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REPORT

ON THE NEED TO SOLVE THE ISSUES OF MASS LITIGATIONS AND THE POSSIBILITIES OF INTRODUCING CLASS ACTIONS IN THE LEGAL SYSTEM OF THE REPUBLIC OF SERBIA

OPEN DOORS OF JUDICIARY

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REPORT ON THE NEED TO SOLVE THE ISSUES OF MASS LITIGATIONS AND THE POSSIBILITIES OF INTRODUCING CLASS ACTIONS IN THE LEGAL SYSTEM OF THE REPUBLIC OF SERBIA

SPECIAL REPORT WITHIN THE SECOND CYCLE OF MONITORING OF THE SITUATION IN JUDICIARY

Authors: Dušan Protić, Katarina Grga

Belgrade, 2023.

I. INTRODUCTION

Serbian judicial system has been continuously experiencing a great backlog of cases in the courts. Nevertheless, there is no balance in the inflow of new cases in different territories, where Belgrade courts experience an enormous pressure, with periodical waves of identical litigation cases that additionally and significantly increase the regular inflow. There are multiple consequences of such occurrences, and big and disproportionate burden of these cases makes successful and efficient processing of the cases much more difficult, both regarding these cases, but also in all other proceedings within the jurisdiction of these courts. Moreover, the litigations are additionally slowed down, available human and technical resources are overburdened, and access to justice is made additionally difficult for the citizens and the individuals. In addition, in certain areas, such as protection of consumers, characteristic sources and reasons for exercising of collective protection appear, whether these are trans-individual infringements of collective interests of big groups of individuals, or identical infringements of subjective rights, which are of small value in single cases and deter citizens and individuals form legal protection in form of individual lawsuits.

The subject matter of this report is examining the possibility to affect and solve the issues related to the problems of negative tendencies observed in the previous reporting cycle of monitoring the situation in judiciary for 2021.[1] This document is a separate thematic report, which links two observed problems. They are the occurrence of so-called mass litigations, which were manifested in the reporting period particularly in the field of protection of the rights of the beneficiaries of financial services ("banking cases"), and the issue associated with that problem, that being the excess backlog of cases in Belgrade courts in form of individual litigations. Other situations in respect to this topic were observed, which included a great number of identical lawsuits that overburdened the courts, most frequently in Belgrade due to territorial jurisdiction determined based on the seats of great number of legal entities that appear as defendants in these cases. Repetitive cases create great expenses, especially lawyers' fees; make citizens' access to justice more difficult in each individual case, thus causing unnecessary repetitiveness in the work of the courts, leading to legal insecurity due to the possibility of unequal deciding in identical matters, etc.

The goal of this specific report is to examine the possibility of solving the described issues through (re)introducing class actions in the litigation proceedings, as a legal protection instrument. This would enable discussion about a great number of identical requests or one request that would have impact on the entire category of entities in the same legal situation within one legal case. The report is the result the of insights and analyses of the current legal situation, with special emphasis on the area

1 *Report on Monitoring of the Situation in Judiciary for 2021*, https://www.otvorenavratapravosudja.rs/stanje-u-pravosudu/izvestaj-o-pracenju-stanja-u-pravosudu-za-2021-godinu

of consumer protection that already has certain forms of collective protection. In the European environment, this area has recently had the greatest number of models of class actions. The report also includes the analyses of relevant comparative solutions for collective legal protection.

Research methodology used for the preparation of this report includes the analysis of the data available in the court statistics and other available relevant data, as well as professional analysis *de lege lata*, and the analysis of the needs in terms of normative conditions for introduction of the class action. The research is predominantly based on the qualitative methodological approach, according to the given thematic framework, based on the expert opinions quoted in the report, for the purpose of the insight in the main cause and qualitative estimate of the observed problems, as well as quantitative analysis of the statistical numerical data available or obtained through research, particularly in terms of examining of the problem of disproportionate distribution of cases among different courts.

This document is a separate thematic report, prepared in a wider context of the activities of continuous monitoring of the situation in judiciary prepared within the project *"Open Doors of Judiciary"* supported by the United States Agency for International Development (USAID) in Serbia[2]. General goal of the project "Open Doors of Judiciary" is strengthening of the citizens' trust in the work of judicial institutions in the Republic of Serbia, through improvement of the communication mechanisms between the citizens and the judiciary[3]. Observations, estimates and recommendations contained in the report reflect the standpoints of the authors of the report and do not need to necessarily reflect the opinions of all partner organizations included in implementation of the project.

