publish at his own expense the correction of unauthorized advertising, when applicable.

The law prohibits initiating another collective redress procedure under the same claim against the same defendant, but allows the possibility for participation of such person as an intervener. However, this does not affect the right of the consumer to bring compensatory action before the court, action to annul or establish the nullity of a contract concluded under the influence of a conduct that infringes collective interests, and the right to initiate any other individual procedure for the exercise of the rights conferred on the consumer.⁷⁵

In the process of enforcing a final court decision in the collective protection procedure, enforcement may, besides the authorized initiators, be sought by an individual consumer having a legal interest.

A special role in terms of consumer protection was also given to the Government of Montenegro, the Ministry of Economy, the Inspection Affairs Directorate and other ministries and inspection bodies.

The role of the Government of Montenegro is limited to proposing regulations, adopting the National Consumer Protection Program, reviewing and adopting annual reports on the implementation of the National Consumer Protection Program.

The Ministry of Economy is designated as the key consumer protection policy maker, which within its competencies undertakes a whole range of activities in order to further develop the system of consumer protection, including the creating of the overall consumer protection policy by monitoring changes in EU legislation and transposing them to the Montenegrin legislation. The Ministry also composes the proposal of the National Consumer Protection Program, monitors its implementation and reports to the Government on the activities undertaken, cooperation with other bodies and institutions dealing with consumer protection, the establishment of subordinate legislation for the implementation of the Consumer Protection Law, cooperation with other consumer protection stakeholders, cooperation with the bodies of other states in charge of consumer protection and international consumer protection organizations.⁷⁶

⁷⁵ See: Article 122 of the Consumer Protection Law 002/14 (14/01/2014).

⁷⁶ See: Article 158 of the Consumer Protection Law 002/14 (14/01/2014).

In addition to these competencies, the Ministry of Economy is also an entity entitled to bring actions for the protection of collective interests. This Ministry is obliged to keep a public electronic registry of collective actions (which the court is obliged to submit to the Ministry immediately upon receipt) and court decisions made immediately after its rendering. To this end, the Ministry also adopted the Rulebook on the content and manner of keeping a registry of actions for the protection of collective interests of consumers and the registry of decisions, Official Gazette of Montenegro, number 16/2015 (03/04/2015), which established that the following data shall be entered into the registry of complaints: ordinal number of the registry, the date of registration, the subject of collective action, the name, seat and address of the trader or a group of traders, the date of bringing action before the competent court, the name and surname of the person authorized to bring collective action. Since the authorized claimants in collective redress actions are not natural persons, instead of the first and last name of the claimant the title of the claimant should be entered. The number of registration, the date of registration and the content of the court decision are entered in the registry of judgments, according to the Rulebook.

In addition to the Ministry of Economy, other ministries and public administration authorities responsible for the implementation of laws regulating consumers' rights, which are otherwise involved in the implementation of consumer protection policy, may also appear as authorized claimants in collective redress actions.

The Decree on the organization and mode of operation of the public administration, which entered into force on January 20, 2012, created a legal basis for the establishment of a single inspection body - the Directorate for Inspection Affairs as an independent public administration body. This Directorate, through competent inspections, monitors the economic interests of consumers and the safety of products. Within the Ministry of Transportation, there is an Inspection for Road Transportation, which is responsible for the protection of users of road services in road traffic and the safety of motor vehicles. Consumer protection stakeholders in the field of product safety are: Institute of Metrology, Institute for Standardization, Accreditation Body of Montenegro and Customs Administration. The Central Bank of Montenegro, which carries out consumer credit control in the banking sector, established the Directorate for Licensing Approvals, Measures and Supervision of Consumer Credits within the Control Sector. In the framework of this Directorate there is a Consumer Credit Control Department, in charge of supervision over the application of the Law on Consumer Credits and the Consumer Protection Law by financial institutions to which the Central Bank issued work permits.

Units of local self-government are also involved in the implementation of consumer protection policy at the local level in accordance with the law, and through their inspections perform supervision over the implementation of regulations within their jurisdiction. They also stimulate the activity of consumer organizations, in particular the organization of consumer advisory services, in order to better inform, advise and educate consumers on how to exercise their rights and interests, as well as to help the operation of consumer organizations, in particular by providing premises and other conditions for their work.⁷⁷

⁷⁷ See: Article 163 of the Consumer Protection Law 002/14 (14/01/2014).

The Consumer Protection Council, the Market Surveillance Coordination Body, the Arbitration Committee for Out-of-Court Dispute Resolution, the Banking Ombudsman (the Protector of Clients in the Banking Sector) and the Consumer Protection System play an important role in strengthening, coordinating and improving the field of consumer protection in Montenegro.

The activities of the Consumer Protection Council are focused on improving the position of consumers, so this body proposes appropriate measures and activities for protecting the health, safety and economic interests of consumers, improving legal protection, improving information and education, and raising awareness about the significance of consumer protection, considers the draft laws and proposes amendments and adoption of new regulations. In addition to representatives of state bodies, members of the Council are also independent consumer protection experts, a representative of the Chamber of Commerce and representatives of two NGOs for consumer protection.

Consumer information system was developed in 2013. The website www.potrosac.me, includes a public information exchange system for dangerous products found on the Montenegrin market in the form of a categorized registry. The national system automatically imports data from the EU RAPEX website, and the national contact point carries out the selection of products of interest from the aspect of the local market. A system for the management of appeals and consumer issues has been established and the exchange of information between competent authorities in the field of consumer protection.

In accordance with the National Consumer Protection Program of Montenegro, it is envisaged that, in order to protect the rights of consumers in accordance with the Consumer Protection Law and other laws that contain provisions on the protection of consumers' rights, the Chamber of Commerce of Montenegro will continuously implement activities on education and monitoring of consumer disputes in out-of-court procedure, improvement of the information system for monitoring consumer complaints and education of members of the Committee for Out-of-Court Settlement of Consumer Disputes and the affirmation of the role of the Committee (familiarization of consumers and businessmen about the and businessmen about the possibilities of resolving disputes by extra-judicial way)⁷⁸. In order to improve the protection of consumers in certain areas, the Chamber of Commerce of Montenegro will continuously carry out activities aimed at raising the level of awareness on food safety through the education of producers and food traders.

The Ombudsman, i.e. the Protector of Human Rights and Freedoms appears in Montenegrin legislation as a participant in collective redress only in the field of anti-discrimination law. In a collective redress that can be initiated before the Ombudsman, the Ombudsman determines whether there was an infringement of a right, although his competences to remedy the violation are limited. On the other hand, the Ombudsman has been entitled to initiate a procedure for protection against discrimination before a court

78 National Consumer Protection Program of Montenegro, available on the link: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjGv-Lck6TUAhXlJSwKH-duaDEIQFgghMAA&url=http%3A%2F%2Fwww.mek.gov.me%2FResourceManager%2FfileDownload.aspx%3Frid%3D212706%26rType%3D2%26file%3DPredlog%2520nacionalnog%2520programa%2520za%25C5%25A1tite%2520potro%25C5%25A1a%25C4%258Da%2520%252012.pdf&usq=AFQjCNHzcWaRTUmN-Z9tUnY8Id-edZSbsAg> Date of access: (15/05/2017).

or to appear in such proceedings as an intervener when the party makes it probable, and the Ombudsman estimates that the defendant through his actions discriminated on the same grounds against a group of persons with the same personal traits⁷⁹.

4.2. Case law and best practices in collective redress

Since the adoption of the new Consumer Protection Law of 2014, which introduced collective consumer redress, there were no special cases of actions brought to protect the collective interests of consumers.

The Consumer Protection Center (CEZAP) has proceeded against the Hypo Alpe Adria Bank on behalf of 300 clients who concluded loan agreements in Swiss francs with the bank. However, this case was not a collective redress that is the subject of our interest, but rather a procedure that is the result of the merger of proceedings, by applying the general rules of civil litigation.

Despite the fact that there is still no practical application of these provisions in Montenegrin law, the Ministry of Economy of Montenegro, which is directly responsible for the implementation of the Consumer Protection Law, in accordance with the obligations imposed by the Law, has prepared a registry of collective actions and judgments.

In this respect, it is not possible to present the best practices in the field of collective protection of consumers in Montenegro in this part.

5. The role of consumer organisations in collective redress

5.1. Legal precondition for consumer organisations' activities to represent consumer rights in collective redress

Consumer Protection Law 02/14 (14/01/2014) recognized the right to association of consumers at local and national level, as well as the right of such organizations to join in alliances to have a better influence on the consumer protection policy, and for representation at national or international levels, as well as to protect the rights and interests of consumers.⁸⁰ It is envisaged that the Ministry of Economy shall keep a record of organizations of consumers and associations of consumer organizations. The Ministry has adopted a special by-law - Rulebook on the registry of consumer organizations⁸¹ regulating the issue of the application for registration, the content of the registry and the appearance of the application form for registration.

In order for the consumer protection organization to be registered in the registry of organizations kept by the Ministry of Economy, it is necessary, in accordance with the Consumer Protection Law, for the organization to be: 1) established in accordance with the law regulating the establishment of non-governmental organizations 2) established to protect consumer rights and interests, 3) an independent organization in accordance with the criteria envisaged by the Consumer Protection Law.

The registration procedure is initiated by an organization submitting an

79 See: Article 21, Paragraph 1, Point 4 of the Law on the Prohibition of Discrimination "Official Gazette of Montenegro", Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

80 See: Article 164 of the Consumer Protection Law 002/14 (14/01/2014).

81 Rulebook on the registration of consumer organizations, Official Gazette of Montenegro, No. 16/2015 (04/04/2015).

application that contains: 1) the number of the decision on the registration in the Registry of non-governmental organizations that is maintained by the competent authority; 2) name and surname of the person authorized to represent the organization. Upon request, the organization shall submit: a copy of the deed of incorporation, a copy of the Statute, a statement that the consumer organization is independent in accordance with the Consumer Protection Law signed by an authorized person. The Ministry is obliged to decide on the application for registration within 15 days from the submission of the application and issue a confirmation thereof.

Consumer organizations inform and educate consumers about their rights and obligations. In order to achieve this role, they can also organize special counseling centers, help consumers solve individual disputes with traders, protect the collective interests of consumers, keep records of received consumer complaints and procedures undertaken by the organization in order to resolve the complaints. In the process of adopting regulations on consumer protection, consumer organizations give comments and suggestions, and participate in the preparation of the National Consumer Protection Program and its implementation. Organizations examine and perform comparative product analysis with mandatory disclosure of results to the public, cooperate with appropriate domestic and international bodies and organizations dealing with consumer protection, and perform other tasks in the field of consumer protection in accordance with the Consumer Protection Law 02/14 (14/01/2014). Organizations are obliged to publish an annual work report with data on financing (a review of all revenues, their sources and costs of the organization), and submit it to the Ministry.⁸²

The independence of consumer organizations is of particular interest. They regulate their independence through the Statutes. The Consumer Protection Law 02/14 (14/01/2014) specifically proclaims their independence from state and local authorities, interests of traders, political parties and trade unions. State and local officials, as well as persons in managerial positions with traders, political parties and trade union organizations, must not have leadership positions in the management bodies of consumer organizations and their associations. In this sense, restrictions have been placed on the use of non-refundable funds received from traders and other participants on the market, unless they have been received on the basis of a fee for the organization of seminars or similar activities.⁸³

In order to achieve the independence of consumers' organizations, the Consumer Protection Law 02/14 (14/01/2014) provides for special rules on financing, so the revenues are limited to funds received from membership fees, donations, registration fees, seminars, conferences, round tables and other activities in the field of consumer protection, funds of the budget of Montenegro for consumer protection on the basis of a public announcement, and other sources in accordance with the law. The funds of the Montenegrin budget for consumer protection are disbursed on the basis of a public announcement only to those organizations that are registered in the Ministry's records and which actually work and have achieved results in the field of consumer protection.⁸⁴

In addition to the fulfillment of these general conditions, consumer protection

82 See Article 166 of the Consumer Protection Law 002/14 (14/01/2014).

83 See Article 167 of the Consumer Protection Law 002/14 (14/01/2014).

84 See Article 168 of the Consumer Protection Law 002/14 (14/01/2014).

organizations may participate in collective redress if they meet the following requirements:

1. if registered in the records of the Ministry of Economy for at least a year;
2. having at least one lawyer employed, with at least three years of work experience;
3. actually operating and achieving results in the field of consumer protection.⁸⁵

The assessment of the fulfillment of requirements was entrusted to the Ministry of Economy. Considering the character of the conditions set, the question of an objective assessment of their fulfillment is posed. The first condition is objectively set up and easily provable, since the fulfillment depends on the time elapsed since the entry into the official records kept by the Ministry, and when registering in the records, the Ministry issues a special decision to the organization. The third criterion is valued according to the annual report of the consumer organization, to be submitted to the Ministry by March 31st current year for the previous year.

To that end, in the course of an interview with representatives of the Ministry of Economy, a special question was focused on assessing the fulfillment of the second criterion.

The second criterion is considered fulfilled when a consumer protection organization has at least one graduate lawyer permanently employed or has a contract of cooperation with a lawyer who can represent the interests of consumers and the organization. The Ministry is obliged to determine the list of organizations entitled to bring action for the protection of collective interests of consumers by April 30th of the current year, and within 15 days from the date of its preparation, the Ministry is obliged to submit it to the European Commission. This list is published on the website of the Ministry of Economy.

In Montenegro, two consumer organizations are active so far: CEZAP and ECOM from Podgorica.

Consumer protection organizations that have exercised the right to bring actions to protect collective interests of consumers are obliged to inform the Ministry of Economy of any changes that may affect their authority to bring actions.

The Ministry shall delete from the list those consumer organizations which received the authorization for collective protection of consumers in case:

1. of giving inaccurate data in the procedure for granting authority to bring collective actions to protect consumers;
2. where the consumer protection organization ceases to fulfill the conditions established by the Consumer Protection Law 02/14 (14/01/2014);
3. where the consumer protection organization requests removal from the list;
4. of termination of operation of consumer protection organization.⁸⁶

The Ministry of Economy keeps a separate list of consumer protection organizations that have been revoked of the entitlement to bring action for the collective protection of consumers' interests, which is published on the Ministry's website.

The right to bring an action is conditional upon a prior written notice that must be addressed to an entity infringing consumer rights, under which it will be warned that if failing to cease with the actions that harm the collective interests of consumers, a

⁸⁵ See: Article 169 of the Consumer Protection Law 002/14 (14/01/2014).

⁸⁶ Article 170 of the Consumer Protection Law 002/14 (14/01/2014).

collective action will be brought against it. After the expiration of 15 days from the date of submission of such notice, the action may be initiated. There are also specific rules on the subject matter and territorial jurisdiction that were discussed in the previous sections. Restrictions exist in terms of the value of the dispute, so that it cannot be determined to an amount greater than 5,000 euros, which does not mean that disputes that are more valuable than that amount cannot be pursued. This means only that the court cannot determine that the value of the dispute is greater, so that the cost risks of a collective action would not be high, thus keeping court fees and attorneys' fees at an acceptable level.⁸⁷ As a larger number of persons are entitled to bring action, it is envisaged that another authorized claimant cannot initiate another procedure in respect of the same claim against the same defendant, but can only act as an intervener, who is not entitled to reimbursement of costs, in order to avoid uncoordinated pursue of several procedures on the same subject. This does not affect the right of consumers as individuals to seek the protection of their individual interests from the contracts already concluded in individual litigation.

5.2. Assessment of the environment for consumer organisations to deal with collective redress

The continuous cooperation of consumer organizations with the Ministry of Economy, as well as the Directorate for Inspection Affairs (Market Inspection), which takes place through daily communication regarding consumer complaints in order to ensure efficient and high quality protection of consumers' rights, is a basic precondition for efficient consumer protection.

During the interview conducted with representatives of the Ministry of Economy, they pointed to the obvious lack of financial resources that might influence the ability of consumer protection organizations to provide adequate collective redress. They also pointed to the fact that the Ministry does not provide financial assistance to these organizations, as well as to some requests by consumer organizations that are unrestrained in their opinion (a request for covering the costs of renting business premises, as well as other fees related to the lease of such premises or payment of earnings for an employee in that organization). Particular emphasis is placed on the need for personnel training in countries where an effective system of collective redress has been established, especially bearing in mind the potential problems that our participants in collective redress may encounter in practice, especially if we have in mind the insufficient definition of the collective redress rules.

The lack of financial resources available to consumer protection organizations was an argument for the lack of collective redress practices in an interview conducted with representatives of the Market Inspection also. Nevertheless, they insisted that further activities in strengthening the environment for collective redress should be directed towards strengthening the role of consumer protection organizations, with the establishment of a special way of donating funds, from funds collected from penalties imposed by market inspections, or through projects that would be financed from the budget, or in some other way.

⁸⁷ See: Article 121 Paragraph 5 of the Consumer Protection Law 002/14 (14/01/2014).

The lack of financial resources was also emphasized by representatives of the Center for Consumer Protection of Montenegro (hereinafter: CEZAP), a non-governmental consumer organization.

Representatives of CEZAP and Market Inspection also stressed the problem of the inconsistency of judicial practice in the field of consumer protection, as well as the reluctance of courts to apply specific consumer protection regulations, as well as that this may in particular indicate a lack of knowledge of consumer law by judges.

CEZAP specifically stated that insufficient activity in the field of collective redress is a consequence of a decision that the costs of a collective action be borne by the parties with regard to their success in the dispute, so that consumer protection organizations could potentially be responsible for the costs in case of loss of a collective dispute, as in some cases that occurred in the wider region. The case that CEZAP lead against the Hypo Alpe Adria Bank concerning loans in Swiss francs, although not a case of collective redress showed the inconsistency of the courts in the interpretation of consumer law rules. This inconsistency in the interpretation by the courts is the main reason why despite the clear powers to initiate collective redress actions, this organization does not bring actions in cases that they characterize as cases in which the courts would have to establish the existence of infringements of consumer rights, and there are many such cases in the Montenegrin system.

In addition, CEZAP also pointed out that consumers, despite their knowledge of their rights, are not interested in protection thereof and do not submit applications to this organization.

CEZAP highlighted in particular the lack of financing of their activities by the Ministry, at least the financing of the costs of renting business premises where this organization would carry out its activity.

5.3. Prerequisites for awareness raising toward consumers in collective redress

The continuous cooperation of consumer organizations with the Ministry of Economy, as well as Market Inspection, is a basic precondition for efficient consumer protection. Cooperation is also being affected with other bodies and institutions (e.g. Agency for Electronic Communications, etc.). In this way, the cooperation between the Ministry, Directorate and other consumer protection organizations in the implementation of projects for consumer informing, education and advising, aims to increase public awareness and knowledge on the need to protect consumers in Montenegro.

In order to raise awareness about consumer rights, the National Consumer Protection Program of Montenegro has been adopted, which indicated that achieving this goal presupposes continuous harmonization of consumer legislation with EU acquis, protection of consumers from unfair commercial practices and dangerous products, by strengthening more efficient market surveillance, and providing adequate support to businesses to correctly apply the new legislation. The National Consumer Protection Program emphasizes the need to protect vulnerable groups and the safety of products, to advertise, improve the quality of telecommunications services, financial and public services, simplify access to information, manage complaints and provide expert advice.

Starting from the need to increase the consumers' awareness of their rights and knowledge about the possibilities of redress in Montenegro, regional consultations

are planned for directors and professional associates, as well as the development of professional training programs for directors, teachers and professional associates, given that the provision of legal consumer protection assistance is provided in educational institutions. The National Program emphasizes the application of modern and active methods in teaching.

In order to increase the level of awareness about the rights and opportunities for consumer protection, institutions and organizations of market control and consumer protection have implemented a wide range of activities to raise public awareness, including the creation of brochures on consumer rights. To achieve the same goal, Market Inspection, other authorities, consumer organizations and the Chamber of Commerce provide information on consumer protection and market surveillance related themes on their websites.

Center for Monitoring and Research (CeMI) within the project Capacity Building of Civil Society Organizations and Consumer Protection System in Montenegro - “zastiti.me” (“protect.me”) provides free legal aid in cases of violation of consumer rights. In addition to free legal aid through the allocation of micro-grants, it will enable other non-governmental organizations to increase the level of protection. Also, the website <http://www.potrosaci.me/> is an Internet-based application through which citizens can report infringements of consumer rights.

During the interview, representatives of the Ministry of Economy pointed out that consumer education was entrusted to consumer protection organizations, which are insufficiently working to raise consumer awareness in Montenegro. They also pointed out the lack of commentary on the Consumer Protection Law that could influence the awareness of both professional and lay public. Particular emphasis was placed on the need to raise awareness of the professional public in view of the weak activity of lawyers in this area, which they regarded as insufficient knowledge of the regulations in this field.

CEZAP reported that consumers are in most cases aware of their rights, but in cases of violation of food quality rules, consumers do not indicate violations of their rights because they deliberately opt for the purchase of poor quality food, which is not surprising if we bear in mind the prices and average earnings of citizens in Montenegro.

We consider that the first successful cases of collective consumer redress may be of particular importance to raise consumer awareness. Successful cases would have a far-reaching impact on the acceptance of this role of non-governmental consumer organizations in the layman and professional public, if they would be claimants in collective actions successfully completed.

6. Recommendations and conclusions

There are no rules on the collective redress of horizontal character in the Montenegrin legal system, as it is, for example, the case today in Croatia, or in Serbia, before the decision of the Constitutional Court, which had declared such rules unconstitutional, which are both countries sharing similar legal heritage with Montenegro. Like in other European countries, the rules on collective redress exist in some segments that have been developed under the strong influence of European law on regulatory policy in that area, and therefore a high level of harmonization of the national with European law. However, in essence, the collective redress mechanism in Montenegro, in addition to the almost standard domain of consumer redress, exists only in the area of prevention and fight against discrimination.

The regulatory concept of collective redress in Montenegro was introduced only in 2014 by the Consumer Protection Law 02/14 (14/01/2014). However, this law did not harmonize national legislation with all relevant sources of consumer law of the European Union, since the drafting of this legal text has taken place since 2011. The continuous process of harmonization of national legislation with the legislation in the field of consumer protection of the European Union is carried out with the support of the projects of the European Union and the Ministry of Economy in cooperation with the competent authorities. Thus, TAIEX supported the finalization of draft versions: the Law on Amendments to the Consumer Protection Law and the Law on Illicit Advertising in the Provision of Services and Sales of Products.

Despite the fact that the Law on Amendments to the Consumer Protection Law, which is currently under preparation is the first amendment after the adoption of the basic text of the Consumer Protection Law in 2014 and its amendments that followed a year later, which only made changes to articles the implementation of which proved to be problematic in practice; new amendments only envisage the harmonization of national legislation with the provisions of the Consumer Rights Directive. Representatives of the Ministry of Economy during the interview indicated that in preparation of these amendments to the Consumer Protection Law there were no planned changes in the system of collective redress. Considering the fact that the system of collective redress, which is based on injunctive and compensatory collective actions, is based on the Recommendation of the European Union, although Montenegro is a candidate country for membership in the European Union, and the current non-compliance of the Montenegrin law with binding sources of European Union law, and the fact that recommendations are not a binding source of law, the decision of the Montenegrin legislator who has not yet considered the need for the adoption of rules on collective consumer redress proposed by non-binding sources of European Union law, is understandable.

The solutions of the Montenegrin legislator establishing the system of collective redress of consumers, are essentially in line with the standards of consumer protection in EU acquis, and given all the specifics of the Montenegrin society, we consider them justified, since Montenegro is a political and state system undergoing comprehensive and often radical reform processes. Reform processes involve the development of a modern legal system and efficient institutions, changing Montenegrin legal system, which is generally a conventional one, much more dynamically than most other legal systems

by constantly “enriching it” with completely novel legal notions and concepts. Such a transplant of new concepts into the Montenegrin legal order is often a challenge not only for the national regulator, but for the Montenegrin expert community as a whole, which must apply these solutions in practice. In the same context, it is necessary to understand the concept of collective redress of consumers, which is in many ways specific in relation to the concept of traditional forms of actions and the existing rules of civil procedure, which until now knew only the procedure of merging several individual actions in order to achieve the principle of efficiency of the procedure, as well as the described approach in terms of its introduction into Montenegrin law.

Apart from the matter of creating mandatory rules on collective redress of consumers, we must in particular take into account the level of awareness of Montenegrin consumers and participants in the process of collective redress, on the significance and possibilities that the existing regulatory framework provides. In this regard, it is particularly important to bear in mind the level of training of Montenegrin judicial authorities in conducting these procedures. This issue has a special significance if we take into account that collective injunctive action is part of the legal order from 2014, and that at the end of May 2017, when the last check of the registry of collective actions of the Ministry of Economy of Montenegro was carried out, no lawsuits were filed for the protection of collective consumer interests.

Particularly surprising is the choice of authorized claimants not to bring actions in cases they described as textbook cases, where it was necessary to provide collective redress to consumers. However, given that the 2010 and 2012 surveys on the application of the general rules on consumer protection in the countries of former Yugoslavia showed that in court practice, courts still prefer to use the Law on Obligations⁸⁸ as a general law in the field of contract law, it indicates that the attitude of Montenegrin courts towards the field of consumer protection and its often complex and for judges new regulations in which there is still no established case law can be a “mitigating circumstance” for the choice made by authorized claimants in collective redress.

The first collective actions will certainly influence the understanding of this form of protection in the lay public and professional public, and in order to achieve a positive outcome on the part of the claimant, at least in first cases, this should be a joint project of several authorized claimants, so that the Ministry of Economy and Market Inspection, in addition to NGOs for consumer protection, should appear as claimants in the same dispute, in order to be able to provide a positive outcome of the dispute with adequate expert assistance in the conduct of the dispute. This approach could also help non-governmental consumer protection organizations get expert assistance from competent state authorities for the claimant in the first disputes, which would also ensure a certain degree of education for employees in consumer protection organizations that could subsequently appear on their own in collective disputes.

This cooperation can be of particular importance in view of the current economic situation in Montenegro, i.e. the financial potential of consumer organizations as authorized claimants in collective redress actions. The organizations, during the interviews, expressed concern about future action with regard to the appropriate application of the described

88 Z. Čadjenović (2014), “Nepoštene ugovorne odredbe u ugovornom pravu Crne Gore”, Forum za građansko pravo za jugoistočnu Evropu, Izbor radova i analiza - Druga regionalna konferencija, Skoplje, 2012, Knjiga II, strana 214.

and other rules of the Civil Procedure Code 022/04 (02/04/2004) concerning the costs of proceedings, which by them, is not the most favorable solution in terms of encouraging the use of collective redress mechanisms for the protection of consumers' interests and improving the position of consumers in general, since it can lead to the dissolution of an organization failing in the dispute, as these organizations in Montenegro do not generally have the financial potential to initiate and lead long-term civil proceedings with uncertain outcome.

We assume that, with regard to the existing solutions regarding costs of proceedings, lawyers would rather bring individual actions or even several individual actions to later be consolidated by courts in one proceeding, in order to charge higher fees for the conduction of the proceeding, in accordance with the existing rules and tariffs of the bar association, especially in cases when they represent more than one client, than to advise clients to contact authorized claimants in collective redress for assistance and possibly opt for cooperation with these organizations. However, given that the Consumer Protection Law 02/14 (14/01/2014) stipulates that the collective redress does not interfere with the individual rights of consumers, and that the system of collective redress and the issue of expenses in the case of collective redress action is especially set up to discourage the filing of such claims for compensation of costs, there can be competition between individual and collective redress in this case.

Until the completion of this report, its authors didn't witness a more serious attempt to promote the idea of compensatory actions by professional associations, the civil sector or other relevant factors, and the political will to implement legal reforms in order to harmonize Montenegrin legislation with the Recommendation does not yet exist or at least is not publicly articulated.

However, given that at least the Montenegrin legal system has shown and still shows signs of fair openness to the modern regulatory trends, even to formally non-binding suggestions coming from the European Union, we believe that the system of compensatory actions in the collective redress of consumers will be introduced in the future period.

Also, in the light of intensive accession negotiations with the European Union and Montenegro's intensive activity in the field of harmonization of the legal system with the EU *acquis*, it is to be expected that the system of collective redress, which corresponds to frames set in this report, will be created in other sectors, such as environmental protection or copyright and related rights protection, where there is already a system of collective achievement of certain categories of these rights, but not their collective protection before the judicial or administrative bodies, where the preparation of amendments to existing laws as well as preparations for new legislation are in progress.

Finally, since compensatory actions for the protection of collective rights have already been introduced by the Law on the Prohibition of Discrimination 46/10 (06/08/2010), it is realistic to expect progress in the protection of collective interests in this field in foreseeable future, so that we can expect the first actions and court decisions on collective redress in this area.

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COLLECTIVE REDRESS IN CONSUMER PROTECTION IN SERBIA

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Executive summary

In the Republic of Serbia, the institute of collective redress is regulated by the 2014 Consumer Protection Act (CPA). The protection of consumers' collective interests is entrusted to administrative authorities and exercised in administrative proceedings. In the former Consumer Protection Act of 2010, the protection of consumers' collective interests was entrusted to civil courts and exercised in civil proceedings. The Civil Procedure Act introduced special civil proceedings regulating collective redress. However, the Constitutional Court of Serbia issued a decision RS IUy-51/2012 (dated 23 May 2013), declaring unconstitutional the provisions of the Civil Procedure Act which regulated the collective redress procedure, *inter alia*, because the 2010 CPA did not explicitly define the concept of collective redress. In comparative law, collective redress is seldom explicitly defined. The new 2014 Consumer Protection Act (CPA) broadly defines the collective redress, without making a clear distinction between the collective interest and a sum of individual interests. Under the 2014 CPA, the collective redress procedure is vested in the administrative authorities in administrative proceedings. Thus, the new CPA envisages a solution that significantly departs from the legal solution applicable in most European countries, which have envisaged various civil law instruments for collective redress in civil proceedings. In comparative law, the collective redress is, as a rule, exercised in civil proceedings.

