



# Legal Position of the Consumer in the Event of a Lack of Conformity of the Goods in Croatian and Serbian Law

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**Abstract.** The objective of this paper is to analyse the legal position of the consumer in the event of a lack of conformity of the goods in Croatian and Serbian law. The national regulations governing this issue in both states are influenced by the legislation of the European Union. More specifically, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees influenced the Serbian Consumer Protection Act, while the said Directive and the new Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods influenced the Croatian Act on Obligations. However, both legislators preserved certain specific rules, most notably the ones pertaining to the rescission of the contract. Given the fact that Serbia has not yet harmonized its Consumer Protection Act with Directive (EU) 2019/771, its regulation is to be assessed taking into account only Directive 1999/44/EC. In comparing the two legal orders, the paper discusses several issues in relation to consumer sales, such as the sources of law in this field and their application, basic definitions and the notion of conformity of the goods with the contract and consumers' rights in the event of a lack of conformity, with the aim to identify differences, similarities, and specificities. It can be inferred that the main differences concern the regulatory approach, the definition of the notion of conformity of the goods with the contract, and certain specific rules relating to the rescission of the contract. On the other hand, the main similarities regard the hierarchy of the rights at the disposal of the consumer and the time limit during which the seller may be held liable.

**Keywords:** lack of conformity of the goods, rights of the consumer, consumer protection, Serbian Consumer Protection Act, Croatian Act on Obligations

## 1. Introduction

Issues concerning consumer protection, particularly the rights of the consumer in the event of a lack of conformity of the goods with the contract, are recurrent, and it can be freely said that they are present in the everyday life of each citizen. This fact accentuates their crucial importance in modern society and the necessity to provide legal protection to consumers. Undoubtedly, their importance is growing exponentially in today's world. Croatia and Serbia are not an exception in this regard either.

The statutory rules of both countries are influenced by the legislation of the European Union, but in different ways. While Croatia, as a member of the European Union, has a direct obligation to transpose the *acquis communautaire*, Serbia, as a candidate country at present, has only an obligation to gradually harmonize its national legal order with that *acquis*. The essence of this paper is the analysis of the position of the consumer in case of the lack of conformity in Croatian and Serbian law, but it will not be limited solely to this issue. The paper also analyses sources of consumer protection law in these states, their application and fundamental notions, including the definition of conformity of the goods. The objective of the paper is to identify peculiarities, similarities, and, especially, differences between these two legal systems regarding the position of the consumer. Taking into account the fact that Croatia in 2021 amended its central piece of legislation governing these issues, i.e. the Act on Obligations, this paper also analyses and compares legal rules contained in this law both before and after the mentioned amendments.

## 2. Sources of Law and Their Application

### 2.1. Croatia

Croatia, concluding and ratifying the Stabilisation and Association Agreement with the European Communities,<sup>1</sup> undertook the obligation to harmonize its legislation and align the level of consumer protection to that in force in the Community. In order to achieve this objective, Croatia agreed to cooperate with other parties to the Agreement. The result of its activities aimed at the harmonization of the legislation and the alignment of consumer protection was the adoption of a set of laws, beginning from 2003, when the first Consumer Protection Act<sup>2</sup> was adopted,

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1 Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica [Act on Ratification of the Stabilisation and Association Agreement between the Republic of Croatia and the European Communities and Their Member States]. *Narodne novine* [Official Gazette] 14/2001. Titles are translated by the authors. Unless otherwise specified, all translations are by the authors.

2 Zakon o zaštiti potrošača [Consumer Protection Act]. *Narodne novine* [Official Gazette] 96/2003.

until today. Provisions protecting consumers are also contained in the Act on Trade,<sup>3</sup> Act on Energy,<sup>4</sup> Act on the General Safety of Products,<sup>5</sup> etc. The Consumer Protection Act<sup>6</sup> (hereinafter: the CPA), as the general law in the field of consumer protection still in force, was adopted in 2014. Among other issues, it deals with business-to-consumer practices, special forms of sale, public services provided to consumers, and unfair terms in consumer contracts.

In Croatian law, the provisions of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (hereinafter: the Directive 1999/44/EC) were transposed into the Act on Obligations<sup>7</sup> (hereinafter: the AO), passed in 2005, and not into the CPA. Croatia also transposed Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods (hereinafter: the Directive (EU) 2019/771), amending the AO in 2021, whereby the novel provisions do not apply to contracts concluded before 1 January 2022.<sup>8</sup> Therefore, issues concerning the rights of the consumer in the event of a lack of conformity with the contract are regulated by the AO.<sup>9</sup> Its provisions regarding the liability for material defects apply to contracts concluded between two natural persons, between two legal persons and even to consumer sales contracts. The AO explicitly limits the application of certain provisions to consumer sales contracts. In this manner, the Croatian legislator avoided the fragmentation of the regulation of the liability for material defects in civil and commercial sales contracts on the one hand and for consumer sales contracts on the other. A uniform regulatory approach – with certain exceptions for consumer sales contracts made with the intent to meet the requirements of the harmonization of Croatian consumer protection law with EU law – was deemed the best and most desirable legislative approach.<sup>10</sup> The AO may also be considered *lex generalis* in the field of consumer contract law given the fact that the provisions of the AO apply to business-to-consumer contractual civil obligations, unless otherwise determined by special laws governing specific administrative areas, which have been harmonized with the *acquis communautaire*, or by the CPA itself.<sup>11</sup>

3 Zakon o trgovini [Act on Trade]. *Narodne novine* [Official Gazette] 87/2008.

4 Zakon o energiji [Act on Energy]. *Narodne novine* [Official Gazette] 20/12, 14/14, 95/15, 102/15, 68/18.

5 Zakon o općoj sigurnosti proizvoda [Act on General Safety of Products]. *Narodne novine* [Official Gazette] 30/09, 139/10, 14/14, 32/19.

6 Zakon o zaštiti potrošača [Consumer Protection Act]. *Narodne novine* [Official Gazette] 41/2014.

7 Zakon o obveznim odnosima [Act on Obligations]. *Narodne novine* [Official Gazette] 35/05, 41/08, 125/11, 78/15, 29/18, 126/21.

8 Act on Amendments to the AO, Art. 22.

9 Given the fact that the Croatian legislator transposed the provisions of Directive 1999/44/EC and of the Directive (EU) 2019/771 in the AO containing general rules of contract law, the terminology used is different. For example, the AO uses the term object (*stvar*) instead of the goods and the term material defect (*materijalni nedostatak*) instead of lack of conformity.