2 "*Constituencies for Judicial Reform in Serbia*"

3 The network of the civil society organization that have taken part in realization of the project "Open Doors of Judiciary", including preparation and presentation of this report includes: Lawyers' Committee for Human Rights (YUCOM); European Policy Centre (CEP); Association of Public Prosecutors and Deputy Public Prosecutors in Serbia; Network of the Committee for Human Rights in Serbia (CHRIS Network); Judges' Association of Serbia; Transparency Serbia; Belgrade Centre for Security Policy (BCSP); Partners for Democratic Change Serbia (Partners Serbia); Belgrade Centre for Human Rights (BCHR); Judicial Research Center (CEPRIS); National Parliament Leskovac and Forum of Judges of Serbia.

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II. OCCURRENCE OF MASS LITIGATIONS IN PRACTICE

Litigation is the main principle of civil procedure law, as a method to solve individual disputes between two or more known entities that participate in substantive legal relation. However, modern life leads to the situations where great numbers of entities are damaged though actions or failure to act of one or more service providers or sellers of goods. Individual protection of the infringed rights through the mechanism of individual litigation has shown to be an inefficient method of protection, because it leads to "mass litigations". Repetitive or "mass litigations" are the terms that have appeared in the court practice and include a great number of litigations where the subject of a dispute are mass infringements of the right, that is, infringement of the right of a great number of entities caused by presumed unlawful actions of one legal entity (*mass harm situations*). The subject matters of mass litigations are significantly similar factual bases and the same legal basis. In the biggest number of those litigations, the plaintiffs are individuals, and the defendant is the same legal entity, most frequently an organization with public authorizations, public company, and increasingly financial institutions, service providers or sellers of goods, in the broadest context.[4]

Court decision in a litigation solves the dispute in a specific legal relation between the subjects of that relation, and that decision does not have legal effect on other entities (*res inter alios acta*). Class action presents a significant departure from this rule of classic civil procedure law, which has been imposed by modern legal life, which is frequently characterized by the massive scale (mass consumption, big population, numerous users of telecommunication services, etc.). Mass litigations are not a term defined in theory nor are they an examined mechanism of the civil procedure law, but a practical occurrence with certain significant characteristics: primarily, a big number of the similar or same cases, that frequently have the mutual disputable legal issue (e.g. certain contractual clause of a service provider to the great number of beneficiaries), and/or similar factual situation (e.g. certain actions or behavior of the merchant or service provider, which, based on the rules of consumer law, would belong to a category of unfair business practice), where the plaintiff appears as the user of the service or consumer, and the same merchant or service provider is the defendant, that is, the same category of those entities. Since the primary and paradigmatic feature of this phenomenon is the fact that they are of the massive scale, it is usually linked to the situations within the services of general economic interest (such as utility or telecommunication services, energy supply, etc.), same financial services (such as the notorious banking cases due to incorrect calculation of interest rates and costs of loans), as well as the same action of the same entities inflicting damages to the great number of individuals (e.g. compensation requests from the public bodies due to identical infringements, or in case of consumer matters, from the same merchant due to identical insufficiencies of the goods).

So far, the court practice has shown numerous negative consequences of "mass litigations", the most important one being the occurrence of unequal court practice, caused by the differences in interpretation and application of the law, unclear legal provisions and the existence of legal gaps, thus leading to the infringements of the right to a fair trial, and citizens' loss of trust in the judiciary. Enormous numbers of mass litigations "paralyze" the work of the courts and disable efficient proceedings, thus infringing the

4 Attachment to this report by Judge Ana Lukić Vidojković, Forum Serbia

right to a trial within reasonable time. Overburdening of the courts and the judges in these cases leads to the situations where the judges spend most of their working hours on these cases, including administrative work in regards to these cases. This means that the financial means for the salaries of the judges and court staff are acquired due to the work on "mass litigations". Furthermore, increased number of "mass litigations" requires constant increase of the number of judges, and the court staff. Let us not forget the problem of the costs of the proceedings that frequently exceed the amounts of the claims, so it is justifiable to ask what the goal of the mass litigations is. Whether the goal is to collect lawyers' fees for the provided services of representation or protection of the rights of the individuals, since in most cases the costs of the proceedings significantly exceed the amounts of the main claims.[5]