Under the 2014 Consumer Protection Act (CPA), the competent administrative body is authorized to initiate an administrative action, by means of which initiation of proceedings has been limited to a single entity. The Ministry of Trade, Tourism and Telecommunications, which is in charge of consumer protection affairs, has the authority to implement the procedure for collective redress, according to the rules of general administrative procedure. The competent Ministry initiates this procedure either *ex officio* or at the request of the authorized person, and assesses whether there has been a violation of the collective interest. In practice, this means that consumers' collective protection would depend on the discretionary decisions of the Ministry of Trade officials. Thus, consumer organizations would have to submit complaints to the competent inspection authority, which then decides on the merits of the claim and assesses the trader's behaviour accordingly. The (in)efficiency of this system of collective redress may be best illustrated by the fact that a total of 41 requests for initiating consumers' collective redress proceedings have been submitted from the adoption of the CPA (in 2014) until the moment of embarking on this research (in May 2017).

By 15th May 2017, relying on the authority envisaged in Article 147 of the CPA, registered associations filed 26 requests, whereas the Ministry of Trade acting *ex officio* launched 15 requests for initiating consumers' collective redress proceedings. In 2014, the Ministry issued one decision confirming a violation of consumers' collective interests, one decision establishing that there was no violation of consumers' collective interests, and one conclusion to suspend then proceedings. In 2015, the Ministry issued six decisions confirming the violation of consumers' collective interests, *three* conclusions to suspend the proceedings (two of which were terminated, and a violation was later established in the third proceeding), and two decisions establishing no violation; concurrently, seven requests for initiating collective redress proceedings were

considered to be ill-founded. In 2016, the Ministry issued *three* decisions establishing the violation of consumers' collective interests, two decisions establishing no violation, *four* conclusions to suspend the proceedings (three of which were later terminated, and one proceeding is still underway); concurrently, *one* request for initiating collective redress proceedings was considered to be ill-founded.

A more efficient protection of consumers' collective interests would be achieved by envisaging the provision which would entitle a greater number of authorized entities to initiate collective redress proceedings. In comparative law, such a solution includes some civil law instruments for exercising collective redress in civil proceedings. In comparative law, procedural legitimacy (perceived as the authority to protect collective interests) is given to different entities, including consumer organizations and public authorities. The instiation or participation in collective redress proceedings does not preclude consumers who have sustained some damage or harm from filing individual complaints with the competent civil court and seek damages, to initiate a proceeding for rescision or establishing the nullity of contract, or to initiate any other court proceeding in pursuit of exercising their consumer rights.

The Recommendation of the European Commission of 2013 (2013/396/EU) makes a clear distinction between *injunctive collective redress* and *compensatory collective redress*. The Recommendation is not limited to the consumer context, as it provides a horizontal application of the common principles of collective redress in case of violation of the rights guaranteed by European Union law, particularly in the field of consumer protection, competition, investment, environment, personal data, and financial services. The horizontal rules on collective redress (*recours collectif*) do not exist in Serbian legislation. After the Constitutional Court found (in mid 2013) that the legal rules on special civil proceedings for the protection of citizens' collective rights and interests were unconstitutional, the Serbian legislator made no further effort to regulate this matter, even on the occasions when the Civil Procedure Act was amended and supplemented in some other part or for some other purpose. In Serbia, there are no rules on sectoral collective redress in civil proceedings.

1. National compliance with the relevant EU acquis

1.1. Directive 2009/22/EC of the European Parliament and of the Council of the 23rd April 2009 on injunctions for the protection of the consumers' interests

Collective actions are aimed at the compensation of creditors in national and cross-border disputes. They are used as a tool, not only in the field of consumer protection, but also for the liability for damage caused by products, protection of competition, as well as for the securities' market abuse. The concept of class actions, which proved to be successful in the US, has not been recognised as adequate for practical application in the continental European legal system, despite the regulations adopted with the aim to effectively protect consumer rights. Directive 98/27 / EC¹ was adopted in order to address the gap in the implementation of the existing consumer protection laws. The lack of immediate legal remedies and the inability of compensation indicated to consumers that a new approach² was needed. The Directive envisages that "qualified entities"³ may file the complaint before the competent court or administrative authorities in other Member States.

The problem of recognising collective redress is mainly the result of unsatisfactory conceptualization of consumers' collective interests. This is also noticeable in the revised Directive 2009/22/EC on injunctions for the protection of the consumers' interests which stipulates that "collective interests mean the interests which do not include the cumulation of interests of individuals who have been harmed by an infringement". The initiation of proceedings aimed at protection of consumers' collective interests entails the existence of a "legitimate interest for collective protection". Thus, Directive 2009/22 / EC⁴, Article 4, paragraph 1 prescribes that "the courts or administrative authorities shall accept this list as proof of the legal capacity of the qualified entity without prejudice to their right to examine whether the purpose of the qualified entity justifies its taking action in a specific case. "The question then arises if it is justifiable to introduce the term "collective action" according to the criteria *ratione personae* instead of *ratione materiae*.⁵ Also, it is questionable if this term refers to all actively legitimated persons and if it is justifiable to use the term "action", if the protection before administrative authorities coexists with the judicial protection. The role of the state in correcting market deficiencies resulted in the dual - public and private - nature of consumer rights. More recently, the distinction between administrative and judicial protection has been called into question having in mind the supplementary role administrative protection has in

1 Directive on injunctions for the protection of the consumers' interest (Directive on Injunctions), OJ 1998, L 166/51.

2 W.H. Van Boom/M.B. Loos (2007), "Collective enforcement of consumer law in Europe: Securing compliance in Europe through private group action and public authority intervention", Groningen, Europa law Publishing, p. 124; C. Poncibo (2009), The reform of Directive 98/28/EC: in New frontiers of consumer protection/the interplay between private and public enforcement, Antwerpen, Intersentia.

3 A 'qualified entity' means: 1) entities constituted in advance by the Member States according to the national legislation: 2) other already existing entities whose primary purpose is to protect the interests of its members and which would be recognised on an ad hoc basis.

4 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, text with EEA relevance, OJ L 110/30, 1.5.2009.

5 M. Baretic (2009), Individual and collective consumer redress in the Croatian legislation (ed. V. Tomljenovic, E. Čulinovic Herc, V. Butorac Malnar) in: Republic of Croatia towards European Judicial Area: resolution of commercial and consumer disputes, Rijeka, p. 260-262.

protecting consumers' collective interests. Although judicial protection is, as a rule, *ex post*, and an administrative one is *ex ante*, a clear distinction between these institutional forms cannot be made.⁶

Consumer collective redress in Serbia is mentioned for the first time in the Consumer Protection Act of 2010⁷, when the competence for conducting civil proceeding was given to the court. Apart from consumers, the active legitimation for initiating procedure for infringement of collective interests was also given to the consumer organisations and their associations which succeeded in fulfilling the conditions prescribed by the law.⁸ They were competent for initiating the procedure of collective redress when the consumer rights were infringed due to the unfair terms of consumer contracts or unfair commercial practice. CPA provides for the provisions of the law regulating civil procedure to be applied accordingly to the procedure of consumer collective redress. The current CPA of 2014⁹ provides for the Ministry in charge of consumer protection to conduct the procedure for the protection of the collective interest of consumers in accordance with the rules of general administrative procedure, unless explicitly stipulated otherwise. The Ministry initiates this proceeding *ex officio* or at the request of an authorised person.

1.2. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes

Alternative Dispute Resolution (ADR) provides a simple, efficient, fast and low-cost out-of-court dispute resolution between consumers and traders. However, the ADR is still not sufficiently and uniformly developed across the Union. Regrettably, despite Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, the ADR is not properly established and does not function satisfactorily in all geographical areas or EU business sectors. Consumers and traders are still not familiar with the existing out-of-court mechanisms of legal protection, and only a small percentage of citizens know how to file a complaint to an ADR entity. When ADR procedures are available, their level of quality varies considerably in Member States, and ADR entities are often not effective in resolving cross-border disputes. Furthermore, in the Conclusions of 30 May 2011 on priorities for relaunching the Single Market, the EU Council emphasised the importance of e-commerce and agreed that the systems for alternative dispute resolution for consumer disputes can offer cheap, simple and prompt legal protection for both consumers and traders. Successful implementation of these systems requires lasting political commitment and support from all stakeholders, without prejudice to the financial availability, transparency, flexibility, speed and quality of decision-making by

6 S. Issacharoff, I. Samuel (2009), *The Institutional dimension of Consumer Protection* (eds. F. Cafaggi, H.W. Micklitz, Insentia, Antwerp.; T. Jovanic (2013), *The Role of Administration in protecting collective interests of consumers*, *Strengthening Consumer Protection in Serbia* (eds. T. Bourgoignie, T. Jovanic), Belgrade, p. 312.

7 Official Gazette of the RS, no. 73/10.

8 Article. 137. CPA 73/10.

9 Official Gazette of the RS, no. 62/14.

an ADR entity covered by the scope of this Directive.¹⁰

In accordance with the CPA of the RS of 2014, the out-of-court resolution of consumer disputes does not apply to: 1) the resolution of disputes under procedures established by the trader; 2) direct negotiations between the consumer and the trader; 3) the endeavour of judges to resolve the dispute in a court procedure by making the parties reach a settlement; 4) in procedures that the trader has initiated against the consumer; 5) in disputes the value of which exceeds RSD 500,000. Since the competence for resolution of consumer disputes was transferred to the Ministry, the Ministry makes the list of bodies for the out-of-court resolution of consumer disputes in accordance with the law regulating mediation, or permanent arbitral institutions in accordance with the Law on Arbitration. Bodies competent for the out-of-court resolution of consumer disputes should release in public and submit to the Ministry a report on the number of received requests for the initiation of disputes, initiated and resolved disputes, significant problems that were evidenced, and alike, once a year no later than 31 January of the current year for the previous year.¹¹ It should be noted that initiating and running an out-of-court consumer dispute resolution procedure does not exclude or influence exercising the right to court protection.¹² As far as Serbia is concerned, there is no data on the implementation of the procedure for protecting consumers' collective interests before the ADR bodies.

1.3. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

The internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There are marked differences between the rules in the Member States governing actions for damages for infringements of Union or national competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the Treaty on the Functioning of the European Union and affect the substantive effectiveness of such right. As injured parties often choose the court of the Member State of their establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate. In the interests of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive¹³ extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC).

¹⁰ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, OJ L 165/63, 18.06.2013.

¹¹ Art. 141. paragraph. 2. CPA.

¹² Art. 143. CPA.

¹³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States, OJ L349/1, 5.12.2014.

In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the Court of Justice of the European Union, any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of competition law. This Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice. Anyone who has suffered harm caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest, irrespective of whether those categories are established separately or in combination in national law.

When Serbia is concerned, the provisions of this Directive have not been transposed into the CPA, but they have been indirectly transposed through the Law on Protection of Competition (LPC).¹⁴ The claim for damages that have been caused by acts and actions which represent infringements of competition pursuant to this law, determined by the final decision of the Commission, could be made in a lawsuit before the competent court in civil proceeding.¹⁵ In this case, it is not assumed that the damage has occurred; it has to be proved in court proceedings. The procedural penalty amounting from 500 Euros to 5000 Euros may be imposed upon a market participant for every day of acting contrary to the given orders of the Commission, i.e. not complying with the given order pursuant to the conditions stipulated in Article 57 of this Law, if: 1) fails to comply with the Commission's request to deliver, communicate, make available or provide access to the requested data; prevents entry to the premises or otherwise prevents investigation; or delivers or conveys inaccurate, incomplete or false data, including data stipulated in Art. 44, 47 and 48 of this Law; 2) does not act in accordance with the interim measure stipulated in Article 56 of this Law; 3) fails to submit notification on concentration within the deadline stipulated in Article 63, paragraph 1 of this Law. The procedural penalty may not exceed the amount of 10 % of the total annual income from the previous year calculated in accordance with the provisions of LPC.

1.4. Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

In mid-2013, the European Commission adopted the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (Recommendation).¹⁶ The preparation of the Recommendation started in October 2010 by publishing a joint statement of three European commissioners concerning the plans

¹⁴ Official Gazette of the RS 51/2009 and 95/2013.

¹⁵ Art. 73 LPC.

¹⁶ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013.

to develop a coherent European approach to collective redress.¹⁷ From February to April 2011, a wide public debate was held, and in February 2012, the European Parliament adopted the Resolution “*Towards a Coherent European Approach to Collective Redress*”.¹⁸ The view expressed in the Resolution is that any proposal in the field of collective redress should take a form of “a horizontal framework including the common set of principles providing uniform access to justice within the EU”.

It is particularly noted that the EU should refrain from introducing collective redress mechanisms in accordance with the American model, which, according to the European Parliament, provides a wide space for abuse; therefore, it is necessary to “take into account the legal traditions and legal orders of the Member States and enhance the coordination of good practices between Member States.”¹⁹ In this document, the Commission recommended that Member States at the national level should institute court proceedings for compensatory collective actions and court or administrative proceedings for injunctive collective actions, in accordance with the established common principles. The Recommendation is a legally non-binding document and it was adopted with the purpose of facilitating access to justice for injured parties in mass harm situations caused by violations of rights granted under Union law, providing instruments for the prevention and suppression of unlawful practices and creating conditions for effective redress. The purpose of the Recommendation is not to unify national legislation on collective redress, but to establish a European horizontal legal framework for the development of national collective redress mechanisms.

2010 CPA provided for a possibility of a registered consumer organization to initiate a proceeding for the protection of consumers’ collective interest against an unfair contract terms and unfair commercial practices. By means of the Civil Procedure Act of 2011, the Republic of Serbia has established a procedure for the protection of collective rights and interests of citizens, as an omnibus procedure aimed at resolving collective disputes in various fields of legal relations. Since the Constitutional Court of the Republic of Serbia declared provisions regulating this procedure unconstitutional,²⁰ it is necessary to re-establish the legal framework for collective redress as soon as possible. Having in mind that the Republic of Serbia has accepted the obligation to harmonise its legislation with EU legislation and to ensure its consistent implementations, the solutions contained in the Recommendation on common principles for injunctive and compensatory

17 Towards a Coherent European Approach to Collective Redress: Next Steps. The Statement was published by the Commissioner for Consumer Protection, the Commissioner for Justice, and the Commissioner for Competition. See: SEC (2010) 1192 (Oct. 5, 2010). [Electronic version]. Retrieved 14 April 2014 from http://ec.europa.eu/competition/ecn/brief/01_2011/ec_redress.pdf.

18 European Parliament resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)) [Electronic version]. Retrieved 14 April 2014 from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN>.

19 See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401 final, [Electronic version]. Retrieved 14 April 2014 from http://ec.europa.eu/justice/civil/files/com_2013_401_en.pdf.

20 Decision of the Constitutional Court of the RS IUz-51/2012 of 23 May 2013, Official Gazette of the Republic of Serbia, no.49 / 2013. The explanation states that, due to the failure to determine the concept of collective interest, the requirements for determination and precision of the legal form, which is an integral part of the principle of the rule of law, has not been met “so that the citizens can actually and accurately know their rights and obligations from the content of the norm, in order to adjust their behaviour”. See: N. Bodiřoga, The comment on the Constitutional Court Decision IUz 51/2012 on the unconstitutionality of Chapter 36 of the Civil Procedure Act, Legal Instructor (ParagrafLex) 45/2013, 65.

collective redress mechanisms are a good signpost in the normative shaping of national collective redress mechanisms.

The CPA of 2014 excluded the protection of consumers' collective interest from the court jurisdiction and transferred it to the line ministry. (See Art. 145–153 CPA).

2. Legal framework for collective redress

2.1. General description

The applicable Consumer Protection Act (Articles 145-153) defines the consumers' collective interest, violation of such interest, the procedure for the protection of the collective interest, the issue of active legitimation, the measure for the protection, as well as the procedure for the compensation of damage. A total of 14 EU Directives have been transposed into this Law. However, since the issue of the consumer collective redress is still not regulated by a Directive, but by a non-binding Recommendation, a significant improvement in this field cannot be expected soon. A reservation towards the possibility to provide necessary uniform implementation of common principles in member states by means of a non-binding instrument has been demonstrated, especially having regard to great diversity of national collective mechanisms for the protection of rights. Although the European Commission did not give up its opinion, it is still obvious that the Commission itself had a certain amount of doubt with regard to the Recommendation potential to provide the implementation of common principles. That is why the Recommendation set out a period of two years during which the states should have implemented the common principles into their national systems, whereby it was provided that within four years as of the adoption of the Recommendation, the European Commission would consider the need for additional normative measures. However, this has not happened to date. The Recommendation does not offer principles with regard to jurisdiction and applicable law in mass harm situations. Considering that there is a parallel jurisdiction of national courts and the national mechanisms of collective redress are different, a large space opened for the opportunistic choice of jurisdiction (the so-called *forum shopping*) which should have been avoided by prescribing appropriate rules in order to prevent the “*magnet jurisdictions*” phenomenon,²¹ i.e. bringing actions to courts of those countries which have the most attractive rules on revealing of evidence before the trial (*pretrial discovery*) and which adjudicate the largest amounts of compensation in practice.

The issue of collective redress starts with determining the entities included under this term, and continues by defining the consumers' collective interest and implementing the collective redress procedure itself. In the light of a multidimensional consumer identity, it is difficult to determine what their collective interests are and who, among others, may represent them. The issue in accepting collective redress mostly stems from unsatisfactory conceptualization of collective interests.²² Practical implications of not distinguishing between the terms such as *legal interest* and *procedural legitimation* may

21 A. Stadler, Focus on Collective Redress, Cross-border Problems, [Electronic version]. Retrieved 14 April 2014 from <http://www.collectiveredress.org/collective-redress/crossborder-problems>.

22 M. Jovanovic Zattila (2015), “The concept of consumer collective redress - The road less taken” Zenica, Zenica, Annals of the Faculty of Law of the University in Zenica, p. 33.

lead to issues in the implementation of collective redress. Implementation of collective redress mechanisms, lack of consumer awareness with regard to right to its utilization, extremely high procedure costs, duration and complexity of the court procedure, lack of experience of judges to tackle such cases, non-conformity of national rules with the regulations of EU member states, language barriers and costs in case of cross-border claims have been identified as key issues.

The mechanisms for legal protection of consumers may exist in the form of individual and collective redress. The former case deals with the protection of the subjective right of the consumer, which they can exercise in general or special civil proceedings. The latter case deals with different mechanisms of legal protection of consumers' collective interests in administrative and civil proceedings. Utilization of the institute of collective redress entails fulfilment of certain procedural presumptions, and the initiation of the procedure is connected to the existence of "justifiable interest for collective redress".

Different understanding of the relationship between collective and general interest only serve to prove the inconsistencies within the European legal concept. Lack of clarification of collective interest also reflects negatively on bringing actions as well as to active legitimation of the claimants. The issue of active legitimation comprises several segments. Namely, the question is who has a justifiable interest to initiate the procedure and whether such persons also have *in concreto* legal interest to initiate and engage in civil proceedings for the purpose of protecting abstract interests of a certain group of consumers. Having in mind that "justifiable" and "legal interests" are not synonymous, as well as that the existence of the latter is determined by the court, the circle of concrete authorized persons may prove to be narrower or wider from the one determined by the legislator. The other segment consists of the lack of clear determination and differentiation between the terms "collective interest" and "collective damage" which the consumers may suffer. In any case, collective interest should be covered by damages only if the claim is founded. It would mean that a number of consumers are upset by certain behaviour or that violation of rights occurs continuously.²³

In accordance with the above, one may conclude that the incomplete adoption of the model, introduced by the EU legal measure, is primarily the consequence of insufficient understanding of the term "consumers' collective interest". Usually, the applicant must suffer a legally recognizable damage in order to undertake measures before national courts. This prevents the courts from granting damages for violation of any interest which may be deemed collective. Such interests are often in the collective form only because a group of individuals founded an organisation or association in order to solve a common issue. Individually, their interest is not legally recognizable, however, by means of association they create a mechanism recognized as a "potentially vulnerable interest".²⁴

23 By following this concept, the CPA, Article 144, prescribes that violation of the consumers' collective interest exists in the following cases: 1) when the right of at least ten consumers in total, granted by this law is violated by the same action or in the identical manner, by the same person, or 2) in the event of unfair commercial practices, or unfair terms in consumer contracts. The violation of the consumers' collective interest under Paragraph 1, item 1) of this article shall exist in cases when the right of less than ten consumers in total is violated, if the competent authority determines that there has been a violation of the consumers' collective interest, in particular with regard to duration and frequency of the trader's actions, as well as the fact that these actions exert negative effects on every consumer in a given factual situation.

24 M. Jovanovic Zattila, *op.cit.*, p. 8.

2.2. Applicable areas for collective redress

Numerous studies and analyses have shown that in mass harm situations, especially those of cross-border nature, collective mechanisms for the protection of rights whose application enables successful suppression of illegal practices and efficient compensation of damages are of key importance. This refers to the mechanisms of collective redress in mass harm situations in all areas of social relations, including the rights in the field of consumer protection, protection of competition, liability for damage from the product, abuses in the securities market, environmental protection, personal data protection, protection from discrimination, provision of financial services, investments etc. A mass harm situation is defined as “a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons.”²⁵

In many EU countries, as well as globally, consumer protection is put in the context of human rights protection.²⁶ However, these are differently interpreted in some parts of the world and their realisation depends on the economic power of the country in question. Although the principles of consumer protection are essentially the same, the manner of exercising them is significantly different. It leads to different types of discrimination, as well as to contracting parties being forced to seek protection through the European Court regardless of their willingness to resolve the disputes out of court, efficiently and economically. As the Court dealt with examining national provisions which made difficult or limited the free movement of goods from the consumer protection point of view, this mode of operation was named “negative harmonization”. The Court was called to react in a situation where member states made it difficult to access certain products through their actions, by openly discriminating them or enforcing such rules, which do not seem discriminatory at first, but their result is exactly of that nature.²⁷ The aim of enforcing these rules is the elimination of potential competitors, and, at the same time, protection of domestic manufacturers. Such behaviour could be seen as unfair commercial practice, which, pursuant to the CPA, is one of the reasons for bringing a collective action.

Our legislator recognises the violation of consumers’ collective interest in case of unfair commercial practices (Articles 17-23 of the CPA) and contracting unfair terms in consumer contracts (Articles 41-45 of the CPA). Although there is no explicit statutory provision requiring the existence of a number of individual violations, it is assumed as sufficient that the trader, during their business operations, acts at least once in a manner qualifying as unfair commercial practice, or contracts a term qualifying as unfair with at least one consumer. Since the CPA stipulates administrative instead of court protection

²⁵ At the time of public consultation the European Law Institute expressed reservations with regard to this definition, indicating that it does not cover cases of activities which are lawful, but hazardous, such as the cases of storing or using dangerous products. See: Statement of the European Law Institute on Collective Redress and Competition Damages Claims, [Electronic version].

http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/General_Assembly/2014/Collective_Redress_Competition_Damages_Claims.pdf

Draft_Statement_on_

²⁶ The European Court of Human Rights, established based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, deals with cases referring to consumer protection. Regardless of the above, the right of consumers to protection is not stated therein as a separate protected human right and can be found only as a secondary issue with regard to some of the protected rights.

²⁷ M. Jovanovic Zattila (2013), Consumers rights, p. 15.

of collective interests, it is assumed that the control of unfair terms in consumer contracts shall be performed by an administrative body, which may order the trader to discontinue contracting the terms which are deemed unfair pursuant to the Law. This tells us of the abandoning of the idea that the consumer collective redress should be exercised in a court procedure. Thus, consumers' collective interests are now protected in a procedure before the administrative body, while the anti-discriminatory interests still enjoy the right to court protection which may be sought by means of an action for determining, omitting, or removing the consequences filed by the Commissioner for protection of equality or organizations for protection of human rights, or the rights of a certain group.²⁸

2.3. Applicable procedure(s) for collective redress according to the national legislation

The introduction of mechanisms of collective redress into the legal systems of EU member states also entailed respecting the differences in the scope of application, rights to submit applications, available legal remedies, competent courts, procedure costs, the existence of opposing *opt-in* and *opt-out* mechanisms.²⁹ This procedural instrument is still not recognized in the Serbian law, although being applied in the surrounding countries.

There are two main procedural mechanisms the implementation of which is recommended: *injunctive collective action* and *compensatory collective action*. Injunctive collective action is a special type of condemnatory action aiming at preventing, or discontinuing the undue practice. It requires that the defendant be forbidden to undertake an action posing a risk of injury, or to repeat an action violating the rights of a number of entities, therefore its aim is to attain preventive protection. Compensatory collective action is an instrument offering the possibility of compensation of damage for a number of persons injured by the same illegal act in a single court procedure, which is especially significant when there is a large discrepancy between the amount of compensation and procedure costs, which discourages legal entities from seeking court protection.

In contemporary economic relations there is a growing need for reactions of market surveillance bodies, which indicates the reinforcement of the administrative legal protection of consumers as the substitute for court protection. At the EU level, in the field of protection of economic interests of consumers, different models of their administrative and court protection have been developed. Consumer protection solely by

28 M. Baretic, *op.cit.*, pp. 248-250.

29 The analysis of principles set out in the Recommendation shows that the procedure involving compensatory collective actions is based on the *opt-in* procedure model, which is set out as the rule, while the possibility to apply the *opt-out* procedure, as an exception, is left open. The key difference between these models is the fact that the *opt-in* procedure model follows the principle of "the possibility of involvement", which entails that individuals are given the opportunity to join collective actions, whereas in *opt-out* procedures, it is assumed that the injured parties are automatically involved in the procedure, unless they expressly state otherwise. Article 21 of the Recommendation provides the possibility for the member states to introduce the *opt-out* procedure as well, but as an exception, which must be prescribed by the law or a court ruling, namely only in the interest of attaining justice. According to the assessment of the European Economic and Social Committee, such solution is useful in cases of a large number of injured parties and very small damage, but there is a serious shortcoming since the Recommendation does not specify when the *opt-out* procedure may be applied. It is a fact that this procedure questions the freedom of legal entities to decide, based on the information, whether they want to proceed with the claim for redress or not. On the other hand, the application of the *opt-out* procedure model does not accomplish the main purpose of collective redress since it does not enable redress of injured persons, as such persons have not been identified.

courts or administrative bodies is almost non-existent, and there are differences among countries based on the combination of undertaken measures. At the harmonization level, member states are allowed to, based on their own systems, apply the consumer protection procedure which suits them best, provided that such protection is efficient, proportional with regard to its purpose and that the sanction has a preventive effect.³⁰

The CPA follows the European trend in this regard, where consumers' collective interests are protected in a procedure before the administrative body, with the difference in our law being that the Ministry, as an administrative body before which the procedure is solely initiated, is the competent body. By defining the violation of the collective interest as the one caused by a single entity, by means of the same action or in the same manner, to a total number of at least ten consumers, the domestic legislator defined the collective interest as an aggregation of individual ones. Pursuant to the CPA, the Ministry of Trade is competent to assess whether the violation of collective interests occurred, and the procedure is initiated upon its assessment. In practice this means that collective consumer protection will depend on discretionary decisions of the officials of the Ministry of Trade. Thus, consumer organizations would file a claim to the market inspectorate, which then determines if the claim is founded and decides on the trader's behaviour in accordance therewith.

A positive side of the CPA is that it improved the administrative legal protection. The emphasis is on the reinforcement of the administrative consumer protection in terms of recognizing the unfair commercial practice and unfair contractual provisions, as well as pronouncing administrative measures in a special administrative procedure for the purpose of protection of consumers' collective interests. The issue is that the law did not include the possibility of collecting the fine upon pronouncing the adequate administrative measure.³¹ Regardless of the fact that introducing the administrative body represents a positive change, it is our opinion that more efficient protection of the consumers' collective interest would be attained by authorizing more entities to initiate the procedure. That is, after all, the European concept which entails the existence of both court and administrative protection.

To what extent the implementation of the consumer collective redress procedure since the adoption of the CPA in 2014 has been efficient is shown below.

30 F. Caffagi, H.W. Micklitz (2007), *Administrative and Judicial Collective Enforcement of Consumer Law in the US and European Community*, EUI Working paper No. 22.

31 In some countries, apart from pronouncing a mandatory fine, the body protecting consumers' collective interests is allowed to determine a monetary fine for each day of being in default, in a fixed amount or depending on the severity of violation of the regulation protecting the consumers.

2.4. Available remedies for collective redress according to the national legislation

Legal remedies provided under the existing CPA are decisions and appeals thereto. If the violation of the law is determined, the inspector shall instruct the trader or seller to eliminate the determined shortcoming. The inspector may, in his decision, set the time limits within which the trader or seller is obliged to eliminate the shortcomings, which may not be shorter than 24 hours or longer than 2 months, unless prescribed otherwise. If the trader or seller fails to act pursuant to the order, the inspector shall pronounce a temporary measure prohibiting the trade of goods or providing services to which the measure refers.