10 Petrić 2007. 97–98.

11 Croatian CPA, Art. 4.

## 2.2. Serbia

The importance of the protection of consumers in Serbian law is emphasized by the fact that the Constitution,<sup>12</sup> as the highest legal-political act, establishes the obligation of the Republic of Serbia to protect consumers and stipulates that activities directed against health, security, and privacy of the consumers, as well as other unfair commercial practices, shall be strictly prohibited.<sup>13</sup> Ratifying the Stabilisation and Association Agreement<sup>14</sup> concluded with the European Union, Serbia undertook the obligation of ensuring the harmonization of its consumer law with that in force in the Community. Bearing in mind the requirement to harmonize the standards of consumer protection to those applied in the Community, Serbia committed itself to cooperate with the European Union and its Member States.

Until the adoption of the first Consumer Protection Act<sup>15</sup> at the federal level in 2002, consumer protection issues were regulated by various laws such as the Act on Obligations<sup>16</sup> (hereinafter: the AO), the Trade Act,<sup>17</sup> and the Standardisation Act.<sup>18</sup> Serbia, as part of the State Union of Serbia and Montenegro, adopted its Consumer Protection Act<sup>19</sup> in 2005 and subsequently, already as an independent state, adopted a new Consumer Protection Act in 2010,<sup>20</sup> another one in 2014,<sup>21</sup> and the latest one in 2021,<sup>22</sup> repealing the Act of 2014.<sup>23</sup>

12 Ustav Republike Srbije [Constitution of the Republic of Serbia]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 83/06.

13 Constitution of the Republic of Serbia, Art. 90.

14 Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica, s jedne strane, i Republike Srbije, s druge strane [Act 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] 83/08.

15 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni list SRJ* [Official Gazette of the Federal Republic of Yugoslavia] 37/2002.

16 Zakon o obligacionim odnosima [Act on Obligations]. *Službeni list SFRJ* [Official Gazette of the Socialist Federal Republic of Yugoslavia] 29/78, 39/85, 45/89 – Decision of the Constitutional Court of Yugoslavia and 57/89; *Službeni list SRJ* [Official Gazette of the Federal Republic of Yugoslavia] 31/93; *Službeni list SCG* [Official Gazette of Serbia and Montenegro] 1/2003 – Constitutional Chapter and *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 18/2020.

17 Zakon o trgovini [Trade Act]. *Službeni list SRJ* [Official Gazette of the Federal Republic of Yugoslavia] 32/93, 50/93, 29/96.

18 Zakon o standardizaciji [Standardisation Act]. *Službeni list SRJ* [Official Gazette of the Federal Republic of Yugoslavia] 30/96, 59/98, 70/2001, 8/2003.

19 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 79/2005.

20 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 73/2010.

21 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 62/2014, 6/2016 – special laws and special law 44/2018.

22 Zakon o zaštiti potrošača [Consumer Protection Act]. *Službeni glasnik RS* [Official Gazette of the Republic of Serbia] 88/2021.

23 The Act of 2014 was repealed on the date of the commencement of the application of the new

The Consumer Protection Act deals with various issues relating to the protection of consumers such as the information and education of consumers, unfair commercial practices, consumer protection in exercising the rights from contracts containing unfair terms or the rights deriving from sales contracts, guarantees, consumer safety, strategy and system of consumer protection, etc. For the purposes of this article, the issues regarding the conformity of goods with the contract, liability for the lack of conformity, request for the removal of the lack of conformity, time limits, and the rules on the burden of proof contained in the CPA, based on the provisions of Directive 1999/44/EC, are the most important. The transposition of the provisions of Directive 1999/44/EC have already occurred by the adoption of the Consumer Protection Act of 2010.<sup>24</sup>

Furthermore, it is necessary to stress that the AO, regulating the creation, effects, modification, and cessation of obligations, but lacking a definition of consumer, contains provisions concerning the liability of the seller for substantive defects (art-s 478–500). They apply to relations between two natural persons, between two legal persons, or between a natural and a legal person, outside the context of consumer law. On the other hand, the provisions on the liability for a lack of conformity contained in the CPA applies to sales contracts in a consumer context (that is, if one of the parties is qualified as a consumer). However, if a specific legal issue is not governed by the provisions of the CPA, the provisions of the AO will apply if they do not reduce the degree of protection granted to the consumer by the CPA.<sup>25</sup>

### **3. Basic Statutory Definitions and the Notion of Conformity of the Goods with the Contract**

#### **3.1. Croatia**

The definitions of essential and fundamental notions are given in the Croatian CPA. Consumer is defined as any natural person concluding a contract or acting for purposes which are outside of his/her trade, business, craft, or profession.<sup>26</sup> Trader, as the other party to a consumer contract, is any person concluding a contract or acting for purposes relating to his/her trade, business, craft, or

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Act of 2021. It specified that it shall, in the most part, be applied starting from the expiration of three months from the date of its entry into force (19 September). This means that the new Act of 2021 is applicable as of 20 December 2021. However, provisions on the position of the consumer in the event of a lack of conformity remained the same as in the previous CPA of 2014. The only difference concerns the definition of the notion of goods.

24 Karanikić Mirić 2010. 137; Dudaš, 2021. 946.

25 Karanikić Mirić 2011. 177; Dudaš 2020. 1059.

26 Croatian CPA, Art. 5, Sec. 1, P. 15.

profession, or anyone acting in the name or on behalf of a trader.<sup>27</sup> The goods, as the object of the consumer contracts, are any tangible movable items with the exception of items sold by way of enforcement or otherwise by authority of the law, water, gas, and electricity if they are put up for sale in a limited volume or in a set quantity.<sup>28</sup> The CPA also contains the definition of consumer sales contract. It is any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services.<sup>29</sup> All these definitions are in line with the definitions contained in Art. 1 of Directive 1999/44/EC.

The legislator, amending the AO in 2021, dedicated Art. 399a to fundamental notions. The definition of consumer is identical to the one contained in the CPA, while the notion of consumer contract is defined in a similar manner as in the AO before the 2021 amendments.<sup>30</sup> Transposing the provisions contained in Art. 2 of Directive (EU) 2019/771, the amendments of the AO introduced the definitions of the notions of producer,<sup>31</sup> digital content,<sup>32</sup> digital service,<sup>33</sup> compatibility,<sup>34</sup> functionality,<sup>35</sup> interoperability,<sup>36</sup> and durable medium.<sup>37</sup>

Concerning the cases in which a material defect exists, the AO maintained the *numerus clausus*, envisaging a higher number of cases compared to their number

27 Id. P. 26.

28 Id. P. 22.

29 Id. P. 29.

30 Before the adoption of the amendments of the AO, the notion of consumer contract was defined in Art. 402 as a contract entered into by a natural person as the buyer, outside his/her economic and professional activity, with the natural or legal person as the seller, within the framework of his/her economic or professional activity. The definition of consumer contract contained in Art. 399a includes, additionally, the person acting on behalf of the seller.

