

Dušan Protić

# CONSUMER PROTECTION IN SERBIA

what are some possible directions for progress?

*a public policy discussion document with options for possible solutions*



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Consumer protection in Serbia - what are some possible directions for progress?

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# Contents

I. INTRODUCTION .....	4
II. ASSESSMENT OF THE CURRENT STATE OF THE IMPLEMENTATION OF CONSUMER PROTECTION RIGHTS .....	7
<i>II.1. Structure of consumers' complaints .....</i>	<i>9</i>
<i>II.2. Modes of implementation of consumer rights protection .....</i>	<i>10</i>
<i>II.3. Key problems in exercising consumer rights .....</i>	<i>11</i>
III. CRITICAL REVIEW OF THE PROPOSED AMENDMENTS TO THE ACT ON CONSUMER PROTECTION .....	19
IV. SUGGESTIONS OF POSSIBLE SOLUTIONS FOR IMPROVING THE LEVEL OF CONSUMER PROTECTION IN PRACTICE .....	26
<i>IV.1. Options for improving administrative-legal forms of protection:.....</i>	<i>26</i>
<i>IV.2. The option of improving legal aid and support .....</i>	<i>36</i>
<i>IV.3. Out-of-court settlement.....</i>	<i>38</i>

# I. INTRODUCTION

*Consumer protection in Serbia* is an area of public policy that has been established and is legally shaped under the auspices of the European integration process. The 2010 Consumer Protection Act<sup>1</sup> (“**2010 Consumer Act**”) introduced consumer protection rules into our legislation based, for the first time, on EU law as part of the legal harmonisation process with the *acquis communautaire*, as well as previously assumed obligations under the Stabilisation and Association Agreement (SAA).<sup>2</sup> Consumer protection policy in Serbia is therefore a reflection of the standards and practices of the EU legal framework. Bearing in mind these conditions and the reasons for the legislative initiative, it is not surprising that the 2010 Consumer Protection Act was focused on the issue of legal harmonisation: a great effort was made with this legislation to implement almost all relevant EU consumer law into the legal order of Serbia with a single law. This approach has crucially influenced the further course of development, in terms of systemic regulation, of the legal framework of consumer protection in Serbia, as it defined and likely irreversibly constituted the practice of *codification of consumer law*, as opposed to *the sectoral approach*, the ability to incorporate relevant consumer *acquis* by sectoral acts.

The rules of consumer legislation envision a complex set of new legal concepts such as regulations on unfair business practices or unfair contractual provisions, compliance and accompanying warranties, and in a number of other areas (as well as with new conditions of application), as compared to the previous domestic legal order, raising questions regarding the understanding and interpretation of norms in the context of both regulation itself and the legal system as a whole. A second group of problems is related to the application of its provisions by competent authorities, i.e. in each institutional context. Weaknesses of the new legal regime of consumer protection have emerged in terms of institutional capacities and procedural mechanisms for the

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<sup>1</sup> Consumer Protection Act (Official Gazette of RS No 73/2010).

<sup>2</sup> Article 78 of the SAA foresees cooperation between the contracting parties in harmonising consumer protection standards in Serbia with those of the European Community, and places this obligation in the context of the successful functioning of the market economy and administrative capacities to ensure market surveillance and law enforcement in this area. In addition, the same provision clarifies the obligation to harmonise consumer protection legislation in Serbia with EU law, achieving effective legal protection.

implementation of the newly created legal concepts for consumer protection. One of the key reasons for this is that the 2010 Consumer Act has placed the focus of legal aid and support on the limited resources of consumer organisations, and consumer legal protection in the context of civil protection, with its realisation through lawsuits in civil proceedings.

Based on these shortcomings, as well as the need to harmonise with new consumer directives and further improve the consumer protection system (such as creating conditions for the further development of consumer organisations), a new Consumer Protection Act was adopted in 2014, which is, with some subsequent amendments, in force today.<sup>3</sup> Although it was adopted as a new act, in terms of its content it is a partial amendment of the previous one. The new act retains the same consumer protection rules of the previous, as derivatives of EU legislation. It also provides mechanisms for the improvement of the implementation of these rules, especially in the protection of collective consumer interests, as well as for analytical capacities for monitoring the situation in this area, introducing the National Register of Consumer Complaints (“**NRCC**”). The procedure for determining violations of the collective interest of consumers, which takes place in the administrative-procedural legal regime before the line ministry,<sup>4</sup> is the most significant change, showing a level of success in practice. However, key shortcomings of the institutional mechanism, which are reflected in the inability to timely, effectively, and successfully ensure the protection of affirmed consumer rights in individual situations, especially in cases of disputes with traders, have continued to manifest in practice even today.

Shortcomings in terms of the "revitalisation" of consumer law were also noticed in the accession negotiation process: the screening report for negotiation Chapter 28 (which concerns consumer and health protection), states that a general legal framework exists, but that it is necessary to improve the enforcement of consumer rights and the implementation of consumer policies.<sup>5</sup> Also, in the annual progress reports of the European Commission, shortcomings continue to be noted in terms of administrative capacities in consumer protection and market surveillance.<sup>6</sup> In this regard, it should be noted that the imperative requirements of the SAA are aimed not only at legal harmonisation, but also at

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<sup>3</sup> Consumer Protection Act (Official Gazette of RS No 62/2016, 6/2016 – other law and 44/2018 – other law), hereinafter: Consumer Act and SAA.

<sup>4</sup> Ministry of Trade, Tourism and Telecommunications (hereinafter: the Ministry).

<sup>5</sup> Screening report for negotiating chapter 28 Consumer and health protection, 15.06.2016.

<sup>6</sup> EC report for Serbia 2019.

ensuring the effectiveness of prescribed rights and protection mechanisms, which imply adequate institutional mechanisms, as well appropriate practice by competent authorities potentially subject to evaluation in terms of the accepted standards of success.<sup>7</sup>

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<sup>7</sup> Art. 78 of the Consumer Act.

## II. ASSESSMENT OF THE CURRENT STATE OF THE IMPLEMENTATION OF CONSUMER PROTECTION RIGHTS

Identifying the key issues that arise in the implementation of consumer protection rules is based primarily on the experiences and comments of representatives of consumer organisations as presented at meetings, thematic discussions and interviews with members of the working group of the National Convention on the European Union ("**NCEU**") for the Negotiation Chapter 28 (which brings together representatives from most active registered consumer organisations), available reports on the structures and content of consumer complaints, as well as on study findings and research on the state of protection and access to justice in the field of consumer rights.<sup>8</sup> Particular attention was paid to existing institutional, process, and organisational solutions, as well as to the practices of competent holders of public authority in resolving consumer protection rights claims.

The implementation of consumer rights should be viewed in the broader context of the functioning of public administration in the field of administrative and inspection supervision, of collective protection procedures and the improvement of consumer protection policy, and especially of access to justice. Violations of the law which are subject to inspection supervision, administrative procedures for the protection of the collective interest of consumers, and misdemeanour procedures, which are supported by administrative measures or possible sanctioning of traders, by their nature cannot ensure the protection of individual rights and interests of consumers, but rather work to influence traders' behaviours.<sup>9</sup> In this way, business entities can be influenced to stop, temporarily

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<sup>8</sup> "Problems and obstacles to access to justice in enforcement procedure from the perspective of consumer protection", Dušan Protić, CEP, 2019; "Analysis of case law - Proceedings of the courts on the proposal for exemption from payment of court costs in litigation", YUCOM, 2018; "Analysis of small value disputes", Ana Lučić Vidojković and others, Forum of Judges of Serbia, 2019.

<sup>9</sup> Administrative measures foreseen by the law include the temporary prohibition of trade in goods or services as determined by the market inspector in cases of violation of orders to eliminate the observed irregularity (Art. 157. Consumer Act), as well as a measure to protect the collective interest of consumers as determined by the Ministry after the conducted procedure (Art. 150. Consumer Act).



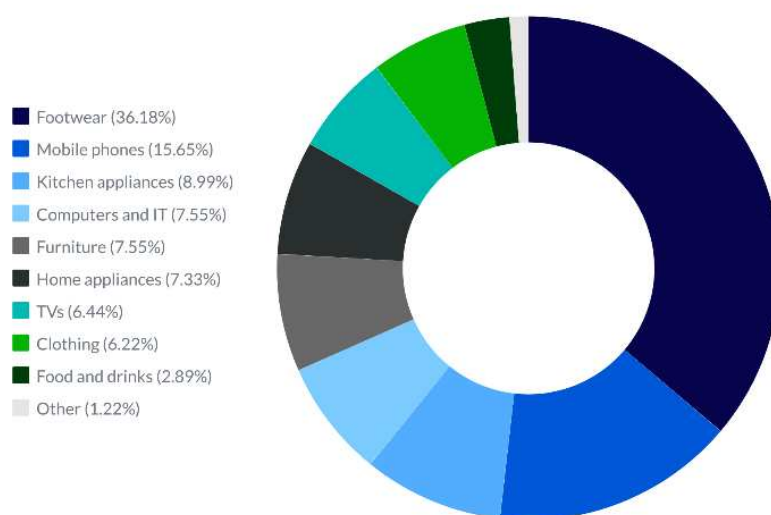
or permanently, their implementation of business practices that violate prescribed consumer rights, and, to a lesser extent, work towards the prevention of such behaviour, based on the severity of sentences imposed, and, especially, the certainty of punishment. On the other hand, the existing civil approach to the protection of consumer subjective rights, in which in a consumer dispute a lawsuit is the legal remedy available to the consumer to protect their rights in a procedure before a state body, is conditioned by general circumstances of access to justice in civil matters, such as questions of the effectiveness of the judicial process, the amount of possible costs, the legal predictability of the practises of courts, and other issues related to the functioning of the judiciary as a whole.