If the inspector determines that there has been a violation of the law, he shall issue and deliver a decision in accordance with his powers within 5 days starting from the day the inspection started or ended. The inspector may render a temporary decision at the time and place of the inspection, which shall cease to be valid once the deadline for the adoption of the decision has passed. The decision may be appealed within eight days and the appeal does not postpone its execution. Against the second instance decision of the Minister, the party who was imposed with the administrative measure may initiate a procedure before the Administrative Court within 14 days, while the complaint shall not postpone the execution of the decision.³²

As far as the Ministry is concerned, in 2016 and 2017 alone, a number of decisions were adopted determining that the consumers' collective interest had been violated by the trader or a public enterprise, and they were ordered to act in an appropriate manner (among them are "Telekom Srbija" a.d. Belgrade, "Serbian Broadband - Srpske kablovske mreže" ("SBB") Belgrade, JKP (Public Utility Company) Belgrade, "Mercator" d.o.o. Novi Sad, "Home centar" Belgrade, "Metro Cash & Carry" Belgrade and others).³³

In the case law of the Republic of Serbia, one of the first collective actions was initiated by the Association of Banking Clients "Efektiva" for redress of clients who took out loans in Swiss francs in 2013. The Association of Banking Clients "Efektiva" brought a collective action in 2013 for redress of loan users taken out in Swiss francs before the Basic Court in Novi Sad. On the basis of these grounds, in April 2015 the Basic Court approved the termination of the agreement between the clients and the bank concluded in 2007 and of the annex to the agreement concluded four years later. Then, the Appellate Court converted the ruling of the Basic Court and dismissed the claim for termination and nullity of the agreement. The Supreme Court of Cassation revoked the final ruling of the Appellate Court in Novi Sad from November 2015, by which the claim for termination of the agreement on housing loan in Swiss francs had been dismissed, due to a change of circumstances, i.e. the increase of the Swiss franc exchange rate and ordered a retrial. By virtue of such decision, the Supreme Court of Cassation adopted the request for revision (extraordinary legal remedy) of the client who took legal action against the bank requesting termination of the agreement and ordered the Appellate

³² Articles 157-159 of the CPA.

³³ For more information about the decisions of the Ministry in the procedure of protection of consumers' collective interest please visit: <http://mtt.gov.rs/informacije/zastita-potrosaca/resenje-o-povredi-kolektivnog-interesa-potrosaca/>.

Court to decide again on such matter.³⁴ The rationale of the decision, the Supreme Court of Cassation pointed at the omissions of the second instance court which converted the decision of the Basic Court from April 2015. In this case, after the final ruling, the bank was given a possibility to collect the loans by selling the mortgaged immovable property.

The Supreme Court of Cassation ordered the Appellate Court to reliably determine in a repeated proceeding whether and to what extent a change of circumstances occurred as of the conclusion of the disputable contract between the parties. After that, as stated in the decision of the Supreme Court of Cassation, “taking into account all circumstances of a concrete case and the contract between the parties, it will determine whether conditions had been met to terminate the contract and render a law-based decision in accordance therewith.” The rationale of the decision states that the opinion of the Appellate Court that fluctuations of foreign currency exchange rates relative to Serbian dinar is not unusual in domestic foreign currency market is not disputed. However, it does not mean that each, even enormous, exchange rate fluctuation represents an unusual occurrence. The Supreme Court of Cassation also reminds of the statement of the Basic Court (which approved the termination of agreements) that the “claimant has taken out a loan to buy a house, and now needs several such houses to repay it.”³⁵

2.5. Costs and financing of the procedure for collective redress with an overview of pros and cons consumer organisations to initiate the procedure

Pursuant to the provisions of the CPA, holders of consumer protection are the National Assembly, Government, Ministry, National Council for Consumer Protection, other ministries and regulatory bodies which are competent as determined by the law in the field of consumer protection, autonomous province and local self-government authorities, as well as organizations and associations.³⁶ Activities of registered organisations and associations may be funded or co-funded from the Budget of the Republic of Serbia, in accordance with the law, Strategy and annual operational plans adopted by the Government. Registered organisations and associations shall submit to the Ministry the financial statement on the activities funded not later than 31 March each year for the previous calendar year, while the Ministry shall release them publicly on its official website. Organisations and associations acquiring funds from sources other than the Budget of the Republic of Serbia shall inform the competent ministry not later than 30 days from the receipt of those funds. Organisations/associations shall not accept funds or other assets, goods, rights or services, with the exception of the gifts of small value, including any form of donation or grant, from

34 The association “CHF Srbija” believes that the loans in Swiss francs are illegal due to the currency clause. Loans were granted in Serbian dinars, not in foreign currency, and debts and interest were calculated as if the loan in question had been in foreign currency. The association emphasises that for the first time in its decision, the Court has taken into account the CPA, considering that the borrowers were not informed about the possible consequences. Regional practice is that loans indexed in CHF are converted to EUR according to the interest rate valid on the day of taking out the loan. The Association believes that terminating the agreement is a much better option for the client than conversion to euro. By exchanging the currency clause in Swiss francs to euros, the principal amount for the borrower would be reduced by 30-35%, and by terminating the agreement, it would be reduced by 50%. The principal amount is the biggest issue in this dispute, while the interest rate is less important (there is a drastic example of borrowing 5.7 million RSD, with repaid 5.6 million RSD and outstanding debt of 9.3 million RSD!).

35 It should be stated that identical procedures in Hungary and Croatia were resolved to the benefit of the consumers, where the bank clients who took out loans in Swiss francs were redressed.

36 Article 124 of the CPA Paragraph 1.

natural or legal entities with which the conflict of interest exists,³⁷ especially from traders or traders' organisations, except in cases of service providing with compensation (training or similar) in accordance with the law and the statute of the organisation or association.

As the holders of authority for consumer protection, consumer associations may initiate a procedure for the protection of the consumers' collective interest, in accordance with Article 135 of the CPA. The legislator certainly provided a fine solution in terms of the authorised registered representative of consumers' collective interests in case of harm to a number of persons by the same act of a trader. This increases consumer security to exercise their rights more easily as compared to the individual court protection procedure, which is uncertain, long-term and usually exceeds the value of the matter in dispute. On the other hand, it is necessary to constantly monitor the activities of the consumer associations through special regulatory bodies in order to avoid the possibility of possible abuse of the consumers' collective interest for personal gain.

2.6. Sectoral collective redress mechanisms

Section 2.2 on the appropriate areas in which collective redress mechanisms of consumers may apply states that this type of violation of rights is possible in all areas of social relations: consumer rights, competition rights, responsibility for product safety, environmental protection, food safety, personal data protection, protection from discrimination, protection of patients' rights, abuses in the securities market, provision of financial services, investments etc.

a. Consumer protection act

The CPA regulates the issue of collective redress through a special section entitled "Protection of the consumers' collective interest". Articles 145-153 deal with issues such as: violation of the consumers' collective interest, procedure for its protection, entities authorised to file a request for the protection of the consumers' collective interest, parties and the initiation of a procedure, decisions in the procedure for the protection of the consumers' collective interest, measures for their protection, temporary measures, termination of the procedure and procedure for the compensation of damage. Initiation or engaging in the procedure for the protection of the consumers' collective interest does not prevent the consumer, who had been caused harm, from initiating, before the competent court, the procedure for the compensation of such damage or from initiating, before the court, the procedure for annulment or determination of nullity of the agreement, or from initiating before the court any other procedure demanding the exercising of their rights. The issue of the collective protection of consumer interest is primarily regulated by the CPA as an administrative measure. We are of the opinion that the circle of entities with active legitimation should be broadened and by following the model recommended by the Recommendation of the European Commission of 11 June alternatively introduce court and administrative protective measure. Thus, one would overcome certain limitations which can be determined only by the court in a

37 Conflict of interest is a situation in which a person acting as a representative, body or member of the organization's or association's body, has a private, business or other interest which affects, may affect or appears to affect the actions of the person in the said capacity in a manner which may endanger the independent nature of the organization or association in achieving the purpose of its foundation (Article 136 Paragraph 5 of the CPA).

civil proceeding (e.g. that a certain contractual provision does not have legal effect and therefore is not binding for the consumer).

b. Law on protection of competition

Competition rights are closely related to the protection of consumer rights. Loyal competition means a market without obstacles relating to free movement of goods, services, persons and capital. However, there are differences among member states regulating the redress procedures due to the violation of competition rights of the EU or national law. Thus, Directive 2014/104/EU has found its place in the Law on Protection of Competition, although it primarily refers to consumers. Differences in national rules caused unequal conditions with regard to redress procedures and therefore may affect the competition in the markets in which such injured parties operate. Compensation for the damage caused by the acts and doings violating the competition in terms of this law which has been determined by the Commission's decision, shall be exercised in a civil proceeding before the competent court.

c. Law on the capital market

The need for the protection of consumers' collective interests is especially noticeable in the segment of capital market, in the part relating to securities trading, credit financing or investments. The objectives of the Law on the Capital Market³⁸ are: 1) the protection of investors; 2) ensuring that the capital market is fair, efficient and transparent; 3) the reduction of systemic risk on the capital market. Violation of the consumers' collective interest may be caused by market manipulations which include: 1) activities by a person, or persons acting in collaboration, to secure a dominant position over the supply of or demand for a financial instrument which has the effect of fixing, directly or indirectly, purchase or sale prices or creating other unfair trading conditions; 2) the buying or selling of financial instruments in the beginning or at the close of the trading day which has or may have a misleading effect on investors who decide based on the published prices, including initial or prices at the close; 3) taking advantage of occasional or regular access to the traditional or electronic media by voicing an opinion about a financial instrument or indirectly about its issuer while having previously taken position on that financial instrument and profiting subsequently from the impact of the opinion voiced on the price of that instrument, without having simultaneously disclosed that conflict of interest to the public in a proper and effective way. The Commission shall prescribe details concerning procedures to be considered market manipulation practice and obligation of the Commission and market participants aimed at detecting and preventing market manipulations.

d. Law on patients' rights

Pursuant to the Law on Patients' Rights³⁹, the patients are guaranteed the right to quality and continuous healthcare in accordance with their health condition, general professional standards and ethical principles, in patients' best interest and respecting

³⁸ Official Gazette of the RS, No. 31/2011.

³⁹ Official Gazette of the RS, No. 45/2013.

their personal attitudes. In the process of exercising the right to healthcare, the patient is entitled to equal access to health services, without discrimination in relation to financial aspects, place of residence, type of condition, time of accessing the health service or in relation to another diversity aspect which may be the cause of discrimination. Basic principles which apply to the protection of consumers' rights shall apply to the patients: the right to information, safety in exercising of healthcare, the right to privacy and confidentiality of data, the right to free choice, quality of provided services, the right to complaint and compensation of damage. Protection of patients' rights shall be provided by the local self-government unit by appointing a person to perform the duties of an advisor for the protection of patients' rights and founding a Health Council. The Health Council shall decide on the complaint of the patient based on the instruction of the relevant ministry.

e. Food safety law

The purpose of the Food Safety Law⁴⁰ is to provide high level of protection of human life and health and protection of the consumers' interests, including the principle of honesty and scrupulousness in the food circulation, taking into account the protection of the health and well-being of animals, as well as the health of plants and environmental protection. Article 8 of the Law refers to providing the protection of the interest of consumers to the largest possible extent. The food business operators shall provide the final consumer with such information as will make it possible for him/her to choose products in a way that will not mislead the consumer with regard to the composition, properties and purpose of products. For the purpose of considering issues related to the risk assessment in the field of food safety, the Minister shall, with the consent of the minister responsible for public health and in accordance with regulations governing state administration, establish a special working group - Expert Council for Risk Assessment in the Field of Food Safety by virtue of a decision. Inspection supervision over the enforcement of the provisions of this Law and the regulations enacted on the basis of this Law shall be conducted by the Ministry through veterinary inspectors, phytosanitary inspectors and agricultural inspectors, and by the ministry responsible for public health, through sanitary inspectors. Violation of provisions on food safety shall be deemed a commercial offence, and the amount of the fine shall be pronounced depending on whether the person in question is an entrepreneur, legal or natural person.

f. General product safety act

This Act⁴¹ shall lay down general safety of products that are placed on the market, criteria for the assessment of product conformity with the general safety requirement, the obligations of producers and distributors, the content and the methods of informing and exchanging the information relating to risks to consumer and other user health and safety posed by products, and the surveillance of product safety. The producer undertakes to, within the boundaries of the activity they perform, provide necessary information to consumers and other users which shall enable them to assess the risk

40 Official Gazette of the RS, No. 41/2009.

41 Official Gazette of the RS, No. 41/2009.

the product may pose during the period of its use determined by the manufacturer or reasonably foreseeable period of use, unless such risk is obvious without an appropriate warning and which shall enable them to undertake appropriate precautions in relation to such risk. The information at the disposal of the competent authority with regard to the risk the product poses for the health and safety of consumers and other users is the information of public importance and available to the public, regardless whether it has been deemed a trade secret by a regulation or another act.

g. Law on environmental protection

Protection of natural values shall be ensured through the implementation of measures for their quality, quantity and reserves preservation, as well as their natural processes, inter-relation and overall natural balance.⁴² Since this represents general good and we all “consume natural values”, we are responsible to care about the preservation of the environment. Financing of environmental protection shall be conducted applying the “user pays”, “polluter pays” and the “liability” principles. Polluter causing environmental pollution shall be responsible for the occurred damage under the principle of objective responsibility. Funds for financing environmental protection in the Republic of Serbia shall be provided from the budget of the Republic of Serbia, budget of the autonomous province and local self-government unit, funds of other countries, international organizations, financial institutions and bodies, as well as domestic and foreign legal and natural persons, European Union funds and other international funds, donations, gifts, contributions, assistance etc. The request for reimbursement may be submitted directly to the polluter or insurer, namely to the financial guarantee of the polluter where the accident happened, if such insurer, namely financial guarantee exists. If several polluters are responsible for the environmental damage, and if it is not possible to determine share of certain polluters, the costs shall be borne jointly and individually. The procedure for reimbursement shall be out-of- date in three years period since the damaged party found out about the damage and damage maker. In any case, this claim shall be out-of- date in 20 (twenty) years after the occurrence of the damage. Court procedure for reimbursement shall be urgent and the Republic of Serbia shall keep the right to redress if there are no other persons with such right.

2.7. Legislative consultations and reform proposals

a. Legislative proposals

For the purpose of more efficient application of the institute of the consumer collective redress it is necessary to perform certain legislative interventions at the EU level. Firstly, the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law should be replaced with a Directive as a binding legal document. Then, like other Directives in the field of consumer protection, it would be transposed into the CPA of the Republic of Serbia, which would contribute to the practical application of this new and very important institute.

⁴² Official Gazette of the RS, No. 135/2004.

The decision of the Serbian legislator to replace the court procedure with an administrative one in the field of the protection of consumers' collective interests has its advantages and disadvantages. One of the advantages is that the procedure is quicker, more efficient, less costly, and that it improves the administrative legal protection. However, although this is undeniably a positive change, one should not limit and reduce the protection exclusively to the administrative body. In that regard, we propose that, apart from the existing administrative body, the court, as well as other entities, should also be entitled to active legitimation for initiating the procedure of the consumer collective redress.

3. Institutional framework for collective redress

3.1. Overview of legal provisions determining stakeholders in implementing collective redress

Strategy for Consumer Protection

The basic legal and policy document on consumer protection in the Republic of Serbia is the *Strategy for Consumer Protection*. The Strategy sets long-term goals and activities undertaken in the Republic of Serbia in order to implement consumer protection policy. The integral plan of the Strategy is the Action Plan for its implementation. The *Strategy for Consumer Protection* for 2013-2018, which was adopted by the Government on 31 July 2013 at the proposal of the line ministry, is in force at the moment.⁴³ The overall objective of the Strategy is to provide consumers in Serbia with a high level of protection and to enhance the consumer protection system in line with EU standards and best practices by 2018. Apart from these, the specific objectives were also determined:

- Promotion of consumer interests and welfare by improving legislation;
- Better integration of consumer policy into other national policies;
- Further strengthening of the institutional framework for consumer protection;
- Upgrade of the effective law enforcement and market surveillance system in the consumer protection field;
- Empowering consumer associations and individual consumers;
- Development of a solid framework for regional and international cooperation.

Constitution of the Republic of Serbia

The Constitution of the Republic of Serbia (Official Gazette of the RS, no. 98/2006). Consumer protection is a constitutional category; therefore the provisions of Article 90 of the Constitution of the RS oblige the Republic of Serbia to protect consumers and to prohibit activities directed against health, safety and privacy of the consumers, as well as all other dishonest activities on the market of the Republic of Serbia.

Stabilisation and Association Agreement

Stabilisation and Association Agreement (The Law confirming Stabilisation and Association Agreement between the European Communities and their Member States of

⁴³ The Strategy for Consumer Protection for 2013-2018 is available at: http://mtt.gov.rs/download/3/strategija_zastite_potrosaca2013-2018_087_cyr.pdf (Retrieved: 09/06/2017). The Strategy was adopted pursuant to Article 124 of the Consumer Protection Act of 2010 and it has not been changed for the Consumer Protection Act of 2014 did not significantly changed neither conditions for its adoption, nor its subject.

the one part and the Republic of Serbia on the other part (“Official Gazette of the RS–International Agreements”, no. 83/08).

Provisions of Article 78 of the Stabilisation and Association Agreement oblige the Republic of Serbia to align its legislation on consumer protection to the standards of the European Union (EU).⁴⁴

The provisions of the same Article oblige the Republic of Serbia to develop a policy of active consumer protection, in accordance with EU law; to increase information and develop independent organizations, to harmonize legislation of consumer protection in Serbia on that in force in the EU; to ensure effective legal protection for consumers; to monitor the rules by competent authorities and provide access to justice in case of disputes; to exchange information on dangerous products.

This practically implies that not only the legislative authorities are obliged to transpose the relevant EU directives into their regulations, but also other authorities and bodies are obliged to ensure their effective implementation, in order to enable the proper functioning of the market economy and to fulfill the Copenhagen criteria for the EU accession of Serbia.

Consumer Protection Act (“Official Gazette of the RS”, no. 62/2014 and 6/2016).⁴⁵

The Consumer Protection Act of 2014 is the fourth law in this matter. Earlier laws were passed in 2002, 2005 and 2010.

The law entered into force on 21 June 2014, and it began to apply from 22 September 2014. The legal basis for the adoption of the Law are the provisions of Article 90 of the Constitution of the Republic of Serbia. The strategic and political basis for the adoption of the law is provided in the Strategy for Consumer Protection for the period 2013-2018, in the part where the objective to improve the protection of consumer rights and interests by amending legislation is set.

The Law contains modern and advanced solutions that are largely aligned with EU law and in a normative sense provides a high level of consumer protection, since the provisions of 14 key European directives in this field were implemented and a legal framework that enables the approximation of consumer protection in Serbia to European standards was established. The purpose of the Law is to fully regulate relations that arise before, during and after the conclusion of a contract between the trader, as a natural or legal person who is acting on the market for commercial purposes or purposes relating to their business, and consumers, as natural persons who are acting on the market as “end users”, i.e. for non-commercial purposes.

In the material sense, the Law regulates the rights of consumers, conditions and means of their protection, rights and responsibilities of the consumer organisations acting in order to ensure consumer protection, the out-of-court resolution of consumer disputes, and the rights and responsibility of the state institutions in the area of consumer protection. In terms of content, new rules on the sale of goods to consumers, legal guarantees,

⁴⁴ See more: Mateja Djurovic and Nebojsa Lazarevic, The New Serbian Law on Consumer Protection and the Position of the Serbian Consumer, RSCAS, Workshop 11, Montecatini Terme, Pistoia 21-24 March 2012. Available at http://www.europeanpolicy.org/images/the_new_serbian_law_on_consumer_protection_and_the_position_of_the_serbian_consumer_mrm_2012_paper_lazarevic_djurovic.pdf. Retrieved 12.06.2017.

⁴⁵ The provision of Article 11 of the Consumer Protection Act ceased to apply on 6 May 2016, from the date of entry into force of the Law on Advertising. (“Official Gazette”, no. 6/2016).

distance contracts and off-premises contracts, contracts on travel and time sharing, unfair business practices, unfair contractual terms and services of general economic interest are envisaged. In relation to the solutions that existed in the previous laws, the most important novelty introduced by the new CPA is the protection of consumers' collective interests. The law introduces a separate administrative procedure for collective redress in order to preventively act and prevent those situations that individually affect individual consumers.

The Law of Contract and Torts

The Law of Contract and Torts (Official Gazette of the SFRY, no. 29/78, 39/85, 45/89 – decision of CCY and 57/89, Official Gazette of the FRY, no. 31/93 and Official Gazette of the SCG, no. 1/2003 - Constitutional Charter) regulates certain issues of consumer protection mainly by general norms and rules of a dispositive nature. Regarding its application, an interesting question arises concerning its hierarchical relationship towards the Consumer Protection Act and the position of the rules related to consumer protection in the future Civil Code of Serbia.⁴⁶ The solutions from the Consumer Protection Act are an “upgrade” of the classic rules of the obligatory right, therefore the Law on Obligations is applied accordingly. In relation to other consumer protection regulations, the CPA is considered as an umbrella law that applies to all relations between consumers and traders, unless a higher level of protection is provided by sectoral law.

Other regulations relevant for certain consumer protection issues

- *Law on Trade* (“Official Gazette of the RS”, no. 53/2010 and 10/2013).
- *Law on Electronic Communications* (“Official Gazette of the RS”, no. 44/2010).
- *Law on Advertising* (“Official Gazette of the RS”, no. 6/2016).
- *Decree on the content of the form for the withdrawal from time sharing contract, long-term holiday product contract, resale and exchange contract* (“Official Gazette of the RS”, no. 12/2015).
- *Decree on the content of the standard informative form for time sharing contract, long-term holiday product contract, resale and exchange contract* (“Official Gazette of the RS”, no. 12/2015).
- *Rulebook on the form and the content of form for withdrawal from distance and off-premises contracts* (“Official Gazette of the RS”, no. 21/2015).
- *Rulebook on the operation of bodies dealing with the out-of-court resolution of consumer disputes* (“Official Gazette of the RS”, no. 74/2015).
- *Rulebook on the content and manner of keeping Registry of Consumer Organisations and Associations and registering criteria* (“Official Gazette of the RS”, no. 21/2015).

3.2. Stakeholders responsible for putting collective redress into practice

According to Article 124 of Consumer Protection Act, the institutions in charge of consumer protection are:

⁴⁶ See. M. Djurovic, Serbian Contract Law: its development and the new Serbian Civil Code, 1 *European Review of Contract Law*, 2011, str. 65-77.

1. The National Assembly of the Republic of Serbia,
2. The Government,
3. The Ministry,
4. The National Council for Consumer Protection,
5. Other ministries and regulatory bodies with competences in the area of consumer protection,
6. The autonomous province and local self-government authorities, and
7. Consumer organisations and their associations from non-government sector.

National Assembly is responsible for defining the consumer protection policy and for the timely adoption of respective regulations for its implementation.

Upon a proposal by the Ministry, the Government adopts the Strategy determining long-term objectives and activities necessary for the comprehensive implementation of the consumer protection policy and an action plan for the realisation of the Strategy. The Ministry of Trade, Tourism and Telecommunications is competent for the concrete consumer protection; nevertheless, this area is horizontal and multidisciplinary.

Ministry (currently, this is the Ministry of Trade, Tourism and Telecommunications), is in charge of consumer protection policy making and monitoring of its implementation by conducting the proceeding and issuing measures for the protection of the consumers' collective interest and by cooperating and coordinating activities with institutions in charge of consumer protection.

In terms of legislation, the Ministry is in charge of improvement of the legal framework for consumer protection and harmonisation with the European Union legislation in the consumer protection area, and ensuring the implementation of regulations and coordination of market surveillance in the consumer protection area.

In terms of direct consumer protection, the Ministry supports the establishment and coordinates development of the bodies for out-of-court dispute resolution, and therefore supports operation and development of organisations and associations and cooperates with institutions dealing with consumer protection on the regional and international levels.

National Council for Consumer Protection was established on 18 October 2012 to perform the following tasks: participate in the drafting of the Strategy; report to the Government on the situation in the field of consumer protection and the implementation of the Action Plan for the implementation of the Strategy; recommend measures and activities for the improvement of consumer protection; give opinions and recommendations on issues in the consumer protection area to the institutions in charge of consumer protection. It consists of representatives of the ministries competent for consumer protection, consumer organisations, trader's organisations, and independent experts in the field of consumer protection.

Autonomous province and local self-government authorities support activities of organisations and associations, in particular in relation to ensuring funding, adequate premises and other necessary conditions for work, in accordance with the regulations on financing programs of public interest realised by consumer organisations. Furthermore, they encourage and support activities directed to consumer protection, in particular the provision of information, advice and education for consumers and instigate and support the participation of consumer representatives in all bodies where decisions are made on

the provincial and local levels in areas of importance for consumers, such as services of general economic interest. Regarding dispute resolution, they support the establishment and operation of bodies for out-of-court resolution of consumer disputes on their territory.

Activities of organisations and associations particularly include information, education, counselling and providing legal assistance to consumers in exercising consumer rights; receiving, registering and handling consumer complaints; carrying out independent examinations and comparable analysis of goods and services and publishing their results; carrying out examinations and studies in the consumer protection area and publishing their results.

3.3. Mapping the cooperation among stakeholders

All competent institutions are obliged to mutually cooperate and to coordinate their activities. The obligation for cooperation among competent institutions has been determined pursuant to Article 124, paragraph 2 of CPA. The objective of prescribed cooperation is “improving consumer protection”. Chambers of commerce, chambers of professionals and traders’ organisations established with the purpose of protecting traders’ rights in the field of commerce are also obliged to cooperate with the competent institutions. The above-mentioned chambers and organisations are expected to encourage and promote consumer protection, in particular among their members and to cooperate with the competent institutions.

Other interested stakeholders may also be involved in activities in this area (Article 125 of the CPA). The Law supports their operation and in particular emphasises the need for inclusion of chambers of commerce and chambers of professionals, or traders’ organisations, in the process. In such a way, the awareness of the need to respect consumer rights and promote their protection is raised among their members.

In the Annual progress report of the European Commission (EC) for Serbia for 2016⁴⁷ it is emphasized that cooperation between ministries and consumer organisations needs to improve, which is a precondition for improving the situation in this field. The National Consumer Council only meets sporadically and the National Consumer Complaint Register has just become publicly accessible on <http://zapotrosace.gov.rs/>. The number of complaints filed by consumers has increased but only a limited number has been resolved. Cooperation between the line ministries and consumer organisations needs to improve, as does cooperation between consumer protection organisations.

4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress

4.1. The role and competencies

General

Directive 2009/22/EC of the European Parliament and the Council of 23 April 2009 on injunctions for protection of consumers’ interests regulates the issues of collective

⁴⁷ Available

at http://eukonvent.org/wp-content/uploads/2016/11/godisnji_izvestaj_16_srp.pdf. Retrieved 10/06/ 2017.

redress in EU law.⁴⁸ It is for the Member states to regulate the procedure for protection, providing that the protection is effective, proportional to the purpose and that sanction has preventive effect. It is also for the Member States to determine if the procedure will be judicial or administrative. None of the Member States envisages consumer protection as exclusively administrative or judicial procedure, i.e. there is no exclusive consumer protection model.⁴⁹

In the Serbian Law consumer collective redress is entrusted to the administration authority in the administrative procedure conducted by the ministry in charge of consumer protection.⁵⁰ In comparative law, the judicial system of protection of collective interests is mainly accepted and it is realised in the civil proceedings.

As an argument for the introduction of the administrative model of protection, it is believed that more efficient protection is achieved at the level of an administrative authority, and that an administrative procedure is faster, cheaper and more efficient than judicial one.⁵¹

CPA prescribes the administrative consumer protection by recognizing unfair commercial practices and unfair contractual provisions in consumer contracts, and it also prescribes the imposition of administrative measures in a special administrative procedure. The administrative authority has the opportunity to make a decision on the merits regarding protection of consumers' collective interests and to decide on the rights and interests of consumers, i.e. to impose a measure that prohibits certain behaviour by applying appropriate actions and surveillance measures prescribed by this law

48 The provisions of Directive 2009/22/EC were implemented in the new Law on Consumer Protection ("Official Gazette of the RS", no. 62/2014- hereinafter: CPA) which regulates the procedure for imposing prohibition in the consumer collective redress procedure.

49 See. Rainer Kulms, „Collective Redress in Europe – A Case for Harmonised Rules? “*Law and Economy* 4–6 (2013), 309 – 327; Marko Baretic, “Individual and collective consumer redress in the Croatian law “*Republic of Croatia towards European Judicial Area*, Faculty of Law of the University in Rijeka, Rijeka 2009, 241–286.

50 In accordance with the Consumer Protection Act of 2010, the court was competent to protect consumers' collective interests in the civil proceedings. Pursuant to the Law, a consumer had a right to initiate the procedure for prohibition of unfair contractual terms and unfair commercial practices. Consumer organisations and associations had the same right. Once the provisions of the CPA regulating special procedures were declared unconstitutional by the Constitutional Court of the Republic of Serbia, pursuant to the CPA of 2014, protection of collective interests has been assigned to the Ministry of Trade in the administrative procedure. Thus, protection of collective interests has been entrusted to the administrative authorities.

