

*Attila I. Dudás*  
*University of Novi Sad*  
*Faculty of Law Novi Sad*  
*A.Dudas@pf.uns.ac.rs*  
*ORCID ID: 0000-0001-5804-8013*

*Ivan M. Jokanović*  
*University of Miskolc*  
*Faculty of Law*  
*jokanovi\_\_ivan@student.uni-miskolc.hu*  
*ORCID ID: 0000-0003-3016-6178*

## THE HIERARCHY OF CONSUMER RIGHTS IN THE EVENT OF A LACK OF CONFORMITY OF THE GOODS IN SLOVENIAN, CROATIAN, AND SERBIAN LAW

**Abstract:** *This paper aims to compare the remedies at the consumer's disposal in the event of a lack of conformity of goods in Slovenian, Croatian, and Serbian law. The Slovenian and Croatian legislators have already transposed Directive (EU) 2019/771 in 2022 and 2021, respectively. On the other hand, the rules of the Serbian Consumer Protection Act are still based on Directive 1999/44/EC. This Directive, however, also shaped the Slovenian and Croatian legislation long before the latest amendments. For this reason, the paper also analyses the rules in Slovenian and Croatian law which were in force before the recent amendments. The principal aim of the authors is to determine the similarities, peculiarities, and differences between the three legal systems.*

*At present, the common denominator of the examined laws is the existence of a hierarchy of consumer rights: repair and replacement are the primary, and appropriate price reduction and termination of the contract the secondary or subsidiary remedies. Before the amendments in 2022 and 2021, termination of contract was the sole subsidiary remedy in Slovenian and Croatian law. It may be inferred that the most important differences between the examined legal orders concern the possibility of the termination of the contract, since the Slovenian and Serbian legislators considerably facilitated it when the lack of conformity becomes*

*evident shortly after the delivery of the goods. Conversely, in Croatian law the emergence of non-conformity in a short period after the delivery does not immediately prompt the termination of contract. Presently, only Croatian law obliges the consumer, except in specific cases, to fix an additional period of reasonable length in which the seller can still perform the contract before the consumer's statement aimed at the termination of the contract gains legal effect.*

**Keywords:** *conformity, Slovenian Consumer Protection Act, Croatian Obligations Act, Serbian Consumer Protection Act, rights of the consumer, hierarchy of rights, repair, replacement, appropriate price reduction, termination of the contract.*

## 1. INTRODUCTION

The fundamental importance of the area of consumer law devoted to the consumer's legal position in the event of lack of conformity of the goods has been recognised by European Union legislation, which has shaped the consumer law regulation of the member states, as well as exerting great influence on the legislation of other countries aspiring to become member states. The enactment of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (hereinafter: 'Consumer Sales Directive – CSD') was the first step of the European Parliament and the Council of the European Union to achieve a high level of consumer protection in this field<sup>1</sup>. It was based on the idea of minimum harmonisation: it envisaged only basic common standards to be applied in member states and enabled them to enact more stringent national provisions<sup>2</sup>.

A recent pivotal change, however, was marked by the enactment of two new directives: Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (hereinafter: 'Sale of Goods Directive – SGD'), and Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter: 'Digital Content Directive – DCD')<sup>3</sup>, which are both part of a broader endeavour of the EU to create a single digital market<sup>4</sup>.

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<sup>1</sup> Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson: *Rethinking EU Consumer Law*, Routledge, London – New York, 2019, p. 187.

<sup>2</sup> CSD Ar. 8. See Christian Twigg-Flesner: 'The EC Consumer Sales Directive: A Lot Still to Do', *Canterbury Law Review*, 8/2001, p. 115.

<sup>3</sup> Mateusz Grochowski: 'European Consumer Law after the New Deal: A Tryphtich', *Yearbook of European Law*, Vol. 39, 2020, pp. 389–390.

<sup>4</sup> See Zoltán Angyal: 'Úton a digitális egységes piac felé' [Towards the Digital Single Market], *Miskolci Jogi Szemle*, Vol. 15, 3/2020, pp. 5–13; Judit Barta: 'Az EU által meghirdetett digitális forradalom hatása a kereskedelmi jog egyes területein: szerződések, fogyasztóvédelem, gazdasági verseny, gazdasági társaságok' [The Digital Revolution Announced by the EU Impact in Certain Areas of Commercial Law: Contracts, Consumer Protection, Economic Competition, Business Companies], *Miskolci Jogi Szemle*, Vol. 15, 3/2020, pp. 14–26; András Téglási: *A szociális jogok*

A common feature of both objectives is that they rely on the idea of maximum harmonisation<sup>5</sup>. Although they introduced many novelties, both departed from the core concepts of CSD<sup>6</sup>.

The consumer law legislation of Slovenia, Croatia, and Serbia has been decisively influenced by EU law, although Serbia is yet a candidate country. In this paper, the authors compare the consumer rights in the event of a lack of conformity of the goods in the mentioned countries. Since Slovenia and Croatia significantly amended their consumer law legislation in 2022 and 2021, respectively, it also analyses the rules contained in national regulations before the amendments, comparing them with the novel rules. The objective of this study is to determine the similarities and, especially, particularities and divergences between the examined legal orders. The rules of the mentioned directives are also considered with the intent to establish whether the examined national laws diverge from their letter and spirit.

## 2. SLOVENIA

In Slovenia, consumer rights in the event of a lack of conformity of goods are contained in a specific act devoted to consumer protection. The transposition of CSD occurred in 2002 by the amendments of the 1998 Consumer Protection Act<sup>7</sup> (hereinafter: ‘1998/2002 SloCPA’). The Ministry of Economic Development and Technology prepared a bill of a novel CPA (hereinafter: ‘Bill’)<sup>8</sup>, which was adopted by the Slovenian Parliament on 29 September 2022 (hereinafter: ‘2022 SloCPA’)<sup>9</sup>, into which the rules of the SGD and DCD have been transposed. Moreover, the

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*alkotmányos védelme – különös tekintettel a szociális biztonság alapjogi védelmére* [Constitutional Protection of Social Rights – with Special Regard to the Constitutional Protection of Social Security]. Ludovika Egyetemi Kiadó, Budapest, 2019, p. 34.

<sup>5</sup> Both directives in Art. 4 explicitly state that ‘Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive’. Thus, the possibility for the Member States to have different legal rules in this field is not extinguished, since the directives on different occasions allow the existence of diverging, authentic, and national rules.

<sup>6</sup> Reiner Schulze and Fryderick Zoll: *European Contract Law*, 3rd ed., Nomos – Beck – Hart Publishing, Baden-Baden – München – New York, 2021, p. 221.

<sup>7</sup> Zakon o varstvu potrošnikov [Consumer Protection Act], *Uradni list RS* [Official Gazette of the Republic of Slovenia], Nos. 20/98, 25/98, 110/02, 14/13 (official consolidated version), 51/04, 98/04 (official consolidated version), 126/07, 86/09, 78/11, 38/14, 19/15, and 31/18.

<sup>8</sup> <https://www.gov.si/drzavni-organi/vlada/seje-vlade/gradiva-v-obravnavi?start=120> (30 December 2022).

<sup>9</sup> Zakon o varstvu potrošnikov [Consumer Protection Act], *Uradni list RS* [Official Gazette of the Republic of Slovenia], No. 130/2022.

provisions of the Obligations Code<sup>10</sup> (hereinafter: ‘the SloOC’), as *sedes materiae* of general contract law, find their subsidiary application when certain issues are not governed by the 2022 SloCPA<sup>11</sup>. The same rule was also contained in the 1998/2002 SloCPA<sup>12</sup>.