Another aspect of the conditionality of the successful implementation of consumer law legislation is the state of the market, the functioning of market mechanisms and, in general, the business and economic environment. Competitive pressure for business entities, as participants in a market with a high degree of competition, is undoubtedly a better mechanism for influencing the correction of irregularities in business practices and the realisation of consumer interests than the intervention of state authorities through legal sanctions. A consumer who is able to substitute a good or service for another that he or she considers similar in character, purpose and price can do so in the case of dissatisfaction with the trader's reaction to the exercise of consumer rights. Actors in such markets follow business practices that imply a high degree of consumer protection, take into account customer experience and satisfaction, and meet consumer requirements even above the minimum prescribed by law (such as "no questions asked" guarantee practices, refunds in cases of dissatisfaction with goods, and others).

Serbia's internal market, in most sectoral areas, is not characterised by a high degree of competition. There are also significant limitations in terms of rule of law and the functioning of the judiciary, and such conditions do not favour an environment in which consumer rights are protected by practices of the courts. With this in mind, the further development of administrative practices of competent bodies, the expansion of their competences in terms of the realisation of individual consumer demands, and other types of restructuring the institutional setting of consumer rights protection in the domain of public administration, are necessary for the improved realisation of these rights in practice.

## II.1. Structure of consumers' complaints

Regarding the work of consumer organisations, the structure of consumer complaints received indicates that they most often relate to malpractice, with traders rejecting complaints regarding product or service conformity claims (33.8%), followed by those related to the quality of the product or service provided (26.6%).<sup>10</sup> Counselling and legal support provided by consumer organisations to consumers most often occurs in cases of complaints about services of general economic interest (35.9%). Mediation with traders to solve individual consumer problems in practice most often occurs regarding the provision of electronic communication services (27.1%) and in the purchase of footwear (16.1%).<sup>11</sup> According to the National Register of Consumer Complaints (NRCC), by type of goods, by far the most complaints are about footwear (32.6%), mobile phones (14.1%), kitchen appliances (8.1%), computers and communication equipment (6.8%), furniture (6.8%), home appliances (6.6%), and TVs (5.8%).<sup>12</sup>



*Structure of customers complaints by the type of goods in 2018 (NRCC)*

<sup>10</sup> Annual Report on the Work of the Consumer Counselling Centre NOPS, 2018.

<sup>11</sup> Consumer Protection Strategy for the Period 2019-2024 (Official Gazette of RS No 93/2019).

<sup>12</sup> Report on the Work of the National Register of Consumer Complaints for 2018, Ministry of Trade, Tourism and Telecommunications.

At this moment, the NRCC contributes predominantly in analytical terms, providing data about the structure of consumer complaints according to subjects, products and services, traders to whose business they refer, and methods of purchase concerned. Data regarding the content of complaints, meaning the violations themselves and the matter addressed by consumer rights, are entered narratively and are not suitable for analytical processing, meaning there is no reliable picture of the situation in this regard. In addition, the number of consumer complaints received through the NRCC system provides some indication of the extent (and even trend) in the number of unresolved consumer claims and situations from which consumer disputes arise.

Consumer complaints are currently the most reliable indicators of the existence of consumer problems. The content and structures of these complaints are systematised according to the types of goods and services concerned. They cannot, however, be qualified as a protection instrument as they do not initiate any procedures and do not imply sanctioning in the event of failure to act on the requests they contain, but are instead more a *petition for assistance* that indirectly (through the website of the Ministry or market inspection) or directly reaches consumer organisations, who, with very limited resources and lacking effective instruments for legal protection, either give advice, legal support, or to try to resolve problems through informal mediation with traders. In addition, it should be noted that the data on the outcomes of resolving consumer complaints are not reliable because they do not provide a true picture of the actual outcome, not showing whether consumers' requests are fulfilled in full or in part, or not at all.

## *II.2. Modes of implementation of consumer rights protection*

According to the existing legal and institutional framework, consumer rights issues can be resolved in the following manners:

- *direct contact with the trader*: the basic and primary instrument of consumer protection is reclamation, which requires the trader to fulfil the conformity of goods or services, i.e. to exercise the right guaranteed by law;
- *consumer complaint*: petitions or complaints reporting violations of consumer rights, addressed to consumer organisations, for advice or legal support in fulfilling requests;
- *out-of-court dispute settlement*: contacting authorised bodies for out-of-court settlement of consumer disputes such as mediators;

- *judicial protection*: filing lawsuits in consumer disputes before competent courts, or other types of judicial protection that concern consumer disputes.

In the previous chapter of this document, a brief overview of the structure and assessment of the treatment of registered consumer complaints is given. At the same time, it should be kept in mind that some complaints are not recorded, as the obligation to do so is only for those consumer organisations that participate in the current annual programme of consumer counselling.<sup>13</sup>

Out-of-court protection is underdeveloped and takes place only sporadically.<sup>14</sup> There are no official statistics on consumer disputes presented before the courts, but based on the experience of consumer organisations it can be concluded that it rarely occurs in practice. Proceedings in which the consumer is the defendant, and which are conducted based on the enforcement of objections on the basis of a credible document in communal and related cases, are much more frequent but are not considered consumer disputes in court practice.

Inspection supervision, which is carried out by the Market and Tourist Inspection, examines the implementation of the prescribed rules of consumer protection and determines measures in order to eliminate observed irregularities and initiate procedures to sanction identified violations. Inspection, however, *does not provide direct assistance to consumers*, nor is it its role to do so, so it cannot be classified as a key area of consumer protection. The role of the procedure of protection of the collective interest of consumers is similar, which represents a specific administrative supervision procedure performed by the competent ministry, but also does not represent a form of direct assistance to consumers in exercising their rights and interests.

### *II.3. Key problems in exercising consumer rights*

The main problem facing consumer protection is not of a normative nature, at least not in terms of prescribing material rules (which have been largely taken over and harmonised from relevant European legislation), but in *the exercising*

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<sup>13</sup> The programme of regional consumer counselling centres of the Ministry of Trade, Tourism and Telecommunications, based on which seven consumer organisations were supported in 2019.

<sup>14</sup> The last available official data are for 2016 and 2017, when a total of eleven requests for initiating out-of-court settlement of consumer disputes were received (Strategy).

*of those rules.* In addition to general problems related to systemic and institutional shortcomings in terms of rule of law, it is necessary to shed light on sector-specific issues, which condition or represent obstacles to the successful and efficient exercise of consumer rights. The following are the key issues in consumer protection, summarised primarily based on the experiences of consumer organisations in the practice of providing support to consumers.

### **1) The common practice of traders of giving negative responses to consumer complaints**

As a rule, traders reject requests for the rectification of the lack of conformity of goods or services, staying within the fulfilment of the imperative legal obligation to receive complaints and respond to them within 15 days for each process, providing a 30-day window for complaints about technical goods and furniture. “Rejection” is often concise, generic and without reasons provided that directly relate to complaints or claims, and it is common that complaints are rejected due to allegations of improper use or use contrary to the declared purpose of the goods. Such responses point to the conclusion that complaints are not even necessarily considered, but that the *rejection of complaints is actually the business policy of the trader*, aimed at avoiding further obligations and costs related to rectifying observed defects in the goods or services provided.

The root cause of this phenomenon is the lack of an effective consumer protection mechanism in individual situations. A “see you in court” response from consumers has little effect on traders as they are aware of the difficulties that consumers have in terms of access to justice in such situations, including the relatively high potential costs of proceedings for consumers as prosecutors, difficulties in evidentiary proceedings for consumers, and the general circumstances of legal unpredictability and the length of court proceedings.

In addition to the lack of an effective legal and institutional mechanism, the economic factors that influence the emergence of such negative business practices should also be kept in mind. When there is a high degree of competition in a certain market, its actors correct their behaviour by pursuing a business policy of meeting the demands of consumers independently and without the intervention of state bodies. They develop their customer service bearing in mind that relationships with consumers are important in making the decision to choose a product or service, and thus the decision to substitute one trader’s product for the product of another, as a consequence of an unfavourable relationship or (non)response to complaints. The lack of competitive pressure in the internal

market is undoubtedly a crucial economic factor in the emergence of the harmful business practice of systematically rejecting complaints.

## **2) Widespread unfair business practices and unfair contract terms**

Unjust contractual provisions and unfair business practices are gross and systematic violations of collective rights and consumer interests. This is not a matter of sporadic violations in individual cases, but of violations that occur in all or most transactions of a particular trader with consumers. By applying the legally prescribed procedure for protecting the collective interest of consumers and the measures that result from it, a higher level of awareness is provided about the characteristics of violations that fall into these categories, as well as the possibilities for eliminating them, both for traders and consumer organisations. Surveys of administrative practice in collective protection proceedings indicate that the most common perpetrators of these violations are service providers of general economic interest, namely public utility companies and telecommunications companies, which further increases the severity of these violations. It can reasonably be expected that these violations are significantly more frequent than the proceedings conducted (a total of 16 cases in the past five years), especially in areas where service providers have monopoly positions in the market, such as utilities.

A significant contributor to unfair contractual provisions are regulations on the manner and conditions of the provision of utility services by local governments, as well as sectoral regulations arranging the conditions of the provision of services to end users (such as energy and telecommunications services), which are not always adequately harmonised with prescribed consumer rights, and in practice often prevail over the latter.

## **3) Insufficient support provided by consumer organisations**

The problem of access to adequate legal aid in consumer matters is one of the key problems in this area. Consumer organizations are the most important providers of legal aid to consumers, and they achieve this quality by informing about their rights, providing legal advice, mediation in resolving consumer complaints, and other forms of support. However, at the moment, the total number of registered consumer organizations is only 26, of which only half are regularly active, and their material, technical and human resources are very limited. The program of regional counselling centres, financed by the Ministry of

Trade, Tourism and Telecommunications every year provides basic funds for their functioning, but this activity is organized only in a few cities (in the program 2019-20, counseling centers were organized in Belgrade, Novi Sad, Kragujevac, Nis and Kikinda). In addition, some legal aid NGOs also provide assistance, especially in consumer disputes and enforcement cases in communal matters (YUCOM).