51 See. Tatjana Jovanic, *The Role of Administration in protecting collective interests of consumers*, in (Thierry Bourgoingnie, T. Jovanić (editors), *Strengthening Consumer Protection in Serbia*, Liber Amicorum Svetislav Taboroši, The Faculty of Law in Belgrade, 2013, p. 311, 313.

This belief is confirmed by the fact that pursuant to the Chapter XIII of the Law on Consumer Protection (Official Gazette of the RS, no. 73/2010) of 2010, a court procedure for prohibition of unfair contractual terms and unfair commercial practices was prescribed. An individual consumer whose right or interest was infringed, as well as consumer organizations, in the case of infringement of consumers' collective rights, were actively legitimized to initiate the procedure. Practice has shown that this was inadequate choice, that is, it did not come to life in practice. The collective redress was also prescribed by the Civil Procedure Act (Official Gazette of the RS, no. 72/2011), Chapter XXXVI - Procedure for the protection of collective rights and interests of citizens. The provisions of the whole Chapter regulating this procedure were repealed by the Constitutional Court Decision RS IUZ-51/2012 of 23 May 2012. One of the key reasons for declaring this chapter unconstitutional by the Constitutional Court was the lack of clear definition of collective interest in the Civil Procedure Act within the special rules on the procedure for protection of collective rights and interests of the citizens. The lack of clarification was presented as a lack of distinct determination when a civil action has characteristics of a collective action, and the Court also emphasized that the concept of collective rights and interests is not regulated. For comment on the Decision see: Nikola Bodiřoga, *The comment on the Constitutional Court Decision IUZ 51/2012 on the unconstitutionality of Chapter 36 of the Civil Procedure Act*, Legal Instructor 45/2013 from 13 June 2013, ParagrafLex and Marija Karanikic Miric: “Protection mechanisms of legally guaranteed consumer rights” in Stevan Lilic (ed.) *Perspectives of Implementation of European Standards in the Serbian Legal System*, Volume 3, Faculty of Law, University of Belgrade, Belgrade 2013, p.180.

whose norms have cogent character, with subsidiary application of the rules on general administrative procedure.

Generally, the violation of consumers' collective interest exists in the cases when a larger number of consumers is influenced by a certain behaviour, when the violation takes place continuously, when a particular practice affects each individual consumer in a given situation, or when a particular practice affects the interests that are of paramount importance to consumers, especially life and health. Therefore, pursuant to the provisions of Article 145 of CPA, the violation of the collective interest of consumers exists in the following cases:

1. When the right of at least ten consumers in total, granted by this law is violated by the same action or in the identical manner, by the same person (number of 10 consumers is an evidence of the existence of the violation of collective interest, and not a criterion for defining the existence of the violation of collective interest) or
2. In the event of unfair commercial practices, or unfair terms in consumer contracts;
3. When the right of less than ten consumers in total is violated, if the competent authority determines that there has been a violation of the collective interest of consumers, in particular with regard to duration and frequency of the trader's actions, as well as the fact that these actions exert negative effects on every consumer in a given factual situation.

The procedure for the protection of consumers' collective interest

In the event of violation of consumers' collective interest, the procedure for the protection of consumers' collective interest is initiated.⁵² The procedure may be initiated:

1. Ex officio; or
2. At the request of a consumer organisation or associations.

If, during the market surveillance activities, the Ministry assumes that certain actions or inactions of market participants, especially the existence of unfair contract terms or unfair commercial practices, violates or threatens to violate the consumers' collective interest, the procedure for determining the violation of the consumers' collective interest is initiated and an administrative measure may be pronounced. The Ministry, *ex officio*, initiates and conducts the procedure, if, based on submitted applications, information or other available data reasonably assumes that there has been a violation of the consumers' collective interest. Initiating procedure *ex officio* is directly related to the new duties of the Ministry, prescribed by Article 126 of the CPA, which include, inter alia, monitoring the market with regard to unfair commercial practices and unfair terms in consumer contracts and giving an opinion and recommendation on the existence of unfair commercial practices and unfair terms in consumer contracts. Market monitoring indicates in which areas the administrative authority determines the existence of these phenomena and initiates the procedure *ex officio*, with the aim of eliminating them from the market.

52 For more details on the procedure, see Mihajlo Dika, Protection of collective interests and rights procedure, available at https://www.vtsrh.hr/uploads/Dokumenti/Savjetovanja/11.%20savjetovanje/00-3_Za%C5%A1tita_kolektivnih_interesa_i_prava_-_Prof._Dika.doc. Retrieved 13/06/2017; Aleksandra Maganić, Protection of collective interest and consumer rights, Conference proceedings of a Lawyers' Gathering (Zbornik Susreta Pravnika), Opatija '14., p. 203-236. Available at https://bib.irb.hr/datoteka/722566.Zatitna_kolektivnih_interesa_i_prava_potroaa.pdf. Retrieved 13/06/2017.

In addition to *ex officio*, the procedure may be initiated at the request of a consumer organisation or association. Consumer organisations and associations actively legitimised to file the request for initiating procedure to the Ministry are the ones that met legally prescribed requirements and are registered in the Register of the line ministry.

The parties in the procedure are the applicant (a registered consumer organisation) and the trader against whom the procedure has been initiated. Persons who submit the application for the determination of the violation of consumers' collective interest, providers of information or data, professionals or organisations whose analyses are used in the procedure, as well as other state bodies and organisations that cooperate with the Ministry during the procedure, do not have the status of a party. The conclusion on the initiation of the procedure, which contains the description of activities or acts that could violate consumers' collective interest, legal basis and reasons for the initiation of the procedure, as well as the invitation to all persons who are in the possession of data, documents or other relevant information to submit these information to the Ministry, is adopted. The conclusion on the initiation of the procedure is unappealable.

The trader against whom the procedure has been conducted is *notified* about the initiation of the procedure and invited to reply within 15 days. The trader's reply is called a corrective statement and it is considered as a *trader's reply* which contains the proposal of the activities the trader is willing to undertake in order to eliminate the violation of the law, along with the conditions and time limits for their realisation.

Stay of procedure. The procedure is stayed, if in their corrective statement, the trader makes a commitment not to continue or repeat the activity or act that violates the consumers' collective interest. The stay may last maximum three months and the trader's behaviour regarding the fulfilment of obligations stated in the corrective statement is monitored during the given period. Once the corrective statement is given, there are two possible scenarios: either the trader shall fulfil the obligation or not.

Termination of the procedure. If the trader fulfils the specified obligations within the stipulated time limits, the procedure shall be terminated. However, if the trader fails to fulfil or infringes specified obligations before the expiry of three months, the procedure will continue.

The procedure for protection continues by confirming (non)existence of the violation of consumers' collective interest, which is then followed by an issuance of the decision by the administrative authority. By means of this administrative act, the violation of collective interest is confirmed in that particular case and administrative measure is pronounced to the trader ordering them to:

1. Stop the violation of any provision of this law or any other regulation, by which he violates the collective interest of consumers and to refrain from such behaviour in future;
2. Remove the determined irregularity;
3. Stop the unfair commercial practice and to refrain from such or similar behaviour in future;
4. Immediately stop contracting the unfair contract terms,
5. In the case unfair commercial practice, forbid such behaviour.

The decision of the procedure for the protection of the consumers' collective interest may be appealed through an administrative procedure before the Administrative

Court.

By means of decision, the trader is given a deadline for the enforcement of the pronounced measure. The competent inspector monitors if the trader acts in accordance with the pronounced measure for protection of consumers' collective interests. The trader's conduct contrary to the pronounced measure will be sanctioned in the misdemeanour procedure.

Not only the trader's conduct contrary to the imposed measure, but also the mere violation of consumers' collective rights is considered to be a misdemeanour. If the competent authority determines that there has been a violation of the collective interest of consumers, they shall file a request for the initiation of a misdemeanour procedure before a Misdemeanour Court. CPA prescribes the fine that will be imposed on a trader, if the violation of consumers' collective interest defined in Article 145 of CPA occurs.

Initiating or conducting an administrative procedure for the protection of the collective interests, does not prevent a consumer who suffered the damage to initiate a procedure for the compensation of the damage or to initiate a procedure before the court for the cancellation or determination of the invalidity of the contract, i.e. to initiate before the court any other proceedings requesting to exercise rights.

Regarding the civil law consequences of the unlawful conduct of traders, they are determined or pronounced in individual court procedures for the protection of subjective rights.⁵³

Resolution of consumer disputes does not fall within the competence of the courts of special jurisdiction, but within the competence of the courts of general jurisdiction.

The role of inspection authorities and regulatory bodies in the procedure of collective redress

Implementation of this law and regulations adopted based on this law is performed by the ministry in charge of trade, through the work of market inspectors, as well as by the ministry in charge of tourism, through the work of tourist inspectors, in accordance with the authorisations prescribed by this law or regulations that regulate inspection surveillance in these fields.

Public administration authorities, autonomous province authorities, and local self-governments, within the scope of their work, perform surveillance of the implementation of consumer protection regulations and undertake actions prescribed by this law or other regulations.

Inspection surveillance of the implementation of this law or regulations adopted based on this law, is performed by the ministry in charge of trade, through the work of market inspectors, as well as by the ministry in charge of tourism, through the work of tourist inspectors, in accordance with the authorisations prescribed by this law or regulations that regulate inspection surveillance in these fields.

Inspection surveillance, in the context of this law, is performed ex officio and it is initiated with the inspector taking the first action in the inspection procedure.

The reports on the violation of the law, or other information, notifications, applications or requests submitted in order to perform inspection surveillance have the status of an initiative for the initiation of the procedure, while the applicant of those

⁵³ Marija Karanikic Miric, Consumer Collective Redress in Serbian Law, Annals of the Faculty of Law of the University of Zenica, p. 78.

initiatives do not have the status of a party in the procedure.

The inspector drafts the *inspection record* regarding all activities in the inspection procedure important for the determination of the factual situation.

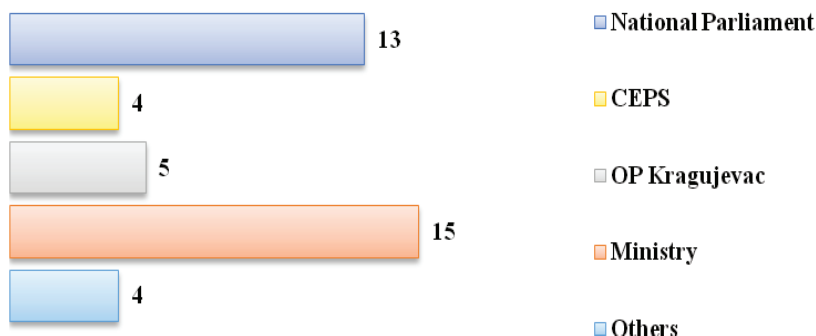
The inspector drafts an *official* note regarding all issues that are not of immediate importance for the determination of the factual situation. If the inspector determines that there has been a violation of the law, he issues and delivers a decision in accordance with his powers within 5 days starting from the day the inspection started or ended.

During the inspection period and at the place of inspection, the inspector may *issue a temporary decision* which becomes invalid with the expiry of the period stipulated for the issuing of the decision from Paragraph 5 of this law. The temporary decision is not appealable. However, the conduct of the trader contrary to the decision of the market inspector - failure to enforce the decision - entails misdemeanour liability.

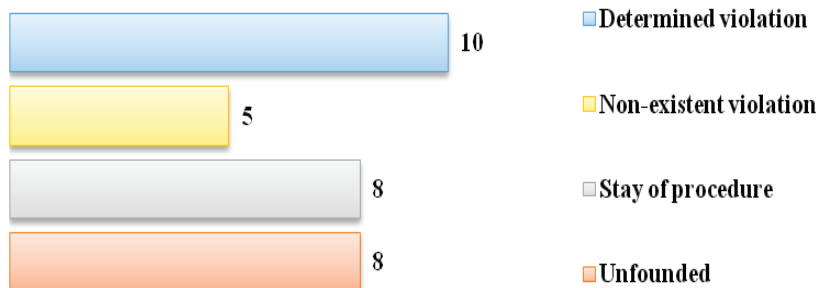
4.2. Case law and best practices in collective redress

Since the adoption of the CPA (2014), until the moment of preparation of this survey (May 2017), a total of 41 requests for the initiation of the procedure for consumer collective redress were submitted. Registered associations, based on the authorities referred to in Article 147 of the CPA submitted 26, while the Ministry ex officio initiated 15 requests.

Applicants



Results of the submitted requests



According to the official records until and including 15 May 2017, the Ministry issued the following:

- In 2014, a decision on the violation of consumers' collective interest; a decision on the non-existence of violation of consumers' collective interest and a conclusion on the stay of procedure;
- In 2015, six decisions on the violation of consumers' collective interest, three conclusions on the stay of procedure (two procedures were terminated and in one procedure the violation was determined), two decisions on the non-existence of violation of consumers' collective interest, while seven requests for initiating procedure for protection of consumers' collective interest were unfounded;
- In 2016, three decisions on the violation of consumers' collective interest, two decisions on the non-existence of violation of consumers' collective interests, four conclusions on the stay of procedure (three procedures were terminated, one procedure is in progress). One request for initiating procedure for protection of consumers' collective interest was unfounded.

Although this method of protection of consumers' collective interests a significant step forward in comparison to the previous period, there are still many deficiencies. Unlike other consumer organizations in EU member states, Serbian ones, apart from sporadic attempts, are not sufficiently stimulated to initiate procedures. First of all, insufficient capacities in the Sector for Consumer Protection in MTTT do not allow for a large number of cases, which indirectly discourages new initiatives. On the other hand, apart from the fact that consumer organizations are conducting one of their basic functions, they do not get any kind of "reward" for a job that requires great effort and preparation in order to successfully complete a procedure. In the consumer collective redress procedures before the competent courts, consumer organizations in the developed European countries receive monetary remuneration as an additional motive for successful completion of their activities. The initiator of the procedure – a consumer organization – receives certain amount of the fines imposed on traders in the procedure of protection of consumers' collective interest. In this way, the capacities of the organizations are definitely strengthened and the institute of consumer collective redress is further instigated as a whole.

Based on the presented data and interviews with the Ministry's representatives who conducted the procedures, the success at the initial stage of the implementation of this completely new procedural mechanism, which is new not only in the field of consumer protection, but also unique in the context of national legislation, can be confirmed. During the period of 3 years, consumer organizations have shown a significant interest in the implementation of this legal institute for consumer protection and an enviable level of understanding of its nature and effects. In addition, there were numerous cases when the trader accepted the requirements stipulated in the request for initiation of procedure, by adopting measures necessary to align with the subject of the request - a corrective statement, thus creating conditions for the stay of the procedure. The attitude of the competent persons in the Ministry when issuing decisions and the references to the Court of Justice of the EU (CJEU) when deciding on violations of the collective interests of consumers are particularly encouraging.

Some examples of best practices:

1. Applicant: National Parliament, Leskovac / Trader: PUC Vodovod, Leskovac
Excerpt from the Decision: It has been DETERMINED that PUC “Vodovod” with headquarters in Leskovac, 14 Pana Djukic Street, infringed consumers’ collective interest by applying different criteria when charging water consumption in residential buildings, thereby discriminating consumers; and by failing to provide the items on the invoice for services that enable consumers to check and monitor the amount of their indebtedness and get an insight into current spending in order to verify the total consumption in accordance with the quality of the provided service. The legal entity referred to in paragraph 1 of the dispositive part of this Decision has been ORDERED to terminate the violation of Article 83, paragraph 2, item 2) and Article 91, paragraph 2 of the Consumer Protection Act.
2. Applicant: CEPS, Belgrade / Trader: Telekom Srbija, Belgrade
Excerpt from the Decision: It has been DETERMINED that the Telecommunications Company “Telekom Srbija” a.d. with headquarters in Belgrade, 2 Takovska Street, infringed consumers’ collective interest by providing an unfair contractual terms in favour of the trader in Article 5 of the Contract on the use of mobile phone services of Telekom Srbija, in such a way that users or consumers give their consent in advance to Telekom Srbija to change the pricelist of its services, including the prices of services of the contract in question, other conditions for the provision of services of the same contract, or the General Terms and Conditions for the provision of services in the public mobile network of Telekom Srbija, i.e. authorises the trader to unilaterally change the content of contractual provisions, including the characteristics of goods or services. The legal entity referred to in paragraph 1 of the dispositive part of this Decision has been ORDERED to terminate without delay the contracting of unfair contractual provisions referred to in Article 45, paragraph 1, item 11, of the Consumer Protection Act.
3. Applicant: Consumer Organisation Kragujevac
/ Trader: Metro cash & carry, Beograd
Excerpt from the Decision: It has been DETERMINED that the legal entity “Metro Cash & Carry” with headquarters in Belgrade, 120, Highway to Novi Sad, in its sales facilities, as well as on its website <https://www.metro.rs/>, uses the large font to emphasize the price without VAT first, while the smaller and not easily visible font is used for the selling price of the goods, thus infringing consumers’ collective interests by performing unfair commercial practice, more precisely, misleading commercial practice referred to in Article 19, paragraph 1, point 4) of the Consumer Protection Act. The legal entity referred to in paragraph 1 of the dispositive part of this Decision has been ORDERED to terminate the misleading commercial practice referred to in Article 19, paragraph 1, item 4) of the Consumer Protection Act.
4. Applicant: Ministry TTT, Belgrade / Trader: PUC Gradska cistoca, Belgrade
Excerpt from the Decision: It has been DETERMINED that PUC “Gradska

cistoca” with headquarters in Belgrade, 4 Mije Kovacevica Street, infringed consumers’ collective interest referred to in Article 145, paragraph 1, item 1 of the Consumer Protection Act, by failing to notifying the consumers on the change of price for the service of municipal waste collection for households at least 30 days prior to the application of the changed prices, thus violating the provisions of Article 88, paragraph 1 and 3 of the Law, and therefore it is ORDERED to refrain from acting similarly in future.

5. The role of consumers organisations in collective redress

The CPA recognises consumer groups as consumer *organisations* and consumer *associations*. Consumer organisations and associations have to be established in accordance with the law regulating the establishment and the legal status of associations of citizens and have to meet the following conditions:

1. consumer protection has to be the area of their goal accomplishment;
2. they have to be non-profit and independent, especially in relation to traders and political parties;
3. a person in a managing position in an organisation or association must not be:
 - a person employed in a state-run institution or a state-run regulatory body, or in a body of the provincial or local self-government dealing with consumer protection issues;
 - a person in a managing or supervisory position with the trader or in a trader’s organisation;
 - a person in a managing position in a political party.

It is forbidden for an organisation or association to introduce themselves as such, or to misuse the words consumer organisation or association in their titles, if they fail to meet the listed conditions.

The main role of organisations and associations is to file the requests for initiating procedures for protection of consumers’ collective interest. In addition, their role is to provide or ensure information, education, counselling and legal assistance to consumers in exercising consumer rights; to receive, register and handle consumer complaints; carry out independent examinations and comparable analysis of goods and services and publish their results; and to carry out examinations and studies in the consumer protection area and publish their results.

5.1. Legal precondition for consumer organisations’ activities to represent consumer rights in collective redress

Prerequisites

Organisations and associations have to be previously registered in a special Register kept by the Ministry (27 registered organisations and associations until May 2017). To be entered in the Register, it is necessary to submit the application and relevant evidence that the organisation or association meets the conditions prescribed by CPA, particularly:

1. that consumer protection is their core activity;
2. that it has been active in the consumer protection area for at least three years;
3. that it has adequate personnel, financial and technical recourses necessary for

- consumer protection activities;
4. that representatives of the organisation or association have adequate experience, expertise and skill to perform activities in the consumer protection area;
 5. that it submits a report to the Ministry on the implemented activities and achieved results in consumer protection, including the related financial statement, which shall certify its experience in this field for at least three years.

To be entered in the Register, a consumer association must include at least three organisations.

When determining whether the conditions for entry in the Register are met, the Ministry solicits an opinion from the Consumer Council from Article 138 of this law.

Activities

The organisations and associations entered in the Register in accordance with law have the following rights:

1. to apply their programme of public interest for incentives of the Ministry;
2. to initiate a procedure for the protection of consumers' collective interest, in accordance with Article 147 of this law;
3. to represent consumer interest in court and out-of-court proceedings;
4. to represent consumer interest in consumer protection consultative bodies at national, regional and local level;
5. to participate in the work of working groups preparing regulations and strategic documents that regulate consumer rights;
6. to use National Consumer Complaints Register referred to in Article 139 of this law, in order to receive, register and handle consumer complaints;
7. to participate in the work of the Consumer Council.

5.2. Assessment of the environment for consumer organisations to deal with collective redress

The environment in which consumer organizations operate is characterized by a low level of cooperation between consumer organizations, which is one of the key factors affecting the efficiency of all their activities. However, the consumer movement in the Republic of Serbia, although continuously evolving, is still insufficiently strengthened, poorly organized, uncoordinated and, in general, inadequately supported financially. The insufficiently developed awareness of the need for joint action results in unnecessary isolation when dealing with everyday challenges of consumer protection. The fact that only 6 registered organizations and associations have used the legal possibility and filed the requests for consumer collective redress confirms the already noticed fact of their insufficient engagement in the procedures of consumer collective redress. A qualitative step forward is certainly the establishment of regional advisory centres financed by the Ministry, which give Serbian consumers the opportunity to obtain information, counselling and legal assistance. According to the official data of the Ministry for 2016, 16,394 consumers received this kind of help. Given that this type of support is a strategic commitment, consumers have recognized advisory centres as places where they can get free aid in exercising their rights.

5.3. Prerequisites for awareness raising toward consumers in collective redress

A prerequisite for raising awareness of the character and importance of collective redress is creation of a system where consumers will be aware of their rights and responsibilities, where they will have an access to information and counselling and be convinced that they are safe on the market, since the effective mechanisms for recognition of unfair business practices will be in place. This also means that effective means of legal protection should be available to consumers, as well as an adequate compensation of damage. However, in countries in transition, such as the Republic of Serbia, the market is characterized by numerous problems that are an obstacle to its smooth functioning. Such problems include the low level of consumer awareness, inability to understand the contractual provisions, especially in the field of telecommunications, financial services, energy, followed by inadequate or non-existent price and additional costs labelling, incomplete product labelling, lack of instructions and warnings and the lack of instructions in Serbian, information asymmetry, unclear guarantee conditions, lack of independent consumer information sources, unfair commercial practices and false advertising, aggressive selling methods. This leads to the lack of possibility to protect consumers' collective interests. Therefore, continuous systemic informing of consumers is necessary. Once consumers become aware of their legal rights and opportunities, conditions for the consistent application of positive regulations in this area will be created as well.

6. Recommendations and conclusions

Conclusions

In the Republic of Serbia, the institute of collective redress is regulated by the 2014 Consumer Protection Act (CPA). The protection of consumers' collective interests is entrusted to administrative authorities and exercised in administrative proceedings instead of civil proceedings as it used to be set forth in the Consumer Protection Act of 2010. Thus, the national legislation envisages a solution that departs from the legal solution applicable in most European countries, which have envisaged various civil law instruments. In comparative law, the consumer collective redress is, as a rule, exercised in civil proceedings.

Under the 2014 Consumer Protection Act (CPA), the competent administrative body is authorised to initiate an administrative action, by means of which initiation of proceedings has been limited to a single entity. The Ministry of Trade, Tourism and Telecommunications, which is in charge of consumer protection affairs, has the authority to implement the procedure for collective redress, according to the rules of general administrative procedure, unless specifically stipulated otherwise. The Ministry initiates this procedure either *ex officio* or at the request of the authorized person pursuant to the CPA. The Ministry of Trade assesses whether there has been a violation of the collective interest and initiates procedure based on the assessment. In practice, this means that consumers' collective protection would depend on the discretionary decisions of the Ministry of Trade officials. Thus, consumer organizations would have to submit complaints to the market inspectorate, which then decides on the merits of the claim and assesses the trader's behaviour accordingly. Once the Ministry determines violation

of consumers' collective interest, they file the request for initiation of misdemeanour procedure against a trader or traders' association. An administrative dispute may be initiated against the decision issued in the consumers' collective redress proceedings.

A more efficient protection of consumers' collective interests would be achieved by envisaging the provision which would entitle a greater number of authorized entities to initiate collective redress proceedings, which is the case in comparative law when it comes to certain civil law instruments for exercising collective redress in civil proceedings.

The instigation or participation in collective redress proceedings does not preclude consumers who have sustained some damage or harm from filing individual complaints with the competent civil court and seek damages, to initiate a proceeding for rescission or establishing the nullity of contract, or to initiate any other court proceeding in pursuit of exercising their consumer rights.

The Recommendation of the European Commission of 2013 (2013/396/EU) makes a clear distinction between *injunctive collective redress* and *compensatory collective redress*. The Recommendation is not limited to the consumer context, as it provides a horizontal application of the common principles of collective redress in case of violation of the rights guaranteed by European Union law, particularly in the field of consumer protection, competition, investment, environment, personal data, and financial services.

The horizontal rules on collective redress (*recours collectif*) do not exist in Serbian legislation. After the Constitutional Court found (in mid 2013) that the legal rules on special civil proceedings for the protection of citizens' collective rights and interests were unconstitutional, the Serbian legislator made no further effort to regulate this matter, even on the occasions when the Civil Procedure Act was amended and supplemented for some other purpose.

In Serbia, there are no rules on sectoral collective redress in court proceedings. It is necessary to adopt rules on sectoral collective redress in court proceedings.

Recommendations

- Continue with further harmonization of national legislation with international standards, and EU law in particular
- Restore court jurisdiction in consumers' collective redress proceedings
- Increase the capacities, expertise and role of the non-governmental sector in the field of consumer protection
- Continue with further consumer education and the implementation of the provision of the Law related to the inclusion of consumer protection topics into the educational programmes of primary and secondary schools.
- Promote the protection of consumer rights and interests through institutions active at the local level in order to educate, inform, and counsel consumers and enable them to participate in the decision-making process
- Continue with the professional development of ministries employees, inspectorates, as well as out-of-court and court authorities, consumer organizations, as well as other market participants.
- Since the Constitutional Court of the Republic of Serbia declared provisions regulating this procedure unconstitutional, it is necessary to re-establish the legal

framework for collective redress as soon as possible. Having in mind that the Republic of Serbia has accepted the obligation to harmonise its legislation with EU legislation and to ensure its consistent implementations, the solutions contained in the Recommendation on common principles for injunctive and compensatory collective redress mechanisms are a good signpost in the normative shaping of national collective redress mechanisms.

- In case of preventive protection and injunctive collective actions, the Recommendation refers to the rules of summary proceedings – where appropriate to apply them, and points to the need of establishing appropriate sanctions (penalties, fines, etc.) against the trader who failed to ensure the effective compliance with the injunctive order.

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PART THREE
COLLECTIVE REDRESS
IN CONSUMER PROTECTION
IN SOUTH EAST EUROPE



COLLECTIVE REDRESS IN CONSUMER PROTECTION IN SOUTH EAST EUROPE

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Executive summary

In recent decade, there have been significant developments in the European Union in the field of collective consumer redress. The European Commission tending to respect the diversity of legal traditions of EU Member States in collective redress on one side and to introduce coherence and balance at EU level on the other with the aim to improve access to justice for the citizens undertook wide spectrum of measures. The European Union enacted numerous measures in the consumer protection field aimed at defending consumers' collective rights.

In March 2007, the Directorate General for Health and Consumers of the European Commission requested preparation of a Study on the Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union. The objectives of this study were to evaluate the effectiveness and efficiency of existing collective redress mechanisms in the European Union and to analyse whether the differing collective redress approaches result in actual obstacles to trade between Member States. At the same time the European Commission adopted the Consumer Policy Strategy 2007-2013 and announced that it would consider introducing collective redress mechanisms for consumers in the EU. In November 2008, the European Commission published the Green Paper on Consumer Collective Redress with the purpose to assess the current state of redress mechanisms, in particular in cases where many consumers are likely to be affected by the same legal infringement, and to provide options to close any gaps to effective redress identified in such cases. In the period February-April 2011 the European Commission launched a horizontal public consultation "Towards a more coherent European approach to collective redress" by inviting citizens, organisations and public authorities to submit their comments, opinions, critics and suggestions. The aim of the consultation was to identify common legal principles for future Commission initiative on collective redress and how these principles could fit into the EU legal system and into the legal orders of the 27 EU Member States. On 22 May 2012, the new European Consumer Agenda was adopted replacing the Consumer Policy Strategy 2007-2013. One of the aims of the European Consumer Agenda was to increase the level of enforcement and to secure the redress of consumers. In June 2013, the Commission adopted the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law with the aim to recommend Member States to have collective redress mechanisms in place and to ensure effective access to justice. The Recommendation set out a series of common, non-binding principles for collective redress mechanisms in the Member States and aims to ensure a coherent horizontal approach to collective redress in the European Union without harmonising Member States' systems. Four years following the adoption of the Recommendation, as it was prescribed in the Recommendation text, the European Commission is currently assessing how it is being implemented in practice in order to ensure that the objectives are fully met. The assessment should provide an overview of collective redress mechanisms across the EU and evaluate the Recommendation's impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market. The Survey focuses exclusively on practical experience with specific collective redress cases. The EU's policy on consumer

protection has gained additional momentum under Directive 2013/11/EU on ADR for consumer disputes and Directive 2014/14/EU on damages for breaches of competition law.