Although the CSD introduced a hierarchy of consumer rights in the event of a lack of conformity of the goods with the contract, differentiating repair and replacement as primary and price reduction and termination of the contract as secondary remedies<sup>13</sup>, the Slovenian legislator initially did not follow the same approach<sup>14</sup>. The 1998/2002 SloCPA enabled the consumer to request the seller to eliminate the lack of conformity, replace the defective with conforming goods, reimburse part of the price paid proportionally to the extent of the lack of conformity, or reimburse the entire price<sup>15</sup>. The consumer was also entitled to compensation for any damage sustained. In this regard, the 1998/2002 SloCPA particularly mentioned, but did not limit remedy to the reimbursement of the costs of material, spare parts, labour, transfer, and transport of products incurred in the realisation of consumer rights<sup>16</sup>. Since the sole condition posed by the 1998/2002 SloCPA for exercising the above-mentioned rights was to notify the seller in the prescribed manner, it may be inferred that the consumer’s choice between the remedies was free<sup>17</sup>. However, if the consumer intended to terminate the contract and request reimbursement of the price entirely, he/she was obliged to approve an additional period of reasonable length for the seller to perform the contract<sup>18</sup>. Since the exercise of the right to request the elimination of the lack of conformity (repair), replacement, and proportional reimbursement of the price paid (appropriate price reduction) was not subject to any further conditions, they may be considered primary remedies,

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<sup>10</sup> Obligacijski zakonik [Obligations Code], *Uradni list RS* [Official Gazette of the Republic of Slovenia], Nos. 83/01, 28/06, 40/07, 97/07 (official consolidated version), and 64/16.

<sup>11</sup> 2022 SloCPA, Art. 3, Sec. 1.

<sup>12</sup> 1998/2002 SloCPA, Art. 37, Sec. 4.

<sup>13</sup> CSD, Art. 3, Secs. 2 and 3. See in more detail Stephen Weatherill: *EU Consumer Law and Policy*, 2nd edition, Edward Elgar Publishing, Cheltenham – Northampton, 2013, p. 163; Hans W. Miklitz and Norbert Reich, p. 180 in: Norbert Reich, Hans W. Miklitz, Peter Rott, Klaus Tonner: *European Consumer Law*, 2nd edition, Intersentia, Cambridge – Antwerp – Portland, 2014.

<sup>14</sup> 14 Damjan Možina: ‘Harmonisation of Private Law in Europe and the Development of Private Law in Slovenia’, *Juridica International XIV*, Tartu, 2008, p. 177.

<sup>15</sup> 1998/2002 SloCPA, Art. 37c, Sec. 1.

<sup>16</sup> 1998/2002 SloCPA, Art. 37c, Sec. 2.

<sup>17</sup> Možina (2008), p. 177.

<sup>18</sup> *Ibid.* For general considerations in relation to the repudiation of contract due to non-performance by fixing the debtor an additional reasonable period of time in Slovenian, Croatian, and Serbian law, see Emőd Veress, Milan Hulmák, Markéta Zimnioková, Łukasz Stępkowski, Attila Dudás, Milan Hlušák: ‘Unilateral Termination of Contracts and Rights of Withdrawal’, pp. 461–503. in: *Contract Law in East Central Europe*, ed. Central European Academic Publishing, Miskolc-Budapest, 2022.

with the termination of the contract and reimbursement of the entire price paid deemed subsidiary. Although the 1998/2002 SloCPA did not pose any limitation on the consumer's choice between repair and replacement, due to the principle of the prohibition of the abuse of rights, the seller was enabled to perform an alternative remedy if the chosen one was disproportionate and if it guaranteed an adequate level of protection of the consumer's interest<sup>19</sup>.

The Slovenian legislator used the opportunity provided in Art. 5, Sec. 2 of CSD to stipulate that the consumer is obliged to notify the seller of the lack of conformity within two months of its discovery in order to exercise the rights in the event of a lack of conformity<sup>20</sup>. The duty of notification was further specified by the requirement to describe the lack of conformity with precision (*natančneje*) and to allow the seller to inspect the goods<sup>21</sup>. Concerning the latter requirement, the Administrative Court in its judgment U 978/2005 stated that it implies, on the one hand, the obligation of the consumer to enable the seller to inspect the goods, but also the seller's right to request the inspection, on the other<sup>22</sup>. In this regard, one should also take into consideration the judgment of the Court of Justice of the European Union (hereinafter: 'CJEU'), in case C-497/13 (Faber case) which stated that 'the notification to be given relates only to the existence of that lack of conformity and that it is not subject to rules of evidence which would make it impossible or excessively difficult for the consumer to exercise his rights'<sup>23</sup>. According to some authors, the consumer is not obliged to inform the seller of the lack of conformity in details<sup>24</sup>. In that case, the requirements specified in the 1998/2002 SloCPA can be considered an additional prerequisite for the exercise of remedies in the event of a lack of conformity<sup>25</sup>. Consumers cannot expect to possess special knowledge or discern the exact cause of the lack of conformity<sup>26</sup>.

One of the most important novelties of the 2022 SloCPA is the introduction of a hierarchy of remedies at the disposal of consumers in line with SGD. First, the consumer is entitled to request that the seller bring the goods into conformity, free of charge, by repair or replacement, after which he/she is allowed to demand an appropriate price reduction or to terminate the contract with the restitution of

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<sup>19</sup> Damjan Možina: 'Pravice kupca na podlagi stvarne napake pri prodajni pogodbi' [Rights of the Consumer Based on Material Defects in Sales Contracts], *Pravni letopis*, 1/2012, p. 97.

<sup>20</sup> 1998/2002 SloCPA, Art. 37a, Sec. 1.

<sup>21</sup> 1998/2002 SloCPA, Art. 37a, Sec. 2.

<sup>22</sup> Administrative Court of Slovenia, Case No. U 978/2005 of 25 April 2007.

<sup>23</sup> CJEU, Case no. C-497/13 of 4 June 2015.

<sup>24</sup> Francesco Paolo Patti: 'Tutela effettiva del consumatore nella vendita: il caso "Faber"', *La nuova giurisprudenza civile commentata*, Padua, 1/2016, p. 13; Emilia Mišćenić, Ivana Kunda, Silvija Petrić, Vlatka Butorac Malnar, Danijela Vrbljanac, Sandra Winkler: *Europsko privatno pravo – posebni dio* [European Private Law – Special Part], Školska knjiga, Zagreb, 2021, p. 85.

<sup>25</sup> Možina (2008), p. 177.

<sup>26</sup> Možina (2012), p. 89.

the price paid. This is emphasised in the basic rule naming the remedies in the event of a lack of conformity<sup>27</sup> and also in the subsequent rules specifying the conditions of their application. In addition, the consumer is entitled to demand compensation for any damage in the same manner as in the 1998/2002 SloCPA<sup>28</sup>. The 2022 SloCPA allows the consumer to withhold the payment of the remaining part of the price or a part thereof until the seller fulfils his/her obligations. Using the opportunity provided by Art. 13, Sec. 6 of the SGD, the Slovenian legislator made the exercise of this right subject to the consumer's duty to inform the seller in the new CPA<sup>29</sup>.

Concerning primary remedies, the general principle is that consumers are free to choose between repair and replacement. However, the equal ranking of these remedies is distorted when the implementation of the chosen remedy proves impossible or excessively burdensome to the seller in terms of disproportionate costs compared to the other remedies, considering all circumstances<sup>30</sup>. Whether the costs are disproportionate is to be assessed particularly considering the value the goods would have if there were no lack of conformity, its significance, and the possibility of applying another alternative remedy without serious inconvenience to the consumer<sup>31</sup>. The Explanatory Memoranda for the Bill of the 2022 SloCPA mentions *exempli causa* that it would be disproportionate to request the replacement of goods due to a minor defect if doing so would cause significant costs to the seller, if it is possible to rectify it without difficulties<sup>32</sup>. This solution represents the transposition of Art. 13, Sec. 2 of SGD.