II.1. "BANKING" CASES AND ATTEMPTS TO SOLVE THIS PROBLEM THROUGH LEGAL STANDPOINTS OF THE SUPREME COURT OF CASSATION

At the time this report is prepared, the problem of mass litigations in so-called banking cases is extremely relevant, and its effects exceed the problem of quantitate backlog of cases in the courts, but they have obtained more significant legal and political significance. Namely, in the last several years, a great number of litigations has been initiated, where the plaintiffs are individuals, beneficiaries of the loans given by the banks, especially housing mortgages, directed against those banks for the return of the portion of collected funds for processing the costs of mortgages or calculation of interest rates. The catalyst for the increase of the number of those litigations was the standpoint of the Supreme Court of Cassation of 2018, adopted due to a greater number of cases in the banking disputes with the request to determine nullity of the provisions of the loan agreements, which envisioned the right of the bank to collect the costs of processing of the loan from the beneficiaries, including payment of the loan in a certain percentage depending on the value of the loan. According to this legal standpoint, it was established that the banks had the quoted right under the condition that the offer of the bank contained clear and unambiguous information on the costs of the loan.[6] Precisely starting from the expressed requirement for the offer of the bank to contain clear and unambiguous information on the calculation of the costs of the loan, a great number of lawsuits have been filed requesting compensation of the collected costs for the processing of the loans, with the explanation that this condition had not been fulfilled at the time the agreements had been concluded. Since court registries do not recognize special classification of these cases, and the practice does not have fully harmonized approach towards specification of the subject of the cases in the records, it is not possible to obtain a fully precise data on the number of these cases. However, based on the estimates of the Association of Serbian Banks, there are currently between 220,000 and 250,000 of such litigations pending, and the number of individual beneficiaries appearing as the plaintiffs in these litigations is between 50,000 and 80.000.[7] Only the First Basic Court in Belgrade received 39,030 such cases from January until November 2020, while the Third Basic Court received 43,922 cases against the banks.[8] Under the pressure of the great inflow of identical claims that have created an enormous burden for the regular workflow of the courts, as well as other issues created in the professional and broader public regarding these cases, the Supreme Court of Cassation has recently intervened, through an "addition" to the above-described standpoint of 2018. It consists of the note that the banks are not under obligation to separately prove the structure, or the amount of the costs included in the total sum of costs of the loan specified in the offer accepted by the loan beneficiary through conclusion of the loan agreement.[9]

Along with the occurrence of the great number of identical cases, this case is followed by several controversies of broader social impact, such as the claim of the Association of Serbian Banks that the main reason of these litigations is actually collection

5 Attachment by A. L. Vidojković

6 Legal standpoint adopted at the session of the Civil Department of the Supreme Court of Cassation of May 22, 2018

7 Statement of the President of the Association of Serbian Banks, Mr. Vladimir Vasić, "Blic", November 13, 2021; https://www.blic.rs/biznis/vesti/trenutno-na-sudovima-250000-tuzbi-gradana-protiv-banaka/drj970r

8 Nenad Kovačević, " Mass litigations - Solution (to mass problem) or (a mass) Problem", *Open Doors of Judiciary*, 2021; https://www.otvorenavratapravosudja.rs/teme/ostalo/masovni-sporovi-resenje-masovnih-problema-ili-masovni-problem

9 Legal standpoint adopted at the session of the Civil Department of the Supreme Court of Cassation of September 16, 2021.

of the costs of litigation proceedings, rather than winning the claims.[10] Based on this understanding, artificial creation of litigation costs by the plaintiffs' attorneys, even in the cases when the amounts of claims are insignificant, which are calculated based on the attorneys' tariff and subsequent successful collection from the banks sued in the litigations, where the success in undisputable due to previously established practice and adopted legal standpoint of the Supreme Court of Cassation, presented another catalyst for multiplication of litigations in these cases. In mid-2011, in order to prevent further multiplication of these cases, a group of the Members of the Parliament in the Committee for Constitutional Matters and Legislation of the National Assembly submitted the request for authentic interpretation of the relevant provisions of the Law on Contracts and Torts, Law on Consumer Protection and Law on Protection of Beneficiaries of Financial Services, directed at relativization of previously adopted legal standpoint of the Supreme Court of Cassation on the obligation of provide clear and unambiguous information on the costs of loan in the offer, but due to the pressure of the attorneys, this request was later withdrawn.[11] Subsequently adopted addition to the standpoint of the Supreme Court of Cassation on this issue, as described above, actually presented a complete turn, fully disavowing previously adopted legal standpoint. Such actions of the highest judicial instance created the impression in public, especially among the attorneys, that the Supreme Court of Cassation ceased under the pressures of the banks. Further controversies followed, such are numerous protests of the attorneys, which culminated in adoption of the decision by Belgrade Bar Association suspending work of all of its members until removal of legal insecurity caused by rendering of the addition to the legal standpoint of September 16, 2021.[12]