Collective redress entails several areas of consumer protection: consumer rights, consumer credit, package travel, unfair commercial practice, unfair terms in consumer contracts, sale of consumer goods and associated guarantees. Various European measures in the consumer protection field include, as part of their enforcement provisions, an obligation on Member States to provide in their implementing legislation for collective action to be taken by consumer representative bodies to defend the collective rights of consumers in specified circumstances.

South East European (SEE) countries covered by this paper (Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia) in line with their EU accession priorities and duties under Stabilisation and Association Agreements have to harmonize their national laws with the relevant EU *acquis* for consumer protection (Chapter 28: Health and Consumer). In these countries only minimal compliance is achieved. Most of the countries in line with the minimal harmonisation principle of the Directive 2009/22/EC on injunctions for the protection of consumers' interests have adopted it into their national legal systems, some of them even providing higher level of consumer protection like Bosnia and Herzegovina, some of the countries like Macedonia are still facing with the existing inconsistencies in the transposition, while the others like Kosovo have not adopted the Directive at all. Only Montenegro from SEE countries have partially aligned with the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. The other countries are still expected to undertake the transposition process. Regarding the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union it is not adopted in most of SEE countries, it is indirectly transposed in the Law on Protection of Competition of Serbia and transposed in one provision of the Law on Protection of Competition and the Tort Law of Macedonia. Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law constitutes non-binding "soft law" given the diversity of national legal systems of EU Member States and very broad scope of areas covered by collective redress. The intention of the Recommendation is not to unify national legal systems on collective redress, but to establish a European horizontal legal framework for the development of national collective redress mechanisms. As the Recommendation has not corresponding effect on the national legislation of EU accession countries where still horizontal regulatory framework for collective redress is not established, SEE countries have not aligned with this Recommendation.

It can be noted that SEE countries have introduced rudimentary collective redress mechanisms, with modest enforcement of collective redress and case law. Compared to the most European countries where horizontal regulatory approach for collective redress is introduced, most SEE countries adopted sectoral approach by regulating collective redress in specific sectors and by separate laws (consumer protection, anti-

discrimination, environment protection). Only in Serbia there are no rules on sectoral collective redress in civil proceedings. Under the Consumer Protection Law in Serbia only an administrative action for procedure for collective consumer protection can be initiated by a single competent administrative body (the Ministry of Trade, Technology and Telecommunications).

The dual collective redress mechanism introduced with the Commission Recommendation 2013/396/EU is a new approach providing for both compensatory and injunctive collective redress. In most of SEE countries the laws do not recognize compensatory but only injunctive collective redress in consumer protection. Albania as an exception with its Code of Civil Procedure provides only group action under which the action can be filed jointly by many plaintiffs or against many defendants. However, under special Albanian laws injunctive and compensatory *quasi*-collective mechanisms are possible in the areas such as: protection against discrimination, consumer protection, protection against unfair competition, environmental protection etc.

In view of the existing consumer redress mechanisms in SEE countries, the following stakeholders are in charge of providing consumer protection: the Governments, the National Assemblies, the National Councils for Consumer Protection, the ministries in charge of consumer protection and other ministries responsible for implementing the consumer protection policy, regulatory bodies, market surveillance authorities and other administrative bodies with competences in the area of consumer protection, competition authorities, local self-government units, consumer protection organizations, commercial and representative associations of traders (business, crafts, etc.).

Collective redress mechanisms of consumers for violation of rights cover the fields of consumer protection, competition protection, product safety, securities market, environmental protection, personal data protection, protection from discrimination, provision of financial services, investments, etc. SEE countries differ in the areas where collective redress may apply. In Kosovo, collective redress is guaranteed in the fields of consumer protection, competition, labour, environment protection, protection from discrimination and civil proceedings. In Serbia, collective consumer protection is possible for protection of consumer rights, competition rights, responsibility for product safety, environmental protection, food safety, personal data protection, protection from discrimination, protection of patients' rights, abuses in the securities market, provision of financial services, investments etc. In Macedonia, collective redress is possible only for protection of the rights of consumers, protection of the rights to a healthy environment and protection of the rights to equality (protection against discrimination). In Albania, collective redress is provided in areas such as protection from discrimination, consumer protection, protection against unfair competition, environmental protection. In Bosnia and Herzegovina collective redress is regulated in the areas of consumer protection, protection against discrimination, competition protection, environment protection. Last but not least in Montenegro collective redress is regulated for consumer protection and prevention and fight against discrimination.

In most of SEE countries in line with the Commission Recommendation 2013/396/EU, collective redress including the rights in the field of consumer protection, protection of competition, liability for damage from the product, abuses in the securities market, environmental protection, personal data protection, protection from discrimination,

provision of financial services, investments etc. court and administrative protection is allowed. Contrary in Montenegro the jurisdiction for collective consumer protection is to the courts under the rules of civil procedure, in Serbia only administrative but not court protection of collective interests is possible (the anti-discriminatory interests still enjoy the right to court protection) and in Kosovo collective redress mechanism is regulated under the Law on Contested Procedure which in civil cases enables joint lawsuits to be filed by many claimants or against many respondents.

Public authorities, courts, consumers, consumer protection organisations and other parties in SEE countries are not sufficiently aware about collective redress mechanisms and their benefits for consumer protection and initiating action for ending of infringements of consumer rights. More vigorous enforcement tools and procedures must be made available to make consumer redress effective. A prerequisite for raising consumers' awareness on collective redress is by their access to information and counselling, effective means of legal protection available to consumers, adequate compensation of damage and creation of a system where consumers are aware of their rights and responsibilities.

Taking into consideration various designated stakeholders in collective redress in each SEE country, there is a need of their mutual coordination and cooperation in order to develop consumer protection system and policies. In most of SEE countries this cooperation is vital to take place between the line ministry responsible for consumer protection, market surveillance bodies, regulatory bodies, Ombudsman and non-governmental consumer protection organizations. Through cooperation and partnership between the national stakeholders and their joint work on consumer information, education and advise, public awareness and knowledge on consumer protection and their rights on collective redress will be increased.

In the practice so far the national consumer protection organisations in SEE countries noted various obstacles for adequate enforcement of collective redress as part of consumer protection laws: lack of adequate legal basis for consumer protection organizations to engage in collective redress as qualified entities, lack of appropriate collective redress practice in the consumer protection organisations and the courts, lack of individual opt-in to the collective action by each consumer, lack of court actions due to financial implications on consumers, citizens, and consumer protection organisations, lack of awareness of consumers and citizens for their rights for collective redress. Existing collective redress mechanisms do not provide sufficient or effective access to justice for a wide range of citizens, particularly but not exclusively consumers, small businesses, employees wishing to bring collective claims. The apparent lack of financial resources was a common problem reported, not only for public entities, but also for the consumer organizations to be sustainable and financially independent to provide collective protection of consumers' interest, to cover extremely high proceeding costs and to have financial potential in case they lose a collective dispute. In addition, in all SEE countries there is a need of adequate training of the personnel of responsible institutions and judges being directly involved in the collective redress who are obviously lacking experience.

By putting in practice the national collective redress mechanisms, effective access to justice to all consumers, the principle of rule of law will be secured and appropriate procedural guarantees to avoid abusive litigation will be ensured.

1. National compliance with the relevant EU acquis

Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia (hereinafter SEE countries) in line with their EU accession priorities and duties under Stabilisation and Association Agreements have to harmonize their national laws with the relevant EU acquis for consumer protection (Chapter 28: Health and Consumer). In these countries only minimal compliance is achieved so far.

SEE countries have introduced rudimentary collective redress mechanisms, with modest enforcement of collective redress and case law. Compared to the most European countries where horizontal regulatory approach for collective redress is introduced, most SEE countries adopted sectoral approach by regulating collective redress in specific sectors and by separate laws (consumer protection, anti-discrimination, environment protection).

1.1. Directive 2009/22/EC of the European Parliament and of the Council of the 23rd April 2009 on injunctions for the protection of the consumers' interests

Directive 98/27/EC of 19 May 1998 on injunctions¹ for the protection of consumers' interests introduced a court or administrative procedure enabling consumer organisations and/or public authorities to seek an injunction that infringes a number of EU rules on consumer protection. Directive 98/27/EC has been amended several times and finally codified by Directive 2009/22/EC which is currently in force.

The Directive 2009/22/EC on injunctions for the protection of consumers' interests² ensures the defence of collective interests of consumers in the internal market. It provides that all Member States have in place injunction procedures for stopping infringements of EU consumer rights.³ The Directive harmonises injunction procedure across the EU. One of the achievements of the Directive is allowing consumer representative bodies and/or independent public bodies from Member States to seek an injunction in another Member State where the infringement originated. These entities can bring an injunction for infringements which harm collective consumer interests on: consumer rights; consumer credit; package travel; unfair commercial practices; unfair terms in consumer contracts; sale of consumer goods and associated guarantees.

Although there have been injunctions in a very wide range of economic sectors, the majority of injunctive actions are concentrated in only a limited number of sectors: telecommunications, banking and investments, tourism and package travel and other sectors such as distance selling, insurance, energy, non-food consumer goods and passenger transport. The list of designated qualified entities in Member States to seek

1 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0022:EN:NOT>.

2 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0022>.

3 For further reading see the literature on Directive on Injunctions: Hodges, Christopher, *The Reform of Class and Representative Actions in European Legal Systems, A New Framework for Collective Redress in Europe*, Oxford: Hart Publishing, 2008, pp. 93-115; Cafaggi, Fabrizio and Miklitz, Hans-Wolfgang (eds.), *New Frontiers of Consumer Protection – The Interplay between Private and Public Enforcement*, Cambridge-Antwerp-Portland: Intersentia; Cafaggi, Fabrizio, Miklitz, Hans-Wolfgang, 2008, *Collective Enforcement of Consumer Law: A Framework for a Comparative Assessment*, *European Review of Private Law* 16, 2009, pp. 391-425; Wilman, Folkert, *Private Enforcement of EU Law Before National Courts: The EU Legislative Framework*, Edward Elgar Publishing, 2015, pp. 255-303; Silvestri, Elisabetta, *Group Actions À la Mode Européenne: A Kinder, Gentler Class Action for Europe?* in Picker, Colin B and Seidman Guy I. 2015, *The Dynamism of Civil Procedure - Global Trends and Developments*, Springer, pp. 203-215.

an injunction includes a total of 313 qualified entities. This number differs from one to another Member State. There are Member States that have designated single qualified entity typically a public authority in charge of consumer protection (Ireland, Latvia, Lithuania, The Netherlands, Romania and Sweden) while others more than 70 (Germany and Greece) by designating several qualified entities usually as a mix of public authorities responsible for consumer affairs at local, regional and national level and representative consumer organisations. The Commission while assessing the application of this Directive noted important disparities in its level of use and effectiveness among Member States such are: the high costs, the length, the complexity of the proceedings and the relatively limited effects of the rulings on injunctions and the difficulty of enforcing them.⁴

SEE countries in line with the minimal harmonisation principle of the Directive 2009/22/EC on injunctions for the protection of consumers' interests have adopted it into their national legal systems, some of them even providing higher level of consumer protection like Bosnia and Herzegovina, Montenegro being completely aligned with the Directive, some of the countries like Macedonia are still facing with the existing inconsistencies in the transposition, while the others like Kosovo have not adopted the Directive at all.

The Directive has been transposed in Article 55 of the Law on Consumer Protection of *Albania* by providing a definition of the infringement as an act that is in contravention of the provisions of this Law and which harms their collective interests. As qualified entities to seek injunctions and protect collective consumer interests are: the Responsible Consumer Protection Structure and the Consumer Associations, as public administration body and private legal entities responsible for protection of consumers' rights and interests.

In *Macedonia*, the amended Law on Consumer Protection as of 2011 contains a Part III-b titled "Consumer Collective Redress". The provisions are not clear, with imprecise formulations and they indicate contradiction between each other. The provisions stipulate that the authorized bodies may submit a proposal to initiate a proceeding for actions contrary to the provisions of the Law on Consumer Protection and the Law on Obligations but not directly to initiate a proceeding which is not in accordance with the Directive. The transposition of Directive is not complete referring its requirement that national legislation provide for competent judicial or administrative bodies to act. Article 31-h of the Law on Consumer Protection stipulates that the authorized body may propose to the competent inspectorate to initiate a proceeding before a competent court thereby introducing a two-stage procedure which disable the authorized body directly to initiate procedure but it goes through competent inspectors who may put a claim directly to the court.⁵

Montenegro has incorporated key standards of protection of collective consumers' interests in its Consumer Protection Law from 2014 as a responsibility arising from EU accession process and defined in Montenegro's Programme of Accession to the European Union 2014-2018.

4 Report from the Commission to the European Parliament and the Council concerning the application of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interest /* COM/2012/0635 final, pp. 5-6,
<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434096245408&uri=CELEX:52012DC0635>.

5 Dabović Anastasovska, Jadranka and Lončar Velkova, Marijana, Collective redress in consumer protection in Macedonia (to be published).

Law on Consumer Protection of *Bosnia and Herzegovina* in art. 120 and the Law on Consumer Protection of the Republic of Srpska in art. 134 provide that the competent court will decide on collective interests according to the requirement of Article 2 of Directive 2009/27/EC. In line with the requirement of the Directive for publication of the decisions (complete or their parts) for removal of any consequences from the infringement, the national laws in Bosnia and Herzegovina are harmonised through stipulating provisions in the Law on Consumer Protection of the Federation of Bosnia and Herzegovina, the Law on Consumer Protection of the Republic of Srpska, the Civil Procedure Code of the Federation of Bosnia and Herzegovina and Civil Procedure Code of the Republic of Srpska. Regarding the qualified entities to initiate injunction proceeding, the Law on Consumer Protection of Bosnia and Herzegovina and the Law on Consumer Protection of the Republic of Srpska are harmonised with the Directive by providing some of the authorised organisations and independent public bodies like the Ombudsman for consumer protection to protect collective consumer interests.

In *Serbia*, the Consumer Protection Law from 2014 in line with the requirements from the Directive stipulates the Ministry of *Trade, Tourism and Telecommunications* as responsible for consumer protection to be qualified entity to initiate and conduct the injunction proceeding for collective consumer protection under the rules of general administrative procedure.

1.2. Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes

Alternative dispute resolution (ADR) offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders. In order for consumers to exploit fully the potential of the internal market, ADR should be available for all types of domestic and cross-border disputes covered by the Directive 2013/11/EU on alternative dispute resolution for consumer disputes⁶. ADR procedures should comply with consistent quality requirements that apply throughout the Union, and consumers and traders should be aware of the existence of such procedures. Due to increased cross-border trade and movement of persons, it is also important that ADR entities handle cross-border disputes effectively.

The purpose of this Directive is to facilitate the out-of-court resolution of consumer disputes thus enabling consumers to submit their complaints, on a voluntary basis, to entities offering independent, impartial, transparent, effective, fast and fair dispute resolution procedures, without prejudice to legal action.

ADR includes procedures such as mediation, conciliation or arbitration, offered by public ombudsmen, complaints boards or private entities. When these procedures are carried out online, they are called Online Dispute Resolution (ODR).

The Directive objective is to introduce a minimum set of criteria for the ADR bodies as competent to resolve almost any type of consumer to trader agreement breach dispute and thereby to contribute through the achievement of a high level of consumer protection and without restricting consumers' access to the courts, to the proper

⁶ 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, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0011>.

functioning of the internal market. However, there are several types of dispute that are not covered by this Directive (non-economic services of general interests, health care services, further or higher education).

Directive obliges Member States to establish national lists of bodies offering alternative dispute resolution (ADR) procedures and imposes information obligations on EU traders and online marketplaces to facilitate access to these ADR methods.

SEE countries are still expected to undertake the transposition process and to align with the Directive 2013/11/EU on alternative dispute resolution for consumer disputes. *Montenegro* through the Law on Consumer Protection have partially aligned with this Directive. The Law on Consumer Protection in art. 133-153 stipulates alternative dispute resolution procedure. The Committee for Out-of-Court Settlement of Consumer Disputes at the Montenegrin Chamber of Commerce is organized according to the principles of the Directive. The harmonisation with the Directive is completed regarding the principles of efficiency and transparency, independence, impartiality and expertise of the members of this Committee to resolve out-of-court consumer disputes. *Serbia* through the Law on Consumer Protection have aligned with this Directive. The Law on Consumer Protection in art. 141-142 stipulates the out-of-court resolution of consumer disputes. The Minister of Trade, Tourism, and Telecommunications regulates the conditions for out-of-court consumer dispute resolution and especially criteria for operation of the bodies competent for the out-of-court resolution of consumer disputes due to guarantee the process of resolving consumer disputes is independent, impartial, transparent, effective, fast and fair. Hence initiating and running an out-of-court consumer dispute resolution procedure in Serbia does not exclude or influence exercising the right to court protection.

1.3. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Directive 2014/104/EU for infringements of the competition law provisions sets out rules to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.⁷

This Directive is not adopted in most of SEE countries. The Directive does not impose an obligation on EU Member States to introduce any mechanisms for collective protection of rights.⁸

⁷ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, Article 1 paragraph 1 and 2, http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=uriserv%3A0J.L_.2014.349.01.0001.01.ENG.

⁸ See: Count 13 of the Preamble to Directive 2014/104/EC (26/11/2014).

Instead of direct transposition in the Law on Consumer Protection of *Serbia*, it is indirectly transposed in the Law on Protection of Competition of *Serbia*⁹. The claim for damages that have been caused by acts and actions which represent infringements of competition pursuant to this law, determined by the final decision of the Commission, could be made in a lawsuit before the competent court in civil proceeding.¹⁰ In *Macedonia* the Law on Protection of Competition in art. 58 determines that if damage is caused by means of any act that constitutes a violation in accordance with the provisions of this Law, the person who sustains damage may request compensation in accordance with the Law. Despite this provision and several amendments of this Law, still harmonization with the Directive is not achieved. On the other hand, the Law on Obligations of *Macedonia* regulates in detail the compensation for damages which refers to its compliance with the Directive. In *Montenegro* as a country carrying out accession *negotiations* with the EU, still do not have projections nor concrete timeframe for transposition of this Directive.

1.4. Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law

Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms¹¹ provides horizontal application of the common principles of collective redress in the fields of consumer protection, competition, investment, environment, personal data and financial services. This Recommendation puts forward a set of principles for judicial and out-of-court collective redress that should be common across the Union, while respecting the different legal traditions of the Member States. The Recommendation addresses both compensatory and injunctive collective redress.¹²

The Recommendation constitutes non-binding “soft law” given the diversity of national legal systems of EU Member States and very broad scope of areas covered by collective redress. The intention of the Recommendation is not to unify national legal systems on collective redress, but to establish a European horizontal legal framework for the development of national collective redress mechanisms.

The Recommendation refers to injunctive and compensatory procedures and provides for minimum standards: a) to be able to allow for efficient resolution of a large number of individual claims for damages, thereby enhancing procedural economy; b) to be able to achieve an accurate and fair outcome of the proceedings within a reasonable timeframe, whereby guaranteeing the rights of all entities involved in the proceeding; c) to provide strong protective measures against malicious prosecution; d) to avoid creating any financial incentives to put forward speculative damages.¹³

9 Official Gazette of the Republic of Serbia 51/2009 and 95/2013.

10 Art. 73 Law on Protection of Competition of Serbia.

11 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396>.

12 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396>.

13 For the development of collective redress in the European Union, see more Efremova, Veronika, Towards introduction of collective redress mechanism in the European Union: pros and cons in Strengthening consumer protection in Serbia-Liber amicorum Svetislav Taboroši, edited by Prof. dr Thierry Bourgoignie Doc. dr Tatjana Jovanić, Law Faculty at the University of Belgrade, Belgrade, 2013, pp. 298-309.

As the Recommendation has not corresponding effect on the national legislation of EU accession countries where still horizontal regulatory framework for collective redress is not established, SEE countries have not aligned with this Recommendation. Despite this, some of SEE countries partially follow parts of the Recommendation.

For an example in *Macedonia* separate proceeding for collective redress is not introduced but the Law on Civil Procedure¹⁴ stipulates the possibility for co-litigation, intervention and joinder of litigation. In addition, some specific procedures for protection of specific rights and interests are regulated with the Law on Consumer Protection¹⁵, the Law against Unfair Competition,¹⁶ the Law on Environment¹⁷ (for environmental damage) and in the Law on Prevention and Protection against Discrimination¹⁸ (class action for protection against discrimination).

In *Montenegro*, collective redress against discrimination where protection of collective interests is guaranteed, provides for possibility of compensatory and injunctive actions which is in accordance with the standards from Part V of the Recommendation. As well the Law on Consumer Protection of Montenegro is in line with Part III of the Recommendation by regulating standing to bring a collective redress, verification of the admissibility of a collective lawsuit, informing the public about the initiated and completed procedures, reimbursement of legal costs of the winning party and rules of cross-border cases. The same Law is aligned with Part VI of the Recommendation concerning the establishment of the Registry of Collective Redress Actions for the Protection of Consumer Rights.

In *Bosnia and Herzegovina*, the entity civil procedure codes of Bosnia and Herzegovina and of Republic of Srpska are harmonized with the Recommendation related to the introduced horizontal approach but are still lacking the possibility for compensation in such actions. They contain one “self-excluding” clause - provisions on disputes for protection of collective rights and interest apply only if no other special law, offering a possibility of action for protection of collective interests. Compensation in collective redress is possible in line with the laws on consumer protection, but not a single procedural matter related to collective redress (only the principle of urgency) is regulated.¹⁹

In *Albania*, also there is partial compliance with some provisions from the Recommendation. Referring to the areas for collective redress listed in the Preamble of the Recommendation (consumer protection, competition, environment protection, protection of personal data, financial services legislation and investor protection), the Albanian legislation provides for *quasi* collective mechanisms in consumer protection, competition protection, environmental protection and protection against discrimination.

14 Law on Civil Procedure, Official Gazette of the Republic of Macedonia, No. 79/2005, 110/2008, 83/2009, 116/2010, 124/2015).

15 Law on Consumer Protection, Official Gazette of the Republic of Macedonia, No. 6p.38/2004, 77/2007, 103/2008, 24/2011, 164/2013, 97/2015 and 152/2015.

16 Law against Unfair Competition, Official Gazette of the Republic of Macedonia, No. 80/99.

17 Law on Environment, Official Gazette of the Republic of Macedonia, No. 53/2005; 81/2005; 24/2007; 159/2008; 83/2009; 48/2010; 124/2010; 51/2011; 123/2012; 93/2013; 187/2013; 42/2014; 44/2015; 129/2015 and 192/2015.

18 Law on Prevention and Protection against Discrimination, Official Gazette of the Republic of Macedonia, No. 50/2010, 44/2014 and 150/2015.

19 Povelakić, Meliha and Meškić, Zlatan, Collective redress in consumer protection in Bosnia and Herzegovina (to be published).

Considering the authorized bodies for representing collective interests of consumers under the Recommendation, the Law on Consumer Protection of Albania explicitly recognizes this right to consumer associations no matter they do not fully comply with the criteria set out in the Recommendation.

2. Legal framework for collective redress

Compared to the most European countries where horizontal regulatory approach for collective redress is introduced, most SEE countries adopted sectoral approach by regulating collective redress in specific sectors and by separate laws (consumer protection, anti-discrimination, environment protection).

In *Macedonia*, general legal framework for collective redress does not exist but special procedural laws in the field of civil, administrative and criminal law regulate procedure for protection of certain rights. The basis for collective redress are introduced in the Law on Consumer Protection²⁰, but the law as such has many inconsistencies in its provisions.

Kosovo is far away from being in compliance with EU acquis despite the fact that specific laws provide for injunctive collective redress mechanisms but lack detailed determination of the roles and responsibilities of consumer organizations for implementing these mechanisms.

Serbia has a specific and unique setting compared to the other SEE countries regulating collective consumer protection with the Consumer Protection Law from 2014²¹. Under this law the collective consumer protection is entrusted to administrative authorities and exercised only in administrative proceedings. In this way Serbia differs from the most European countries where administrative and civil law instruments for collective redress in civil proceedings are provided.

In *Montenegro*, collective redress mechanisms are present only in two fields of law (consumer protection and antidiscrimination). The national regulatory framework for collective consumer protection in Montenegro was introduced with the Law on Consumer protection from 2014²². The procedure of collective protection of consumers' interests in Montenegro is regulated in a uniform manner.

The *Albanian* legislation includes an injunctive collective redress mechanism applicable in consumer protection cases regulated with the Law on Consumer Protection from 2008²³ (currently being under amendment procedure due to comply with the relevant EU Directives, the process launched in July 2016). The actual Albanian procedural law does not provide for a general injunctive and compensatory collective redress mechanism according to the Commission Recommendation 2013/396/EU. Only the Albanian Code of Civil Procedure in art. 161 provides for group lawsuit, according to which the lawsuit can be filed jointly by many claimants or against many of the respondents (joint litigants). Special so called quasi collective and compensatory redress

20 Law on Consumer Protection, Official Gazette of the Republic of Macedonia, No. 38/04, 77/07, 103/08, 24/11, 164/13, 97/15 and 152/15.

21 Consumer Protection Act, Official Gazette of the Republic of Serbia, no. 62/2014.

22 Consumer Protection Law, Official Gazette of Montenegro, No. 002/14 (14/01/2014), 006/14 (04/02/2014) and 043/15 (31/07/2015).

23 Law no. 9902 on Consumer Protection, dated 17.04.2008.

mechanisms are regulated with special Albanian laws.

Bosnia and Herzegovina having into consideration its complex and specific setting as a state still faces the responsibility to harmonise with the EU Law in the field of collective redress. In the both entities Republic of Srpska and the Federation of Bosnia and Herzegovina special civil procedures for the protection of collective interests and rights are introduced by the Civil Procedure Codes (in 2013²⁴ and 2015²⁵). In the District Brčko only sectoral approach to collective redress mechanism is provided. Civil Procedure Code of Brčko District do not stipulate any provision on special collective redress procedures.

2.1. Applicable areas for collective redress

Collective redress mechanisms of consumers for violation of rights cover the fields of consumer protection, competition protection, product safety, securities market, environmental protection, personal data protection, protection from discrimination, provision of financial services, investments, etc.

SEE countries differ in the areas where collective redress may apply. In Kosovo, collective redress is guaranteed in the fields of consumer protection, competition, labour, environment protection, protection from discrimination and civil proceedings. Collective consumer protection in *Serbia* is provided for protection of consumer rights, competition rights, responsibility for product safety, environmental protection, food safety, personal data protection, protection from discrimination, protection of patients' rights, abuses in the securities market, provision of financial services, investments etc. Collective redress for protection of the rights of consumers, protection of the rights to a healthy environment and protection of the rights to equality (protection against discrimination) is stipulated in *Macedonia*. *Albanian* legislators opted for collective redress in areas such as protection from discrimination, consumer protection, protection against unfair competition, environmental protection. *Bosnia and Herzegovina* determined the areas of consumer protection, protection against discrimination, competition protection and environment protection. Last but not least in *Montenegro* collective redress is regulated only in two sectors: consumer protection and prevention and fight against discrimination.

2.2. Applicable procedures for collective redress

Most of SEE countries regulate the procedure of collective redress as a special civil procedure with applicable Civil Procedure Codes (Albania, Bosnia and Herzegovina, Macedonia, Montenegro) and Law on Contested Procedure in Kosovo, while Serbia differs by providing only for administrative consumer protection before a competent administrative body and under the Law on Consumer Protection.

Collective redress mechanism in consumer protection in *Montenegro* is established by the Consumer Protection Law in art. 118 par. 2 for cases in which the defendant “in any way infringes the rights of consumers established by this or other law, thereby violating the collective interests of consumers”. For these cases, the competent

24 Law Amending the Law on Civil Procedure of Republic of Srpska, Official Gazette of Republic of Srpska, No. 72/11, 49/13.

25 Law Amending and Supplementing the Law on Civil Procedure of the Federation of Bosnia and Herzegovina, Official Gazette of the Federation of Bosnia and Herzegovina, No.98/15 from 23.12.2015.

court shall apply the provisions of the Civil Procedure Code²⁶ and of the Law on enforcement and security.²⁷ According to the Consumer Protection Law an action for the protection of collective interests of consumers may be brought against unfair contractual terms, commercial practices or any other infringements of consumers' rights established by this or other laws, which at the same time represent infringements of their collective interests. Authorised entities to bring an action for collective consumer protection are the Ministry of economy as being responsible for consumer protection, other ministries and public administration bodies dealing with protection of consumer rights, consumer organizations, commercial and representative associations of traders.

Entity civil procedure codes of the Federation of *Bosnia and Herzegovina* and of the Republic of Srpska, regulate the procedure of collective redress as a special civil procedure. Active legitimacy under these codes for bringing claim is given to the entity (associations, bodies, agencies, etc.) responsible for protection of individual rights and interests, under the condition they fulfil the requirements and conditions under these laws. Regarding the consumer disputes, the entity civil procedure codes stipulate a special competence related to the consumer protection disputes under which consumer is entitled to bring an action before the court where the defendant has temporary or permanent residence. Before the beginning or during the collective redress, the court may, upon the proposal of claimant, order injunctive measures provided in the civil procedure code.