An important circumstance that makes it difficult to provide legal aid in consumer matters is their relatively small value in relation to the number of attorney's fees under the Lawyer's Tariff, so there is a reluctance of citizens to pay high costs of proxies in consumer disputes, which can be significantly higher than the value dispute, regardless of the merits of the claim and the (uncertainty) of the success of the dispute.

#### **4) Unavailable and inadequate judicial protection**

Bearing in mind that the court is the final means of protection of subjective rights and that at the same time it has the final word regarding the rights of consumers in individual disputes, its role is still very modest in the process of consumer protection. Judicial practice in consumer disputes is insufficient, sporadic, and does not provide assurance about the possibility and certainty of the protection of individual rights and interests. In the first place, the court's rules of procedure do not provide the procedure for consumer lawsuits in the register, but are conducted under the general "P" mark, which prevents the analytical processing of these cases in court statistics, even though the Law on Civil Procedure recognises such procedures as special and as containing certain special procedural rules.<sup>15</sup> In practice, these cases are most often supported by consumer organisations that provide legal aid and sometimes representation with attorneys with whom they cooperate, in cases where consumers file lawsuits to exercise their rights or interests.

On the other hand, in practice, it is extremely common for consumers to be defendants in procedures, especially in those initiated against them by enforcement decisions based on credible documents in utility cases, and upon the enforcement debtor's complaint which induces litigation. These cases are conducted in court as payment order proceedings and are not recognised as consumer disputes, neither in the procedural nor in the material-legal sense,

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<sup>15</sup> Chapter XXXV "Procedure in consumer disputes", Art. 488 to 493 of the Code of Civil Procedure.



although it is a legal relationship which certainly includes consumer law (when the user is an individual, in the categories of "population" or "household").

The most common remarks heard from representatives of consumer organisations that provide legal support to consumers in court cases are that the court rarely and reluctantly recognises the application of the Consumer Act in said cases, that its rules are often implemented incorrectly, that priority is given to sectoral regulations (even when they don't have legal rank), and that there is often not even a sufficient level of knowledge of consumer law. In addition, a particular problem concerns the rules of evidence invoked, often ignoring the prescribed statutory burden of proof that falls on the trader when examining the conformity of a good or service within the statutory time limit of his liability for non-conformity. It should be kept in mind that consumer cases concern relatively small values and that the costs of proceedings may be higher than the values of the subjects of disputes, especially when considering the costs of representation and expertise. In consumer disputes, prosecutors should be exempted from paying court fees, but in practice, this rule is not consistently applied.

Therefore, access to judiciary proceedings in consumer matters is characterised by many obstacles, which are reflected in their legal unpredictability, the length of proceedings and the possible amounts of total costs, which work well to deter consumers from initiating court proceedings to protect their rights. In conditions in which traders reject complaints and there is no out-of-court mechanism that can influence them to accept even well-founded consumer requests, court proceedings remain the only legally possible (yet essentially unavailable) way to protect consumer rights.

## **5) The lack of an effective out-of-court model for dispute resolution**

In practice, the out-of-court settlement of consumer disputes is extremely rare. The law provides mediation and arbitration as potential forms of out-of-court dispute resolution, and the existing model of mediation is based on the current legal framework that describes mediation in dispute resolution.<sup>16</sup> However, to date, a relatively small number of intermediaries have been registered on the list of bodies for out-of-court settlement of consumer disputes (a total of 10 persons), and no official data on the number of cases resolved in this manner are available. According to earlier estimates there are only a few consumer disputes a year

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<sup>16</sup> Mediation in Dispute Resolution Act ("Official Gazette of RS", No. 55/2014).



presented before the body for out-of-court settlement. In addition, it should be noted that no functional consumer arbitration has been established so far.

Representatives of consumer organisations point out that the main cause of this phenomenon is the lack of motivation of traders to participate in mediation or any other form of out-of-court dispute resolution. Traders are aware that access to justice in consumer matters is difficult and uncertain, that apart from inspections and misdemeanour penalties, there is no effective mechanism to ensure compliance with prescribed rules, that there is often little competitive pressure in the market, and that consumers are left to the trader's decision as to whether the trader accepts the requirements for rights' protection. At the same time, there is not enough pressure to potentially damage the reputations of traders, which would occur as a consequence of their failure to comply with justified consumer demands, leading them to believe that there is no need to engage in substantive examination of consumer demands and actually solving their problems.

Accordingly, therefore, there are two main aspects of this phenomenon: the lack of a successful and efficient model and the lack of incentives for traders to participate in settling any dispute in an out-of-court dispute resolution (not mandatory as such).

## **6) Insufficient visibility of consumer protection organisations**

A first period of enthusiasm, with legal harmonisation and the introduction of the European legal regime of consumer protection (at the time of the adoption of the first act based on the legal reception of European consumer law in 2010), an amended act adopted on the same basis in 2014, the expansion of consumer organisations (24 of 26 were registered in the period from 2011 to 2015), the introduction and implementation of procedures for the protection of the collective interests of consumers, as well as activities related to the screening of negotiation Chapter 28 (2014/15), was followed by a period in which the topic of consumer protection largely disappeared from the public domain. The most significant event for consumer protection policy is the recent adoption (in December 2019) of the Consumer Protection Strategy for the period from 2019 to 2024, which generated little enthusiasm among the public.

At the same time, it should be noted that consumer protection policy has not been a focus of the government for a long time. After the adoption of the Consumer Act in 2010 and the establishment of a system based on EU standards, in all expositions of the prime-minister-elect, representing the basic political programme of the government to be elected, consumer protection is not

mentioned at all.<sup>17</sup> According to the existing division of competencies, the Ministry of Trade, Tourism and Telecommunications is the key responsible body in this area. This same ministry is responsible for other affairs in the organisation of the market as a whole, however, and cannot always be a true advocate for consumer protection, as that would risk disturbing its balanced position in relation to other actors, such as the business sector as a whole. Consumer organisations, on the other hand, are not strong or influential enough in the public eye: currently there is no association or network at the national level that brings together all, or most, relevant organisations, so stakeholders assume that consumer protection is not a focus of public policy and not sufficiently present in the public discourse. The question that arises in this context is who is the "champion" of consumer protection: who should be the main advocate of this public policy and the bearer of key proposals and measures, and this question currently remains without an adequate answer.

As this area is closely connected with the EU accession negotiation process, it is expected that the announced opening of negotiation Chapter 28 will provide new momentum for the development of consumer protection, and greater public interest and progress in improving the institutional order which enables the implementation of consumer protection rules.<sup>18</sup>

## **7) An insufficiently developed theory of consumer law**

Consumer law is not adequately represented in domestic academic institutions; it is not studied as a separate legal field, although is a subject of study within various courses in law and economics. Domestic legal literature in this field consists mainly of professional and scientific articles, commentary on regulations and academic masters' theses. There are currently no thematic textbooks on the topic of consumer law, and scientific and professional monographs are rarely published in this area.<sup>19</sup> The state of the theory of consumer law in Serbia has indirect consequences both on the quality of regulations produced in this area and on the exercise of consumer rights in the practices of competent state bodies and economic entities in the role of traders. There is a lack of systematised expert knowledge on consumer law, which would be available to legal

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<sup>17</sup> Expositions of Prime ministers from 2012, 2014, 2016 and 2017

<sup>18</sup> At the time of writing, a negotiating position for Chapter 28 has been prepared but has not yet been adopted: this chapter does not contain a criterion for opening negotiations.

<sup>19</sup> In terms of recent professional monographs, we can single out Denis Perinčić, "Provisional Consumer Legal Protection", Andrejević Endowment, 2019.

practitioners who are not professionally involved in providing legal assistance in consumer matters or applying consumer law on a daily basis, such as judges, lawyers, legal counsels who perform related tasks with business subjects, and other persons who have interests in or needs for improving knowledge in this area. The consequences of this situation are uneven legal practice, involuntary mistakes in the application of material law, and ignorance of the applicable consumer law in certain situations. The lack of "emancipation" of consumer law creates an impression that this legal area has secondary importance, often in the shadow of contract law or sectoral legislation, and thus produces an unfavourable, subjective attitude of decision-makers on consumer rights in individual matters, which can be crucial for exercising subjective right in the end.

### III. CRITICAL REVIEW OF THE PROPOSED AMENDMENTS TO THE ACT ON CONSUMER PROTECTION

The Draft of the Act on Consumer Protection ("**Draft of the Act**"), which was prepared and presented to the public for public discussion in November 2019 as the text of the new act (completely derogating the current one),<sup>20</sup> based on its content only represents a modification of existing legal solutions and does not prescribe significant changes to the system, concept, and legal regime of consumer protection. In this way, the trend of the gradual development of consumer law continues, following the adoption of the first Consumer Act based on the harmonisation of EU consumer law in 2010 with Serbian law, which largely took over provisions from relevant EU directives at the time and set the ground for the existing system and institutional environment, with the law of 2014 implementing certain minor improvements.<sup>21</sup>

The changes envisaged by the Draft of the Act as compared to the current act include the following areas:

- Significant changes and amendments are made to the part of the act that regulates consumer protection in tourist services, and appropriate changes are made to the glossary regarding the newly proposed legal solutions;

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<sup>20</sup> Consumer Protection Act ("Official Gazette of RS" No. 62/2014, 6/2016 - state law and 44/2018 - state law).

<sup>21</sup> The current Consumer Act implements in full or in essential provisions most European consumer legislation, such as Directive 2011/83/EU on consumer rights, Directive 2005/29/EC on unfair commercial practices, Directive 85/374/EEC on liability for defective products (as amended by 99/34/EC), Directive 93/13/EEC on unfair contract terms in consumer contracts, Directive 99/44/EC on the sale of consumer goods and accompanying guarantees, Directive 90/314/EEC on travel arrangements, Directive 2008/122/EC on the timed use of immovable property (timesharing), Directive 2009/22/EC on prohibitive measures to protect the interests of consumers, Directive 2002/65/EC on the distance marketing of financial services, Directive 2002/22/EC on universal service, Directive 2009/72/EC on electricity, Directive 2009/73/EC on natural gas and Directive 2013/11/EU on alternative dispute resolution for consumer disputes.