The 2022 SloCPA, transposing Art. 14, Sec. 1 of SGD, obliges the seller to comply with the consumer's request free of charge within a reasonable period from the moment the consumer informed him/her about the lack of conformity and without significant inconvenience to the consumer, considering, particularly, the nature of the goods and the purpose for which the consumer requires them<sup>33</sup>. The 2022 SloCPA, however, sets an upper limit to this 'reasonable period': it may not be longer than 30 days. This rule is in line with Recital 55 of SGD, stating that a reasonable period is 'the shortest possible time necessary for completing repair or replacement'. Recital 55 enables member states to specify a concrete time limit in which the restoration of conformity is to be achieved, a possibility that has been used by the Slovenian legislature<sup>34</sup>. Additionally, the 2022 SloCPA provides the

<sup>27</sup> 2022 SloCPA, Art. 81, Sec. 1.

<sup>28</sup> 2022 SloCPA, Art. 81, Sec. 3.

<sup>29</sup> 2022 SloCPA, Art. 81, Sec. 2.

<sup>30</sup> 2022 SloCPA, Art. 82, Sec. 4.

<sup>31</sup> 2022 SloCPA, Art. 82, Sec. 5.

<sup>32</sup> Explanatory memoranda for the Bill, commentary to Art. 82, p. 113.

<sup>33</sup> 2022 SloCPA, Art. 82, Sec. 1.

<sup>34</sup> In some countries this reasonable period is fixed at 15 days. See Miodrag Mićović, 'Prodaja robe prema Direktivi EU 2019/771' [Sale of Goods According to Directive 2019/771], pp. 371–382

possibility of extending the mentioned 30-day period to the shortest time necessary to comply with the requested repair or replacement, but not longer than 15 days. The exact duration of the extension is to be determined taking into consideration the nature and complexity of the goods, the nature and significance of the lack of conformity, and the effort required to complete the repair or replacement. The seller is obliged to inform the consumer about the reasons for the extension and the number of days for which the primary period is being extended before its expiry<sup>35</sup>. Therefore, it can be inferred that the period for accomplishing repair or replacement may not exceed 45 days, consisting of the primary 30-day period and the 15-day extension. It is worth noting that the possibility of an extension was not contained in the Bill. Finally, the rule specifying that the request of the consumer be accomplished free of charge means that the costs incurred are borne by the seller, especially the costs of postage, transport, labour, and materials<sup>36</sup>.

The consumer is obliged to make the goods available to the seller, while, on the other hand, in case of a replacement, the seller has to deliver the goods back to the consumer at his/her own expense<sup>37</sup>. These obligations are concordant with the provision contained in Art. 14, Sec. 2 of the SGD. However, the seller is entitled to refuse to perform the consumer's request if both repair and replacement are impossible, or if they would incur disproportionate costs, considering all the circumstances, particularly those indicated in Art. 82, Sec. 5<sup>38</sup>. The Explanatory Memoranda for the Bill of the 2022 SloCPA refers to the situation, as an example, where goods are situated at a place different from that of delivery, rendering the costs of dispatching and transport disproportionate to the seller, hence justifying the refusal of the request<sup>39</sup>.

Transposing Art. 14, Sec. 4 of SGD, the 2022 SloCPA stipulates that the consumer is relieved from any payment obligations for the normal use made of the goods during the period preceding their replacement<sup>40</sup>. According to Recital 57 of the SGD, the use made of the goods is considered normal if in line with their nature and purpose. This provision was influenced by the decision of the CJEU in the *Quelle* case<sup>41</sup>. The CJEU stated, namely, that Art. 3 of the CSD on consumer rights 'is to be interpreted as precluding national legislation under which a seller

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in: *Usklađivanje pravnog poretka Srbija sa standardima Evropske unije* (ed. Miodrag Mićović), Kragujevac, 2019, p. 379.

<sup>35</sup> 2022 SloCPA, Art. 82, Sec. 2.

<sup>36</sup> 2022 SloCPA, Art. 82, Sec. 3.

<sup>37</sup> 2022 SloCPA, Art. 82, Sec. 7.

<sup>38</sup> 2022 SloCPA, Art. 82, Sec. 6.

<sup>39</sup> Explanatory Memoranda for the Bill of the 2022 SloCPA, commentary to Art. 82, p. 113.

<sup>40</sup> 2022 SloCPA, Art. 82, Sec. 9.

<sup>41</sup> Elias Van Gool and Anaïs Michel: 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis', *Journal of European Consumer and Market Law*, Vol. 10, 4/2021, p. 144; Mišćenić et al. (2021), p. 70.

who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods<sup>42</sup>.

Finally, there is a specific solution when repair or replacement affects goods that had been installed consistently with their nature and purpose before the lack of conformity became apparent. In that case, the seller's obligation includes the removal of non-conforming goods and the installation of replacement or repaired goods, or bearing the costs of the removal and installation.<sup>43</sup> This provision, based on Art. 14, Sec. 3 of the SGD, reflects the ruling of the CJEU in the joined cases C-65/09 and C-87/09 (cases 'Weber' and 'Putz').<sup>44</sup> The CJEU decided that, in the case of goods installed in good faith by the consumer in a manner consistent with their nature and purpose, 'the seller is obliged either himself to remove the goods from where they were installed and to install the replacement goods there or else to bear the cost of that removal and installation of replacement goods'. Furthermore, the CJEU pointed out that 'obligation on the seller exists regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased'<sup>45</sup>. In this manner, the CJEU intervened in the contractual equilibrium between the parties, obliging the seller to provide additional services that were not stipulated in the sales contract<sup>46</sup>.

The subsidiary set of remedies, consisting of the appropriate price reduction or termination of the contract, is available to the consumer if

1) The seller has not completed the repair or replacement of the goods or, where applicable, he/she has not done so according to the law, or he/she has refused to bring the goods into conformity according to Art. 82, Sec. 6;

2) There is still a lack of conformity, even though the seller attempted to bring the goods into conformity,

3) The nature of the lack of conformity is so serious that it justifies an immediate appropriate price reduction or termination of the contract, or if

4) The seller has declared, or it is evident from the circumstances, that he/she will not bring the goods into conformity within a reasonable time or without significant inconvenience to the consumer<sup>47</sup>.

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<sup>42</sup> CJEU, Case C-404/06 of 17 April 2008.

<sup>43</sup> 2022 SloCPA, Art. 82, Sec. 8.

<sup>44</sup> Manuel Jesús Marín López: 'La Directiva 2019/771/UE, de 20 de mayo, sobre contratos de compraventa de bienes con consumidores', *Centro de Estudios de Consumo – Publicaciones jurídicas*, 2019, p. 15; Gonzalo Muñoz Rodrigo, 'Algunas cuestiones sobre la transposición de la Directiva 2019/771. 20 mayo 2019, relativa a determinados aspectos de los contratos de compraventa de bienes', *Actualidad Jurídica Iberoamericana*, p. 1300.

<sup>45</sup> CJEU, joined cases C-65/09 and C-87/09 of 16 June 2011.

<sup>46</sup> Hans-W. Micklitz, Betül Kas: 'Overview of Cases before the CJEU on European Consumer Contract Law (2008–2013) – Part I', *European Review of Contract Law*, Vol. 10, 1/2014, p. 61.

<sup>47</sup> 2022 SloCPA, Art. 83, Sec. 1.



These requirements are in line with Art. 13, Sec. 4 of the SGD. For a proper interpretation of the second case, it is necessary to consider Recital 52 of the SGD. It recommends the objective determination of whether the consumer should accept further attempts to bring the goods into conformity, considering all the circumstances, particularly the type and value of the goods and the nature and significance of the lack of conformity. Expensive and complex goods are explicitly mentioned as examples where another attempt to eliminate the lack of conformity is justified. Another important circumstance to consider is whether the consumer is expected to maintain confidence in the seller's ability to bring goods into conformity. These recommendations are also contained in the Explanatory Memoranda for the Bill of the 2022 SloCPA<sup>48</sup>.