Under the Law on Consumer Protection of Kosovo collective redress proceeding may be initiated by the representative of the institution responsible for the field of consumer protection, consumer associations and business associations. These entities may ask the market inspectorate or other inspection bodies to initiate proceedings for the termination of abuses that infringe the provisions from the law.

The *Macedonian* laws do not directly provide mechanism for collective redress in property relations. This is an option given by traditional procedural instruments of the Law on Civil Procedure, such as co-litigation, intervention and joinder of lawsuits for joint dispute for cases of collective redress only if certain conditions are met. The Law on Consumer Protection under art. 83 provides consumer protection associations the right to initiate a proceeding for declaring the nullity of contractual terms that are considered unfair. Under this article anyone with a justified interest in the protection of consumers, as well as consumer protection associations, may require from the court to declare the contractual term null and void if it is determined that such term under the law is considered unfair.

Article 95 of the Code of Civil Procedure of Albania stipulates that “no one can make valid on his name the right of another person in a civil legal process, except when expressly provided by law”. The Law on Consumer Protection provides for the right of collective administrative complaint by representation aiming to prohibit the violation and provide for the compensation of damage. Under art. 55 of this law “in case of any act contrary to the provisions of this law, which harms the collective interests of

26 Civil Procedure Code, Official Gazette of the Republic of Montenegro, No. 022/04 (02/04/2004), Nos. 028/05 (05/05/2005) 076/06 (12/12/2006) and Official Gazette of Montenegro, Nos. 073/10, (10/12/2010), 047/15 (18/08/2015), 048/15 (21/08/2015).

27 Law on Enforcement and Security, Official Gazette, Nos. 036/11 (27/07/2011), 028/14 (04/07/2014), 020/15 (24/04/2015), 022/17 (03/04/2017).

consumers, the responsible consumer protection structure and the consumer associations which are declared to be representative of the collective interests of consumers may address to the Consumer Protection Commission and/or to the court seeking rendering of a decision". In this manner, the Law on Consumer Protection directly authorises the responsible consumer protection structure and the consumer associations to request from the administrative body to impose the cessation or prohibition of the infringement. The same law under art. 57(5) entitles the Consumer Protection Commission to decide on the value of the damage compensation. The consumers in cases when their rights are violated, have several options where to file their complaint: 1) responsible consumer protection structure; 2) consumer associations; 3) ombudsman, 4) arbitration courts; 5) judiciary; and 6) any other body particularly established for out of court dispute settlement.

Serbia differs from the other SEE countries as consumer collective protection is provided only with administrative but not court protection and before a competent administrative body. The Ministry of Trade, Tourism and Telecommunications of Serbia has a single competency to assess whether the violation of collective interests occurred, and the procedure is initiated upon its assessment, thereby giving discretion to decide to the officials of this Ministry. A positive aspect of this law is that it provided for improved administrative legal protection, and negative side is the law did not include option for collecting fine upon pronouncing the adequate administrative measure.

2.3. Available remedies for collective redress

When it refers to the procedural mechanisms for implementation of collective redress, two main types can be distinct: *injunctive collective action* and *compensatory collective action*. Injunctive collective action aims at requiring cessation of or prohibiting a violation of rights granted under the law in order to prevent any or further harm causing damage because of such violation. Compensatory collective action aims at requiring compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass situation or by an entity entitled to bring a representative action. SEE countries provide only for injunctive collective actions.

The Law on Consumer Protection in *Serbia* stipulates administrative protection of collective consumer interests in a procedure before the administrative body. The law defines the collective interest as an aggregation of individual ones to a total number of at least ten consumers. The competent administrative body is the Ministry of Trade, Tourism and Telecommunications and it assess whether the violation of collective interests occurred giving discretion right to this institution whether to initiate a proceeding. As *Serbia* is the only country from South East Europe not stipulating the possibility for court protection of collective consumer interests, it should be considered to introduce next to the administrative protection a court proceeding as well extending the list of authorized entities to initiate the procedure.

In *Albania* the Law on Protection from Discrimination provides for a group lawsuit and a criminal denunciation (art. 34(1)) and for a collective lawsuit with special representation (art. 34(3)). The Law also provides for collective administrative complaint with special representation. Art. 3(9) stipulates authorised bodies to file a claim as organisations registered in Albania and acting for protection of human rights or supporting victims of discrimination. The submission of collective administrative complaint

charges the applicant the costs of the proxy representation. Under the Law on Consumer Protection the right of collective administrative complaint by representation is stipulated. The aim is to prohibit violation or to provide for compensation of damage. Art. 55 of the same law authorises the responsible consumer protection structure and the consumer associations as representatives of collective consumer interests to address the Consumer Protection Commission and/or the court seeking rendering of a decision in cases which harm the collective interests of consumers. Art. 57(5) of the law entitles the Consumer Protection Commission to also decide on the value of the damage compensation. Art. 55 also provides for a collective representation lawsuit as a typical form of a prohibitive mechanism. The Law on Competition Protection provides for a collective administrative representation complaint under Article 29(1), according to which third parties or interested parties in cases of restrictions, distortions or impediments to competition submit to the Competition Authority complaints and notices of these findings and require prohibition of infringements. The Law on the People's Advocate in Article 12 provides for the collective administrative representation complaint: "Every individual, group of individuals or non-government organization, claiming that his/their rights, freedoms or lawful interests have been violated by the unlawful, improper actions or failures to act by the organs of the public administration, shall have the right to complain or notify the People's Advocate and to request his intervention to remedy the violation of the right or freedom". Art. 52 of the Law on Environmental Protection provides for collective administrative complaint: "Physical or legal entities and environmental associations in the territory that are directly affected or suffer the consequences of the damage caused to the environment have the right to request from the National Environment Agency to request from the operator: a) restoration of the environment to its previous state; b) compensation for environmental damage if the restoration of the environment to its previous state is impossible." This law in art. 48 (b) provides for collective lawsuit claim with special representation: "In the event of a threat to the environment, its pollution and damage, the public has the right to bring a lawsuit in court, in accordance with the conditions provided by the Code of Civil Procedure, against the public authority or natural and legal person".

The Law on Consumer Protection²⁸ in *Macedonia* regulates the available remedies for collective redress in the inspection supervision proceeding. The following remedies are available according to this law: a prohibition of further actions with which a violation is made, removal of established irregularities and public announcement of the decision, prohibition of exhibiting market behavior which is considered unfair. Measures are imposed upon a decision of the inspectorate. According to art. 31-p par. 1, the competent inspectorate may take temporary measures to order the termination of certain actions for which there is a reasonable doubt that they are contrary to the provisions of the law. Art. 32 of the Law on Protection of Competition²⁹ stipulate the right to instigate a misdemeanor procedure before the Misdemeanor Commission of the Commission for Protection of Competition upon a request by a natural person or a legal entity which

28 Law on Consumer Protection, Official Gazette of the Republic of Macedonia, No. 6p.38/2004, 77/2007, 103/2008, 24/2011, 164/2013, 97/2015 and 152/2015.

29 Law on Protection of Competition, Official Gazette of the Republic of Macedonia, No. 145/2010; 136/2011; 41/2014 and 53/2016.

has a legitimate interest in establishing the commission of a misdemeanor. The Law against Unfair Competition³⁰ explicitly authorizes consumer protection associations to file a claim for compensation for damages that have arisen as a consequence of the violation (art. 18 par. 10). The Law on Environment³¹ provides for collective redress by authorizing environmental protection associations to participate in certain procedures before the competent environmental protection bodies and the compensation procedures. The Law on Prevention and Protection against Discrimination³² in art. 41 provides for class action for protection against discrimination that may be filed before the civil court as co-litigants, associations and foundations, institutions or other civil society organizations that have a legitimate interest in protecting the collective interests of a particular group.

The Law on Consumer Protection³³ in *Kosovo* in art. 73 stipulates that the authorities responsible for consumer protection may initiate proceedings for termination of misconducts that are in violation of this law, other laws and other by-laws, but does not specify the right to collective compensation in cases of violations. Art. 76 of the same law stipulates monetary fines for violations of consumer rights but not for violations of collective consumer rights. The Law on Contested Procedure³⁴ provides for different forms of compensation of injured parties. Compensation is imposed by a judgment. The Law on Labor³⁵ explicitly stipulates collective compensation and states that the employee cannot be dismissed until the employer has paid immediate monetary compensation. The Law on Protection of Competition³⁶ provides for temporary injunctions.

In *Bosnia and Herzegovina*, the entity civil procedure codes explicitly stipulate the type of claims that may be filed by parties authorised to protect collective interests (art. 453 b of the Civil Procedure Code of the Federation of Bosnia and Herzegovina and art. 453 b of the Civil Procedure Code of the Republic of Srpska). The first type of claim may be filed in cases when certain activities or omission on the part of the defendant violated or harmed collective interests and rights granted under law, which the claimant is authorised to protect. Another type of claim may be filed for prohibition of activities that violate or harm protected collective interests and rights, granted under law. Third type of claim may be filed in cases when damage occur, requesting removal of damaging consequences caused by unlawful activities on the part of defendant. The entity civil procedure codes do not provide for a possibility that the authorised claimant may require compensation.

Under art. 123 of the Law on Consumer Protection in *Montenegro* when it rules in favor of claimant who submitted an action for the protection of collective interests of consumers, the acting court shall establish the infringement of this or other laws regulating the rights of consumers. This law does not explicitly recognize compensatory collective redress. On a contrary, with the aim to increase the protection of consumer

30 Law against Unfair Competition, Official Gazette of the Republic of Macedonia, No. 80/99.

31 Law on Environment, Official Gazette of the Republic of Macedonia, No. 53/2005; 81/2005; 24/2007; 159/2008; 83/2009; 48/2010; 124/2010; 51/2011; 123/2012; 93/2013; 187/2013; 42/2014; 44/2015; 129/2015; 192/2015 and 39/2016.

32 Law on Prevention and Protection against Discrimination, Official Gazette of the Republic of Macedonia, No. 50/2010, 44/2014, 150/2015 and 31/2016.

33 Law on Consumer Protection, Kosovo/04/L-L121/2012.

34 Law on Contested Procedure, Kosovo/03/L-006/2008.

35 Law on Labor, Kosovo/03/L-212/2010.

36 Law on Protection of Competition, Kosovo/03/L-229/2010.

interests, art. 124 stipulates that any consumer who has a legal interest in the execution of the claim may require for the execution of a final court decision. In cases where individual action was brought against the same defendant who had already been sued in the proceedings on a complaint for the protection of collective interests of consumers, provided that the claim was upheld, art. 126 establishes the obligation of the court to decide in accordance with a final decision in the action to protect the collective interests of consumers.

2.4. Costs and financing of the procedure for collective redress

In SEE countries in parallel to establishing a legal framework for consumer collective protection allocation of public funds for the consumer organizations as legitimate representatives of consumers' interests should be provided with the aim to cover their costs for initiating the proceeding, training of their professional staff, informing consumers on the running collective redress proceedings and covering the risk of losing the litigation.

Currently the consumer organisations in these countries receive modest financial incentives from the Governments on annual basis which are not sufficient for their sustainable operation neither for their motivation to launch and initiate collective redress proceedings without being financially capable for taking this risk. National Programmes for consumer protection in SEE countries provide for possibility to grant consumer protection organisations with limited funds for their activities allocated by way of public competition. Considering the fact that these funds should be awarded and spent in the interests of consumers, the legislator in these countries restricted entitlement to their allocation only to such consumer organizations that meet the requirements stipulated by the law such as:

- to be established in accordance with the law as non-profit organisations;
- to be established to protect the rights and interests of consumers;
- to be independent.

The apparent lack of financial resources was a common problem reported in SEE countries, not only for public entities, but also for the consumer organizations to be sustainable and financially independent to provide collective protection of consumers' interest, to cover extremely high proceeding costs and to have financial potential in case they lose a collective dispute.

Referring the proceeding costs and legal framework in each country the situation is as follows.

Under Law on Consumer Protection of *Serbia* the legislator provided a fine solution in terms of the authorised registered representative of collective consumer interests in case of harm to a number of persons by the same act of a trader.

In *Albania*, collective administrative complaint does not impose any costs but collective administrative complaint with special representation (under the Law on Protection from Discrimination) have cost for proxy representation. When filing collective lawsuits (representative or with a special representation) at the court certainly impose costs. The costs of representative collective lawsuits are lower than the costs of lawsuits with special representation and several times more than the number of individual lawsuits. Until 2016 the Albanian state has not been able to financially support, directly

or through various grants, any association acting in the field of consumer protection.³⁷

General principle of civil litigation in *Macedonia* is that the entity requiring protection of its rights and interests has the obligation to cover the costs for initiating and conducting the proceedings. Art. 145 of the Law on Consumer Protection stipulates that the litigation costs consist of expenses incurred during or as a result of the proceeding³⁸, the lawyer's fee³⁹ and the fees for other persons who have the right to a fee according to the law. Art. 146 par. 2 and 3 of the same Law define that the court will not act upon a lawsuit nor take any another action if the court fee has not been paid and if the plaintiff does not pay the court fee within 15 days from the day the lawsuit was filed. Art. 148 par. 1 stipulates the basic rule that the party who fully loses the litigation is obliged to compensate the opposing party and his/her intervenor for their costs.

The Law on Consumer Protection in *Kosovo* do not provide for explicit provisions on covering the costs of collective redress procedure. Taking into account that these procedures are initiated by consumer associations and business associations, it can be expected that they are responsible for covering the costs. Article 450 of the Law on Contested Procedure explicitly specifies the coverage of the expenses of the joint litigation, where each party in advance carries itself the expenses that it caused with its procedural actions. Furthermore, Article 452.1 states that the party who loses the judicial process entirely has the duty to cover all judicial expenses of the winning litigant⁴⁰. Article 459.1 provides for the coverage of costs in the case of joint litigation that the joint litigants bear the court expenses in equal parts⁴¹.

In *Bosnia and Herzegovina*, the issue of the capacity of consumer protection organisations to initiate and conduct collective redress proceedings is crucial. This especially refers to their available expertise and funding for carrying such activity. The problems arising in practice relate to the payment of court fees and potential representation, payment of costs of proceedings in case of losing the case and the payment of counterclaims for compensation of suffered harm or punitive damages.

Collective consumer redress in *Montenegro* as in other SEE countries can be initiated only by injunctive actions. In these cases, the court is the one determining the value of the dispute. Under art. 152 of the Civil Procedure Code of Montenegro a party which loses a case in its entirety shall bear the costs of the adverse party. The consumer protection organisations as authorized entities to initiate consumer collective proceeding are financially not stable to bear the costs of the proceeding. They do not financial potential to initiate and conduct long-term civil proceedings with uncertain outcome. Only the ministries and public administration authorities responsible for consumer protection are capable for financing the procedure for collective redress as authorized entities under art. 119 of the Consumer Protection Law.

2.5. Sectoral collective redress mechanisms

Sectoral approach towards regulating consumer collective protection is common

37 Kola Tafaj, Flutura and Teliti, Ersida, Collective redress in consumer protection in Albania (to be published).

38 Law on Court Fees, Official Gazette of the Republic of Macedonia, No. 114/2009, 148/2011, 106/2013 and 166/2014.

39 Tariff for the fee and reimbursement of expenses for lawyers' work [<http://www.mba.org.mk/index.php/mk/akti/advokatska-tarifa>] (13.05.2017).

40 Law on Contested Procedure, Kosovo/03/L-L06/2008.

41 Ibid.

for all SEE countries. Various areas of application of collective redress mechanisms are regulated with different special laws beside consumer protection laws which are in details elaborated through this comparative analysis.

In *Albania*, collective redress is regulated by special laws in the areas of patient rights, health care and safety of non-food products. The Charter of Patient Rights from 2011⁴² and the Law on Health Care recognize the right of patients to act individually or collectively through organizations who act for protection of patients. The Charter recognizes patients' right to complain, individually or collectively, through their organizations. Art. 38 of the Law on Health Care recognizes the right of the State Health Inspectorate to impose fines when the provision of health care is contrary to this law. Art. 22 and 23 of the Law on Food⁴³ provides the establishment of civil liability for food business operators in case of harm to human health caused by food consumption resulting unsafe in all stages of production, processing and distribution. The Law on General Safety of Non-food Products,⁴⁴ stipulates that the responsible structure has the competence to take prohibitive and binding measures when unsafe products are placed on the market. The Law on Trade and Market Surveillance of Non-food Products⁴⁵ in art. 27 stipulates that prohibitive or restrictive measures are imposed by the network of structures responsible for market surveillance, supported by the customs authorities in cases where the health and safety of users is impaired as a result of placing these non-food products on the market. The key measures which these structures may take are the temporary ban on making the product available on the market.

Bosnia and Herzegovina stipulate the possibility for consumer collective protection in the areas of competition protection, environment protection and prohibition of discrimination. The Law on Competition of Bosnia and Herzegovina⁴⁶ stipulates that actions that prevent, limit or distort market competition may violate individual and collective interests. The procedure before the Competition Council may be brought by legal and natural persons who have a legal or economic interest, chambers of commerce, associations of employers and entrepreneurs, associations of consumers, bodies of executive authorities in Bosnia and Herzegovina. Under art. 27 the Competition Council may also initiate the procedure *ex officio* in case of suspicion that the market competition is significantly narrowed, limited or distorted. Art. 43 defines that the Competition Council may adopt recommendations and/or sanctions. Recommendations aim to prevent, suspend or refrain from actions that constitute prevention, limitation, and distortion of market competition, while sanctions are fines against behaviour which is in contravention with this law. Laws on Environment Protection of the Federation of Bosnia and Herzegovina and of the Republic of Srpska entitle "representatives of the interested public" to submit a claim before the court, in case that a natural or legal person should act in contradiction to environmental principles arising from environmental laws.

42 Available at:

http://www.shendetesia.gov.al/files/userfiles/KARTA_SHQIPETARE_E_TE_DREJTAVE_TE_PACIENTIT.pdf.

43 Law no. 9863, dated 28.01.2008, as amended by Law no. 74/2013 on some amendments and supplements to Law no. 9863 on Food, dated 28.01.2008, as amended.

44 Amended by Law no. 16/2013 dated 14.02.2013.

45 Amended by Law no. 17/2013, dated 14.02.2013.

46 Law on Competition, Bosnia and Herzegovina, Official Journal of Bosnia and Herzegovina, No. 48/05 (29 June 2005), 76/07 (24 July 2007) and 80/09 (1 October 2009).

These laws stipulate that associations, bodies, institutions or other organisations legally founded, which are engaged in protection of legally established collective interests and rights of citizens within their registered or prescribed activity, may file a collective redress complaint. Collective redress mechanisms are also stipulated under the Law on Prohibition of Discrimination of Bosnia and Herzegovina.⁴⁷ Associations, bodies, institutions and other organisations who hold a justified interest to protect the interests of certain groups, or who are involved in protection against discrimination of certain groups of persons by the nature of their activities are considered to have active legitimation to bring a collective redress action in cases of discrimination. The Law on Financial Operations of the Federation of Bosnia and Herzegovina⁴⁸ also stipulates the possibility of collective protection of creditors. In art. 15 par. 7 it defines that an authorised person may file a lawsuit for protection of collective interests and rights. Chambers of commerce or professional creditors associations are listed as authorized bodies.

Kosovo characterizes with consumer collective redress established in the areas of competition protection, food safety, product safety, environment protection and protection from discrimination. The Law on Protection of Competition in art. 13.4 stipulates that the government, upon a proposal from the competition authority, by a sub-legal act shall determine the manner of submitting the application and the criteria for determining the concentration⁴⁹, based on which the establishment of a joint venture by two or more independent enterprises, which operates on a permanent basis as an independent economic entity, must be notified and a review and approval process or refusal of such action must be made. This provision actually sets possibility for collective redress of parties or market participants (companies or consumers) through preventive or injunctive mechanism. The Law on Food⁵⁰ in art. 16.1 foresees the application of injunctive measures in cases when the food business operator knows, or has reason to suspect that the food that has been imported, produced, processed, placed on the market, does not meet the conditions of safe food, the entity must immediately start withdrawing the food from the market. The Law on General Product Safety⁵¹ for the cases when the products are dangerous for the safety and health of consumers and users, grants the market inspectorate with a role for a collective consumer redress and the inspectorate orders the withdrawal from the market and/or recall of those products from consumers.⁵² The Law on Environmental Protection⁵³ provides for injunctive and compensatory approach in case of damages. Art. 66.1 of this Law stipulates that the polluter causing environmental pollution is responsible for the damage caused and bears the costs for the assessment and elimination of the damage, but it foresees that parties must turn to courts for compensation, including collective compensation. The Law on Protection from Discrimination⁵⁴ in art. 7 provides for injunctive and compensating mechanisms in

47 Law on Prohibition of Discrimination, Bosnia and Herzegovina, Official Journal of Bosnia and Herzegovina, No. r. 59/2009 (23.07.2009).

48 Law on Financial Operations, Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Official Journal of the Federation of Bosnia and Herzegovina, No. 48/16 (02.06.2016).

49 Law on Protection of Competition, Kosovo/03/L-229/2010.

50 Law on Food, Kosovo/03/L-016/2009.

51 Law on General Product Safety, Kosovo/04/L-078/2013.

52 Law on Amending and Supplementing the Law no. 04/L-078 on General Product Safety, Kosovo/ 04/L-189/2013.

53 Law on Environmental Protection, Kosovo/ 03/L-025/2009.

54 Law on Protection from Discrimination, Kosovo/05/L -021/2015.

the case of collective or group redress. An authorised body for collective redress in this field is the ombudsperson, while for the advancement and promotion of human rights it is the Office of Good Governance within the Office of the Prime Minister.

In *Macedonia* consumer collective redress is regulated with provisions of special laws in the areas of competition protection, unfair competition, patients' rights, environment protection and protection against discrimination. The Law on Protection of Competition does not provide explicit provisions for consumer collective redress, but indirectly by regulating the right to instigate a misdemeanor procedure before the Misdemeanor Commission of the Commission for Protection of Competition. This right might be assigned to the consumer protection organizations only for establishing misdemeanor liability of an enterprise for violation of the rules of competition. The Law against Unfair Competition⁵⁵ regulates the liability of persons who, when conducting the business, for the purposes of competition, commit an act or action contrary to the good business practices or contrary to the principle of conscientiousness and honesty. This law authorizes consumer protection organisations to file a claim for compensation for damages that have arisen as a consequence of the violation. The Law on Protection of Patients' Rights⁵⁶ does not envisage collective redress but in art. 53 stipulates that the patient, as an individual, has the right to judicial protection for a violation of his/her right in a manner and in a procedure established by law. The Law on Environment⁵⁷ through the recognition of the right of environmental protection associations to participate in certain procedures that are carried out before the competent environmental protection bodies and the compensation procedures, provides for collective redress. Collective redress is also stipulated in the Law on Prevention and Protection against Discrimination⁵⁸ where art. 41 provides for class action for protection against discrimination. The procedure is initiated against the person who has violated the right to equal treatment.

In *Montenegro* consumer collective redress is regulated for the area of protection against discrimination. The Law on the Prohibition of Discrimination in art. 30 par. 1 explicitly stipulates that organizations and individuals dealing with the protection of human rights may bring actions on behalf of discriminated groups of persons. In these cases, a written consent of discriminated persons is required. The procedure shall be conducted under the civil procedure law. The law authorizes the Ombudsman to initiate a proceeding before the court for protection against discrimination.

Serbia regulate collective consumer protection for the areas of competition protection, capital market, patients' rights, food safety, product safety and environment protection. Under the Law on Protection of Competition compensation for the damage caused by the acts violating the competition shall be exercised in a civil proceeding before the competent court. Consumers collective protection is especially important to securities trading, credit financing or investments. The Law on the Capital Market⁵⁹

55 Law against Unfair Competition, Official Gazette of the Republic of Macedonia, No. 80/99.

56 Law on the Protection of Patients' Rights, Official Gazette of the Republic of Macedonia, No. 82/2008, 12/2009, 53/2011 and 150/2015.

57 Law on Environment, Official Gazette of the Republic of Macedonia, No. 53/2005; 81/2005; 24/2007; 159/2008; 83/2009; 48/2010; 124/2010; 51/2011; 123/2012; 93/2013; 187/2013; 42/2014; 44/2015; 129/2015; 192/2015 and 39/2016.

58 Law on Prevention and Protection against Discrimination, Official Gazette of the Republic of Macedonia, No. 50/2010, 44/2014, 150/2015 and 31/2016.

59 Law on the Capital Market, Official Gazette of the Republic of Serbia, No. 31/2011.

provides for the protection of investors, ensuring that the capital market is fair, efficient and transparent, and reduction of systemic risk on the capital market. According to the Law on Patients' Rights⁶⁰, protection shall be provided by the local self-government unit and establishment of a Health Council. The Health Council shall decide upon complaint of the patient based on the instruction of the relevant ministry. The Law on Food Safety⁶¹ stipulates that violation of its provisions shall be deemed a commercial offence and the amount of the fine will depend on whether the person in question is an entrepreneur, legal or natural person. The Law on General Product Safety⁶² regulate general safety of products that are placed on the market. The information shared with the competent authority for the risk the product poses to the health and safety of consumers and other users is available to the public, regardless whether it has been deemed a trade secret by a regulation or another act. The Law on Environmental Protection⁶³ stipulates that the polluter causing environmental pollution is responsible for the occurred damage. The request for reimbursement may be submitted directly to the polluter or insurer, namely to the financial guarantee of the polluter where the accident happened.

2.6. Legislative consultations and reform proposals

From the analysis above and the level of achieved compliance with the relevant EU acquis on consumer protection, it can be considered that SEE countries need further efforts to regulate collective consumer redress in details and provide for its efficient application. In some of the countries the process of legal reform is already on the way and special working groups are working on drafting the amendments to the existing Laws on consumer protection (Albania and Kosovo), while in all other SEE countries concrete necessary interventions for legal reform are determined but still the process is not planned nor launched. Below detailed overview of the existing obstacles and deficiencies in the legal framework for regulating consumer collective redress in SEE countries is presented.

Montenegro as already being part of intensive accession negotiations with the European Union and harmonization of national legislation with EU law, collective redress mechanism should be extended to other sectors such as environment protection and protection of copyrights and related rights, thereby guaranteeing collective consumer redress before the judicial and administrative bodies. In addition, considering the fact that compensatory actions are already in place under the Law on Prohibition of Discrimination it can be expected to extend them to the Law on Consumer Protection for the protection of collective interests.

The existing legal framework in *Serbia* by restricting the protection of collective consumers interests only with an administrative procedure without a possibility for their court protection deviates from the requirements under the Recommendation Commission Recommendation 2013/396/EU. Despite the fact that the administrative procedure has its own positive sides and advantages such as being quicker, more efficient, less costly it certainly limits and reduce consumer protection. Therefore, legal reform is needed

60 Law on Patients' Rights, Official Gazette of the Republic of Serbia, No. 45/2013.

61 Law on Food Safety, Official Gazette of the RS, No. 41/2009.

62 Law on General Product Safety, Official Gazette of the RS, No. 41/2009.

63 Law on Environmental Protection, Official Gazette of the RS, No. 135/2004.

to extend the list of authorized entities with active legitimacy to initiate procedure for consumer collective protection (here main reference is to the courts).

In July 2016, the Ministry of Economic Development, Tourism, Trade and Entrepreneurship of *Albania* launched the procedure for amendment of the Law on Consumer Protection from 2008 with the aim to achieve full compliance with the Directive 2011/83/EU on Consumer Rights, Directive 2013/11/EU on alternative dispute resolution for consumer disputes and Directive 2009/22/EC on injunctions for the protection of consumers' interests. This draft law creates the competent authorities for alternative dispute resolution for services of public interest. In November 2016, the Ministry of Economic Development, Tourism, Trade and Entrepreneurship organized public consultations on the draft law with stakeholders and interest groups. Until today no progress towards adoption of the law is achieved nor the text is submitted to the Albanian Parliament.

As *Kosovo* is still missing comprehensive approach for collective redress currently being stipulated by different laws, there is a need for further harmonization of national legal framework with the EU law and regulating more detailed provisions in specific laws. Currently the country is carrying out amendment of the existing Law on Consumer Protection due to achieve better compliance with numerous EU directives and to introduce dispute resolution through out-of-court mechanisms. In addition, National Consumer Protection Program 2016-2020 foresees further harmonization of national legislation to comply with the Directive 2009/22 on injunctions for the protection of consumers' interests and Directive 2013/11/EU on alternative dispute resolution for consumer disputes⁶⁴.

In *Macedonia* and in *Bosnia and Herzegovina* currently there are no developments for legal amendments or reform on the way.

3. Institutional framework for collective redress

3.1. Overview of stakeholders responsible for putting collective redress into practice

In view of the existing consumer redress mechanisms in SEE countries, the following stakeholders are mostly common to be responsible for providing collective consumer protection: the Governments, the National Assemblies, the National Councils for Consumer Protection, the ministries in charge of consumer protection and other ministries responsible for implementing the consumer protection policy, regulatory bodies, market surveillance authorities and other administrative bodies with competences in the area of consumer protection, competition authorities, local self-government units, consumer protection organizations, commercial and representative associations of traders (business, crafts, etc.).