However, these banking cases are not the only case of mass litigations, since there are other ones in practice. One case is discrimination against the war veterans with disabilities in payment of war related per diems based on their place of residence. In the period 2010-2019, competent courts in the area of the Appellate Court in Kragujevac received 35,483 litigations in this respect, while 18,447 litigations were initiated before the courts on the territory of the Appellate Court in Nis. Mass lawsuits were filed in other cases of massive infringements of rights: against National Employment Service, due to payment of decreased compensations in case of unemployment, against Public Company Serbian Railroad due to payment of decreased reimbursement for work in shifts and night work, food and vacation allowance, against Pension and Disability Insurance Fund, due to discrimination against insured farmers in terms of harmonization of retirements, etc.[13]

The annual report of the Supreme Court of Cassation contains the statement that in 2017, the total inflow of civil cases increased, because 56,342 lawsuits were filed before all higher courts in the Republic of Serbia by reservists that were part of armed forces and mobilized during the state of war in 1999. It is further confirmed that these are repetitive cases, which could be solved based on the so called pilot decision, but that for the uniform application of the law it was necessary to previously solve disputable legal issues, pursuant to Article 180 of the Civil Procedure Law, in terms of the legal nature of these cases, and the existence of the judicial jurisdiction for their solving, in case when there no allocated requests for payment of war per diems, or for the compensation of material damages.[14]

II.2. DISPROPORTIONATE BURDEN IN BELGRADE COURTS

By far, the biggest number of litigations is led before Belgrade courts based on the rules of territorial jurisdiction. The same applies to above-mentioned mass cases, since they are directed against the same defendant, which is usually seated in Belgrade. The Judges' Association of Serbia has already pointed to the problem of excess workload of Belgrade courts, stating that three basic courts in Belgrade processed 63% of cases of all 66 basic courts in Serbia, that the judges worked on three times more