- A register of consumers who do not want to receive calls and/or messages in direct advertising is introduced;
- Details of complaint procedures are modified;
- An obligation to issue budgets for services worth over 5,000 RSD is defined;
- Amendments are introduced regarding the obligation to form commissions for resolving complaints with service providers of general economic interest;
- The possibility of deleting associations from the Register of Consumer Protection Associations is adopted, based on determining and publishing membership in commissions of service providers of general economic interest;
- Significant changes and additions are defined in terms of consumer dispute and out-of-court dispute resolution;
- A change in how misleading business practices are determined, as well as certain procedural changes in collective protection procedures, are added, and unfair business practices in terms of collective protection are left out;
- Changes in the procedure and authorisations for inspection supervision are introduced.

The following section will comment on several of the most significant changes from the perspective of the general legal regime of consumer protection and the related institutional mechanisms, specifically the proposed modifications regarding unfair business practices and collective protection, as well as proposed changes in judicial protection and models of out-of-court resolution of consumer disputes.

Regarding the prescribed protection against unfair business practices, it should be noted that the Draft of the Act contains an amendment on its definition of misleading business practices, stipulating that this term refers only to business practices based on false information. In this way, its meaning is narrowed, yet nevertheless this directive presents a more precise definition taken of the term.<sup>22</sup> On the other hand, there are limitations in terms of the instruments of protection available against unfair business practices, given that it is proposed that this form of violation of consumer rights be excluded from the area of the protection of collective consumer interests.<sup>23</sup> Collective protection, in the form prescribed by the current act, is based on the mechanism provided by Directive 2009/22/EC

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<sup>22</sup> Article 16 of the Draft of the Act and Directive 2005/29/EC on unfair commercial practices, Article 6.

<sup>23</sup> Article 170 of the Draft of the Act.

9 on injunctions for the protection of consumers' interests<sup>24</sup>, which leaves the possibility for member states to regulate procedures for protecting collective interests in court or administrative proceedings. As the Constitutional Court ruled the Civil Procedure Act, which regulated procedures for the protection of collective rights and interests of citizens (on which the implementation of judicial protection of collective interests of consumers is based), unconstitutional and repealed its provisions,<sup>25</sup> the only possibility left is to prescribe for protection in administrative procedures, which was done by the valid act. Moreover, this mechanism has shown in practice that it is one of the most effective instruments of consumer protection, with 16 decisions made in procedures of protection of the collective interest of consumers implemented by the Ministry of Trade since its implementation in 2015.<sup>26</sup>

The Draft of the Act, however, prescribes the exclusion of unfair business practices from the scope of protection of collective interests, which would be a step backwards in terms of the achieved level of legal protection and administrative practice in this matter. "Unfair business practice" is a category of violations of the collective interests of consumers, meaning violations of consumer rights that go beyond individual cases, violating consumer interests on a wider scale. These are practices that affect the interests of a particular group of consumers or consumers in general, representing a subject of collective protection in the cited Directive 2009/22/EC.<sup>27</sup> In addition, a provision of the current law, which has not been changed in the text of the Draft of the Act, specifically prohibits business practices that threaten to significantly disrupt the

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<sup>24</sup> 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 available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0022&from=EN>

<sup>25</sup> Decision of the Constitutional Court of the RS, No. IUz-51/2012 of 23 May 2012 ("Official Gazette of the RS", No. 49/13).

<sup>26</sup> <https://mtt.gov.rs/informacije/zastita-potrosaca/resenje-o-povredi-kolektivnog-interesa-potrosaca/>

<sup>27</sup> Directive 2009/22/EC on judicial and administrative measures to protect the interests of consumers, recital (3) of preamble: "Existing mechanisms to ensure compliance with these directives, both at the national and community levels, are not in a position to stop in time violations of the collective interests of consumers. Collective interests are interests that do not represent the sum of the interests of individuals harmed by the injury. This is without prejudice to the individual actions of individuals harmed by the injury."

economic behaviour of a certain group of consumers, who are, due to personal traits, particularly sensitive to certain business practices or products, thus emphasising the collective character of this form of consumer protection.<sup>28</sup> In this way, unfair business practices, in the context of administrative supervision, remain the subject only of inspection supervision carried out by the market inspection, in a procedure conditioned by specific subjects and manners of conducting inspection supervision. Such a solution is not expedient given the purpose and nature of inspection, which involves examining the implementation of laws and other regulations by direct insight in the supervised entity's business, the specifics of inspection procedures as adapted to the needs of field controls, the implementation of planning supervision in accordance with risk analysis in specific administrative areas subject to control, as well as preventative action.<sup>29</sup> A particularly limiting aspect of the proposed legal solution is the exclusion of consumer organisations from the procedure regarding unfair business practices, because they do not have, or cannot have, the status of a party in inspection supervision procedures. In this way, the evidentiary proposals of consumer organisations, their requests, and other procedural proposals are reduced to the level of initiative, losing the opportunity to participate in procedures, to get informed about their courses and outcomes, to gain insight into case files, to participate in evidentiary actions, and the right to resort to legal remedies. Thus, along with the unjustified deprivation of the property of things of collective interest described above, the loss of the procedural mechanism for their protection by the representatives of those interests, consumer organisations, is added to the violations based on unfair business practices.

Therefore, the proposed legal changes in the Draft of the Act lower the category of unfair business practices from issues of collective interest of consumers to the level of individual items that are subject to inspection supervision, significantly reducing the active role and importance of consumer organisations in combating these phenomena, and doing so without clear reason and contrary to the results achieved in the implementation of the current law.

Furthermore, the Draft of the Act contains significant changes in terms of its regulation of out-of-court settlement of consumer disputes in relation to the current law. The Draft of the Act, firstly, introduced a cross-border element into

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<sup>28</sup> Art. 18, paragraph 4 of the Consumer Protection Law.

<sup>29</sup> The subject and procedure of inspection supervision are regulated by the Law on Inspection Supervision ("Official Gazette of RS" No. 36/2015, 44/2018 - state law and 95/2018) and provisions on inspection supervision conducted by the market inspection of the Trade Act ("Official Gazette of RS" No. 52/2019).



potential consumer disputes (going beyond those disputes arising solely in the domestic market), in this way including disputes involving traders with registered offices or separate organisational units in the Republic of Serbia as well as those with neither domicile nor residence.<sup>30</sup> The question already arises as to whether this determinant "breaks through", in terms of the competence of domestic authorities and the implementation of domestic applicable law, to matters between foreign consumers and domestic traders, in cases where their contractual relationship (the purchase of goods or services) is not localised for the domestic market, because the criteria for the place of concluding the contract, the occurrence of the contractual relationship, and the procurement of goods or services are not contained in this determinant. It should be kept in mind that the current determinant does not exclude the legal protection of the rights of consumers who are not resident, or do not have a long stay visa, in the Republic of Serbia, so the need for this intervention is not clear, especially when it has the potential to introduce new dilemmas.

The model of out-of-court resolution of consumer disputes proposed by the Draft of the Act is based on the work of special bodies, which acquire this role by entering the list of bodies kept by the Ministry. The detailed conditions for the establishment, work, criteria for registration, procedures, reporting, compensation for the work of the body for out-of-court resolution of consumer disputes, as well as the form for requesting entry on the list, and the legal form for proposing the initiation of an out-of-court dispute resolution adopted by the Minister, are prescribed. As a precondition for initiating proceedings before this body, the consumer is required to have previously lodged a complaint or objection to the trader. However, the most significant change in this segment is in its prescribing the legal obligation of traders to take part in out-of-court resolution procedures, to declare themselves at the request of consumers based on their proposals for initiating procedures, as well as to clearly display notices of their obligations on the marketplace, under the threat of misdemeanour sanctions. The mediation procedure ends with a recommendation on the manner of resolving the dispute, concluding an agreement on resolving the dispute or a decision of the body to suspend the procedure.

The issue of establishing an effective mechanism for the out-of-court resolution of consumer disputes is a key problem of consumer protection in general, for the reasons discussed in Part II of this document. A successful and functional model for out-of-court dispute resolution appears as an imperative to improving the

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<sup>30</sup> Article 148 of the Draft of the Act.



level of consumer protection in practice, given the relatively complex legal and other obstacles to effective access to justice in consumer court proceedings.

The model for the out-of-court resolution of consumer disputes, which is defined by the Draft of the Act, however, contains shortcomings which create doubt about its functionality and effectiveness. First of all, there is a lack of preliminary analysis and recognition of the shortcomings of the current model, based on information from an existing network of intermediaries who have met prescribed conditions and obtained permits in accordance with the law describing mediation, as well as of the general implementation of conditions, procedures and rules of mediation which are implemented in out-of-court dispute resolution processes.<sup>31</sup> The Draft of the Act, however, partially changes the existing system of mediation, and although it maintains the similar implementation of a law describing mediation, it has a direct effect on the principles and rules invoked, and costs of procedures, along with the types and effects of decisions made. In terms of mediators, the legal criterion is narrowed to individuals with law degrees and "two years of experience in civil law matters".<sup>32</sup> The reasons why professionals with law degrees are required for mediation in consumer disputes while not necessary to perform this function in other disputes in accordance with the general legal framework for mediation in resolving disputes, are not clear. Additional confusion is introduced by the condition that requires experience in civil law matters, given the imprecision and generality of such a determinant in terms of the work that lawyers perform in practice. It should be kept in mind that the Draft of the Act contains a provision on the "competence" of bodies for the out-of-court resolution of consumer disputes, although it does not prescribe the entrustment of any public powers to these persons, nor the competence to carry out such tasks.