The Law on Consumer Protection in *Macedonia* in art. 31-i stipulates the responsibility of the Government, upon a proposal by the Minister of Economy, with a special act, to determine the authorized bodies that have an interest in protecting the collective interests of consumers. These authorized bodies are defined as "bodies and organizations established by the regulations governing the establishment of the activity

⁶⁴ Kosovo/ Ministria e Tregtisë dhe Industrisë (2015)/ Programi për Mbrojtjen e Konsumatorit 2016-2020.

of those bodies and which have a common interest for consumer protection, such as consumer protection associations, chambers and other specific bodies that have a common interest in consumer protection”. Unfortunately, the Government has not yet adopted the special act and defined a list of authorized bodies for initiating proceedings for collective redress. Under the separate laws, responsible entities for initiating administrative and judicial proceedings for collective consumer representation are: Directorate for Personal Data Protection (for infringement of personal data), the National Bank of Macedonia (for financial services banks and savings houses), Agency for insurance supervision (for violation of the rights of insured), Ombudsman of the Republic of Macedonia (for public services), Commission for protection of competition (for infringement from the abuse of monopoly or dominant position and restrictive market practices), consumer organizations, Chambers of Commerce, inspection bodies and other organizations and institutions.

In *Bosnia and Herzegovina*, the Law on Consumer Protection of Bosnia and Herzegovina in art. 4 stipulates that “competent bodies for consumer protection in Bosnia and Herzegovina have the main responsibility for promotion and exercising of the rights of consumers.” Under the same Law the following stakeholders are responsible for providing collective consumer protection: the Ministry of foreign trade and economic relations, Competition Council of Bosnia and Herzegovina, the Ministry of trade of the Federation of Bosnia and Herzegovina, the Ministry of trade and tourism of the Republic Srpska, the Alliance of consumer associations and the consumer associations. The Ministry of foreign trade and economic relations plays a coordinating and supervising role and one of its core tasks is to improve legislation for collective consumer protection. Art. 27 of the Law on Competition⁶⁵, determined natural and legal persons, commercial chambers, associations of employers and entrepreneurs, associations of consumers and executive power bodies in Bosnia and Herzegovina as qualified to file a complaint to the Competition Council. The Law on Prohibition of Discrimination⁶⁶ defines two key stakeholders in collective redress: the Ombudsmen for Human Rights and associations or other organisations engaged in protection of human rights. According to art. 35 of the Law on Collective Management of Copyright and Related Rights⁶⁷, the role of stakeholders is granted to a collective organisation or a representative association authorised in accordance with provisions of the Law.

Entities qualified to be authorized claimants in *Montenegro* are: public administration body competent for consumer protection, other ministries and public administration bodies competent to enforce laws protecting consumers’ rights, consumer organisations, commercial and representative associations of traders.⁶⁸ Collective redress is also possible under the Law on the Prohibition of Discrimination.⁶⁹ The Ombudsman is given the authority to initiate the procedure for protection against discrimination before

65 Law on Competition, Bosnia and Herzegovina, Official Journal of Bosnia and Herzegovina, No. 48/05 (29.06.2005.), 76/07. (24.07.2007.) i 80/09 (01.10.2009.).

66 Law on Prohibition of Discrimination of Bosnia and Herzegovina, Official Journal of Bosnia and Herzegovina, No 59/09 (23.07.2009) i 66/16 (31.08.2016).

67 Law on Collective Management of Copyright and Related Rights, Official Journal of Bosnia and Herzegovina, 63/10 (13.07.2010).

68 Article 157, Paragraph 1 of the Consumer Protection Law 002/14 (14/01/2014).

69 Law on the Prohibition of Discrimination, Official Gazette of Montenegro, Nos. 046/10 (06/08/2010), 040/11 (08/08/2011), 018/14 (11/04/2014).

the court or to appear in the proceedings as intervener when a party makes it possible.⁷⁰ The Ombudsman estimates that the respondent through his actions discriminated on the same ground against a group of persons with the same or similar traits.⁷¹

Under art. 124 of the Law on Consumer Protection in Serbia, the institutions in charge of consumer protection are: the National Assembly of the Republic of Serbia, the Government, the Ministry, the National Council for Consumer Protection, other ministries and regulatory bodies with competences in the area of consumer protection, the autonomous province and local self-government authorities, consumer organisations and their associations. National Assembly is responsible for defining the consumer protection policy and for the timely adoption of respective regulations for its implementation. The Ministry of Trade, Tourism and Telecommunications is in charge for conducting the proceeding and issuing measures for the protection of the collective consumer interests. The National Council for Consumer Protection recommend measures and activities for the improvement of consumer protection and consists of representatives of the ministries competent for consumer protection, consumer organisations, trader's organisations, and independent experts in the field of consumer protection. Autonomous province and local self-government authorities support activities of organisations and associations.

The state administrative bodies responsible for consumer protection in *Albania* are: responsible body for consumer protection, consumer associations, the ombudsman, the arbitration court, the judiciary, any other body particularly established for out of court dispute settlement. Under art. 49(2) of the Law on Consumer Protection the responsible body for consumer protection the Ministry of Economic Development, Tourism, Trade and Entrepreneurship in charge for developing consumer complaint handling systems and alternative dispute resolution schemes. The Ministry and consumer associations according to art. 55 of the same Law are authorized to make a collective administrative complaint to the Consumer Protection Commission and/or to file a collective representative lawsuit in court for the cessation and prohibition of the infringement. Pursuant to Article 50 of the LCP, the Responsible Market Surveillance Inspectorate is the implementing structure of consumer protection legislation. CPC is a decision-making body, and through its decisions, as appropriate, orders the prohibition of the violation, takes measures to remedy the violations, decides on consumer compensation, warns about the non-repetition of such violations, and imposes administrative fines. The Law on the People's Advocate stipulates the possibility to file an administrative, individual or collective complaint to the People's Advocate institution, but it does not have a decision-making power but only an advice-giving role.

The Law on Consumer Protection in Kosovo determines the stakeholders for collective consumer protection: the representative of the responsible institution in the field of consumer protection, market inspectorate or other inspection bodies, the group of traders, distant communication operators, consumer associations and business associations. In addition, other legal acts determine different stakeholders as representatives of collective consumer interests. Under the Law on Protection of

70 Article 21, Paragraph 1, Point 4 of the Law on the Prohibition of Discrimination "Official Gazette of Montenegro", Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

71 Article 21 Paragraph 1 Item 4 of the Law on the Prohibition of Discrimination "Official Gazette of Montenegro", Nos. 46/2010 (06/08/2010), 40/2011 (08/08/2011) – other laws 18/2014 (14/03/2014).

Competition the following stakeholders are defined: the enterprises, the Inspectorate of Competition, Competition Council as well as various parties that have the right to initiate the procedure for reviewing the concentration and the dominant position of certain parties. The Law on Food determines the distributors, manufacturers and importers of food, the Food and Veterinary Agency, consumers, the Ministry of Agriculture and the Ministry of Health, the Laboratory for Testing and the Board of Directors of the Food and Veterinary Agency as stakeholders in collective redress, while under the Law on General Product Safety those are manufacturers, distributors, importers, Market Inspectorate as well as Customs which control the import of goods. Under the Law on Environmental Protection, the stakeholders are specific economic operators, the Ministry of Environment and Spatial Planning, the Environmental Inspectorate, the Municipalities, and the public or civil society. In the Law on Protection from Discrimination, key stakeholders are individual or legal persons, certain groups that may initiate group proceedings, the Ombudsperson, the Courts, the Office for Good Governance, and the organizations or NGOs that represent specific public groups.

3.2. Mapping the cooperation among stakeholders

The enforcement of EU consumer protection law is a responsibility of national authorities. They are in charge to ensure that consumer rights legislation is applied and enforced in a consistent manner across the internal market, while the European Commission coordinates the cooperation between these authorities. With the aim to facilitate cooperation between public authorities responsible for enforcement of the laws that protect consumers' interests in dealing with intra-EU infringements and to contribute to the smooth functioning of the internal market, the quality and consistency of enforcement of the laws that protect consumers' interests and the monitoring of the protection of consumers' economic interests, in 2004 Regulation (EC) No 2006/2004 on consumer protection cooperation (the CPC Regulation)⁷² was adopted. The CPC Regulation lays down a cooperation framework to allow national authorities from all countries in the European Union to jointly address breaches of consumer rules when the trader and the consumer are established in different countries. The cooperation is applicable to consumer rules covering various areas, such as unfair commercial practices, e-commerce, audio-visual media services, comparative advertising, package holidays, online selling, consumer credit agreements, distance marketing of consumer financial services, and passenger rights.

On 25th of May 2016 the Commission put forward a proposal for the reform of the CPC Regulation as a result of the need to better enforce EU consumer law, especially in the digital sphere. The proposal for reform of the CPC Regulation shall provide enforcement authorities with competencies to work together faster and more efficiently. With the amendments of the CPC Regulation, the Commission will be able to launch and coordinate common actions to address Union-wide problematic practices. A one-stop-shop approach to consumer law is proposed where enforcement authorities will notify the businesses concerned of the issues, asking them to change their practices and,

⁷² 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),

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2004.364.01.0001.01.ENG.

if necessary, to compensate the affected consumers. Consumer protection organisations will be able to signal bad cross-border practices to enforcers and to the Commission. Finally, the list of laws to which CPC Regulation refers will be updated to ensure that transport and retail financial services sectors are included.⁷³

Taking into consideration various designated stakeholders in collective redress in each SEE country, there is a need of their mutual coordination and cooperation in order to develop consumer protection system and policies. In most of SEE countries this cooperation is vital to take place between the line ministry responsible for consumer protection, market surveillance bodies, regulatory bodies, Ombudsman and non-governmental consumer protection organizations. Through cooperation and partnership between the national stakeholders and their joint work on consumer information, education and advise, public awareness and knowledge on consumer protection and their rights on collective redress will be increased.

As a common to all SEE countries is having adopted bi-annual or three years National Consumer Protection Programs as strategic documents which define the consumer protection policy, priority activities and conditions for their implementation. They are complemented with special Action Plans for their implementation by setting out tasks, responsible stakeholders, timeframe, necessary financial resources and other conditions. In addition, legal acts in these countries stipulate provisions for cooperation between different stakeholders for developing and implementing consumer protection system and policies.

In *Montenegro*, this is regulated with art. 157 par. 2 of the Consumer Protection Law. The country reported good running mutual cooperation on a daily basis between the responsible Ministry of Economy, Market Inspectorate and consumer protection organizations. This cooperation, coordination and exchange mainly refers to the complaints of consumers in order to ensure efficient and high-quality protection of consumers' rights. Cooperation also takes place between other bodies and institutions such as Electronic Communications Agency, the Ombudsman, civil sector, judicial institutions (Center for Judicial and Prosecutorial Training) and the Bar Association, as well as other public bodies.

The Ministry of Economy of *Macedonia* is responsible for development and implementation of the consumer protection policy, proposing amendments of the Law on Civil Procedure and identifying interested parties in consumer collective redress. As the country reported insufficient cooperation between institutions in the process of application of the Law on Consumer Protection, especially when it refers to combating unfair market behavior,⁷⁴ there is a need for strengthening their mutual cooperation and education and joint actions for increased protection of consumer interests and rights.

Cooperation between responsible stakeholders for consumer protection in *Bosnia and Herzegovina* mainly is initiated by the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina as having coordinating role in this process. This ministry is responsible for development of the annual consumer protection programme

⁷³ For further details please visit:

http://ec.europa.eu/consumers/enforcement/cross-border_enforcement_cooperation/index_en.htm

⁷⁴ Lončar Velkova, Marijana and Kostovski, Ivo, Stimulating fair competition on the market, detecting and analysing problems with consumer protection and combating unfair market practice, Consumer Organisation of Macedonia, Skopje, 2017, p. 30.

which after preparation is submitted to the Consumer Protection Council composed of representatives of different stakeholders. The adoption of the annual consumer protection programme requests formal co-operation between consumer protection stakeholders. In addition, under art. 101(c) of the Law on Consumer Protection formal cooperation also takes place between the Ombudsmen for Consumer Protection, entity level inspection bodies and consumer protection associations. The Ombudsmen for Consumer Protection under art. 101 (f) of the same law is responsible to initiate proposal for amendments of the Law on Consumer Protection to the Consumer Protection Council and the Council of Ministers of Bosnia and Herzegovina.

The Law on Consumer Protection of *Serbia* in art.124 par. 2 determines duty for formal cooperation and coordination between competent institutions for improving consumer protection. There is also a duty to cooperate between the chambers of commerce, chambers of professionals and traders' organisations established with the purpose of protecting traders' rights in the field of commerce to encourage and promote consumer protection and to cooperate with the competent institutions. The country reported the need to urgently improve cooperation between the line ministries and consumer organisations, as well between consumer protection organisations.⁷⁵

In *Albania*, responsible stakeholders for implementation of the *quasi* collective redress mechanisms are determined by special laws in specific areas. Under art. 56. of the Law on Consumer Protection, these stakeholders are: the state administrative bodies responsible for consumer protection, consumer associations, the ombudsman, the arbitration court, the judiciary and any other body particularly established for out of court dispute settlement. The responsible body for consumer protection and consumer associations are qualified representatives of collective interests of consumers and they may address the Consumer Protection Commission and/or the court to seek a decision. As the above listed stakeholders have different role in the process of consumer collective redress, different forms and modalities of their coordination and cooperation exist in the country.

The Law on Consumer Protection of *Kosovo*, determines the need for formal cooperation between the market inspectorate or other inspection bodies, associations for protection of consumers' rights, representatives of the institution responsible for consumer protection and policy makers in the area of consumer rights. These cooperation is based on exchange and coordination for application of consumer protection law, the need for its amendments and to provide better protection to consumers. Related to the other fields where collective redress takes place, cooperation between different stakeholders is also stipulated by specific laws. Under the Law on Protection of Competition, this cooperation should take place between the competition authority, various associations, consumer association and economic chambers. Under the Law on Food, cooperation must take place between producers, importers and the Food and Veterinary Agency, the board of the Agency and the Consumer Association. The Law on Environment Protection foresees cooperation between the environmental protection inspectorate and the public, while the Law on Protection from Discrimination defines cooperation between the ombudsperson, groups represented by non-governmental organizations or other organizations.

⁷⁵ Jovanovic Zattila, Milena and Vukadinovic, Radovan, Collective redress in consumer protection in Serbia (to be published).

4. The role of courts, inspection bodies, regulatory bodies, ombudsman and others in collective redress

SEE countries entitle various entities and bodies to initiate consumer collective redress proceedings and to have role and competencies in protection of consumer rights. All countries except Serbia stipulate the possibility for administrative and court protection of collective consumer interests. Civil procedure laws or consumer protection laws in these countries entrust the courts with a jurisdiction for conducting collective redress proceedings. A special role for consumer collective redress is given to the inspection bodies in specific cases and regulated by special laws. The Ombudsman and consumer protection organizations in all of these countries play a key role in the process of consumer collective protection.

4.1. The role and competencies

Under the actual legal framework in *Montenegro*, the following public administration bodies may file a complaint in cases of consumer collective protection: state authority competent for consumer protection and other ministries and public administration bodies, consumer organizations and commercial and representative associations of traders (commercial, crafts, etc.).

The Law on civil procedure⁷⁶ and the Law on enforcement and Securing of Claims⁷⁷ apply to an action for the protection of collective interests. These laws stipulate jurisdiction of ordinary courts in dealing with collective disputes. The court is also given a jurisdiction to determine the value of the dispute in the amount of up to EUR 5,000 regardless of the actual economic value of the dispute. The court also has a jurisdiction to order interim measures in a case when a trader has undertaken actions that violate collective interests of consumers. A special role is also granted to the Government of Montenegro, the Ministry of Economy, the Inspection Affairs Directorate and other ministries and inspection bodies. The Government of Montenegro plays role in proposing regulations, adopting the National Consumer Protection Program, reviewing and adopting annual reports on the implementation of the National Consumer Protection Program. The Ministry of Economy is the key consumer protection policy maker entitled to bring actions for the protection of collective interests and to keep a public electronic registry of collective actions and court decisions. Consumer protection stakeholders in the field of product safety are: Institute of Metrology, Institute for Standardization, Accreditation Body of Montenegro and Customs Administration. Units of local self-government are also involved in the implementation of consumer protection policy at the local level. The Consumer Protection Council, the Market Surveillance Coordination Body, the Arbitration Committee for Out-of-Court Dispute Resolution, the Banking Ombudsman and the Consumer Protection System play an important role in strengthening, coordinating and improving the field of consumer protection in Montenegro. The Ombudsman (the Protector of Human Rights and Freedoms) is also playing a role in collective redress but only for cases of discrimination under anti-discrimination law.⁷⁸

⁷⁶ Law on Civil Procedure, Official Gazette of Montenegro, No. 22/04 and 76/06.

⁷⁷ Law on Enforcement and Securing of Claims, Official Gazette of Montenegro, 36/2011 of 27 July 2011.

⁷⁸ Savković, Vladimir and Dožić, Nikola, Collective redress in consumer protection in Montenegro (to be published).

The Law on Consumer Protection of *Bosnia and Herzegovina* in art. 120 entitles the courts with jurisdiction for litigation procedures on collective redress. Art. 33a of the same law stipulates that for the litigation procedures in cases of consumer protection jurisdiction is given to the courts of general jurisdiction but also special jurisdiction is given to the courts in the place where the consumer hold residence. In the first instance procedure the following courts have jurisdiction: basic courts in Republic of Srpska, municipal courts in the Federation of Bosnia and Herzegovina, the Basic Court in the District Brčko of Bosnia and Herzegovina, while in the second instance the jurisdiction is to the following courts: district courts in Republic of Srpska, cantonal courts in the Federation of Bosnia and Herzegovina, the Appellate Court in the District Brčko of Bosnia and Herzegovina and the Supreme Courts of the Federation of Bosnia and Herzegovina and Republic of Srpska. The Law on Consumer Protection also entitles the inspection bodies with a role in consumer protection. What is interesting for Bosnia and Herzegovina and differ from many countries not only in the region but also in Europe is the existence of the Ombudsmen for Consumer Protection established under art. 1000 of the Law on Consumer Protection. The Ombudsmen is established as an independent public institution appointed by the Council of Ministers of Bosnia and Herzegovina upon a proposal by the relevant ministry. The Ombudsmen for Consumer Protection is entitled to initiate a proceeding before the competent court for compensation claims concerning collective consumer interests.

The Law on Contested Procedure⁷⁹ in Kosovo entitles the courts to have a key role as decision-making bodies for collective redress procedures. This role of a court is not stipulated in other special laws having provisions for collective redress such as: consumer protection law, patient protection law and competition protection law. Beside the Law on Contested Procedure, the court is entitled as decision-making body under the labor law, the law on protection from discrimination and the law on environmental protection. A special role for consumer collective redress is given to the inspection bodies in specific cases. Under the Law on Consumer Protection this role is granted to the market inspectorate who may request termination of harmful practices. The Law on Labor entitles the inspectorate to impose punitive measures. The Law on Food entitles the Food and Veterinary Agency to perform food inspections and require withdrawal of harmful food or closing production sites that are not in compliance with the required standards. The Law on General Product Safety entitles the market inspectorate and customs with a role in consumer collective redress. The Law on Protection of Competition stipulates competence of the Kosovo Competition Authority to be a decision-making body and bring administrative disputes before the court. Last but not least, the Law on Ombudsperson entitles the Ombudsman to promote fundamental rights and freedoms and initiate a proceeding for collective rights.⁸⁰

In *Serbia* the Law on consumer protection entitles the administration authority to be responsible for collective consumer protection in administrative procedure. The responsible administrative authority is the Ministry of Trade, Tourism and Telecommunications as being responsible for consumer protection. Serbia opted for this model with an argument that it will provide for more efficient protection and faster,

⁷⁹ Law on Contested Procedure, Kosovo/03/L-006/2008.

⁸⁰ Selimi Enis, Collective redress in consumer protection in Kosovo (to be published).

cheaper and more efficient procedure. In cases of violation of collective consumer interest, the procedure for their protection is initiated ex officio or at a request of a consumer organisation or associations. In this procedure it is confirmed whether the violation of collective consumer interests exists or not and on the base of it decision by the responsible Ministry is made. If violation of collective consumer interest is confirmed, an administrative act is issued with an administrative measure for a trader. This decision may be appealed through an administrative procedure before the Administrative Court. Consumers may also request for the initiation of a misdemeanor procedure before a Misdemeanor Court if their collective interests are violated.

In *Albania* the Law on Consumer Protection entitles the responsible consumer protection structure and consumer associations to bring collective representative lawsuits before the court for the cessation or prohibition of infringements that undermine collective consumer interests. On the other hand, the law does not entitle them to seek compensation at the court. Under art. 52 of the same law, the Consumer Protection Commission was established with the main purpose to review violations and take measures for the implementation of the provisions from the law and supporting by-laws. The Consumer Protection Commission is a decision-making body and to identify alleged violations by complaining consumers it decides on the basis of findings, claims, complaints and any other kind of information. The Law on the People's Advocate in art. 21 entitles the People's Advocate to conduct a full investigation in the case of complaints from interested persons. The People's Advocate is established as a public institution with the aim to protect the rights, freedoms and legitimate interests of any person from unlawful or improper public administration actions. The practice shows lack of information of consumers on their rights on consumer protection. The Annual report for 2016 of the People's Advocate stated that a total of 249 complaints were addressed to this institution mainly for the issues of overbilling from public service providers or for the quality of services offered by them.

The Law on Consumer Protection in Macedonia entitles certain inspection bodies for consumer collective redress in cases of violation of consumer rights. The following inspection bodies perform the supervision under this law: the State Market Inspectorate, the Food and Veterinary Directorate, the State Sanitary and Health Inspectorate and the State Inspectorate for Environment. As misdemeanor bodies for conducting a misdemeanor procedure under this law are: the State Market Inspectorate, the State Inspectorate for Agriculture, the State Sanitary and Health Inspectorate, the State Inspectorate for Environment and the Food and Veterinary Agency. Any authorized body may propose to the competent inspectorate to initiate a proceeding before a competent court for termination of actions contrary to the provisions of the law. The Agency for Electronic Communications is in charge for resolving consumer disputes with operators in general administrative proceedings. Consumer protection organizations may submit a request to the Agency to review information, contractual provisions or certain irregularities affecting larger consumer groups. The Food and Veterinary Agency is entitled to conduct misdemeanor procedure and issue misdemeanor sanction. Consumer protection organizations and other stakeholders may request the Food and Veterinary Agency to initiate a procedure to prevent abuses or mass violations of the rights of consumers for cases of food safety. The courts act in cases when the consumer protection

organisations require them to declare null and void the contractual term which are unfair under the Law on Consumer Protection. The country faces with procedural obstacles as unlimited number of entities are entitled with legitimate interest to file lawsuits for consumer collective redress. Therefore, amendments of the Law on Consumer Protection are needed to define the concept of collective interests and the Government of Macedonia to identify the list of persons authorized to initiate proceedings for consumer collective redress before the courts. In addition, judicial protection for collective redress should be regulated not only by the Law on Consumer Protection, but also by the Law on Civil Procedure. The proceeding before the Ombudsman is initiated by submitting a complaint. The Ombudsman deals in four areas: labor relations, consumer rights, the environment and other areas. The Ombudsman has no jurisdiction to initiate litigation for collective redress, but just to give recommendations, suggestions, opinions and indications for removal of the established violations.

4.2. Case law and best practices in collective redress

SEE countries characterise with modest enforcement of collective redress and case law. This is mainly resulted to many existing obstacles and deficiencies within the established national legal systems for application of consumer collective protection. One of the key obstacles is demotivation and financial instability of qualified entities to initiate proceedings for protection of collective consumer interests, to cover extremely high proceeding costs and to have financial potential in case they lose a collective dispute. Another important obstacle is lack of appropriate collective redress practice in the consumer protection organisations and the courts and lack of their expertise, knowledge and skills to deal with such cases.

With reference to each SEE country separately and its standing in the enforcement and case law generated, an overview is given below.

Montenegro is a typical example of not having any practice of actions being brought to protect collective consumer interests. The same situation is in *Kosovo* where no cases are registered on consumer collective redress.

In other SEE countries, some practice exists with modest cases dealt so far. For an example in *Bosnia and Herzegovina* there are two cases that can be mentioned. The first collective complaint was submitted before the Municipal Court in Mostar by the Ombudsmen Office for Consumer Protection in 2012 due to numerous complaints in telecommunication sector. the Municipal Court in Mostar accepted the claim in full and instructed the respondent to stop with the practice which is in contradiction to the provisions of the Consumer Protection Law. Currently on this case there is an ongoing appellate procedure before the Cantonal Court in Mostar. The second case is a collective complaint submitted by over 400 citizens in Bosnia and Herzegovina against the company “Travel House” from Sarajevo. The travel agency offered a package trips to Istanbul and Dubai and despite advanced payments of the passengers no one arrived at the final destination nor was reimbursed with the money paid for the travel arrangement. The collective claim was brought before the Municipal Court in Sarajevo.

Serbia despite the fact that offers only administrative but not a court protection of collective consumer interests, has extensive number of in total 41 requests submitted for the initiation of the procedure for collective consumer protection. 26 requests are submitted by

the registered associations, while 15 requests were initiated ex officio by the responsible Ministry. This system established in Serbia has own deficiencies as demotivation of consumer organizations to act and initiate proceedings as they are not awarded nor financially stimulated for their job. On the other hand, a positive movement is the action of the responsible Ministry and its staff when issuing decisions on violations of the collective interests of consumers to make references to the Court of Justice of the EU (CJEU).

In *Albania*, we have similar situation like most SEE countries with not having a single case where the consumer through a consumer association or responsible consumer protection structure filed a collective representative lawsuit for cessation of the infringement. On the other hand, the Consumer Protection Commission in the country has better practice recorded. Since 2009 until 2016 it made in total 40 decisions divided per the area they dealt with as following:

- 1 decision for the prohibition of broadcasting publicity spots;
- 3 decisions for the prohibition of the violation and restoration of the situation plus the punishment by fine;
- 8 decisions ordering the prohibition of the violation and restoring the situation;
- 1 decision to dismiss the case due to the correction of the violation by the entity itself and the order to take measures for non-repetition of such practices in future;
- 2 decisions to prohibit the violation and restore the situation plus a fine;
- 1 decision ordering the prohibition of the violation and restoring the situation;
- 1 decision ordering only a fine for non-disclosure of information;
- 2 decisions for fines for non-disclosure of information;
- 2 decisions for restoring the situation and the obligation of the entity to indemnify the complainant;
- 1 decision ordering the prohibition of the violation and restoring the situation;
- 2 decisions for termination of administrative proceedings;
- 1 decision with a fine for non-disclosure of information;
- 2 decisions for restoring the situation and the obligation of the subject to indemnify the complainant, 1 decision to prohibit the violation and restore the situation;
- 3 decisions to prohibit the violation and restore the situation;
- 2 decisions to prohibit the violation and restore the situation;
- 1 decision to cease the administrative proceeding and give recommendations for legal initiatives to regulate the situation;
- 2 decisions to prohibit the violation and restore the situation;
- 4 decisions for the approval of the terms of the standard contracts.⁸¹

In *Macedonia* we have three cases where the Consumer Organisation of Macedonia made actions for consumer collective protection. In the first case, it addresses the online sales where the trader's website must have a separate form whereby the buyer can cancel the product in a period of 14 calendar days, and receive a refund. As this was not respected by the traders in the country, the Consumer Organisation of Macedonia had to react to stop this practice. It addressed the State Market Inspectorate to initiate a procedure for preventing this type of sale. The inspectorate informed the Consumer Organisation of Macedonia for further procedures under its jurisdiction. The second case addresses the fraudulent clauses the contract concluded outside the business premises

⁸¹ Kola Tafaj, Flutura and Teliti, Ersida, Collective redress in consumer protection in Albania (to be published).

contain stating that the buyer can cancel the order within three days, although the legal deadline is 14 days. For this case the Consumer Organisation of Macedonia informed publicly informed consumers through the media not to enter in this kind of sales and contracts and at the same time addressed the State Market Inspectorate regarding the violation of their rights, requesting to initiate a procedure against a particular trader. The third case dealt with operators who simultaneously sell mobile phones through a tying service and place their offers in promotional material in the shops where they offer their services with different size letters. The Consumer Organization of Macedonia jointly with the Council of the City of Skopje on Consumer Protection submitted an initiative to the Agency of Electronic Communications. The Agency of Electronic Communications acted in accordance with the request and instructed the operators to align the letter size as well as the visibility of the tying offer, thus stopping such unlawful actions against consumers, which fall into fraudulent market practices.⁸²

5. The role of consumers organisations in collective redress

Consumer organisations certainly play an important role in applying consumer redress. It is a general rule not only in EU member states but also for the other countries to clearly specify the criteria and conditions regarding this role of consumer organisations.

The national legal framework should determine the following aspects for the consumer organisations to efficiently perform the collective redress mechanism: allocation of financial resources; coordination and cooperation with the other qualified entities in the country dealing with collective redress (public authorities, lawyers, etc.); their required capacities, expertise and skills; determination of their concrete responsibilities and tasks in the process (legal advice, information to consumers, awareness raising through their website, leaflets, brochures, debates, press releases); their role and contribution in the policy making (legal framework and country annual programme and strategy planning on consumer protection); their right to initiate collective consumer protection proceedings.