Furthermore, the 2022 SloCPA allows the consumer to terminate the contract and request the restitution of the amount paid if the lack of conformity becomes apparent in less than 30 days after the delivery of the goods<sup>49</sup>. Therefore, when the lack of conformity appears shortly or, more precisely, in the period not exceeding 30 days from delivery, the general hierarchy of rights set out by the 2022 SloCPA does not apply. The consumer is entitled to terminate the contract without being obliged to request the prior elimination of the lack of conformity by repair or replacement. However, it can be said that the preservation of the validity of the contract still depends on the consumer's choice, since nothing hinders him/her from opting for other remedies at his/her free choice. This legal solution is not contrary to SGD, which explicitly states that the Directive does not affect the freedom of Member States to introduce specific rules applicable when the lack of conformity manifests shortly after delivery<sup>50</sup>. However, SGD specifies that this time period cannot exceed 30 days, with which the solution of the 2022 SloCPA fully complies. This legal solution, enabling the consumer to terminate the contract if the lack of conformity manifests in a very short period after delivery, is inspired by the rules on the right to reject the goods in the common law legal systems<sup>51</sup>.

The Slovenian legislator, in line with Art. 16, Sec. 1 of the SGD, envisages that the termination of the contract is exerted by the consumer's statement with which he/she informs the seller about the decision to terminate the contract<sup>52</sup>. This unilateral statement addressed to the seller is sufficient to terminate the contract<sup>53</sup>. The question, however, arises whether it is still necessary for the consumer to grant

<sup>48</sup> Explanatory Memoranda for the Bill of the 2022 SloCPA, commentary to Art. 83, p. 114.

<sup>49</sup> 2022 SloCPA, Art. 83, Sec. 2.

<sup>50</sup> SGD, Recital 19 and Art. 3, Sec. 7. See Emilia Miščenić, 'The Constant Change of EU Consumer Law: The Real Deal or Just an Illusion?', *Anali Pravnog fakulteta u Beogradu*, 3/2022, p. 706.

<sup>51</sup> Kåre Lilleholt: 'A Half-built House? The New Consumer Sales Directive Assessed as Contract Law', *Juridica International* 28/2019, p. 5.

<sup>52</sup> 2022 SloCPA, Art. 83, Sec. 4.

<sup>53</sup> Chiara Sartoris: 'La risoluzione della vendita di beni di consumo nella dir. n. 771/2019 UE', *La nuova giurisprudenza civile commentata*, Vo. 36, 3/2020, p. 708.

the seller an additional period of time of reasonable length to perform his/her contractual obligations, as was the case before the adoption of the 2022 SloCPA, considering that a hierarchy of remedies has been introduced by the new act.

Having transposed Art. 16, Sec. 2 of SGD, the 2022 SloCPA allows the consumer to terminate the contract even in relation to conforming goods if the lack of conformity concerns only some of the delivered goods. The termination of the contract is admissible when the consumer cannot reasonably expect to keep only conforming goods<sup>54</sup>. The general rule is that, if a lack of conformity affects only a part of the goods and there are grounds for the termination of the contract, the consumer is entitled to terminate the contract only in relation to non-conforming goods. The possibility of terminating the contract in relation to otherwise conforming goods is conditioned by the consumer's lack of reasonable expectations of keeping those goods.

However, the Slovenian legislator excluded the possibility of terminating the contract if the lack of conformity is of minor significance. The burden of proof of whether non-conformity is of minor significance is on the seller<sup>55</sup>. Therefore, in this case, the consumer is entitled to a primary set of remedies (repair and replacement), but only to the appropriate price reduction as a subsidiary remedy. It is important to underline that the CJEU ruled in the case C-32/12 ('Duarte' case) that the national court should be allowed to 'grant of its own motion an appropriate reduction in the price of goods which are the subject of the sales contract in the case where a consumer who is entitled to such a reduction brings proceedings which are limited to seeking only the rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end'<sup>56</sup>. Therefore, the appropriate price reduction should be granted *ex officio* by the national court when the consumer incorrectly invokes the termination of the contract due to the lesser relevance of the lack of conformity, and the national system makes it impossible or excessively difficult to invoke the price reduction as an alternative remedy<sup>57</sup>.

The termination of the contract implies certain obligations for both parties. Transposing Art. 16, Sec. 3 of the SGD, 2022 SloCPA, on the one hand, mandates that the consumer return the goods to the seller at the seller's expense<sup>58</sup>. On the other hand, the seller is required to reimburse the consumer the price paid for the goods immediately upon, or in eight days at the latest after the receipt of the goods or of evidence that the consumer sent them back<sup>59</sup>. The consumer's obligation is

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<sup>54</sup> 2022 SloCPA, Art. 83, Sec. 5.

<sup>55</sup> 2022 SloCPA, Art. 83, Sec. 7.

<sup>56</sup> CJEU, Case C-32/12 of 3 October 2013.

<sup>57</sup> Sanne Jansen: 'Price Reduction as a Consumer Sales Remedy and the Powers of National Courts: Duarte Hueros (case note)', *Common Market Law Review*, Vol. 51, 3/2014, p. 990.

<sup>58</sup> 2022 SloCPA, Art. 83, Sec. 6.

<sup>59</sup> 2022 SloCPA, Art. 86, Sec. 1.

prior in time; he/she must send back the goods first, activating the obligation imposed on the seller to refund the paid amount. The Slovenian legislator used the opportunity to determine the reimbursement modalities provided by the above-mentioned article of the Directive, establishing the time limit for the completion of the seller's obligation. Interestingly, the Bill contained different provisions in this regard. It envisaged that the consumer is obliged to return the goods within 14 days of the realisation of the request (termination of the contract) if the lack of conformity is not disputed between the parties<sup>60</sup>. The same 14-day time limit from the termination of the contract is likewise applicable to the seller: in this time limit, the seller is obliged to reimburse the price paid<sup>61</sup>.

Concerning price reduction, the 2022 SloCPA, transposing Art. 15 of SGD, states that it should be proportionate to the decrease in the value of the goods received by the consumer, compared to the value the goods would have if they were in conformity with the contract<sup>62</sup>. The Slovenian legislator introduced a time limit during which the seller must meet the consumer's request. Namely, the seller is obliged to refund the consumer part of the price paid within eight days from the receipt of the request for the appropriate price reduction<sup>63</sup>.

Finally, the 2022 SloCPA did not introduce any change regarding the consumer's obligation to notify the seller about the lack of conformity compared to the 1998/2002 SloCPA. Thus, the consumer is still obliged to notify the seller of the non-conformity within two months of its discovery<sup>64</sup>. The requirements regarding the content of the notification also remained the same: the consumer has to describe the lack of conformity in detail and allow the seller to inspect the goods<sup>65</sup>. However, the question remains open: how should the consumer's obligation to substantiate the lack of conformity in detail be construed? If it is interpreted rigorously, requiring the consumer to give a precise description of the cause of the non-conformity, such an interpretation might be considered overly burdensome to the consumer, as demonstrated by the CJEU in the Faber case.

### 3. CROATIA

Most of the rules of the CSD were transposed into the Croatian legal system in 2005 into the Obligations Act (hereinafter: 'the CroOA')<sup>66</sup>, instead of transposition

<sup>60</sup> Bill of the 2022 SloCPA, Art. 86, Sec. 2.

<sup>61</sup> Bill of the 2022 SloCPA, Art. 86, Sec. 1.

<sup>62</sup> 2022 SloCPA, Art. 83, Sec. 3.

<sup>63</sup> 2022 SloCPA, Art. 86, Sec. 2.

<sup>64</sup> 2022 SloCPA, Art. 84, Sec. 1.

<sup>65</sup> 2022 SloCPA, Art. 84, Sec. 2 and 4.