The key change in this model is the prescribed participation of traders in the out-of-court resolution of consumer disputes. The question remains open as to whether sanctioning non-participation in the mediation process will motivate traders to take consumer requests into account and to focus on solving problems, or they will stick to formal actions that exclude sanctions. Experience

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<sup>31</sup> The concept, principles, procedures, and legal effects of mediation in resolving disputes, as well as conditions for mediation, the rights and duties of mediators, and mediator training programmes are regulated by the Act on Mediation in Dispute Resolution ("Official Gazette of RS" No. 55/2014), and they are similarly applied in the work of the body for mediation in consumer disputes, on the basis of Art. 144 of the Consumer Protection Act.

<sup>32</sup> Article 150, paragraph 3 of the Draft of the Act.

in implementing the applicable legal rules on complaints indicates the latter - traders in practice act on complaints by giving responses within the prescribed period, and as a rule reject requests and avoid getting to the essence of the matter, thus only formally fulfilling their legal obligation. The normal response is merely a *formalistic procedure, aimed at avoiding punishment*, which should be expected to appear equally in the procedure of out-of-court resolution of disputes. On the contrary, it is necessary to consider ways to incentivise traders to resolve consumer demands, strengthening the interest of traders to resolve disputes through the proper implementation of the law, efficiently and out of court.

In addition, the model does not contain a reliable plan for financing the work of the mediation body, given that it prescribes that each party in the proceedings bears its own costs, with the work of the body being free (supposed it is free for the parties in the proceedings), therefore prescribing financing from the budget of the Republic of Serbia. On the other hand, it is prescribed that the Minister, by adopting a regulation, prescribes the amount of compensation for the work of the body, without determining the details of the compensation in question such as who would bear expenses. Provisions on the method of financing these bodies are therefore contradictory and do not provide a mechanism for their secure financing.

The above-mentioned changes are the most significant ones prescribed by the current Draft of the Act, along with significant changes in the field of consumer protection in exercising the rights provided in tourist travel contracts, which are not discussed in more detail here, given their sectoral character. Other changes are smaller in importance and scope, although some are also problematic and may bring new issues in practice.<sup>33</sup> Based on the above-mentioned, it is necessary to review the proposed legal solutions in the next cycle of preparation, to consider possible legal innovations, and to reopen discussion on improving the legal framework for the successful functioning of consumers' legal protection.

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<sup>33</sup> Special mention should be made here of the proposed possibility of sanctioning failures of consumer organisations to determine and publish their memberships in commissions of service providers of general economic interest, deleting it from the Register of Consumer Protection Associations (Article 145 of the Draft of the Act).

## IV. SUGGESTIONS OF POSSIBLE SOLUTIONS FOR IMPROVING THE LEVEL OF CONSUMER PROTECTION IN PRACTICE

In order to improve the situation in the field of consumer protection and define possible solutions to key problems in the implementation of its rules, options for potentially better institutional, process, and organisational frameworks for solving these problems are presented below.

### *IV.1. Options for improving administrative-legal forms of protection*

#### **IV.1.1. Extension of the competences of the Commission for Protection of Competition**

The Commission for Protection of Competition ("**Commission**") has achieved significant and relevant practice after a key legal change in 2009, whereby the Commission received full procedural authorisations for conducting investigation procedures, determining administrative measures that sanction violations of competition,<sup>34</sup> and strengthening internal professional capacities in the past few years.<sup>35</sup> In the same period, there is a lack of performance of certain functions, such as those of a regulatory nature, especially in the process of preparing relevant regulations and giving legal opinions, its public competition advocacy, as well as in the need to further strengthen economic market analysis and economic argumentation for decisions. The practice of the Commission should undoubtedly be richer, to provide decisions in landmark cases, which are necessary for the concretisation of relatively abstract material rules for

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<sup>34</sup> Protection of Competition Act ("Official Gazette of RS" No. 51/2009 and 95/2013; hereinafter: Competition Act).

<sup>35</sup> In the past four years, the KPC has issued decisions establishing infringement of competition in eight cases of restrictive agreements and three cases of abuse of a dominant position.

competition protection and building more efficient competition policy, with a better understanding of, and respect for, the business practices of market participants. Although there is room for further progress in all functions of the Commission, it successfully fulfils its basic role and today is one of the leading authorities for protection of competition in the region.

The goal of exercising competition rights is primarily related to improving the economic efficiency of market players and optimising the allocation of resources, as part of the classic model of functional competition in the market. The second goal is related to protecting consumers and small market actors from the actions of large and powerful market actors, consequences of their dominant positions in the market or their agreements which limit the market.<sup>36</sup> Benefitting consumers is defined as one of the main goals of competition protection, according to its positive-legal determinant.<sup>37</sup> However, the protection of competition does not directly affect the rights and interests of consumers, nor is consumer protection a competence of the Commission under current legislation, even if the interest of consumers is a necessary element of any market analysis and assessment of competition rules. The correlation between the levels of consumer protection and competition protection is strongly conditioned, primarily, by economic factors. The *consumer power of customers*, which is manifested through the behaviour, choices, and economic power of customers, represents one of the forces that crucially affects levels of competition in certain sectoral markets.<sup>38</sup> According to the above, examination in proceedings before the Commission is the interest of consumers, but not the level of realisation of consumer protection rules as well.

In the first place, the material closeness of the content of these two public policies can be noted, which goes beyond the stated formal common denominator - the interest of consumers as the ultimate goal. Possibilities for synergy in the activities of competition protection authorities and consumer protection bodies occur primarily at the analytical level, however; market analysis conducted in cases of competition violations and in sectoral analysis provides a reliable, factual picture of the situation in the relevant or sectoral market, including issues directly related to the interests of consumers (such as price movements, contractual conditions with end users, possibilities of product substitution, among others). Some forms of systematic violations of consumer rights, such as unfair business practices and unfair contract terms, are closely

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<sup>36</sup> P. Craig, G. De Burca, *EU Law: texts, cases and materials* (4th ed.), Oxford University Press, 2008, p. 950-951.

<sup>37</sup> Competition Act, Art. 1.

<sup>38</sup> Porter, M.E. (2007).

linked to the existence of restrictive agreements, especially in cases of abuse of a dominant position.<sup>39</sup> The support to the thesis of synergy in exercising supervision over the business of market participants in these two areas represents the authority that the Commission has among business actors, due to its independent position, strong procedural powers, and, especially, sanctions that can be determined in individual cases, which confirm that none of the actors of consumer policy has such an influence on traders.

A single and separate organisational solution for monitoring and enforcing rules in these two matters is not uncommon in the European environment. The material rules of competition protection are unique for the EU countries, but each member state organises its own national body in a form and with competencies adapted to the specified system of state bodies and procedural competences, creating various forms of competition protection bodies across the Union. In this environment, organisational models emerge which prescribe the existence of a single body responsible for supervising competition rules violations and for enforcing consumer protection rules.<sup>40</sup>

Responsibilities from the field of consumer protection which could be transferred to the Commission for Protection of Competition include:

- conducting proceedings and determining measures to protect the collective interest of consumers, as well as submitting requests for initiating misdemeanour proceedings for violations of such collective interests;
- providing professional support to the National Council for Consumer Protection;
- leading educational activities aimed at raising consumer and public awareness about consumer rights and consumer protection policy;
- monitoring the market by recognising unfair business practices and unfair provisions in consumer contracts and giving opinions and recommendations regarding unfair business practices and unfair provisions in consumer contracts.

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<sup>39</sup> Examples of decisions in which violations of consumer rights and interests have been established in connection with abuses of a dominant position, were made in the cases EPS Distribution (5/0-02-336/2018-30 of 18 June 2018 and 5/0-02-563/2016-60 from 23.12.2016.) and JKP Pogrebne usluge Beograd (5/0-02-831/12, 5/0-02-29/13 from 27.11.2014.).

<sup>40</sup> *Competition and Consumer Protection Commission* (Ireland), *Autorità Garante della Concorrenza e del Mercato* (Italy), *Konkurrence-og Forbrugerstyrelsen* (Denmark), *Urząd Ochrony Konkurencji i Konsumentów* (Poland).

## ADVANTAGES DISADVANTAGES

Related matter	Possibility of the "superiority" of one area over another, in practice or in the eyes of the public
Unique analytical basis	
Professional service capacities	Excessive burden of additional tasks on the Commission (if additional resources are not provided)
Experience in the administrative practices of conducting competition violation investigations	
The authority of an independent supervisory body, crucial in the field of market protection	Transferring the entire burden of consumer protection to one, national institution

### IV.1.2 A measure for protection of the consumers collective interest in the form of monetary obligation as a percentage of the trader's annual income

The administrative procedure for the protection of consumers' collective interests, conducted before the Ministry of Trade, Tourism and Telecommunications since 2015, has produced satisfactory results: 16 decisions were made, with 7 regarding unfair business practices, 6 on unfair contractual provisions and 3 cases on breaches of obligations of service providers of general economic interest. These decisions especially influenced service providers of general economic interest as in 4 cases decisions were made against utility companies and in 6 cases against telecommunications operators.<sup>41</sup> The administrative measures produced by these cases consist of orders to prevent established violations that endanger the consumers' collective interests, to eliminate the identified irregularities, and to stop unfair business practices or the use of unfair contractual provisions in the future. When it determines the existence of a violation of the collective interest, the Ministry submits a request

<sup>41</sup> <http://mtt.gov.rs/informacije/zastita-potrosaca/resenje-o-povredi-kolektivnog-interesa-potrosaca/>

to the competent court for initiating misdemeanour proceedings, and a fine of 2,000,000 RSD is imposed on the trader if the misdemeanour proceedings establish liability for unfair business practices, unfair contractual provisions, or cases of non-compliance with measures from decisions on violations of consumers' collective interests.<sup>42</sup> Therefore, the procedure of determining and sanctioning is divided into an administrative procedure in which the existence of a violation is determined, and an administrative measure aimed at stopping and/or eliminating the violation, with a misdemeanour procedure before a competent court in which liability is determined and a misdemeanour penalty is imposed.