31 Art. 399a, Sec. 1, P. 3 of the Croatian AO: Producer is a person who manufactured the object, imported the object into the European Union or any other person purporting to be a producer by placing his/her name, trademark, or other distinctive sign on the object.

32 Art. 399a, Sec. 1, P. 4 of the Croatian AO: Digital content is data which are produced and supplied in digital form.

33 Art. 399a, Sec. 1, P. 5 of the Croatian AO: Digital service is a) a service that allows the consumer to create, process, store, or access data in digital form or b) a service that allows the sharing of any other interaction with data in digital form uploaded and created by the consumer or other users of that service.

34 Art. 399a, Sec. 1, P. 6 of the Croatian AO: Compatibility is the ability of the object to function with hardware or software with which an object of the same type is normally used, without the need to convert the object, hardware, or software.

35 Art. 399a, Sec. 1, P. 7 of the Croatian AO: Functionality is the ability of the object to perform their functions having regard to their purpose.

36 Art. 399a, Sec. 1, P. 8 of the Croatian AO: Interoperability is the ability of the object to function with hardware or software different from those with which an object of the same type is normally used.

37 Art. 399a, Sec. 1, P. 9 of the Croatian AO: Durable medium is any instrument which enables the consumer or the seller to store information addressed personally to that person in a way that is accessible for future reference, for a period of time adequate for the purposes of the information, and which allows the unchanged reproduction of the information stored.

in the AO before the adoption of the amendments<sup>38</sup> and differentiating subjective and objective requirements of conformity, which is the consequence of the transposition of art-s 6 and 7 of Directive (EU) 2019/771. Subjective requirements of conformity take into account the intention of the parties expressed in the sales contract. According to the AO,<sup>39</sup> a material defect exists:

- if the object does not correspond to the description, type, quantity, and quality or does not possess functionality, compatibility, interoperability, and other features required by the sales contract;
- if it is not fit for any particular purpose for which the buyer requires it and which the buyer made known to the seller at the moment of the conclusion of the sales contract at the latest and in respect of which the seller has given acceptance;
- if it is not delivered with all accessories and instructions, comprising installation, as stipulated by the sales contract; or
- if it is not supplied with updates as stipulated by the sales contract.

In addition, the legislator enumerated the objective requirements of conformity<sup>40</sup> stating that a material defect also exists:

- if the object is not fit for purposes for which objects of the same kind are normally used, taking into account any existing law of the European Union and of the Republic of Croatia, technical standards, or, in their absence, applicable codes of conduct in the specific sector;
- if it does not correspond to the quality and description of a sample or model that the seller made available to the buyer before the conclusion of the contract;
- if it is not delivered with additional accessories, comprising packaging, installation instructions or other instructions, as the buyer may reasonably expect to receive;
- if it is not of the quantity or does not possess qualities and other features, including durability, functionality, compatibility, and security normally required

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38 According to Art. 401 of the AO before the adoption of the amendments, a material defect shall exist:

- if the object lacks the qualities required for its regular use or circulation;
- if it lacks the qualities required for the specific purpose the buyer intends to use it for and where it was known or should have been known to the seller;
- if it lacks qualities or characteristics which were agreed or stipulated expressly or by implication;
- if the seller has delivered an object that does not conform to the sample or model, unless the sample or model has been shown for information purposes only;
- if it lacks qualities otherwise inherent to other objects of the same kind and which the buyer could have reasonably expected in accordance with the nature of the object, taking into consideration public statements of the seller, the manufacturer, and their representatives on the qualities or characteristics of the object (particularly in advertising or on labelling etc.);
- if it has been poorly assembled provided that the service of assemblage is included in the performance of the sales contract or if a bad assemblage is a result of deficiencies in the instructions for assembly.

39 Croatian AO, Art. 401, Sec. 1.

40 Croatian AO, Art. 401, Sec. 2.

of objects of the same type and which the buyer may reasonably expect given the nature of the object and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling;

- if it is installed incorrectly, provided the installation forms part of the sales contract, and was carried out by the seller or another person under the seller's responsibility; or

- if it is stipulated that the installation of the object is to be carried out by the buyer, and the incorrect installation is attributable to shortcomings in the installation instructions provided by the seller or, in the case of objects with digital elements, provided by the seller or by the supplier of the digital content or digital service.

Besides terminological differences, there is an important conceptual one as well, in comparison with the legal solutions from the Serbian CPA and Directive 1999/44/EU, which contain a negative definition of conformity with the contract combined with a rebuttable presumption of conformity.<sup>41</sup> The Croatian legislator specified an exhaustive range of possible cases of material defects (positive definition), envisaged by the AO even before its amendments, and distinguishing subjective and objective requirements of conformity in the spirit of Directive (EU) 2019/771. The obligation of the seller to deliver goods which are in conformity with the contract is not stipulated as a general rule. It is only one of the cases of material defects categorized into the subjective requirements of conformity. This positive definition – as it was the case in the AO before the adoption of the amendments – applies to contracts concluded between two natural persons or between two legal persons, not only to consumer sales contracts.

Given the fact that the seller is liable for any public statement made on his/her behalf, the AO, transposing Art. 7, Sec. 2 of Directive (EU) 2019/771, stipulates<sup>42</sup> that the seller will be released from the liability:

- if he/she demonstrates that he/she did not know and neither could reasonably have been aware of the public statement in question;

- if by the time of conclusion of the contract the public statement had been corrected in the same way, or in a way comparable to, as it had been made; or

- if the public statement could not have influenced the decision to buy the goods.

In all these cases, the burden of proof is explicitly on the seller, which is a significant difference in comparison with the previous regulation.<sup>43</sup> Previously,

<sup>41</sup> Mišćenić 2013. 163.

<sup>42</sup> Croatian AO, Art. 401, Sec. 3.

<sup>43</sup> Art. 401 of the AO stated that the seller would have been released from the liability if the seller was not or should not have been aware of such statements, or such statements were withdrawn by the conclusion of the contract, or they had no influence on the buyer's decision to conclude the contract.

regarding the relevance of the seller's awareness of the public statement, there was a presumption that he/she acted in good faith and, thus, the burden of proof was on the buyer.<sup>44</sup> Furthermore, the amendments of the AO introduced a new ground of release from the liability applicable exclusively to consumer sales contracts. Transposing Art. 7, Sec. 5 of Directive (EU) 2019/771, the AO prescribes that there shall be no material defect if, at the time of the conclusion of the contract, the consumer was specifically informed that a particular characteristic of the object was deviating from the criteria mentioned in Sec. 2, paras. 1–4 of the same article, and the consumer expressly, in a separate statement, accepted that deviation.<sup>45</sup> Therefore, the consent of the consumer who had been previously informed on deviations is an indispensable prerequisite in this case.