From the analysis and research implemented within the European Union in the last decade and from the practice in specific member states which apply collective redress, the following common obstacles for applying collective redress can be listed: expensive costs of litigation, length of court proceedings, formal requirements of existing mechanisms, complexity of judicial procedures, lack of public support for financial assistance for collective redress, limited financial and human resources of consumer organisations, lack of experienced and skilled judges, lack of consumers' awareness and information on their rights to collective redress.⁸³

5.1. Legal precondition for consumer organisations' activities to represent consumer rights in collective redress

82 Dabović Anastasovska, Jadranka and Lončar Velkova, Marijana, *Collective redress in consumer protection in Macedonia* (to be published).

83 For further literature on the role of the consumer organisations in collective redress please see: Howells Geraint, and Micklitz, Hans-Wolfgang, *Guidelines for Consumer Organisations on Enforcement and Collective Redress*, September 2009, pp. 14-15, available at: http://www.cojef-project.eu/IMG/pdf/d_CLEFfinalguidelines_76647.pdf; European Parliament, *Overview of existing collective redress schemes in EU Member States*, 2011, p. 9, available at: [http://www.europarl.europa.eu/RegData/etudes/note/join/2011/464433/IPOL-IMCO_NT\(2011\)464433_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2011/464433/IPOL-IMCO_NT(2011)464433_EN.pdf).

The Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms specifies the key criteria to be met for designating legal standing to certified entities to bring the representative action. The certified entity is required to prove its administrative and financial capacity to represent the interest of claimants in an appropriate manner. According to the Recommendation these are clearly defined conditions of eligibility and refer to the following requirements:

1. the entity should have a non-profit making character;
2. there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and
3. the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

The Member States should ensure that representative actions can only be brought by entities which have been officially designated in advance and have been certified on an ad hoc basis by a Member State's national authorities or courts for a particular representative action.⁸⁴

In SEE countries, the established legal framework defines certain criteria the consumer protection organisations must meet to represent collective consumer interests.

For an example in *Albania* art. 53(3) of the Law on Consumer Protection stipulates three criteria: 1. active membership; 2. experience; and 3. geographical extent. The legal form of organisation of consumer protection organisations can be either "association" or "centre". Under this only associations but not the centres can represent collective interests of consumers which is an obstacle for the centres to initiate collective representative lawsuits. Under the current circumstance in the country the only form the consumer protection centres may contribute to the aims of the collective representation lawsuit is by filing complaints to the responsible consumer protection structure and requesting latter bringing the case to the court.

The Law on Consumer Protection of Bosnia and Herzegovina in art. 111 (1) LCP stipulates that the consumer protection organisation perform activities of consumer protection and are registered as legal persons in the registry of associations in accordance with law. Art. 111(2) determined that consumer protection organisations are non-profit, non-governmental organisations and cannot engage in commercial activities. The laws of Bosnia and Herzegovina and both entities stipulate a precondition for the establishment of a consumer protection organization: to have three founders, who may be either legal or natural persons. The process of registration of all consumer protection organisations is performed in one of registries of associations at the level of Bosnia and Herzegovina. Art. 112 defines that consumer protection organisations must be independent from sellers, importers, suppliers and service providers. Art. 111 par. 4 prescribes the possibility consumer protection organisations to establish the Alliance of Consumer Associations of Bosnia and Herzegovina for cooperation with international consumer organisations. The Alliance of Consumer Associations of Bosnia and Herzegovina was established in September 2004 and registered with the Ministry of Justice of Bosnia and Herzegovina.

⁸⁴ Art. 4 and 6 from the Commission Recommendation 2013/396/EU.

The Law on Consumer Protection in *Kosovo* do not stipulate provisions regarding the conditions to be met by consumer protection organisations for consumer representation. Only notion is made in the Law that the consumer organisation is authorized to initiate the procedure for collective redress of consumers without issuing further procedures. Other specific laws provide for possibility consumer organizations to apply the collective redress mechanism such as following: the Law Against Discrimination enables non-governmental organization or Ombudsperson to initiate group action for discrimination cases affecting groups of persons which does not required the consent of the group members; the Law on the Ombudsperson authorize the ombudsperson to start a proceeding on his/her own initiative concerning the violation of the rights and freedoms of a larger number of citizens, children or persons with disabilities and their consent is not needed; the Law on Protection of Competition authorize consumer organizations to initiate procedures for verification of concentration and abuse of dominant position. None of these specific laws do not determine criteria or conditions which consumer organisations must meet to be certified representatives of collective consumer interests.

The Law on Consumer Protection in *Macedonia* defines the role of consumer organisations as “established by consumers for the protection and realization of their rights”. Art. 127 of the same law defines the rights of consumer organisations: to examine consumers’ complaints directly or in cooperation with the competent inspection bodies and other state administration bodies that have competencies related to consumer protection; to mediate between consumers and traders of goods and service providers in order to resolve disputes; to represent the interests of consumers in collective disputes before the competent courts. Consumer organisations are financially supported on annual basis from the state budget for their counseling, information and education activities. Art. 128 of the Law on Consumer Protection determines that consumer organisations are granted with financial support from the Ministry of Economy for their activities of informing and advising, prevention and education of consumers and raising consumer awareness and culture, but not for amicable dispute resolution and participation in such procedures.

As well the Law on Consumer Protection (art. 31-h, 31-i, 31-p, 31-q), do not fully stipulate the role of collective consumer advocacy by consumer organisations. According to these articles the Government upon a proposal by the Minister of Economy, shall determine by an act the authorized bodies that have a common interest in consumer protection but this act is still not adopted in the country. Last, the Law does not define the category of vulnerable consumers that need to be separately protected because of their particular vulnerability.

The Law on Consumer Protection in *Montenegro* in art. 162 recognize the right to association of consumers at local and national level for representation at national or international levels, as well as to protect the rights and interests of consumers. The Law delegates responsibility to the Ministry of Economy to keep a record of organizations of consumers and associations of consumer organizations. For this purpose the Ministry of Economy adopted a Rulebook on the registry of consumer organizations.⁸⁵ The consumer protection organization to be registered in the registry of organizations kept by the Ministry of Economy need to fulfil the following criteria: 1. to be established in

⁸⁵ Rulebook on the registration of consumer organizations, Official Gazette of Montenegro, No. 16/2015 (04/04/2015).

accordance with the law regulating the establishment of non-governmental organizations; 2. to be established to protect consumer rights and interests; and 3. to be an independent organization in accordance with the criteria envisaged by the Law on Consumer Protection. The independence of consumer organizations is regulated by their special Statutes. Under the Law on Consumer Protection it is clearly stipulated that the consumer organisations must be independent from state and local authorities, interests of traders, political parties and trade unions. For this purpose, art. 168 from the Law on Consumer Protection provides for special rules on financing consumer organisations from the following sources: membership fees, donations, registration fees, seminars, conferences, round tables and other activities in the field of consumer protection, funds of the budget of Montenegro for consumer protection on the basis of a public announcement, and other sources in accordance with the law. The consumer organisations to be certified representative of collective consumer interests must fulfil the following requirements stipulated in art. 169 of the same Law: 1. to be registered in the records of the Ministry of Economy for at least a year; 2. to have at least one lawyer employed, with at least three years of work experience; and 3. to actually operate and achieve results in the field of consumer protection. The Ministry of Economy is responsible to assess the fulfillment of these requirements. Currently two consumer organizations are registered, fulfil the above listed criteria and are active in the country in the field of consumer collective redress: CEZAP and ECOM from Podgorica.

Regarding the preconditions needed in *Serbia* for consumer organisations and associations to be certified representatives of collective consumer interests, first they need to be registered in a special Register kept by the Ministry of Trade, Tourism and Telecommunications. For the process of registration, the following criteria must be met: consumer protection to be their core activity; they are active in the consumer protection area for at least three years; they have adequate personnel, financial and technical resources necessary for consumer protection activities; their representatives have adequate experience, expertise and skill to perform activities in the consumer protection area; they submit a report to the Ministry on the implemented activities and achieved results in consumer protection, including the related financial statement, which shall certify its experience in this field for at least three years.

5.2. Assessment of the environment for consumer organisations to deal with collective redress

In the practice so far the national consumer protection organisations in SEE countries noted various obstacles for adequate enforcement of collective redress as part of consumer protection laws: lack of adequate legal basis for consumer protection organizations to engage in collective redress as qualified entities, lack of appropriate collective redress practice in the consumer protection organisations and the courts, lack of individual opt-in to the collective action by each consumer, lack of court actions due to financial implications on consumers, citizens, and consumer protection organisations, lack of awareness of consumers and citizens for their rights for collective redress. Existing collective redress mechanisms do not provide sufficient or effective access to justice for a wide range of citizens, particularly but not exclusively consumers, small businesses,

employees wishing to bring collective claims. In addition, in all SEE countries there is a need of adequate training of the personnel of responsible institutions being directly involved in the collective redress who are obviously lacking experience. Finally, we can say that the legal framework, the lack of financial and human resources creates a negative environment for consumer collective protection in SEE countries.

An established cooperation between the responsible institutions and consumer protection organisations in SEE countries is one of the most important precondition for efficient protection of consumers' rights. In *Montenegro*, the Ministry of Economy as a responsible line ministry for consumer protection on a daily basis cooperate and communicate with the Market Inspection and consumer protection organisations mostly for consumer complaints. The country reported apparent lack of financial resources of consumer protection organisations to provide collective redress as the state does not provide financial assistance for them. Another obstacle noted for efficient implementation of collective redress is lack of adequate training of the personnel within the responsible institutions and consumer protection organisations dealing with collective redress. In addition, the country lacks judicial practice on collective redress and mostly devote this to the reluctance of courts to apply specific consumer protection regulations and lack of knowledge of the judges on applicable consumer law. Therefore, the country faces the need to strengthen the role of consumer protection organizations, allocate funds to consumer protection organizations and provide specialized trainings for the staff applying collective redress.

Financial, spatial and human resources are also the key reasons indicated in *Macedonia* for inefficient enforcement of collective redress. Due to improve the situation, the country need to establish a legal framework for consumer collective redress, to allocate funds for the consumer protection organizations as qualified entities to represent collective consumer interests to initiate proceedings, regularly to inform consumers on the initiated collective redress proceedings, to improve spatial and technical conditions of consumer protection organisations to be able to receive and deal with a large number of consumers during the opt-in procedure.

Bosnia and Herzegovina is also a country lacking practice on collective redress as no single complaint was filed before regular courts, despite the fact that the legal framework is established, the consumer protection organisations are qualified to represent collective consumer interests, the Consumer Protection Council is established and maintain coordination and cooperation with the relevant stakeholders for collective consumer protection and the Ombudsmen for Consumer Protection is established and operational. The reasons behind are more or less the same as in the other SEE countries: lack of financial support for consumer protection organisations by the responsible entities ministries and lack of provisions in the state annual programme for consumer protection for development and activities of consumer protection associations.

The environment in which consumer protection organizations operate in *Serbia* is characterized with inefficient cooperation, lack of efficiency and results generated in the field of collective consumer protection. Up today only 6 registered consumer protection organizations and associations have filed requests for collective consumer protection. However, one of the positive steps which might improve the situation in the future for more efficient enforcement of collective consumer protection is the establishment of

regional advisory centers financed by the responsible Ministry of Trade, Tourism and Telecommunications for informing, counseling and providing legal assistance to the consumers.

In *Albania*, there are only 5 organizations dealing with consumer protection.⁸⁶ Art. 54(3) from the Law on Consumer Protection provides for the possibility of financial support from the Ministry of Economic Development, Tourism, Trade and Entrepreneurship only to associations and not to other non-profit organizations. Until 2016, no financial support was granted from the state budget to any association acting in the field of consumer protection. This impacted the potentials of the consumer protection associations and organisations as they are not financially stable to cover the costs for their staff and personnel and mostly use people working on a voluntary basis, running projects or funds from other sources. Aiming to improve the situation in the country, it is needed to raise the consumer awareness on their rights to collective redress, to provide financial assistance for consumer protection associations and to improve their available human resources to deal with consumer collective protection.

From several registered consumer protection organisations in *Kosovo*, only one can be recognized as active in the field of consumer collective protection. That is “The Consumer” organization which on the other hand does not have capacity for greater activism in the field of consumer collective redress. Legal framework in the country guarantees the right of the consumer protection organisations to apply collective redress, to represent consumers and protect their collective interests. However, the legal framework still needs to be further harmonized with the relevant EU *acquis* and to specify the conditions that consumer protection organizations must meet to represent consumers in collective redress proceedings. Last but not least, the legal framework also need to stipulate provisions for representation and funding of consumer protection organizations

5.3. Prerequisites for awareness raising toward consumers in collective redress

Public authorities, courts, consumers, consumer protection organisations and other parties in SEE countries are not sufficiently aware about collective redress mechanisms and their benefits for consumer protection and initiating action for ending of infringements of consumer rights. More vigorous enforcement tools and procedures must be made available to make consumer redress effective. A prerequisite for raising consumers’ awareness on collective redress is by their access to information and counselling, effective means of legal protection available to consumers, adequate compensation of damage and creation of a system where consumers are aware of their rights and responsibilities.

An important role in awareness-raising on consumers’ rights on collective redress should be given both to the entity representing collective interests and to non-governmental consumer organisations. Moreover, authorities whose role is to protect consumers may undertake awareness raising actions for the general public. SEE countries should ensure that consumers are aware of their rights on collective redress so they can use them every day. For this purpose, regular consumer campaigns, informing citizens of their consumer rights under the laws and pointing them to the right places where they

⁸⁶ For more details see: <http://kmk.ekonomia.gov.al/index.php/shoqatat/>.

can get advice and help in case of questions or problems should take place in each SEE country.

The National Consumer Protection Program of *Montenegro* with the aim to increase consumer awareness on collective redress define the need for protection of consumers from unfair commercial practices and dangerous products by strengthening more efficient market surveillance, to protect vulnerable groups and the safety of products, to advertise, improve the quality of telecommunications services, financial and public services, simplify access to information, manage complaints and provide expert advice. Market inspection, consumer organizations and the Chamber of Commerce regularly provide information on consumer protection and market surveillance on their websites, as well implement other activities to raise public awareness. Consumer protection organisations are entitled to implement consumer education but they need to work more efficiently on this especially for raising awareness of the professional public (like lawyers dealing in this area) as they are lacking knowledge of collective redress regulations.⁸⁷

Consumer protection organizations in *Macedonia* are not provided by the Law on Consumer Protection with funding of their activities for collective consumer advocacy. In addition, the Consumer Protection Program 2017-2018 do not foresee raising consumers' awareness of collective redress. Despite the fact that conditions for educating, informing and counseling consumers are in place, sufficient funds for consumer protection organisations are not allocated from the budget for this purpose. Due consumer protection organization to formally have active legitimacy as authorized bodies for consumer collective protection, amendments of the Law on Civil Procedure should take place. Last but not least, in order consumer protection organizations to be considered as qualified entities for filing a claim and to be able to act on collective consumer advocacy in several areas (discrimination, human rights, labor rights, consumer rights, environmental protection, etc.), it is necessary to determine conditions they need to fulfill in order to gain that status by amending the Law on Consumer Protection, the Law on Civil Procedure and other relevant laws.

Numerous stakeholders in *Bosnia and Herzegovina* are responsible for raising consumer awareness on collective consumer protection but unfortunately there are not so many successful examples in the practice up today. The Law on Consumer Protection follows up, even outside the scope of collective protection, the problem of both citizens and courts not being sufficiently informed about the contents of the law.⁸⁸ Some of the qualified entities for collective consumer protection are expected to work on building trust and confidence at the citizens and consumers and attract public attention. This specially refers to the field of prohibition of discrimination where the role of the Ombudsmen for Consumer Protection is crucial. Another possibility might be considered is to carry out a debate similar to the one the EU member states are implementing for provision of economic benefits for associations when bringing collective redress actions related to

⁸⁷ Savković, Vladimir and Dožić, Nikola, Collective redress in consumer protection in Montenegro (to be published).

⁸⁸ See Z. Meškić, u Ch. Jessel-Holst/G. Galev (ed.) Forum za građansko pravo za Jugoistočnu Evropu, Beograd: GIZ, 2010, p. 422.

consumer protection as expression of public interest.⁸⁹

A prerequisite for raising consumer awareness on collective consumer protection in *Serbia* is creation of a system where consumers will be aware of their rights and responsibilities, where they will have an access to information and counselling and be convinced that they are safe on the market. Currently the country faces with a low level of consumer awareness, inability to understand the contractual provisions, especially in the field of telecommunications, financial services, energy, incomplete product labelling, lack of instructions and warnings, unclear guarantee conditions, lack of independent consumer information sources, unfair commercial practices and false advertising, aggressive selling methods.⁹⁰

The level of consumer awareness in Albania on their rights to initiate litigation (individually or collectively) for the protection of their collective interests is low. This is mainly due to the low number of the existing and active consumer protection organizations in the country (currently only five). The public administrative structures in the country, mainly the Ministry of Economic Development, Tourism, Trade and Entrepreneurship, Consumer Protection Commission and the Consumer Protection Agency at the Municipality of Tirana are constantly working on consumer education, information and awareness raising. The Ministry of Economic Development, Tourism, Trade and Entrepreneurship as responsible ministry initiated opening of two counselling centres by consumer associations with the aim to increase the level of consumer awareness. The basis for establishment of these counselling centres are defined in the Intersectoral Strategy on Consumer Protection and Market Surveillance 2020.⁹¹ The strategy aiming to increase consumer awareness and improve consumer education suggest organizing awareness raising campaigns to inform consumers on the costs of collective redress mechanisms and consumer education as part of the 9-year education curriculum.

The Law on Consumer Protection in *Kosovo* is lacking clear provisions on the role of the consumer protection organisations as representatives of collective consumer interests, as well their role in consumer collective advocacy. Therefore, urgent amendments of the law are needed to clarify and specify the process of consumer collective representation and collective redress and to improve the communication between consumer protection organizations and consumers as a prerequisite for raising awareness among consumers.

6. Recommendations and conclusions

SEE countries as an aspirant or accession countries to become members of the European Union are challenged with responsibilities under the Stabilisation and Association Agreements to comply their national legal systems with the relevant EU *acquis* for consumer protection (Chapter 28: Health and Consumer). From the analysis of the actual level of compliance achieved in these countries it can be noted only

89 C. Meller-Hannich, 'Effektivität kollektiver Rechtsschutzinstrumente', in C. Brömmelmeyer (ed.), *Die EU-Sammelklage*, Baden-Baden: Nomos, p. 50; J. Buchner (2015) *Kollektiver Rechtsschutz für Verbraucher in Europa*, V&R unipress: Göttingen, 102.

90 Jovanovic Zattila, Milena and Vukadinovic, Radovan, *Collective redress in consumer protection in Serbia* (to be published).

91 The complete text can be found at: <http://kmk.ekonomia.gov.al/wp-content/uploads/2015/11/Strategjia-e-Mbrojtjes-se-Konsumatoreve-dhe-Mbik%C3%ABqyrjes-se-Tregut.pdf>.

minimal compliance. With reference to the key EU legal acts, SEE countries in line with the minimal harmonisation principle of the Directive 2009/22/EC on injunctions for the protection of consumers' interests have adopted it into their national legal systems. Regarding the Directive 2013/11/EU on alternative dispute resolution for consumer disputes they are still expected to undertake the transposition process (only Montenegro through the Law on Consumer Protection have partially aligned with this Directive). As the Directive 2014/104/EU for infringements of the competition law provisions does not impose an obligation on EU Member States to introduce any mechanisms for collective protection of rights, it has not been adopted yet in SEE countries. The Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms doesn't have corresponding effect on the national legislation of EU accession countries where still horizontal regulatory framework for collective redress is not established. SEE countries have not aligned with this Recommendation.

The countries introduced rudimentary collective redress mechanisms, with modest enforcement of collective redress and case law. Compared to the most European countries where horizontal regulatory approach for collective redress is introduced, sectoral approach towards regulating consumer collective protection is common for all SEE countries. Various areas of application of collective redress mechanisms are regulated by separate laws (consumer protection, competition protection, product safety, securities market, environmental protection, personal data protection, protection from discrimination, provision of financial services, investments, etc).

When it refers to the procedural mechanisms for implementation of collective redress, two main types can be distinct: *injunctive collective action* and *compensatory collective action*. SEE countries provide only for injunctive collective actions. Most of SEE countries regulate the procedure of collective redress as a special civil procedure with applicable Civil Procedure Codes (Albania, Bosnia and Herzegovina, Macedonia, Montenegro) and Law on Contested Procedure in Kosovo, while Serbia differs by providing only for administrative protection of collective consumer interests before a competent administrative body and under the Law on Consumer Protection.

It can be considered that SEE countries need a systemic reform with thorough amendments of consumer protection laws to consistently transpose EU Directives with the aim to achieve vertical harmonization. In addition, this process will require amendment of special laws regulating consumer rights in certain areas (competition, food and product safety, electronic communications, etc.), with the aim to achieve full horizontal harmonization. SEE countries within their legal systems should establish mechanisms for alternative resolution of consumer disputes and adopt separate laws on alternative consumer dispute resolution regulating different forms of alternative dispute resolution (reconciliation, mediation, arbitration, etc.).

In some of the countries the process of legal reform is already on the way and special working groups are working on drafting the amendments to the existing Laws on consumer protection (Albania and Kosovo), while in all other SEE countries concrete necessary interventions for legal reform are determined but still the process is not planned nor launched.

In view of the existing consumer redress mechanisms in SEE countries, the

following stakeholders are mostly common to be responsible for providing collective consumer protection: the Governments, the National Assemblies, the National Councils for Consumer Protection, the ministries in charge of consumer protection and other ministries responsible for implementing the consumer protection policy, regulatory bodies, market surveillance authorities and other administrative bodies with competences in the area of consumer protection, competition authorities, local self-government units, consumer protection organizations, commercial and representative associations of traders (business, crafts, etc.).

Taking into consideration various designated stakeholders in collective redress in each SEE country, there is a need of their mutual coordination and cooperation in order to develop consumer protection system and policies. An established cooperation between the responsible institutions and consumer protection organisations in SEE countries is one of the most important precondition for efficient protection of consumers' rights. In most of SEE countries this cooperation is vital to take place between the line ministry responsible for consumer protection, market surveillance bodies, regulatory bodies, Ombudsman and non-governmental consumer protection organizations. Through cooperation and partnership between the national stakeholders and their joint work on consumer information, education and advise, public awareness and knowledge on consumer protection and their rights on collective redress will be increased.

As a common to all SEE countries is having adopted bi-annual or three years National Consumer Protection Programs as strategic documents which define the consumer protection policy, priority activities and conditions for their implementation. They are complemented with special Action Plans for their implementation by setting out tasks, responsible stakeholders, timeframe, necessary financial resources and other conditions. In addition, legal acts in these countries stipulate provisions for cooperation between different stakeholders for developing and implementing consumer protection system and policies.

SEE countries entitle various entities and bodies to initiate consumer collective redress proceedings and to have role and competencies in protection of consumer rights. All countries except Serbia stipulate the possibility for administrative and court protection of collective consumer interests. Civil procedure laws or consumer protection laws in these countries entrust the courts with a jurisdiction for conducting collective redress proceedings. A special role for collective consumer protection is given to the inspection bodies in specific cases and regulated by special laws. The Ombudsman and consumer protection organizations in all of these countries play a key role in the process of consumer collective protection.

SEE countries characterise with modest enforcement of collective redress and case law. This is mainly resulted to many existing obstacles and deficiencies within the established national legal systems for application of consumer collective protection. From the analysis and research implemented for SEE countries, the following common obstacles for adequate enforcement of collective redress can be listed: expensive costs of litigation, length and complexity of court proceedings, lack of public support for financial assistance for collective redress, lack of adequate legal basis for consumer protection organizations to engage in collective redress as qualified entities, limited financial and human resources of consumer organisations, lack of experienced and skilled judges,

lack of consumers' awareness and information on their rights to collective redress, lack of individual opt-in to the collective action by each consumer, lack of awareness of consumers and citizens for their rights for collective redress.

It is a general rule to clearly specify the criteria and conditions regarding the role of qualified entities to represent collective consumer interests and initiate a proceeding for collective redress. The Commission Recommendation 2013/396/EU specifies the key criteria and conditions to be met for designating eligibility of certified entities to bring the representative action:

1. the entity should have a non-profit making character;
2. there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and
3. the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

In SEE countries, the established legal framework defines certain criteria the consumer protection organisations must meet to represent collective consumer interests. Still these countries need to align further with the Recommendation 2013/396/EU and to specify in their national laws precise criteria the entities have to meet in order to conduct efficiently procedures for collective protection. These laws should also contain clear provisions of financing of entities authorised to bring collective redress actions from public funds and third parties with prescription of explicit criteria in terms of transparent financing from third parties in accordance with the Recommendation 2013/396/EU.

In SEE countries in parallel to establishing a legal framework for consumer collective protection allocation of public funds for the consumer organizations as legitimate representatives of consumers' interests should be provided with the aim to cover their costs for initiating the proceeding, training of their professional staff, informing consumers on the running collective redress proceedings and covering the risk of losing the litigation. They should establish a clear system for financing consumer organizations as a legitimate advocate of consumers and their advocate in collective disputes.

Currently the consumer organisations in these countries receive modest financial incentives from the Governments on annual basis which are not sufficient for their sustainable operation neither for their motivation to launch and initiate collective redress proceedings without being financially capable for taking this risk. National Programmes for consumer protection in SEE countries provide for possibility to grant consumer protection organisations with limited funds for their activities allocated by way of public competition. Considering the fact that these funds should be awarded and spent in the interests of consumers, the legislator in these countries restricted entitlement to their allocation only to such consumer organizations that meet the requirements stipulated by the law such as:

- to be established in accordance with the law as non-profit organisations;
- to be established to protect the rights and interests of consumers;
- to be independent.

The apparent lack of financial resources was a common problem reported in

SEE countries, not only for public entities, but also for the consumer organizations to be sustainable and financially independent to provide collective protection of consumers' interest, to cover extremely high proceeding costs and to have financial potential in case they lose a collective dispute.

Public authorities, courts, consumers, consumer protection organisations and other parties in SEE countries are not sufficiently aware about collective redress mechanisms and their benefits for consumer protection and initiating action for ending of infringements of consumer rights. More vigorous enforcement tools and procedures must be made available to make consumer redress effective. A prerequisite for raising consumers' awareness on collective redress is by their access to information and counselling, effective means of legal protection available to consumers, adequate compensation of damage and creation of a system where consumers are aware of their rights and responsibilities.

An important role in awareness raising on consumers' rights on collective redress should be given both to the entity representing collective interests and to non-governmental consumer organisations. Moreover, authorities whose role is to protect consumers may undertake awareness raising actions for the general public. SEE countries should ensure that consumers are aware of their rights on collective redress so they can use them every day. For this purpose, regular consumer campaigns, informing citizens of their consumer rights under the laws and pointing them to the right places where they can get advice and help in case of questions or problems should take place in each SEE country. It should also be considered to introduce or/and further develop consumer education and inclusion of consumer protection topics into the educational programmes of primary and secondary schools. Protection of consumer rights and interests should also be promoted through institutions active at the local level in order to educate, inform, and counsel consumers and enable them to participate in the decision-making process

Existing collective redress mechanisms do not provide sufficient or effective access to justice for a wide range of citizens, particularly but not exclusively consumers, small businesses, employees wishing to bring collective claims. In addition, in all SEE countries there is a need of adequate training of the personnel of responsible institutions being directly involved in the collective redress who are obviously lacking experience. Finally, we can say that the legal framework, the lack of financial and human resources creates a negative environment for consumer collective protection in SEE countries

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PART FOUR

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS AND RECOMMENDATIONS

Based on the key findings from the comparative research analysis for the countries from South East Europe and the follow-up discussion between the representatives from all relevant institutions and organisations working on consumer protection in these countries during the Regional meeting on “Collective redress mechanisms for consumers in the European Union and South East Europe” held on 24th and 25th of January 2018 in Skopje, Macedonia and supported by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Open Regional Fund for South East Europe-Legal Reform (ORF-LR), the following conclusions are defined for the region:

1. There are evident deficiencies within the established national legal systems for application of collective protection of consumers’ interests.
2. There is a need for continuous education of institutions, judges’ associations, mediation centers and other public and administrative bodies on developments of national legislation for collective redress.
3. There is a lack of financial and human resources and skills of consumer protection organizations to take procedures in collective redress due to the actual insufficient and modest financial support they receive on annual basis from the Governments.
4. It is essential to explore the possibilities for allocation of financial resources for identified public entities and consumer protection organisations to become financially independent and to provide collective protection of consumers’ interests as well as to be in a position to cover extremely high proceeding costs in case they lose a collective dispute.
5. There is a need for strengthening capacities of the relevant stakeholders in the region on collective redress case management, injunctions and alternative dispute resolution procedures.
6. There is a lack of public awareness and information of citizens and consumers regarding the existing national legislation and possibilities for collective redress procedures.

Based on the above conclusions, the following recommendations are perceived for the region:

- To provide support by EU mechanisms to further develop national legislation in SEE countries and to improve legal base for collective redress.
- To allocate public funds and third parties finances for supporting activities of the entities authorised to bring collective redress actions.
- To secure available public funds for the consumer protection organizations as legitimate representatives of consumers’ interests to cover their costs for initiating the proceeding for collective redress.
- To organise trainings of public institutions and consumer protection organisations in management of collective redress procedure, predicting the risk of losing the litigation.
- To support awareness raising of consumers on collective redress, access to information and counselling.

ISBN: 978-608-4536-20-8



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