<sup>66</sup> Zakon o obveznim odnosima [Obligations Act], *Narodne novine* [Official Gazette], No. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22 and 156/22.

into the Consumer Protection Act<sup>67</sup> (hereinafter: ‘the CroCPA’). Only some of the rules of the CSD were transposed into the then effective CPA<sup>68</sup>. The CroCPA explicitly states concerning consumer rights in the event of a lack of conformity of the goods, that the provisions of the CroOA apply<sup>69</sup>. The transposition of the SGD into the Croatian legal system occurred with amendments to the CroOA in 2021<sup>70</sup>, while the DCD was transposed in a special statute<sup>71</sup>. However, some provisions of the directives are transposed into CroCPA. Another peculiarity of the Croatian regulation is that the provisions on the rights of the consumer in the case of a lack of conformity apply not only to consumer sales contracts but also to other contracts, unless the CroOA limits the application of a specific provision exclusively to the consumer context<sup>72</sup>. By transposing the rules of SGD into the general rules of contract law, while combining the rules of DCD into a separate statute, the Croatian legislator diverged somewhat from the German model. The German legislature transposed both directives by amending the BGB<sup>73</sup>. The decision of the Croatian legislator to transpose first the CSD, and then the SGD not into the CroCPA but into the CroOA, meant that many of the rules of directives underwent significant adjustments to the terminology and legal institutions of the CroOA<sup>74</sup>. The distinctive feature of the Croatian regulation, as from the transposition of the CSD in 2005, is that it contains a range of deviations from the wording of directives, which were necessitated by the terminology and concepts used in CroOA. For instance, CroOA uses the term ‘material defect’ instead of ‘lack of conformity’ and the term ‘thing’ instead of ‘goods’, to name the most important<sup>75</sup>.

<sup>67</sup> The effective act is the *Zakon o zaštiti potrošača* [Consumer Protection Act], *Narodne novine* [Official Gazette], No. 19/22.

<sup>68</sup> Emilia Mišćenić: ‘Consumer Protection Law’, pp. 279–290 in: *Introduction to the Law of Croatia* (ed. Tatjana Josipović), Wolters Kluwer, Alphen aan den Rijn, 2014, p. 287.

<sup>69</sup> CroCPA, Art. 47, Sec. 2.

<sup>70</sup> Act on Amendments to the CroOA, Art. 12.

<sup>71</sup> *Zakon o određenim aspektima ugovora o isporuci digitalnog sadržaja i digitalnih usluga* [Act on Certain Aspects of Contracts on Supply of Digital Content and Digital Services], *Narodne novine* [Official Gazette], No. 110/21.

The recent Croatian literature points out that this legislative technique may result in difficulties in the application and interpretation of the new rules of the CroOA and the special act by which the DCD has been transposed into the Croatian law. See Marko Baretić, ‘Novine u Zakonu o obveznim odnosima – odgovornost za materijalne nedostatke stvari’ [Novelties in the Obligations Act – Liability for Material Defects], pp. 187–206 in: *Zbornik susreta pravnika Opatija ’22*, eds. Petar Miladin and Miljenko Giunio, Hrvatski savez udruga pravnika u gospodarstvu, Zagreb, 2022, p. 189.

<sup>72</sup> Silvija Petrić: ‘Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima’ [Liability for Material Defects According to the New Law on Obligations], *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 27, 1/2006, p. 118; Mišćenić et al. (2021), pp. 31–32,

<sup>73</sup> Saša Nikšić: ‘Odgovornost za nedostatke kod ugovora o kupoprodaji stvari s digitalnim elementima’ [Liability for Defects in Sale of Things with Digital Elements], *Anali Pravnog fakulteta u Beogradu*, Vol. 70, 2022, Poseban broj u čast profesora Mihaila Konstantinovića, p. 514.

<sup>74</sup> Nikšić (2022), p. 513.

<sup>75</sup> See Nikšić (2022), pp. 516 and 521.

The hierarchy of rights in the case of material defects<sup>76</sup>, introduced by CroOA in 2005, diverged from that envisaged in CSD. The consumer, as well as any buyer, was allowed to request at his/her choice from the seller the elimination of the lack of conformity, delivery of flawless goods, or price reduction, or to declare the contract terminated<sup>77</sup>. He/she was also entitled to compensation for damage according to the general rules of tort law, including damage inflicted on his/her other property as a result of non-conformity<sup>78</sup>. Although the CroOA contained the term ‘by his/her choice’, which can lead to the conclusion that the consumer was able to invoke any remedy without being constrained to obey their hierarchy, the provisions on the termination of the contract support a somewhat different conclusion<sup>79</sup>. Namely, to terminate the contract, the consumer was obliged to fix an additional period of reasonable length for the seller to perform his/her contractual obligation<sup>80</sup>. The performance of the seller’s contractual obligation was interpreted as the elimination of the lack of conformity by repair or replacement<sup>81</sup>. The price reduction was not conditioned by this requirement<sup>82</sup>. Therefore, it can be inferred that the hierarchy of remedies in Croatian law differed from that contained in CSD, since repair, replacement, and price reduction were considered primary remedies, while the termination of the contract was the only subsidiary remedy<sup>83</sup>. The possibility of terminating the contract was excluded when the lack of conformity was of minor significance.<sup>84</sup> This limitation was introduced by amendments to the CroOA enacted in 2008.<sup>85</sup>

Using the possibility provided by Art. 5, Sec. 2 of the CSD, the Croatian legislator introduced a two-month time limit in which the consumer is required

<sup>76</sup> For the sake of uniformity of terminology in the paper, the term ‘lack of conformity’ shall be used hereinafter in the part pertaining to the Croatian law.

<sup>77</sup> CroOA, Art. 410, Sec. 1.

<sup>78</sup> CroOA, Art. 410, Sec. 2.

<sup>79</sup> Mišćenić et al. (2021), p. 60.

<sup>80</sup> CroOA, Art. 412, Sec. 1.

<sup>81</sup> Mišćenić et al. (2021), p. 73.

<sup>82</sup> Petrić (2006), p. 118.

<sup>83</sup> Petrić (2006), p. 118; Zlatan Meškić, Neda Zdraveva, Jadranka Dabović-Anastasovska, Nenad Gavrilović: ‘Consumer Sales Directive (99/44)’, pp. 518–550 in: *Civil Law Forum for South East Europe – Volume III – VII EU Consumer Contract Law*, Forum za građansko pravo za jugoistočnu Evropu, Cavtat, 2010, p. 530; Meliha Powlakić: ‘Odgovornost za materijalne nedostatke/ nesaobraznost robe u kupoprodajnim ugovorima u zemljama jugoistočne Evrope u poređenju sa rješenjima evropskog prava’ [Liability for Material Defects/Lack of Conformity of the Goods in the Sales Contract in Southeast Europe Countries Compared to the Solutions in European Law], pp. 57–72 in: *Forum za građansko pravo za jugoistočnu Evropu Book II*, ed. Ardian Nuni et al., Skoplje, 2012, pp. 69–70; Mišćenić et al. (2021) p. 61; Zvonimir Slakoper in: *Komentar Zakona o obveznim odnosima* [Commentary of the Croatian Obligations Act] (ed. Vilim Gorenc), Narodne Novine, Zagreb, 2014, p. 705.

<sup>84</sup> CroOA, Art. 410, new Sec. 3.

<sup>85</sup> Act on the Amendments to the CroOA, Art. 8.

to notify the seller, starting from the moment of the discovery of the lack of conformity. The notification had to be effectuated within two years from the moment of passing of the risk to the consumer (i.e., the moment of delivery of the goods). The same deadline was applied to both visible<sup>86</sup> and invisible lack of conformity<sup>87</sup>. Regarding its content, CroOA explicitly stipulated that the consumer was not obliged to describe the lack of conformity in detail nor to invite the seller to inspect the goods<sup>88</sup>, which seems to be in line with the judgment of the CJEU in the Faber case. It can be concluded that these provisions are concordant with the rules of the CSD<sup>89</sup>.