10 Statement of the President of the Association of Serbian Banks, Mr. Vladimir Vasić.

11 Tanjug news, July 5, 2021; http://www.tanjug.rs/full-view.aspx?izb=666110

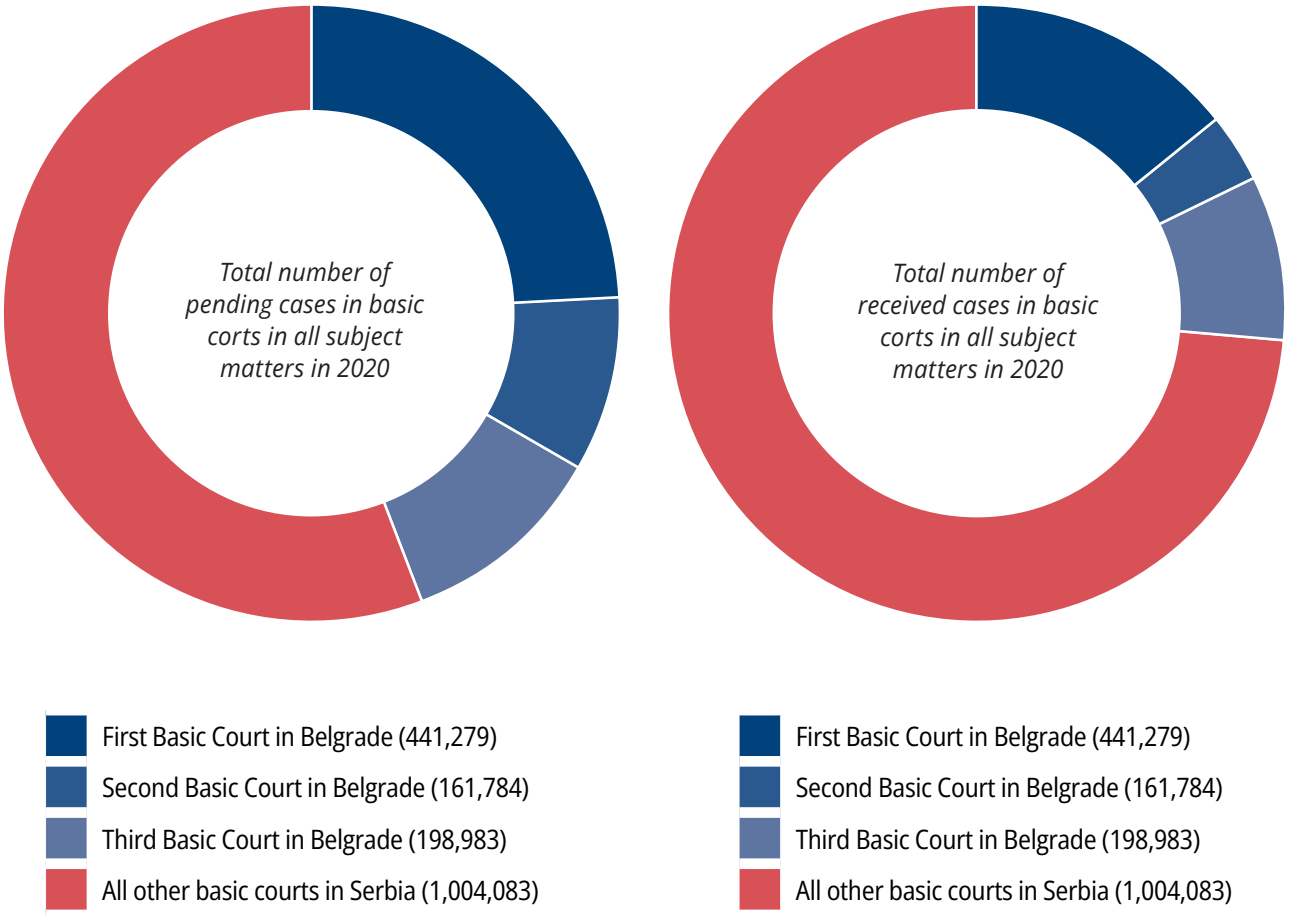
12 Decision no. 11262/2021 rendered at the Assembly of Belgrade Bar Association of December 21, 2021.

13 Nevena Petrušić, "Legal protection in cases of mass infringements of rights: lessons learned and challenges", Open Doors of Judiciary, 2020; https://www.otvorenavratapravosudja.rs/teme/radno-pravo/sudska-zastita-u-slucajevima-masovnih-povreda-prava-naucne-lekcije-i-izazovi

14 Annual report of the Supreme Court of Cassation on work of the courts, 2020, pg. 9

cases that their work targets, and that such numbers of cases in Belgrade courts were unprecedented.[15] This trend of inflow of new cases in Belgrade courts and the speed at which it happens are alarming: the number of newly received cases in the First and the Third Basic Court in Belgrade increased from 2019 to 2020 for more than a double, from 61,106 to 131,779 cases. This is all despite the fact that the judges were solving three times more cases a month than what was set as their monthly target. Judges of the High Court in Belgrade (101 of them) make 29% of the total number of all the judges of higher court in Serbia (351), and they were assigned 53% of all the cases of the higher courts in Serbia at the end of 2020. Judges of the three basic courts in Belgrade (235 of them) make 19% of the total number of all the judges of the basic courts in Serbia (1,181), and they were assigned 63% of all the cases of basic courts in Serbia at the end of 2020.[16]

According to the data from the Annual report of the Supreme Court of Cassation for 2020, three basic courts in Belgrade had a total number of pending cases in all subject matters that made 44% of the total number of cases of all basic courts, and the inflow of new cases in that year in all subject matters made for more than one third of the total inflow in all basic courts.[17] In total, during last five year, the judicial system has received two million cases more than the expected annual inflow.[18]