Concerning the time according to which the liability for material defects is determined, the AO prescribed even before the amendments that the seller is liable for material defects of the object that existed at the moment of the transfer of risk to the buyer (consumer), regardless whether he/she was aware of them or not.<sup>46</sup> The moment of the transfer of risk is the moment of delivery. The legislator also prescribed that the seller is liable for all material defects arising after the transfer of risk to the buyer if they arose as a result of a pre-existing cause.<sup>47</sup>

In order to comply with the definition of the sales contract contained in Directive (EU) 2019/771, the Croatian legislator stipulated that in consumer sales contracts the seller shall be liable for material defects according to the rules pertaining to the sales contract even if the object is yet to be produced or manufactured, notwithstanding whether it is qualified, according to general rules, as a sales, service, or any other contract.<sup>48</sup> The AO establishes two rebuttable presumptions according to which: (1) each material defect becomes apparent within one year following the passing of risk at the latest, (2) these defects have existed at the time of passing of risk unless the seller proves otherwise or this presumption, is incompatible with the nature of the object or with the nature of the material defect.<sup>49</sup> The burden of proving that the material defect did not exist at the time of the passing of risk is expressly on the seller. It is important to underline that the time period in which this rebuttable presumption applies is longer than the one envisaged in the previous regulation – one year, compared to six months. This provision represents the transposition of Art. 11 of Directive (EU) 2019/771.

The AO explicitly states that its provisions on the liability for material defects shall not apply to consumer sales contracts for the supply of digital content or digital services, except if the object of the contract is a movable item into which

44 Petrić 2007. 107.

45 Croatian AO, Art. 401, Sec. 4.

46 Id. Sec. 1.

47 Id. Sec. 2.

48 Id. Sec. 4.

49 Id. Sec. 9.

digital content or digital services are incorporated or they are interconnected with a movable item in such a way that the absence of the digital content or digital service prevents the object from performing its functions and which are provided under the sales contract, irrespective of whether such digital content or digital service is supplied by the seller or by a third person (objects with digital elements).<sup>50</sup> The objective of this provision is to differentiate the provisions of this law from those of the Act on Certain Aspects of the Contract for the Supply of Digital Content and Digital Services<sup>51</sup> by which Croatia transposed Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. Furthermore, the AO stipulates that in the event of doubt as to whether the supply of incorporated or interconnected digital content or digital service forms part of the consumer sales contract, the digital content or digital service shall be presumed to be covered by it.<sup>52</sup> Both provisions represent the transposition of Art. 3, Sec. 3 of Directive (EU) 2019/771.

The legislator also introduced a particular rule regarding the moment of the passing of risk in the case of goods with digital elements, envisaging that the risk shifts onto the buyer when the supply of the digital content and digital service is completed or when the continuous supply of the digital content or digital service is initiated.<sup>53</sup> The abovementioned rebuttable presumptions, according to which any material defect becomes apparent within one year following the transfer of risk, and the defect must be considered as having existed at the time of the transfer of risk, are applicable to objects with digital elements as well.

### 3.2. Serbia

The CPA defines the notions of consumer, trader, and seller. Consumer is any natural person who acquires goods and services on the market for purposes that are outside of his/her business or other commercial activities,<sup>54</sup> while a trader is any legal or natural person who acts on the market for purposes related to his/her business or other commercial purposes, including other persons acting on his/her behalf or for his/her account.<sup>55</sup> A rebuttable presumption that each natural person acts in the capacity of a consumer should be established, though the CPA does not mention it explicitly.<sup>56</sup> The seller is a trader with whom the consumer

50 Croatian AO, Art. 400, Sec. 5.

51 Zakon o određenim aspektima ugovora o isporuci digitalnog sadržaja i digitalnih usluga [Act on Certain Aspects of the Contract for the Supply of Digital Content and Digital Services]. *Narodne novine* [Official Gazette] 110/21.

52 Croatian AO, Art. 400, Sec. 8.

53 Id. Sec. 6.

54 Serbian CPA, Art. 5, Sec. 1, P. 1.

55 Id. P. 2.

56 Karanikić Mirić 2010. 132.

concluded the sales or service contract.<sup>57</sup> The definition of the notions of goods and sales contract are also provided in the CPA. Goods are any tangible movable items, other than goods sold by way of enforcement, or otherwise by the authority of law, while water, gas, and electricity are to be considered goods where they are put up for sale in a limited value or set quantity.<sup>58</sup> A sales contract is any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer, and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both the sale of goods and the provision of services.<sup>59</sup> The notions of consumer and seller are completely concordant with their definition in Directive 1999/44/EC.

It is noteworthy that the definition of goods contained in the previous CPA showed discrepancies. The Directive in Art. 1, Sec. 2 excludes water and gas where they are not put up for sale in a limited volume or set quantity and electricity from the notion of (consumer) goods. On the other hand, pursuant to the repealed CPA water and gas were to be considered goods only if they were not put up for sale in a limited volume and set quantity. Additionally, thermal energy, not mentioned in the Directive, was also considered good without any limitation. The Serbian legislator eliminated these discrepancies in the novel CPA, although not completely since it stipulates that electricity, explicitly excluded from the notion of (consumer) goods in the Directive, can be considered good if put up for sale in a limited value or set quantity.

The CPA obliges the seller to deliver goods that are in conformity with the contract.<sup>60</sup> Any deviation from the quality and features of the goods specified by the contract represents a lack of conformity (negative definition). The CPA establishes<sup>61</sup> a presumption that the delivered goods are in conformity with the contract:

- if they comply with the description given by the seller and possess the qualities of the goods that the seller has presented to the consumer as a sample or model;
- if they are fit for any particular purpose the consumer requires them for, provided it was known or must have been known to the seller at the time of the conclusion of the contract;
- if they are fit for the purposes for which goods of the same type are normally used; or
- if they are of a quality and performance that are normal for goods of the same type and that the consumer can reasonably expect, given the nature of the goods,

57 Serbian CPA, Art. 5, Sec. 1, P. 3.

58 Serbian CPA, Art. 5, Sec. 1, P. 7.

59 Id. P. 6.

60 Serbian CPA, Art. 49, Sec. 1.

61 Id. Sec. 2.

and taking into account any public statement on the specific characteristics of the goods made about them by the seller, the producer, or their representative, particularly in advertising or on labelling.