One of the most important novelties introduced by the amendments of CroOA in 2021 is the modification of the hierarchy of remedies<sup>90</sup>, such that the price reduction became a subsidiary remedy along with the termination of the contract<sup>91</sup>. The elimination of the lack of conformity (repair) and delivery of conforming goods (replacement) remained the primary set of remedies alternatively available to the consumer, except under certain circumstances. Because the amendments in this regard represent the transposition of SGD, relying on the principle of maximum harmonisation, the majority of rules are identical to those contained in the SloCPA from 2022<sup>92</sup>. Therefore, to avoid unnecessary repetition, only the specificities and divergences of the Croatian regulation shall be analysed which are in accordance with the rules of SGD enabling divergencies to some extent. The provision of the CroOA on damages in force before the enactment of the amendments (Art. 410, Sec. 2), as well as the above-mentioned rules on the time limit for the notification addressed to the seller, distinguishing visible and invisible cases of lack of conformity (Art. 403, Sec. 4 and Art. 404, Secs. 1 and 2), and its content (Art. 406, Sec. 1), remained unchanged.

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<sup>86</sup> CroOA, Art. 403, Sec. 4.

<sup>87</sup> CroOA, Art. 404, Secs. 1 and 2.

<sup>88</sup> CroOA, Art. 406, Sec. 1.

<sup>89</sup> Powlakić (2012), p. 67.

<sup>90</sup> CroOA, Art. 410, Sec. 1.

<sup>91</sup> CroOA, Art. 410, Sec. 5.

<sup>92</sup> The rules that are completely the same as in the 2022 SloCPA concern the following questions: the alternative choice between the repair and replacement granted to the consumer and situations in which it is excluded (Art. 410, p. 3), situations in which the seller is entitled to refuse such a request of the consumer (Art. 410, p. 4), situations in which the consumer is entitled to demand the appropriate price reduction and the termination of the contract (Art. 410, p. 5), the minor relevance of the lack of conformity that impedes the termination of the contract (Art. 410, p. 7 and 8), rights and obligations of the contractual parties regarding the repair and replacement of the goods (Art. 410a – the only difference in this case concerns the fact that the Croatian legislator did not determine the duration of the reasonable time), termination of the contract when the lack of conformity relates to only some of the goods delivered (Art. 414), obligations of the contractual parties when the contract is terminated (Art. 419, p. 3 and 4, although without determining the deadline for the performance of the seller's obligation), and the definition of the price reduction (Art. 420).

Regarding the repair and replacement of goods, the CroOA does not specify the duration of the reasonable time within which the seller is obliged to comply with the consumer's request. It is up to the court to determine what should be the reasonable time for the fulfilment of the request in the specific case, considering Recital 55 of the SGD. The Croatian legislator did not specify additional conditions and modalities for exercising the consumer right to withhold the payment until the seller fulfilled his/her obligations.

The most important difference in this respect compared to the SloCPA concerns the exercise of the right to terminate the contract. Having informed the seller about his/her decision to terminate the contract, the consumer is obliged to grant the seller an additional time period of reasonable length to fulfil his/her contractual obligation<sup>93</sup>.

However, the CroOA permits termination of the contract without granting an additional period of reasonable length in the following situations:

- 1) If the seller, after being informed of the lack of conformity, states that he/she will not perform the contract;
- 2) If it can be inferred from the circumstances of the case that the seller will not perform the contract within the additional period; or
- 3) If the consumer cannot realise the purpose for which he/she concluded the contract because of the seller's default<sup>94</sup>.

In the third case, the burden of proof that the purpose for which the contract was concluded cannot be realised is on the consumer<sup>95</sup>. Additionally, the consumer is entitled to request an adequate price reduction or terminate the contract if the elimination of the lack of conformity or the delivery of conforming goods causes significant inconveniences to him/her<sup>96</sup>. This provision safeguards consumers' interests, since it hinders the seller from providing the repair or replacement owing to the serious inconvenience the realisation of this set of claims would cause to the consumer.

Finally, regarding the effects of the seller's failure to perform his/her contractual obligations within an additional period of reasonable length, CroOA states that the consumer is entitled to declare the contract terminated<sup>97</sup>. It can be inferred that this provision represents the transposition of Art. 16, Sec. 1 of the SGD, making possible the exercise of the right to terminate the contract by means of unilateral statement of the consumer. These rules differ from the general rules applicable in non-consumer contracts, according to which the contract is considered terminated *ex lege* if the seller fails to perform in the additional period<sup>98</sup>. Therefore, the con-

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<sup>93</sup> CroOA, Art. 412, Sec. 1.

<sup>94</sup> CroOA, Art. 412, Sec. 2.

<sup>95</sup> Petrić (2006), p. 121; Mišćenić et. al. (2021), p. 74.

<sup>96</sup> CroOA, Art. 412, Sec. 3.

<sup>97</sup> CroOA, Art. 413a.

<sup>98</sup> Art. 413. Sec. 1. See Nikšić (2022), p. 529; Baretić (2022), p. 203.

sumer is the last instance of control of the contract's existence, since he/she can decide to keep it in force, notwithstanding the seller's failure to perform his/her obligation in the additional period of reasonable length.

Another example of the Croatian legislator's endeavour to maintain the validity of the contract is that the appearance of the lack of conformity immediately or shortly after the delivery of goods does not have any influence on the hierarchy of claims, unlike in Slovenian and Serbian law.

#### 4. SERBIA

Unlike Slovenia and Croatia, Serbia is not yet a member of the European Union. Nevertheless, by concluding and ratifying the Stabilisation and Association Agreement (SAA)<sup>99</sup> in 2008, Serbia made a commitment to harmonise its legislation with the *acquis communautaire*, inter alia in the field of consumer protection<sup>100</sup>. As a result, Serbia transposed the CSD<sup>101</sup> in the 2010 Consumer Protection Act<sup>102</sup> two years after the ratification of the SAA. In the following years, Serbia adopted new consumer protection acts twice: in 2014<sup>103</sup> and in 2021<sup>104</sup>. The provisions of the 2021 Consumer Protection Act in force today (hereinafter: 'SrbCPA'), on consumer rights in the event of a lack of conformity of goods are still based on the CSD, since the SGD and DCD have not yet been transposed into the Serbian

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<sup>99</sup> Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica, s jedne strane, i Republike Srbije, s druge strane [Law on Ratification of the Stabilisation and Association Agreement between the European Communities and Their Members, on One Side, and the Republic of Serbia, on the Other Side], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 83/08.

<sup>100</sup> For a short overview of the history of regulation of consumer protection law in Serbia see Ivan Jokanović and Attila Dudás: 'Legal Position of the Consumer in the Event of a Lack of Conformity of the Goods in Croatian and Serbian Law', *Acta Universitatis Sapientiae, Legal Studies*, Vol. 11, 1/2022, pp. 26–27.

<sup>101</sup> Marija Karanikić Mirić: 'Šta je novo u srpskom (ugovornom) potrošačkom pravu' [What is New in Serbian (Consumer) Contract Law], pp. 127–146 in: *Pravni kapacitet Srbije za evropske integracije*, Book V (ed. Stevan Lilić), Pravni fakultet Univerziteta u Beogradu, Belgrade, 2010, p. 137.

<sup>102</sup> Zakon o zaštiti potrošača [Consumer Protection Act], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 73/2010. The first act on consumer protection in the competence of the Republic of Serbia was enacted in 2005, but it did not transpose the rules of the CSD. Mićović Miodrag, 'Od odgovornosti za materijalne nedostatke do odgovornosti za nedostatke saobraznosti prema Direktivi EU 1999/44' [From the Liability for Material Defects to the Liability for Lack of Conformity According to Directive EU 1999/44], *Pravo i privreda* 5-8/2007, 278.

<sup>103</sup> Zakon o zaštiti potrošača [Consumer Protection Act], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 62/2014, 6/2016 – other law and 44/2018 other law.

<sup>104</sup> Zakon o zaštiti potrošača [Consumer Protection Act], *Službeni glasnik RS* [Official Gazette of the Republic of Serbia], No. 88/2021.



legal system<sup>105</sup>. Thus, considering the commitments undertaken by ratifying the SAA, it is reasonable to expect that the Serbian legislator will transpose the provisions of SGD and DCD in the prospective future<sup>106</sup>. Although the issue of conformity of goods in consumer sale contracts is not regulated in the Obligations Act (hereinafter: ‘the SrBOA’), as in the Croatian law, similarly to the Slovenian law, the provisions of the SrBOA are applied if a specific legal issue is not governed by the SrBCPA<sup>107</sup> and if they do not reduce the degree of protection granted to the consumer by the SrBCPA<sup>108</sup>.