It is noted in consultations with key actors (consumer organisations and ministry representatives) that, although there is an administrative practice already developed, more effective sanctions would have a stronger deterrent effect. Bearing in mind that such violations are systemic, occurring in an entire "class" of cases - those that affect a large number of consumers - and exceed the significance of other violations identified in individual or groups of similar cases, it is necessary to create more effective instruments to combat them. The benefit realised for the trader through unfair contractual provisions and certain forms of unfair business practices can make misdemeanour sanctions for violations or for non-compliance with measures adopted in the protection of collective interest insignificant.

On the contrary, *the administrative measure of competition protection*, as established by the Commission for Competition Protection in a special administrative procedure for examining the violation of competition rules, represents an extremely powerful and effective instrument for influencing the behaviour of market participants.<sup>43</sup> This measure invoked to protect competition includes an obligation to pay out up to 10% of the total annual income of business entities to market participants, who abuse dominant positions in the relevant market, conclude or execute restrictive agreements, or fail to execute or implement measures to eliminate violations of competition as determined by the decision of the Commission, i.e. implements concentration in legally prescribed

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<sup>42</sup> Competition Act, art. 160.

<sup>43</sup> More details on the legal nature and effect of the administrative measure of competition protection, D. Protić *et al.* "Administrative measure of competition protection - legal nature and properties", Legal Life, no. 3-4, 2012.



cases of mandatory termination or concentration for which no approval has been issued.<sup>44</sup>

It can therefore be concluded that there is a possibility of changing *administrative measures to protect the consumers' collective interest*, including obligations to pay sums of money up to a certain amount of the total annual income of traders based on competition protection measures. Such measures would be imposed in existing procedures for the protection of the collective interest and would be determined according to amounts prescribed by law, which could be significantly higher than the valid legal maximums for misdemeanour penalties. With a special bylaw, the criteria for determining amounts due could be better regulated, along with the conditions for determining measures, manners, and deadlines for payment. The practice of determining and implementing competition protection measures provides a valuable source of experience, along with opportunities for specification, with the need to more closely link the conditions and manner of measuring the amounts due based on violations of consumers' collective interest in the case of specific forms of unfair business practices and unfair contractual provisions.

## ADVANTAGES    DISADVANTAGES

Improving the effectiveness of measures to protect the collective interest

Potentially opening issues of a procedural nature in measuring the monetary amount of the measure

Its deterrence effect

Sourcing additional budget funds which would be (indirectly) used to finance consumer organisations

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The funds collected from the implementation of this measure would certainly represent additional budget revenue, but based on the planning of these revenues, it is possible to predict a special *budget fund* in order to help finance

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<sup>44</sup> Consumer Act, art 68.



the work of consumer associations. In this way, the amount of funds to support the work of consumer counselling centres could be increased, which would provide consumers with a higher level of legal support. The dedicated funds for financing consumer organisations would be managed by the Ministry, and the funds would be distributed according to a competition that is similar to the current programme for financing consumer counselling methodology.

#### IV.1.3 The Consumer Ombudsman

The experiences and effects of ombudsman-type institutions established and functioning in Serbia in the past fifteen years can be assessed differently, but a common denominator is their affirmation of the protection of subjective rights of citizens, their raising of public awareness of the importance of these rights in areas where institutions operate, and their level of influence on other state authorities and bodies to adjust or correct practices in order to improve the level of protection of certain rights.<sup>45</sup> Especially important is the reputation that these institutions have gained with the public, and the readiness of citizens to reach out to them with their reports, requests and complaints.

An *ombudsman* is an institution that represents an early form of independent control over the work of the state administration, whose appearance and name first appeared in Scandinavian countries in the early 19<sup>th</sup> century as parliamentary commissioners charged with preventing the non-application of laws by the state administration through their authority to initiate appropriate procedures to determine the responsibilities of officials.<sup>46</sup> During the seventies and eighties of the last century, there was an expansion of this form of institution worldwide, particularly aimed at combating the phenomenon of so-called “maladministration”, and, more recently, in the field of human rights protection along with other, more specialised areas. The affirmation of these institutions was especially encouraged by the Council of Europe, the most important pan-European organisation in the field of protecting rule of law and human rights,

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<sup>45</sup> The Protector of Citizens (*General Ombudsman*, institution established and operational in 2005), the Commissioner for Information of Public Importance and Personal Data Protection (since 2004, in the field of information on public importance, and 2008 in the field of personal data protection), and the Commissioner for the Protection of Equality (2009).

<sup>46</sup> The first ombudsman was established in Sweden in 1809 (<https://www.jo.se/en/About-JO/History/>).

giving its members a proposal to establish an ombudsman institution at national, regional, and local levels in special areas of public administration, as well as with the goal of effectively implementing basic human rights and freedoms in the work of the competent authorities.<sup>47</sup> Today, *the European Network of Ombudsmen* brings together 95 ombudsman bodies from 36 European countries, including national and regional ombudsmen.<sup>48</sup> There is also currently a trend of an increasing number of ombudsmen specialised in certain administrative areas or certain categories of persons.<sup>49</sup> One of the factors in the expansion of this institution is the theoretical opinion on a cheap and simple mechanism for supervising massive and regular violations of citizens' rights before administrative bodies.<sup>50</sup> The second, crucial factor is their successful combination of legal and political control over administrations, especially when there is a need to introduce administrative control instruments free from procedural rigidity and legal formalism, and effective in pushing the transparency of administrative processes and structures.<sup>51</sup>

Undoubtedly, in the matter of consumer protection, there is a need for a mechanism that has these listed key features (including efficiency, informality, and the ability to deal with numerous cases of violations of individual consumer rights), but also to identify matrices of massive and common violations (invoked in the protection of collective consumer interests) and to undertake effective measures. On the other hand, the subjects of supervision of ombudsmen most often are state and public administration bodies or other holders of public authority, and not subjects of private law and market participants, such as legal entities in the role of traders. Therefore, the ombudsman mechanism and procedure appear to be something desirable for consumer protection bodies, bearing in mind that the supervised entities, traders, are not public authorities, in this way conflicting with the main purpose of ombudsman.

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<sup>47</sup> Recommendation R (85) 13 of the Committee of Ministers to member states on the institution of the ombudsman (1985).

<sup>48</sup> <https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/members/all-members>.

<sup>49</sup> On certain forms of specialised ombudsmen, "Ombudsman - Comparative Law, Legislation and Practice", International Documents, Lilić et al., Jukom, 2002.

<sup>50</sup> Walter Gellhorn, *Ombudsman And Others – Citizen's Protectors In Nine Countries*, Harvard University Press, Cambridge, MA, 1967, p. 3–4.

<sup>51</sup> Stevan Lilić, *Human Rights and Serbian Transition: Can the Ombudsman Help*, Norwegian Institute of Human Rights, University of Oslo, November 2001.

“Consumer ombudsmen” are institutions that appears in some EU member states, especially in which this institution has a strong tradition,<sup>52</sup> and in some examples, these bodies can act as models, with their experiences providing relevant information in the case of possibly creating a similar institution in our country (such as the *consumer protector*). This organisational model is particularly suitable for providing recommendations, guidelines, and other instructive forms of influence to business entities and their practices in order to properly implement the prescribed consumer rights and to improve the level of consumer protection. On the other hand, measures aimed at sanctioning, as a rule, imply the participation of other bodies and authorities.

## COMPARATIVE EXAMPLE

### *the Finnish Consumer Ombudsman*

The most important responsibility of the Finnish Consumer Ombudsman is to monitor compliance with Finland’s Consumer Protection Act and other relevant acts in order to ensure that market activities, contractual conditions, and payment activities are performed in accordance with the law. The Consumer Ombudsman provides assistance to consumers if it appears necessary in resolving individual disputes, such as if a dispute’s resolution has a significant impact on the interpretation of the law or on the general welfare of consumers, as well as in cases when decisions of the Consumer Disputes Committee have not been respected. The Consumer Ombudsman may also file group complaints with the Consumer Disputes Committee as well as initiate collective actions.

The main goal of the activities of the Consumer Ombudsman is to influence businesses not in accordance with the law to halt such activities or change them voluntarily. If companies cannot be persuaded to stop illegal activities, the Consumer Ombudsman must take the necessary enforcement actions or refer matters to the court for further action. In practice, these situations are subject to prohibition and monetary fines as determined by the Commercial Court. The Consumer Ombudsman, based on the severity of problems or their rapid impacts, may issue temporary work bans if violations of consumer rights do not stop immediately.

*The Consumer Protector* is a model for a consumer ombudsman that could provide a higher degree of consumer protection in individual cases, representing a key problem in current practice. Procedures conducted before Ombudsman, on the complaint of citizens or on its own (Ombudsman’s) initiative , and which end with recommendations aimed at eliminating the identified deficiencies, provide a model for procedures and the content of measures that would be within

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<sup>52</sup> Norway, Denmark, Finland.

the competence of the Consumer Protector. Procedures would be initiated by *consumer complaints*, which would be submitted after the rejection of complaints, or in other situations in which violations of consumer rights occur and traders refuse to accept requests to eliminate irregularities or fulfil legal obligations. If it is determined that consumers' requests are justified, the Consumer Protector would recommend traders to fulfil their requests. As the supervised entities in this case are not parts of state bodies or other holders of public authority, sanctions for non-compliance with recommendations could not provide the initiative to dismiss responsible officials for established violations of rights or to initiate disciplinary proceedings against employees of the supervised entities, so it is therefore necessary to provide other sanctions. In the first place, there is a possibility of prescribing misdemeanour sanctions for non-compliance with recommendations, as well as the possibility of publicly publishing a list of traders who do not comply with these recommendations (the so-called "pillar of shame" invoking the "*name and shame*" system). Reputational damage often poses a greater threat to traders than misdemeanours or other sanctions, and the effect of publishing consumer rights violations cases backed by an independent, professional, and public institution such as the Consumer Protector is certainly more important than individual consumer organisations or individuals.