This presumption, favouring the consumer as an economically weaker party to the contract, is rebuttable. It does not cover an extensive range of possible cases of lack of conformity, as the Croatian law does. Therefore, the consumer can prove before the court that the goods were not in conformity with the contract even if the above-mentioned conditions were met in a given case. This legal solution, based on the negative definition of the lack of conformity and on the presumption of conformity, is identical to the solution contained in Art. 2 of Directive 1999/44/EC. The difference between the CPA and the Directive<sup>62</sup> concerns the fact that pursuant to the CPA it is sufficient that the particular purpose of the goods required by the consumer was known or must have been known to the seller at the moment of the conclusion of the contract and there is no obligation of the consumer to inform the seller about it. On the other hand, according to Art. 2, Sec. 2 of the Directive, the consumer has to make it known to the seller at the moment of the conclusion of the contract and the seller has to accept it.

Regarding liability for lack of conformity, the CPA stipulates that the seller shall be liable for any lack of conformity of the delivered goods if it existed at the moment of passing of the risk onto the consumer (in Serbian law, that is the moment of delivery of the goods), irrespective of whether the seller knew about the lack of conformity.<sup>63</sup> In addition, the liability also emerges if the defect appears after the passing of risk, provided it derives from a pre-existing cause.<sup>64</sup> Finally, the liability arises for such material defects as well, which could have been easily noticed by the consumer, if the seller declared that the goods were in conformity with the contract.<sup>65</sup> The aim of the third case of liability specified by the CPA is to make liable the seller who apparently acted in bad faith. Along with that, the seller shall be liable for any lack of conformity resulting from improper packaging, installation, or assemblage by the seller or by a person under his/her supervision. The liability also arises if the incorrect installation or assemblage of the goods by the consumer are attributable to a shortcoming in the instructions the seller handed over to the consumer.<sup>66</sup>

The CPA specifies that the seller may be released from liability if at the moment of the conclusion of the contract the consumer knew or could not have been unaware of the lack of conformity or if its cause was in the material provided

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62 The aim of the Directive was the minimum harmonization of the rules governing the sale of consumer goods, and states may guarantee better protection to the consumers than the protection offered by the Directive.

63 Serbian CPA, Art. 60, Sec. 1, P. 1.

64 Id. P. 2.

65 Id. P. 3.

66 Serbian CPA, Art. 60, Sec. 2.

by the consumer.<sup>67</sup> In these cases, the burden of proof is on the seller, who has to prove that at least one of the conditions of waiving the liability exists. The position of the consumer is further protected by a provision prescribing that the seller's liability for a lack of conformity may not be limited or excluded contrary to the provisions of the CPA.<sup>68</sup>

Furthermore, the general rule is that the seller is bound by his/her own public statements and by public statements given by the producer or his/her representative. The CPA specifies<sup>69</sup> that the seller shall be released from the liability:

- if he/she was not and could not have been aware of the statement in question,
- if the correction of the statement was published before the time of the conclusion of the contract, or
- if the decision of the consumer to conclude the contract could not have been influenced by the statement.

The burden of proof is also on the seller, who has to demonstrate that at least one of the required conditions was met in the specific case. The legal solutions concerning the liability for a lack of conformity are identical to those contained in Art. 2 of Directive 1999/44/EC.

## **4. Rights of the Consumer**

### **4.1. Croatia**

The Croatian AO, after its 2021 amendments, envisages that the buyer (consumer), who informed the seller of a material defect properly and in a timely fashion, shall be entitled to request from the seller the elimination of the defect (repair), delivery of another object without defect (replacement), request an adequate price reduction, or declare the contract rescinded.<sup>70</sup> The same rights were at the disposal of the buyer even before the adoption of the amendments in 2021. The novelty introduced by the amendments of the AO concerns their hierarchy.<sup>71</sup> Pursuant to the AO, the buyer is entitled to choose between repair and replacement unless the remedy chosen would be impossible or, compared to other remedies, would impose disproportionate costs on the seller taking into account all circumstances, particularly the value the object would have if there were no material defects, the

<sup>67</sup> Serbian CPA, Art. 60, Sec. 3.

<sup>68</sup> Id. Sec. 4.

<sup>69</sup> Id. Sec. 5.

<sup>70</sup> Croatian AO, Art. 410, Sec. 1.

<sup>71</sup> Before the 2021 amendments, the right to repair, replacement, and price reduction were considered in the doctrine as primary rights that could be exercised alternatively, while the right to rescind the contract was considered secondary. See Slakoper in Gorenc 2014. 705.

significance of the material defect, and whether the repair or replacement could be provided without significant inconvenience to the buyer.<sup>72</sup> The AO entitles the seller to refuse to restore conformity if the repair and replacement are impossible or would impose disproportionate costs taking into account all circumstances, especially those that are relevant regarding the exclusion of the choice of the buyer between the remedies.<sup>73</sup>

Furthermore, the Croatian law prescribes<sup>74</sup> that the buyer shall be entitled to price reduction or rescission of the contract:

- if the seller has not repaired or replaced the object, or has refused to do so, or has not brought the object into conformity according to Art. 410, Sec. 2 and 3;
- if the material defect appears despite the seller having attempted to restore conformity;
- if the seller explicitly declined to restore conformity or it is obvious from the circumstances that he/she will not do so within a reasonable time or without significant inconvenience to the buyer; or
- if the material defect is so serious that it justifies an immediate price reduction or rescission of the contract.

Therefore, one may conclude that the rights to request elimination of the material defect or a delivery of another object without material defect are primary rights, and the consumer may exercise them alternatively, while the rights to request an adequate price reduction and to declare the contract rescinded are secondary, depending on the failure of the seller to bring the object into conformity or on the nature of the material defect. It is important to underline that these provisions apply to all, not solely to consumer contracts. Additionally, the consumer is entitled to damages in accordance with the general rules of liability for damage, including the damage caused by the defect to his/her other property.<sup>75</sup> These provisions represent the transposition of Art. 13 of Directive (EU) 2019/771.

On the other hand, the provision of the AO – in force before the amendments of 2021 – contained the term ‘by choice’,<sup>76</sup> which may have suggested that the buyer was completely free to choose between the rights.<sup>77</sup> However, it was not the case because the AO in Art. 412 stated that the buyer may rescind the contract only after having allowed the seller a subsequent adequate time limit to perform the contract. Thus, the right to request the elimination of a material defect, the

<sup>72</sup> Croatian AO, Art. 410, Sec. 3.

<sup>73</sup> *Id.* Sec. 4.

<sup>74</sup> *Id.* Sec. 5.

<sup>75</sup> Croatian AO, Art. 410, Sec. 2.

<sup>76</sup> Art. 410, Sec. 1 of the AO: The seller (consumer), in the event of a lack of conformity, shall be entitled to the choice to request that the defect be eliminated by the seller, to request from the seller delivery of another object without defects, to request a price reduction or to declare the contract rescinded.