The main feature of Serbian law in this field is the existence of a hierarchy of rights in the spirit of the CSD introduced by the 2010 SrBCPA. Even though two novel laws were adopted afterwards, the regulation of consumer rights in the event of a lack of conformity did not change profoundly. Thus, the relevant provisions of the SrBCPA in force today will be presented with due regard to some differences in relation to previous acts.

In Serbian law, the remedies in case of a lack of conformity are repair and replacement, as primary, and adequate price reduction and termination of the contract, as subsidiary remedies<sup>109</sup>. In addition, the consumer is entitled to request compensation for the damage caused by the lack of conformity according to the general rules of liability in tort<sup>110</sup>.

The SrBCPA grants the consumer a choice between repair and replacement<sup>111</sup>. Furthermore, the law mandates that any repair or replacement be completed in a reasonable time, without any significant inconvenience to the consumer and with his/her consent, considering the nature of the goods and the purpose for which

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<sup>105</sup> The Explanatory memoranda for the Bill of the 2021 SrBCPA does not indicate that the Act is supposed to transpose either the SGD or the DCD. [http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi\\_zakona/2021/1290-21%20-%20lat..pdf](http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2021/1290-21%20-%20lat..pdf) (4 January 2023).

<sup>106</sup> The 2021 SrBCPA mentions digital content at almost a dozen places, although the transposition of the DCD has not yet been achieved.

<sup>107</sup> SrBCPA, Art. 3, Sec. 7.

<sup>108</sup> Marija Karanikić Mirić: ‘Usklađenost srpskog potrošačkog prava sa Direktivom 99/44/EZ o prodaji robe široke potrošnje i pratećim garancijama’ [Implementation of the Rules of Directive 1999/44/EC Concerning the Sale of Consumer Goods and Associated Guarantees in Serbia], pp. 173–191 in: *Perspektive implementacije evropskih standarda u pravni sistem Srbije*, Book I (ed. Stevan Lilić), Pravni fakultet Univerziteta u Beogradu, Belgrade, 2011, p. 177; Atila Dudaš: ‘Osvrt na regulativu saobraznosti i garancije u mađarskom pravu – primer transpozicije Direktive 1999/44/EZ u opšta pravila ugovornog prava’ [Conformity of Goods and Guarantees in Hungarian Law – Example of Transposition of Directive 1999/44/EC by Amending the General Rules of Contract Law], *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3/2020, p. 1059; Atila Dudaš: ‘Neposredna odgovornost proizvođača za nesaobraznost proizvoda u srpskom i evropskom pravu’ [Producer’s Direct Liability for Non-conformity in European and Serbian Law], *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3/2021, p. 947.

<sup>109</sup> SrBCPA, Art. 51, Sec. 1.

<sup>110</sup> SrBCPA, Art. 51, Sec. 12.

<sup>111</sup> SrBCPA, Art. 51, Sec. 2.

he/she acquired them<sup>112</sup>. The Serbian legislator did not determine the maximum duration of this reasonable period. However, SrbCPA specifies that all claims of the consumer (including claims arising from a lack of conformity) are to be communicated to the seller in the form of reclamation (complaint), prescribing a short time limit in which the claims should be decided upon, the consumer notified about the decision, and the means of the resolution of claims if the consumer's complaint is justified, which rules shall be described later. Finally, any repair or replacement must be performed free of charge, signifying that all the costs necessary to bring goods into conformity are borne by the seller<sup>113</sup>. The SrbCPA particularly mentions the costs of labour, materials, taking over, and delivery of goods. It is worth mentioning that during the preparatory works on the Bill of the 2010 SrbCPA, there were suggestions to include provisions enabling the consumer to repair the goods at the seller's expense or buy new goods at another place if the seller did not fulfil the consumer's request to repair or replace them. In such situations, the seller would have been obliged to reimburse the expenses incurred by the consumer without delay<sup>114</sup>.

The consumer is entitled to subsidiary remedies in the following situations:

- 1) When it is not possible to bring the goods into conformity by repair or replacement, or it cannot be completed in a reasonable time;
- 2) When the consumer cannot exercise the right to repair or replacement, that is, the seller has not completed the repair or replacement in a reasonable time;
- 3) When it is not possible to complete the repair or replacement without significant inconveniences for the consumer owing to the nature of the goods and their purpose; or
- 4) When bringing goods into conformity by repair or replacement represents a disproportionate burden to the seller<sup>115</sup>.

The notion of disproportionate burden to the seller is to be interpreted as excessive costs that the performance of the repair or replacement would cause to the seller compared to the appropriate price reduction or the termination of the contract, taking into account the value the goods would have if they were conformant to the contract, the significance of the conformity in the specific case, and whether it is possible to eliminate the lack of conformity without significant inconveniences for the consumer<sup>116</sup>.

Concerning the exercise of the right to terminate the contract, the question arises as to whether the consumer has to fix the limit of an additional period of reasonable length for the seller to perform the contract, as required by the SrbOA

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<sup>112</sup> SrbCPA, Art. 51, Sec. 6.

<sup>113</sup> SrbCPA, Art. 51, Sec. 9.

<sup>114</sup> Karanikić Mirić (2011), p. 181.

<sup>115</sup> The Serbian CPA, Art. 51, Sec. 3.

<sup>116</sup> The Serbian CPA, Art. 51, Sec. 4.

according to the general rules of contract law on non-performance<sup>117</sup>. This issue is not explicitly governed by SrbCPA. It can be assumed that in this case the subsidiary application of the SrbOA does not seem justified, because it would significantly reduce the degree of consumer protection by the SrbCPA. The seller already had the opportunity to perform the contract by repairing or replacing the goods, and he/she failed to do so or it was not feasible. The termination of the contract is effected by a simple statement of the consumer, which is in line with the extrajudicial termination of the contract due to non-performance according to the general rules of Serbian contract law<sup>118</sup>. Therefore, the consumer can terminate the contract with a mere statement informing the seller of his/her decision to dispose of this right without being obliged to give the seller an additional opportunity to repair or replace the goods.

Moreover, the general hierarchy of rights is modified in two exceptional situations introduced in Serbian law by the CPA of 2014, which were not envisaged in the CSD. Namely, the consumer is entitled to choose between the replacement of the goods, appropriate price reduction, and termination of the contract, whereby the repair is admissible only with the consumer's explicit consent, when:

1) The same or another lack of conformity becomes evident after the first repair<sup>119</sup>; or

2) The lack of conformity appears within six months of the delivery of the goods to the consumer<sup>120</sup>.

Essentially, in these two cases, the consumer is entitled to terminate the contract or obtain the appropriate price reduction immediately, without being obliged to demand repair and replacement. The second case is similar to that existing in Slovenian law, but favours the consumer considerably more, since the time period is notably longer (six months in Serbian law compared to 30 days in Slovenian law). The purpose of the provision allowing repair only with the consumer's explicit consent is to prevent its imposition by the seller<sup>121</sup>. In practice, the seller, especially in relation to technical goods, often rejects the replacement of non-conforming goods and insists on attempting to repair them before replacing them<sup>122</sup>. However, it is

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<sup>117</sup> Pursuant to Art. 490 of the SrbOA, the buyer is obliged to allow the seller a subsequent reasonable time limit to perform the contract. However, it is possible to terminate the contract without granting the subsequent adequate time limit if the seller informed the buyer that he/she will not perform the contract or if the circumstances of the specific case indicate without doubt that the seller will not be able to perform the contract even in the subsequent adequate time limit.

<sup>118</sup> Maša Mišković: 'Ostvarivanje prava potrošača po osnovu nesaobraznosti robe' [Exercising Consumer Rights in Case of Non-conformity of Goods], *Pravo i privreda*, 7-9/2016, p. 758.