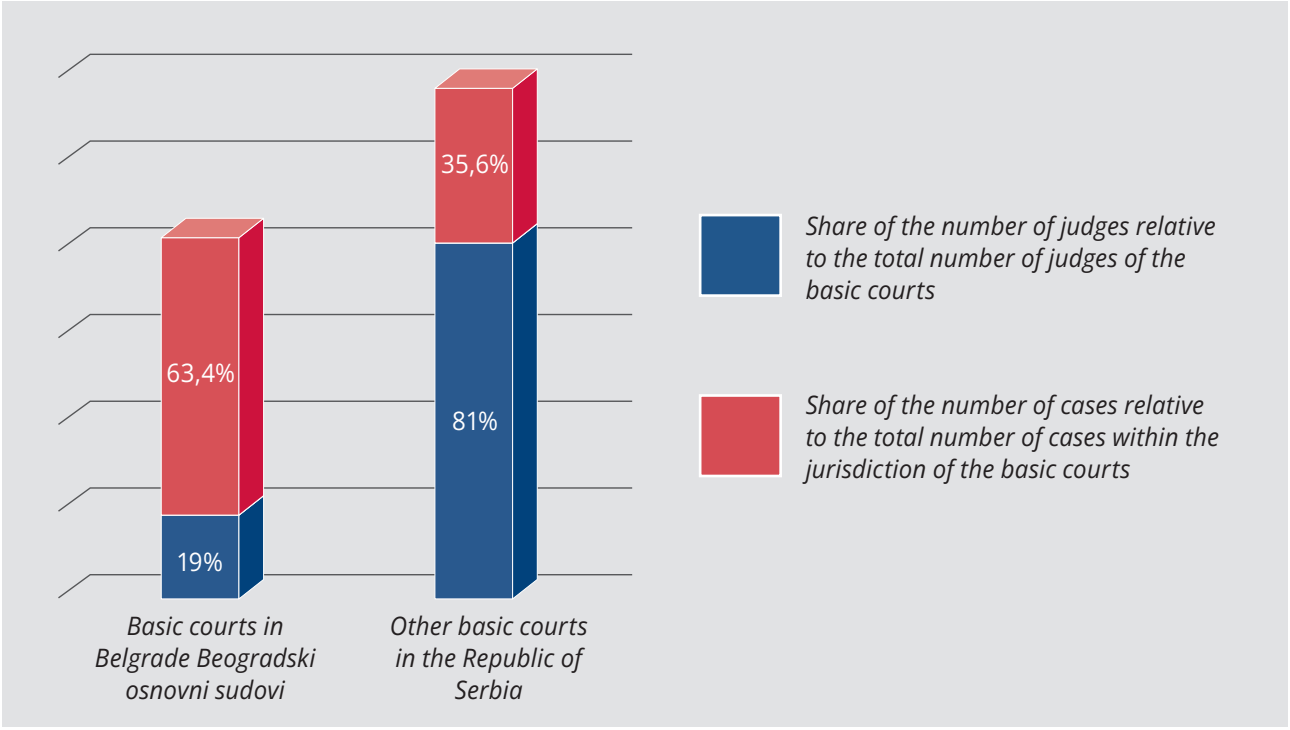
15 From the statement of the Judges' Association of Serbia, for daily Politika of June 7, 2021; https://www.politika.rs/sr/clanak/480711/Kako-su-izmene-CIVIL PROCEDURE LAW-a-otvorile-Pandorinu-kutiju

16 From the statement of the Judges' Association of Serbia of March 3, 2021, regarding the suggestions submitted to the Ministry of Justice regarding amendments to the Civil Procedure Law.

17 Statistics on the work of the courts of general jurisdiction in the Republic of Serbia for 2020, attachment to the Annual report of the Supreme Court of Cassation on the work of courts

18 Annual report of the Supreme Court of Cassation on the work of courts, 2020

Since at the end of 2020, there were 351 judges working in all higher courts with the total of remaining 94,776 cases, and 101 judges of the Higher Court in Belgrade had 50,461 pending cases, that means that the judges of the High Court in Belgrade were disproportionally more burdened than the judges in other courts of the same instance - 29% of them (compared to the number of all judges of the higher courts in Serbia) were assigned 53% of all the cases of the higher courts in Serbia. On the other hand, 71% of judges in the remaining higher courts in Serbia worked on 47% of all the cases of the higher courts in Serbia. The same, although more striking, conclusion has been reached in regards to the basic courts and excessive and disproportionately bigger burden in the basic courts in Belgrade compared to the basic courts in Serbia. Namely, at the end of 2020, there were 743,869 pending cases at basic courts, with 471,908 cases (63.44%) at three basic courts in Belgrade, where out of the total number of 1181 judges in all 66 basic courts in Serbia, these three courts employed 234 judges (19%). Thus, at the end of 2020, the judges of basic courts in Belgrade, which constitute 19% of the total number of judges in the basic courts in Serbia, were assigned 63.4% of the total number of the cases of all the basic courts in Serbia, while 81% of the judges in the remaining basic courts in Serbia were assigned 35.6% of the cases within the jurisdiction of the basic courts.[19]