<sup>77</sup> Petrić 2007. 118.

delivery of another object without material defect or a price reduction (the Act did not stipulate any precondition of the price reduction) were considered primary, while the right to declare the contract rescinded secondary, contingent on the non-performance of the contractual obligation by the seller in the subsequent adequate time limit for the proper performance of the contract.<sup>78</sup>

Regarding the seller's obligation to remove the defect or to deliver another object without defect, the amended AO stipulates that repair or replacement shall be carried out free of charge, within a reasonable time from the moment when the seller has been informed by the buyer about the material defect and without any significant inconvenience to the buyer, taking into account the nature of the object and the purpose for which the buyer bought it.<sup>79</sup> This provision seems much broader than the one contained in Art. 411 of the AO before the 2021 amendments, which stated that all costs of repair and replacement (for example, costs of labour, material, delivery, and taking-over of the object) shall be borne by the seller. Furthermore, the AO obliges the buyer to make the object available to the seller and requires the seller to take it over and to bear the costs relating to the takeover.<sup>80</sup>

A specific rule applies to the repair or replacement of the object that had been installed in a manner consistent with its nature and purpose before the material defect became apparent. In this case, the obligation to repair or replace the object shall include the removal of the non-conforming object and the installation of replacement or repaired object or bearing the costs of such removal and installation.<sup>81</sup> The legislator stipulated explicitly that the consumer shall not be held liable to pay compensation for the normal use of the replaced object during the period prior to its replacement.<sup>82</sup> This rule applies, however, only to consumer sales contracts. All these provisions represent the transposition of Art. 14 of Directive (EU) 2019/771. The only difference is that the Croatian legislator specified an obligation of the seller to take over the object and bear the costs of taking it over (Sec. 2), while the Directive stipulates that the seller shall take the replaced object back at his/her expense.

Concerning the right of the consumer to declare the contract rescinded, the legislator decided not to modify the above-mentioned Art. 412. Thus, the requirement to allow the seller a subsequent adequate time limit to perform the contract is the general rule.<sup>83</sup> However, the AO entitles<sup>84</sup> the buyer to rescind the contract even without providing the seller a subsequent time limit:

<sup>78</sup> Petrić 2007. 118.

<sup>79</sup> Croatian AO, Art. 410a, Sec. 1.

<sup>80</sup> Croatian AO, Art. 410a, Sec. 2.

<sup>81</sup> Croatian AO, Art. 410a, Sec. 3.

<sup>82</sup> Id. Sec. 4.

<sup>83</sup> Croatian AO, Art. 412, Sec. 1.

<sup>84</sup> Id. Sec. 2.

- if the seller, duly notified of the defect, informs the buyer that he/she will not perform the contract;
- if the circumstances of the particular case render it obvious that he/she will not be able to perform the contract even within the subsequent time limit; or
- if the buyer, due to the seller's default, may not achieve the purpose for which he/she concluded the contract.

In the third case – which is similar to unilateral termination due to the non-performance of a fixed contract (when the performance of an obligation within a specified period of time is an essential element of the contract and if the debtor does not perform the obligation within such period of time, the contract is rescinded *ex lege*)<sup>85</sup> –, the buyer bears the burden of proof that the purpose for which the contract was concluded may not be achieved. The AO envisaged another exception from the general rule, taking into account the interests of the buyer who is also entitled to rescind the contract or to request an adequate price reduction if the manner of elimination of the defect or the delivery of another object without defect would create substantial inconveniences to him/her.<sup>86</sup>

The AO also protects the position of the seller by stipulating that if a defect is of lesser relevance, the buyer shall not be entitled to rescind the contract but retains other rights due to non-conformity, including the right to damages.<sup>87</sup> Furthermore, the Croatian law envisages that if the seller fails to perform the contract within the subsequent adequate time limit, it shall be rescinded by virtue of law (*ex lege*), but the buyer may extend its validity if he/she notifies the seller without delay that the contract is to remain in force.<sup>88</sup> The same rule applies to the defective performance of an obligation when performance within a specified period of time constitutes an essential term of the contract (fixed contracts).<sup>89</sup>

On the other hand, the amendments of the AO introduced a new rule applicable exclusively to consumer sales contracts in the spirit of Art. 16 of Directive (EU) 2019/771. Pursuant to the AO, if the seller does not perform the obligation from the consumer sales contract within a subsequent reasonable time limit, the consumer shall be entitled to rescind the contract.<sup>90</sup> Therefore, in this case, the contract will not be considered rescinded *ex lege*, but it depends on the will of the consumer expressed through his/her declaration to terminate it. Furthermore, the AO stipulates that if the contract is rescinded, the buyer shall return the object to the seller at his/her expense and the seller shall also reimburse to the buyer the price paid for the object upon receipt of it or of any evidence provided

85 Petrić 2007. 121.

86 Croatian AO, Art. 412, Sec. 3.

87 Croatian AO, Art. 410, Sec. 7.

88 Croatian AO, Art. 413, Sec. 1.

89 Id. Sec. 2.

90 Croatian AO, Art. 413a.

by the buyer of having sent the object back.<sup>91</sup> The AO also explicitly states that the rescission of the contract due to the material defect has the same effect as the termination of bilateral contracts due to non-performance.<sup>92</sup>

The legislator decided not to change the provision applicable solely to consumer contracts that has already been contained in the AO before the 2021 amendments<sup>93</sup> prescribing that the consumer, before exercising his/her rights, is obliged to notify the seller of any visible defects within the period of two months from the day he/she discovered the defect, but no later than two years from the passing of risk onto the consumer.<sup>94</sup> The time limit of two months is of so-called 'subjective' nature since it commences from the moment of the discovery of the defect by the consumer.<sup>95</sup> On the other hand, the liability of the seller ceases in two years after the passing of risk onto the consumer. This time limit is traditionally denoted as 'objective' since it is calculated from a moment that is independent of either parties' cognizance of the relevant circumstances.

Concerning hidden defects, the time limits for the notification of the seller applicable to consumer contracts are the same as for visible defects – two months from the day the defect was discovered and two years from the delivery of the goods to the consumer (passing of risk).<sup>96</sup> According to the AO, the time limit of two years commences from the day the notice was sent to the seller, after which the rights of the buyer shall be extinguished unless the buyer failed to exercise his/her rights due to the seller's deceit.<sup>97</sup> This time period of two years is considered preclusive since after its expiration the rights of the consumer, including the right to file a legal action, are extinguished.<sup>98</sup> The AO also allows the buyer, who has notified the seller in a due time and who has not yet paid the price, to request price reduction or compensation for damage even after the expiry of the two-year time limit, in a form of objection against the seller's request for the payment of the price.<sup>99</sup> This provision mitigates the legal implications of

91 Croatian AO, Art. 419, Sec. 3 and 4.

92 The effects of the termination of bilateral contracts are regulated by Art. 368 of the AO. Pursuant to this article, both contracting parties shall be released from their obligations other than the obligation to pay damages. In case that one party has performed the contract fully or partially, he/she has the right to restitution of whatever he/she has given. Furthermore, each party owes the other one compensation for the benefits that he/she enjoyed in the meantime from whatever he/she is obliged to return or compensate.