<sup>119</sup> SrbCPA, Art. 51, Sec. 5.

<sup>120</sup> SrbCPA, Art. 51, Sec. 7 and 8.

<sup>121</sup> Explanatory memoranda for the Bill of the 2014 SrbCPA, p. 97. [http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi\\_zakona/1892-14.pdf](http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/1892-14.pdf) (5 January 2023)

<sup>122</sup> Mišković (2016), p. 757.

important to underline that the Serbian CPA explicitly excludes the possibility of termination of the contract when the lack of conformity is of minor significance<sup>123</sup>.

To avail himself/herself of the mentioned remedies, the consumer is obliged to inform the seller about the lack of conformity by submitting a reclamation/complaint<sup>124</sup>. This is a general legal instrument by which the consumer lodges not only claims arising from non-conformity of goods and services but also claims arising from inaccurate calculation of the price and claims from commercial guarantees<sup>125</sup>. The procedure of lodging, registering, and resolving a complaint is regulated in detail by the SrbCPA. Among other provisions, it specifies that the seller must decide if the complaint shall be approved or rejected, and inform the consumer about the decision in eight days. If the complaint is approved, the seller is obliged to resolve it in 15 days, or in 30 days if the object of the contract is technical goods or furniture<sup>126</sup>. This means that the indicated time limit of 15/30 days applies to all remedies for redressing non-conformity: repair, replacement, price reduction, or termination of the contract.

The Serbian legislator did not avail itself of the opportunity provided by CSD in Art. 5, Sec. 2 to envisage a two-month deadline from the date of detection of the lack of conformity for the notification. Therefore, it can be inferred that the consumer will not forfeit the rights if he/she does not inform the seller about the lack of conformity shortly after its discovery<sup>127</sup>. In this regard, Serbian law is an exception among the examined laws, since both the SloCPA and CroOA stipulate a deadline for the notification addressed to the seller.

## CONCLUDING REMARKS

The common denominator of the examined laws is the existence of a hierarchy of rights at the consumer's disposal. It consists of repair and replacement as primary and appropriate price reduction and termination of the contract as secondary remedies. It is important to emphasise that legal regulation in the examined countries in this regard is not based upon the same set of EU rules. While Croatia and Slovenia already transposed the provisions of the SGD in 2021 and 2022, respectively, the SrbCPA still reflects the rules of the CSD. Considering her obligation to harmonise the national legislation with the *acquis communautaire* in the field of consumer protection undertaken by the Stabilisation and Association Agreement, it is expected that Serbia will also transpose the SGD soon. It is inter-

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<sup>123</sup> SrbCPA, Art. 51, Sec. 11.

<sup>124</sup> SrbCPA, Art. 55, Sec. 1.

<sup>125</sup> SrbCPA, Art. 55, Secs. 1 and 2.

<sup>126</sup> SrbCPA, Art. 55, Sec. 9.

<sup>127</sup> Karanikić (2011), p. 188.

esting to note that the examined laws seem more similar now, when they are based on two different directives, than when all were influenced by the CSD. Namely, the hierarchy of rights in the Slovenian and Croatian laws before the transposition of SGD differed from SrbCPA and CSD, since repair, replacement, and appropriate price reduction were considered primary remedies, while the termination of the contract was the only subsidiary remedy.

The direct consequence of the fact that the SGD is a maximum harmonisation directive is the existence of a notable number of identical provisions in the Slovenian and Croatian laws. However, certain legal solutions show some discrepancy, such as the rule on the duration of a reasonable time limit within which the seller is obliged to repair or replace goods.

The most important differences between the examined laws concern the termination of the contract and the obligation to notify the seller about a lack of conformity. Regarding the first issue, Slovenian and Serbian laws contain certain provisions that notably facilitate the termination of contracts and change the statutory hierarchy of rights. Namely, if the lack of conformity appears 30 days after the delivery of the goods, the termination of the contract is immediately possible under Slovenian law. The Serbian CPA is even more favourable and beneficial to the consumer, since he/she is entitled to terminate the contract without being obliged to request repair or replacement if the lack of conformity becomes evident within six months of the delivery of the goods. Conversely, CroOA does not contain any provision of this nature. Thus, the circumstance that the lack of conformity appeared immediately or within a short period after the delivery of the goods does not make any meaningful difference in Croatian law, and the consumer still must obey the hierarchy of remedies. The Croatian legislator's tendency to maintain the validity of the contract is further demonstrated by the requirement imposed on the consumer to fix an additional period of reasonable length for the seller to perform her contractual obligations (except in specific cases) before declaring the contract terminated. If the seller fails to comply, the contract shall not be terminated *ex lege*, since it depends on the consumer's will. In contrast, such a requirement does not exist in Slovenian and Serbian laws in relation to consumer sales contracts. The 2022 SloCPA explicitly stipulates that the contract is terminated by a mere statement given by the consumer and addressed to the seller, without mentioning the obligation to fix an additional period of reasonable length for the seller's performance. Although the SrbCPA is reticent in this regard, it can be said that the same rule as in Slovenian law applies due to the requirement expressed in the legal doctrine that the provisions contained in the SrbOA are applied if they do not reduce the degree of protection granted to the consumer, as indicated earlier.

Finally, regarding the notification about the lack of conformity, Slovenian law seems to be the strictest, since the consumer is obliged to inform the seller about the lack of conformity within two months of its discovery under the risk of

forfeiting the available rights, describing it in detail, and allowing the seller to inspect the goods. In contrast, the CroOA only establishes the two-month deadline for the notification, explicitly exempting the consumer from the obligations to describe the lack of conformity with precision and to invite the seller to inspect the goods. The SrbCPA seems to be the most beneficial to the consumer's position among the examined laws since it does not envisage any deadline for notification.

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Аји́ла И. Ду́даш  
Универзитет у Новом Саду  
Правни факултет у Новом Саду  
A.Dudas@pf.uns.ac.rs  
ORCID ID: 0000-0001-5804-8013

Иван М. Јокановић  
Универзитет у Мишколцу  
Правни факултет у Мишколцу  
jokanovi\_\_ivan@student.uni-miskolc.hu  
ORCID ID: 0000-0003-3016-6178

### Хијерархија права потрошача у случају несаобразности производа у словеначком, хрватском и српском праву

**Сажетак:** У овом раду аутори уоређују права потрошача у случају несаобразности робе у словеначком, хрватском и српском праву. Словеначки и хрватски законодавци су већ трансформисали Директиву (ЕУ) 2019/771 2022, односно 2021. године. С друге стране, правила српског Закона о заштити потрошача и даље су заснована на Директиви 1999/44/ЕЗ. Ова Директива је, међу тим, обликовала и словеначко и хрватско потрошачко право знајно пре последњих измена. Из тог разлога, у раду се анализирају и правила у словеначком и хрватском праву која су била на снази пре недавних измена. Основни циљ аутора је да утврде сличности, особености и разлике између три правна система.

Заједнички именила ова три правна система је постојање хијерархије права потрошача: оправка и замена су примарна, а одговарајуће умањење цене и раскид уговора секундарна. Пре измена 2022. и 2021. године, раскид уговора је био једино секундарно право у словеначком и хрватском праву. Може се закључити да се најважније разлике између ова три правна система односе на моћност раскида уговора, јер су та словеначки и српски законодавци знајно олакшали када се несаобразност јојави у крајком временском периоду након испоруке робе. Сувојино томе, у хрватском закону јојавна несаобразности у крајком периоду након испоруке не даје непосредно основа за раскид уговора. Тренујно само хрватски закон обавезује потрошача, осим у посебним случајевима, да одреди накнадни примерени рок у којем продавац још може извршити уговор пре него што изјава потрошача усмерена на раскид уговора произведе правно дејство.

**Кључне речи:** саобразности, Закон о заштити потрошача, права потрошача, хијерархија права потрошача, оправка, замена, одговарајуће умањење цене, раскид уговора.

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