The consumer protector could act as a "missing link" in the exercise of consumer rights, operating between the phase at which the trader's conduct is required, and which is conditioned by the trader's business policy and willingness to act conscientiously and in accordance with the prescribed rules of consumer law, and the phase of protection of rights in court, especially in conditions where there is no effective out-of-court model for dispute resolution.

## ADVANTAGES    DISADVANTAGES

Informal, efficient procedure	Organisational and technical requirements
Impact on traders and their business practices through recommendations	The potential burden of numerous cases
Comparative models and experience of domestic ombudsman bodies	

## IV.2. The option of improving legal aid and support

### IV.2.1. Financing of consumer organisations

The model of financing the work of consumer organisations through public competitions, as is implemented by the Ministry of Trade, Tourism and Telecommunications, is currently the only effective way to finance their work and provide basic conditions for continuous legal support and consumer advice. However, the Consumer Counselling programme has significant limitations, including a relatively small amount of total funds for its purposes (which are then distributed to the individual programmes of consumer organisations for four regional centres),<sup>53</sup> as well as a one-year duration, which hinders the continuity and sustainable development of consumer organisations. In addition to these revenues, consumer organisations are also referred to sporadic donor programmes or projects funded by international development aid programmes. However, such programmes and projects are negligible, and the capacities of consumer organisations to "receive" funds from such programmes and projects are weak, especially bearing in mind the complexity and demands of applications for these programmes.

The existing financing model is one of the most significant factors contributing to the slowed expansion of consumer organisations<sup>54</sup> as it provides only a minimum amount of funds for the functioning of a limited number of organisations (so far, a maximum of seven organisations in one one-year cycle).

A potential source for funds for the work of consumer organisations, which could provide an incentive for their work and expansion beyond several of the largest city centres, is the *budget of local self-government units*. In the past period,

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<sup>53</sup> Financial resources provided in the budget of the Republic of Serbia for 2019, within the Programme - Development of trade and consumer protection, Programme activity - Support to programmes of consumer associations, on Economic Classification 481 - Grants to non-governmental organisations and amounts to a total of 20,000,000.00 RSD, and according to the conditions of public call, the maximum amount that can be approved under the proposed programme is 3,000,000 RSD to individual organisations (<https://mtt.gov.rs/slider/konkurs-za-finansiranje-za-programmea-od-javnog-interesa-u-oblasti-consumer-protection/>).

<sup>54</sup> Since 2015, the total number of consumer organisations registered with the Ministry has been between 25 and 27.

dedicated programmes for financing or incentives for the work of consumer organisations in local self-government units are rare.<sup>55</sup> On the other hand, in terms of public policy within the competences of local self-government, establishing thematically-oriented support in the field of consumer protection is in the public interest, *especially in relation to the provision of utilities, services of general economic interest from the point of view of consumer law and the direct responsibilities of municipalities and cities*. Local self-government units also prescribe the conditions for the provision of these services, and are also the founders and supervisors of the work of public utility companies, an area in which a large number of consumer complaints arise, such as forced payment procedures in utility cases, which create the need for adequate legal aid in terms of consumer rights.

The public competition conducted by the Ministry is a good starting point, and a potential model for the preparation of similar programmes at the level of local self-government units, which would significantly increase funding sources for consumer organisations, and affirm their work and organisation in many cities and municipalities across the country, raising the level of consumer legal support available outside several existing regional centres.

#### *The example of the City of Kragujevac's programme*

The City Administration for Economy of the City of Kragujevac annually publishes public calls for projects in the area of economics, which, among other things, call for applications for proposals from associations in the field of consumer protection. Based on the allocation of funds from the city budget for 2019, the city council decided to provide 1.4 million RSD to the Consumer Organisation of Kragujevac for its "Improvement of consumer protection - Consumer Counselling" programme.

In addition to support for programmes at the local level, there is also the possibility of increasing funds to support the work of consumer organisations at the national level, if the previously proposed change in the *administrative measure to protect the consumers collective interest* is accepted, potentially receiving a portion of traders' annual incomes as a result of sanctions. The funds that would be provided in this way could be (in whole or in part) used to furnish a special budgetary fund for the purpose of financing the work of consumer associations (item IV.1.2. of this document).

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<sup>55</sup> In some cities, incentives for the work of consumer counselling centres are provided within the support of the programmes of associations in the field of economy (e.g. Kragujevac)

ADVANTAGES	DISADVANTAGES
Strengthening the organisational and personnel capacities of consumer organisations	/
Expanding the network of consumer organisations outside regional centres	
Building a greater degree of sustainability for consumer organisations	

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### *IV.3. Out-of-court settlement*

#### **IV.3.1. Consumer arbitration**

Out-of-court settlement of consumer disputes appears as the most reliable way to rapidly and efficiently resolve disputes in a competent manner and with the lowest possible costs. Consumer disputes, as a rule, belong to the category of so-called “small value claims”, yet court proceedings applied in consumer and small-value claims disputes invoke a significant expenditure of time and resources, as well as uncertainty regarding the proper application of consumer law. These are just some of the reasons for finding an adequate model of out-of-court settlement of consumer disputes.

The Consumer Act allows the possibility of resolving consumer disputes through mediation or arbitration, in accordance with the relevant laws governing mediation and arbitration or other means of resolving disputes in accordance with other regulations governing out-of-court dispute resolution. However, in practice, cases of out-of-court dispute resolution occur only sporadically, through



the mediation bodies registered in the list kept by the Ministry of Trade, while cases of arbitration of consumer disputes have not been recorded so far.

### *The example of the Agency for the Peaceful Settlement of Labour Disputes*

Arbitration within the Agency for the Peaceful Settlement of Labour Disputes is competent for resolving labour disputes between employees and employers if both parties have accepted its jurisdiction. In addition to disputes over the implementation of collective agreements, the same applies to individual disputes. This model, in addition to the organisational and procedural solutions it provides, has significance as an institution established to improve the economic environment and to push for socially responsible business, aspects shared by consumer arbitration, in which the same entities could appear as traders instead of as employers.

This agency performs professional tasks related to the peaceful resolution of collective and individual disputes, the selection of conciliators and arbitrators, keeping a Directory of Conciliators and Arbitrators, the professional training of conciliators and arbitrators, and keeping records of individual and collective labour disputes. The involvement of this agency in an individual labour dispute requires the consent of both employee and employers, as the two parties to the dispute. Relevant proceedings are conducted before arbitrators selected from the Directory of Arbitrators maintained by the agency, as determined by agreement of the parties to the dispute. If the parties to the dispute do not agree on their choice of arbitrator, the arbitrator shall be appointed by the Director of the Agency. Arbitrators preside over hearings, take statements from the parties to the dispute and other persons in the proceedings, present evidence and ensure that all facts relevant to making decisions are presented during hearings. Each party to the dispute shall bear their own costs in proceedings, including the costs of experts engaged, except for the costs of arbitrators, which come from the budget of the agency. A procedure before an arbitrator ends with the issuance of a decision, which is final and enforceable on the day of delivery to the parties to the dispute.

Bearing in mind that joining the arbitration is voluntary, the fact that in 2017 alone 1,045 individual proceedings were initiated shows that this form of out-of-court resolution of labour disputes is largely accepted by both employers and employees.

Arbitration implies a procedure in which a dispute is resolved out of court, on the basis of a prior explicit and formal agreement of the parties on its jurisdiction,



based on the arbitration clause, and by independent experts selected by the parties themselves from a special list (the arbitrators in this case). The most important institutional arbitrations in our country are the Permanent Arbitration (Permanent Selected Court) at the Serbian Chamber of Commerce and the Belgrade Arbitration Centre (BAC), yet arbitration institutions also appear in certain sectoral areas (such as for the peaceful settlement of labour disputes).

Starting from the basic paradigm of the relationship between consumers and traders (which is the basis for the entire system of consumer law) of economic inequality in favour of traders, as well as a significantly higher level of expertise and information on the part of traders, a dilemma emerges as to whether arbitration, resolving disputes between parties "on the same level" can provide the right solutions. This dilemma is very clear in cases of ad hoc arbitration, a form of arbitration established to directly resolve individual cases, in which consumers do not have sufficient competence to participate equally in producing an agreement. There are no such obstacles, however, to establishing an institutional form of arbitration, as it implies a permanent organisational form with a pre-established procedure and list of arbitrators. The lack of an effective model of out-of-court settlement of consumer disputes is largely related to the lack of an institutional solution for arbitration, as well as to the underdeveloped and fragmented system of mediators. Permanent consumer arbitration could provide a platform on which to build professional capacities, primarily of arbitrators, as well as organisational opportunities for the efficient and economic resolution of consumer disputes.<sup>56</sup> The advantages of the arbitration procedure are simplicity, speed, efficiency, and at the same time the presentation of facts by the two sides simultaneously and most importantly, *the decision made at the arbitration is binding for both parties to the dispute and has the effect of an executive document.*

In order to establish a successful model of consumer arbitration, it is necessary to imagine solutions for its possible organisational form, the financing of its work, the list of arbitrators available, as well as for providing incentives for parties concerned, especially traders. In the first place, a proper organisational platform is required, which would provide the necessary conditions for its institutional character. One possible solution is the existing arbitration chamber of the Serbian Chamber of Commerce (Permanent Arbitration), which could provide organisational and technical preconditions, the professional support of its

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<sup>56</sup> More details on the legal nature of consumer arbitration and the arbitrability of consumer disputes: Nataša Petrović Tomić, "Resolving consumer disputes before arbitration", Annals of the Faculty of Law, vol. 62, no. 2 (2014)

secretariat, significant procedural experience, as well as the participation of traders, who are mostly members of the chamber.