93 Croatian AO, Art. 403, Sec. 4.

94 This provision is in line with the option provided by Art. 12 of the Directive (EU) 2019/771, according to which Member States may maintain provisions stipulating that, in order to exercise his/her rights, the consumer has to inform the seller of a lack of conformity within a period of at least two months of the date on which the consumer detected such lack of conformity.

95 Petrić 2007. 114.

96 Croatian AO, Art. 404, Sec. 1 and 2.

97 Croatian AO, Art. 422, Sec. 1.

98 Petrić 2007. 122.

99 Croatian AO, Art. 422, Sec. 2.

the strict application of the time limit of two years. Furthermore, in the case of second-hand objects, the parties may agree on a period of one year in which the seller is liable for the material defect.<sup>100</sup>

The novelty introduced by the 2021 amendments of the AO concerns the continuous supply of an object with digital elements, transposing Art. 10, Sec. 2 of Directive (EU) 2019/771. The AO stipulates that if the consumer contract provides for a continuous supply of objects with digital elements in a period longer than two years, the seller shall be held liable for any material defect occurring within the period of time during which the object with digital elements is to be supplied. On the other hand, if the continuous supply covers a shorter period, the seller shall be liable for any material defect occurring within two years from the moment of the passing of risk.<sup>101</sup>

Finally, the Croatian legislator used the possibility envisaged by Art. 18<sup>102</sup> of Directive (EU) 2019/771 to prescribe the liability of the previous seller in the chain of transactions if all the prerequisites of the liability for material defects between the seller and the previous seller are satisfied. The AO specifies that the seller is obliged to inform the previous seller without delay that he/she repaired or replaced the object, reduced the price or that the contract has been rescinded, supplying all information necessary to the determination of the liability for material defects.<sup>103</sup> The legislator restricted the liability of the previous seller stipulating that he/she shall not be liable after two years from the passing of risk from the previous seller on the seller.<sup>104</sup> However, the previous seller and the seller may agree on other time periods, just as on the exclusion, limitation, or expansion of the liability.<sup>105</sup> It is important to underline that the same rules apply to relations between the previous seller and his/her predecessor in the chain of transactions as well.<sup>106</sup>

## 4.2. Serbia

Pursuant to the Serbian CPA, if the goods do not conform to the contract, the consumer who has notified the seller about the lack of conformity is entitled to demand from the seller the elimination of non-conformity, without additional

100 Croatian AO, Art. 404, Sec. 3.

101 Croatian AO, Art. 404a, Sec. 1 and 2.

102 Art. 18 of the Directive (EU) 2019/771: 'Where the seller is liable to the consumer because of a lack of conformity resulting from an act or omission, including omitting to provide updates to goods with digital elements in accordance with Art. 7(3), by a person in previous links of the chain of transactions, the seller shall be entitled to pursue remedies against the person or persons liable in the chain of transactions. The person against whom the seller may pursue remedies, and the relevant actions and conditions of exercise, shall be determined by national law.'

103 Croatian AO, Art. 422a, Sec. 3.

104 Id. Sec. 4.

105 Id. Sec. 5.

106 Id. Sec. 6.

charge, through repair or replacement, or to demand an appropriate price reduction or to rescind the contract in relation to those goods.<sup>107</sup> The CPA introduced a hierarchy of these rights, stating that the consumer is primarily entitled to choose whether the lack of conformity shall be remedied by repair or replacement.<sup>108</sup> However, it specifies<sup>109</sup> that the consumer is entitled to demand an appropriate price reduction or to rescind the contract:

- if the repair or replacement of the goods is not possible or cannot be completed in the appropriate time period;
- if the consumer cannot exercise the right to repair or replacement, that is, if the seller has not complied with the request to repair or replacement in the appropriate time period;
- if the repair or replacement cannot be completed without significant inconvenience to the consumer taking into account the nature and purpose of the goods; or
- if the elimination of the lack of conformity by repair or replacement represents a disproportionate burden to the seller.

Furthermore, the AO defines<sup>110</sup> the notion of disproportionate burden to the seller. It exists if it, in relation to the price reduction or termination of the contract, imposes excessive costs, taking into account:

- the value the goods would have if they were in conformity with the contract,
- the significance of the conformity in the specific case, and
- whether the lack of conformity can be remedied without causing significant inconvenience to the consumer.

It is worth underlining that the first and second cases of enabling the consumer to demand an appropriate price reduction or to rescind the contract represent the impossibility of the completion of repair or replacement, while the third and fourth cases deal with circumstances relating to the position of the consumer and the seller respectively. It is important to stress that these rights of the consumer do not affect his/her right to demand from the seller compensation for damage inflicted by the lack of conformity in accordance with the general rules on liability for damage, prescribed by the AO.<sup>111</sup>

The general rule is that the consumer is primarily entitled to choose freely and independently between repair and replacement, and only if the conditions specified in the CPA are met, can the consumer request the appropriate price reduction or the rescission of the contract. The CPA establishes an exception from this rule, stating that if the lack of conformity appears within six months

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<sup>107</sup> Serbian CPA, Art. 51, Sec. 1.

<sup>108</sup> Id. Sec. 2.

<sup>109</sup> Serbian CPA, Art. 51, Sec. 3.

<sup>110</sup> Id. Sec. 4.

<sup>111</sup> Id. Sec. 12.

from the passing of risk onto the consumer (within six months from the delivery of the goods), the consumer is entitled to choose between the request for the elimination of the lack of conformity by replacement, an appropriate price reduction or may rescind the contract.<sup>112</sup> Furthermore, in this period, the lack of conformity may be eliminated by repair only upon the explicit consent of the consumer.<sup>113</sup> Therefore, in this case, the appropriate price reduction and the rescission of the contract are not hierarchically superior and can be exercised immediately. Only the removal of the lack of conformity by repair depends on the explicit consent of the consumer. Hypothetically, the consumer may demand the elimination of the lack of conformity by repair or replacement even if it represents a disproportionate burden to the seller.

Furthermore, the CPA introduces the same legal solution (replacement, an appropriate price reduction, rescission of the contract as primary rights and repair only upon the explicit consent of the consumer) if the same or different lack of conformity appears after the first repair.<sup>114</sup> One may notice that this provision is similar to the one contained in the Croatian AO stating that the buyer shall be entitled to price reduction or the rescission of the contract if the material defect appears despite the seller's attempt to restore conformity. However, there are no such rules in Directive 1999/44/EC. Thus, it can be inferred that the Serbian law in this case offers broader and better protection to the consumer than this Directive.

The CPA stipulates that a repair or replacement must be completed in due time, without significant inconveniences to the consumer and with his/her consent, taking into account the nature of the goods and the purpose for which the consumer acquired them.<sup>115</sup> The CPA contains an additional provision which further strengthens the position of the consumer. It states that all costs required to restore the conformity of the goods, particularly the costs of labour, material, takeover or delivery, shall be borne by the seller.<sup>116</sup> On the other hand, the position of the seller is protected by the provision that the consumer may not rescind the contract if the lack of conformity of the goods is of a lesser relevance.<sup>117</sup> In these cases, the seller is also entitled to demand from the producer in the supply chain to reimburse to him/her the costs of actions he/she has taken in order to comply with his/her obligations.<sup>118</sup>

Furthermore, the CPA deals with time limits applicable to the consumer's request, prescribing that the seller shall be accountable for any lack of conformity of the goods becoming apparent within two years from the day of passing of

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112 Serbian CPA, Art. 51, Sec. 7.

113 Id. Sec. 8.

114 Id. Sec. 5.

115 Id. Sec. 6.

116 Id. Sec. 9.

117 Id. Sec. 11.

118 Serbian CPA, Art. 51, Sec. 10.

the risk onto the consumer.<sup>119</sup> The Serbian legislator establishes a rebuttable presumption in favour of the consumer that the lack of conformity existed at the time of passing of risk onto the consumer if it manifests within six months from the day of passing of the risk unless it is contrary to the nature of the goods and to the nature of the specific lack of conformity.<sup>120</sup> The burden of proof is on the seller, who has to demonstrate that the goods were in conformity with the contract at the moment in which the consumer received it.<sup>121</sup> The legislator used the possibility offered by Directive 1999/44/EC and stipulated that in the case of second-hand goods, the seller and the consumer may agree on a shorter period in which the seller is liable for the lack of conformity, but not shorter than one year.<sup>122</sup> Therefore, any provision in the contract specifying a liability period shorter than one year shall be considered null and void. The above-mentioned time limits shall not apply to the period the seller uses to eliminate the lack of conformity.<sup>123</sup> This provision is clearly in favour of the consumer.

## 5. Concluding Remarks

Before the adoption of the 2021 amendments of the AO, which had the aim to transpose Directive (EU) 2019/771 into Croatian law, the Croatian and Serbian law on the regulation of the position of the consumer in the event of a lack of conformity of goods was based on the provisions of the same act: Directive 1999/44/EC. Since the Serbian legislature has not yet harmonized its consumer law regulation with Directive (EU) 2019/771, while its Croatian counterpart has already transposed the Directive, the existing differences between these two legal orders concerning the rights of consumers in case of a lack of conformity have only become more apparent.

The first difference concerns the regulatory method. The Serbian legislator opted for dual regulation: liability for material defects (non-conformity) is regulated both in the CPA and the AO. The CPA applies to consumer sales contracts, while the AO applies to sales contracts outside the consumer context. Bearing in mind that the AO is *lex generalis* in this field, it should be applied to consumer sales contracts when the CPA does not regulate the specific issue, if it does not reduce the degree of protection granted to the consumer by the CPA. On the other hand,

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119 Serbian CPA, Art. 52, Sec. 1.

120 Id. Sec. 2.

121 Id. Sec. 2.

122 On the other hand, the Serbian legislator did not make use of the possibility provided by Directive 1999/44/EC to prescribe the obligation of the consumer to inform the seller of the lack of conformity within a period of two months from the date on which he/she detected such lack of conformity.

123 Serbian CPA, Art. 52, Sec. 4.

the Croatian legislator opted for a different regulatory approach: the rules of the Directives have been transposed into the law containing general rules of contract law, i.e. into the AO. It applies to both consumer and non-consumer contracts, whereby it explicitly states if certain provisions apply exclusively to consumer sales contracts. It is worth noting that the legal terminology is also different. The terminology used in the Serbian CPA is in line with Directive 1999/44/EC (for example, *roba* – the goods, *saobraznost ugovoru* – conformity with the contract), while the Croatian AO uses words different than those used in Directive (EU) 2019/771 (for example, *stvar* – object, *materijalni nedostatak* – material defect) but in line with the terminology used in general rules of contract law.

A further difference may be identified regarding the definition of conformity of the goods with the contract. The Serbian CPA envisaged a general obligation of the seller to deliver goods that are in conformity with the contract and introduced a rebuttable presumption of conformity in certain enumerated situations. Conversely, there is no such general obligation in the Croatian law. It states specifically the cases in which a material defect exists and differentiates – in the spirit of Directive (EU) 2019/771 – subjective and objective requirements of conformity. However, the obligation of the seller to deliver goods (the object) that are in conformity with the contract is incorporated into subjective requirements of conformity. It renders this difference less important from a practical point of view, and thus it is rather theoretical and conceptual. The Croatian legislator amending the AO introduced certain notions and specific rules, such as the ones pertaining to digital content and digital services (object with digital elements), which are not known by the Serbian CPA. Furthermore, the Croatian legislature extended the time period in which a rebuttable presumption applies that the material defect existed at the moment of the passing of risk onto the consumer (one year compared to six months envisaged by the Serbian CPA and the Croatian AO before the adoption of the amendments).

Finally, though the hierarchy of the rights of the consumer is identical in these laws (repair or replacement as primary rights, the appropriate price reduction or rescission of the contract as secondary rights), there are some differences as follows: The Serbian CPA prescribes exceptions favouring the position of the consumer: if a lack of conformity appears within six months from the passing of risk onto the consumer or if it appears after the first repair by the seller, the right to request replacement, appropriate price reduction or to rescind the contract can equally be exercised, while the repair is admissible solely upon the explicit request of the consumer. The Croatian AO contains a similar rule stating that the consumer shall be entitled to price reduction and rescission of the contract if the material defect appears despite the seller's attempt to restore conformity. However, in this regard, it seems that the Serbian law offers a higher level of protection to the consumer than the Croatian one. It is worth underlining that

before the 2021 amendments of the Croatian AO, the hierarchy of the rights of the consumer was different because only the rescission of the contract was considered a secondary right. The Croatian legislator, unlike the Serbian one, used the option offered by Directive (EU) 2019/771 envisaging a time limit for the notification of the seller of the defect (a 'subjective' time limit of two months and an 'objective' one of two years).

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