*Permanent consumer arbitration* could function within the organisational form of Permanent Arbitration, as a body of the chamber independent in its work and decision-making, with its separate special list of arbitrators. The list of arbitrators of the permanent consumer arbitration system would include experts with relevant experience in the field of consumer protection, preferably at the suggestion of consumer organisations, with a final list determined by the governing body of the arbitration. The issue of the arbitration clause merits special attention. It should be formulated in an adequate and unobtrusive manner in order to improve the willingness of traders to accept the jurisdiction of the court of arbitration (such as within the Code of Good Business Practice or through other business ethics documents). It is also necessary to prevent the use of unfair contractual provisions that impose obligations on consumers to resolve disputes before arbitration. Proceedings would be conducted before individual arbitrators from the List of Arbitrators, as appointed by both parties, with each party bearing its own costs in proceedings. According to this model, the costs of the work of the Consumer Arbitration and the engagement of arbitrators would be borne by the Chamber of Commerce with its own funds. The procedure and organisational details of this process would be regulated in greater detail by the Rulebook on Permanent Arbitration at the Serbian Chamber of Commerce, which is adopted by its assembly.

## ADVANTAGES    DISADVANTAGES

Encouraging efficient and economical contradictory procedure	The limited motivation of traders to approach arbitration
expertise of arbitrators (relevant for selections and formation of the list of arbitrators)	The lack of a culture of arbitration
Making decisions that resolve disputes and are enforceable documents	The trader's possible advantage as well as professional and economic strengths while simultaneously derogate the court's jurisdiction

Undoubtedly, the successful and correct resolution of consumer disputes is in the interest of traders, in terms of creating and retaining regular customers and users of services. It is also necessary, however, to strengthen their motivations to participate in specific proceedings and resolutions of individual cases. An efficient arbitration model, in the familiar environment of the Chamber of Commerce, and done with arbitrators and in a procedure they can trust (which raises awareness of the importance of strengthening consumer confidence and good trade practices for business) are some elements that can increase traders' willingness to resolve consumer disputes in this way. An affirmation of socially responsible business, and raising the level of harmonisation of business practices of its members with applicable regulations (including those in the field of consumer protection) is certainly in the interest of the Serbian Chamber of Commerce, which can be concretised through the organisation and work of Permanent Consumer Arbitration.

## V. CONCLUSION

Consumer law in Serbia is the result of the legal reception of European consumer law (*consumer acquis*), which has been implemented in the past ten years as part of Serbia's legal harmonisation and EU accession processes. However, although the material rules in this area are largely harmonised, the legal position of consumers in Serbia is less favourable than that of consumers in the EU single market, especially in terms of the protection of their rights in specific situations where violations or restrictions of these rights occur by the actions of traders.

The main problems in consumer protection in Serbia are related to traders' lack of willingness to act on consumer complaints about goods or services, regardless of whether justified or not. Unfair business practices, unfair contract terms, and breaches of the obligations of traders who are service providers of general economic interest are frequent. Legal aid and support provided by consumer organisations are insufficient and adequate professional and technical resources are lacking. The "judicial protection of rights" implies litigation, in which consumer need to realise their claims or protect their rights, but access to justice in consumer matters is difficult - court proceedings can be long, legally unpredictable and relatively expensive, with costs that are usually many times higher than the value of the dispute. The out-of-court settlement of consumer disputes through specially registered intermediaries or arbitration is extremely rare in practice.

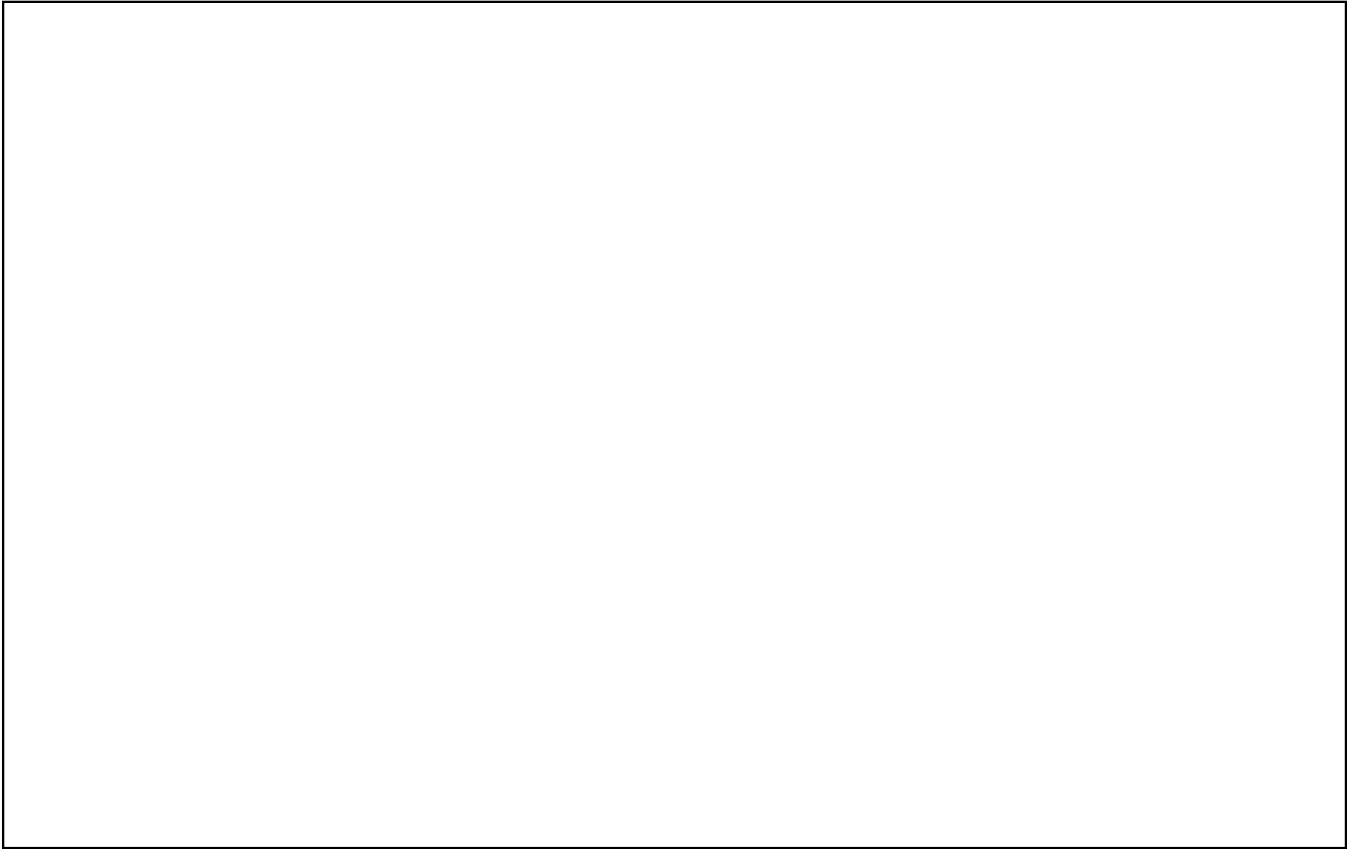
Undoubtedly, the key problem facing consumer protection is not legal norms, but the mechanisms that ensure their application in practice. In order to improve the current situation regarding the application of consumer rights, possible options for improving the institutional, procedural and organisational framework have been defined, based on previous experience in the work of consumer organisations as well as comparative-legal models and the previous practice of relevant domestic institutions.

Among the options for administrative and legal forms of protection, a proposal was made to expand the competencies of the existing Commission, , as related to the tasks it already performs, which would become a key institution for market "fair-play" supervision. A proposal to change existing measures for protecting the collective interest of consumers is also defined, as an administrative measure that obliges traders to pay a monetary amount up to a certain amount of their total annual income, based on the measure of protection of competition. The introduction of a Consumer Ombudsman (the so-called Consumer Protector), is

an option that would be procedurally and organisationally based on comparable European models and on the experience of domestic ombudsman institutions. The Consumer Protector could function as a "missing link" in the exercise of consumer rights, operating somewhere between recourse through consumer complaints and the protection of rights in court, based on the possibility of establishing an efficient procedure without excessive formality and providing recommendations for sanctions to traders.

Options for improving legal aid and the out-of-court settlement of consumer disputes are also offered. Significantly larger sources are needed for financing the work of consumer organisations, key bearers of the advisory function in this area, and as an option, the possibility of establishing a programme to support the work of consumer organisations at the level of local government is proposed, following the national programme of the regional consumer counselling centre. Finally, in order to start out-of-court dispute resolution from the deadlock, the proposal for the establishment of *Consumer Arbitration*, as an independent, institutional arbitration mechanism based on the existing platform of the Permanent Arbitration of the Serbian Chamber of Commerce, was defined.

The purpose of these proposals is to offer concrete options in the forthcoming cycle of discussions on public policy options in the field of consumer protection, including for the expected amendments to the Consumer Act which are already in preparation, and to encourage key actors in this process to pay special attention to institutional and organisational mechanisms that ensure the implementation of proclaimed consumer rights.





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ЗА ТЕБЕ

Consumer protection in Serbia is an area of public policy that has been established and is legally shaped under the auspices of the European integration process. The 2010 Consumer Protection Act ("2010 Consumer Act") introduced consumer protection rules into our legislation based, for the first time, on EU law as part of the legal harmonisation process with the *acquis communautaire*, as well as previously assumed obligations under the Stabilisation and Association Agreement (SAA). Consumer law in Serbia is, therefore, the result of the legal reception of European consumer law, which has been implemented in the past ten years as part of Serbia's legal harmonisation and EU accession processes.

Undoubtedly, the key problem facing consumer protection is not legal norms, but the mechanisms that ensure their application in practice. In order to improve the current situation regarding the application of consumer rights, possible options for improving the institutional, procedural and organisational framework have been defined, based on previous experience in the work of consumer organisations as well as comparative-legal models and the previous practice of relevant domestic institutions.

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