19 From the analytical attachment of the Judges' Association of Serbia, submitted to the Ministry of Justice for the amendments to the Civil Procedure Law

Delegation of the cases, currently decided by the Supreme Court of Cassation pursuant to the current legal solution referred to in Article 63 of the Civil Procedure Law, is estimated as good, but a short-term measure in the current circumstances. Namely, the delegation of cases does not essentially solve the issue of continuous inflow of cases in certain courts, and subsequently leads to greater overburdening of the highest court in the state. That is why one of the short-term measures should be considered to solve the problem of disproportionate and excessive burden of certain courts, in a form of so-called "automatic delegation". This would entail design and development of the model of automatic "overflow of cases", in order to decrease the burden of certain courts and distribute the cases to the courts that have significantly smaller number of pending cases.[20]

The occurrence of the great number of cases in Belgrade courts, disproportionate burden of the courts and work of judges, is a problem that is not solely related to mass litigations, and certainly requires a combination of several measures in order to be solved. Those measures could be organizational (delegation), changes to the procedural rules (changes of the rules on territorial jurisdiction for certain categories of cases or for certain defendants; more details on that in the text below in the section of the report on the draft amendments to the Civil Procedure Law), or more significant changes of the number of courts and judges in Belgrade. Mass litigations have made this situation additionally difficult, to the extent that the work of the above-mentioned courts in Belgrade is made so challenging that it jeopardizes their primary function and thus significantly prevents the access to justice. That is why, along with other measures, it is necessary to envision a solution for occurrence of mass, repetitive cases as well.

20 *Ibid.*

III. DRAFT LAW ON AMENDMENTS TO THE CIVIL PROCEDURE LAW OF 2021

Solving the problem of mass litigations and disproportionate burden of the courts due to inflow of litigation cases has been among numerous issues discussed within the reform of the current Civil Procedure Law. The Draft Law presented to the public in mid-January 2021 contained the proposal of certain new procedural rules, which, based on the ideas of the drafter of legislative novelties and expected effects, should provide a solution for such occurrences that have drastic impact on regular and successful functioning of the courts.

Draft Law on Amendments to the Civil Procedure Law, which has been prepared and presented to the public, contains comprehensive changes to the current rules of the procedure, since the envisioned changes apply to almost one third of the provisions of generally lengthy Law, and they include the amendments to the procedural authorizations of the parties and exercising the right to access the courts.[21] Analysis of the proposed novelties referred to in this Draft exceeds the subject and the scope of this report. Only issues that refer to the changes of the way mass litigations and disproportionate burden of courts shall be discussed in this document. Primarily, it should be observed that the explanation of the Draft does not directly correlate any of the proposed changes with the problem of mass litigations[22]. However, certain provisions should indirectly be connected, mainly from the angle of the legislator to decrease the inflow of cases, that is, to make the access to courts more difficult for the plaintiffs. Thus, it is envisioned that a submission shall be considered withdrawn in case a court fee has not been paid within a deadline stipulated by the law regulating courts fees[23]. This rule, among other things, means that it shall be considered that a lawsuit has been withdrawn in case a court fee has not been paid within eight days as of the day of conclusion of the first hearing based on that lawsuit, and the appeal to the first instance decision within the same deadline, but as of the moment a submission has been filed.[24] In respect of the calculation and collection of the costs of proceedings, there is a controversy regarding proposed novelty, based on which the plaintiff who submitted two or more lawsuits to state two or more claims that could have been done in the same lawsuit, and is entitled to compensation of the costs of only that litigation proceeding that was initially stared, under the condition of a success in the litigation, and that the plaintiff shall be under obligation to compensate the costs of all subsequently initiated litigation proceedings to the defendant, regardless of the outcome of the litigations. The application of this

21 Draft Law on Amendments to the Civil Procedure Law, published on May 19, 2021 on the Internet page of the Ministry of Justice, for the needs of a public debate; https://mpravde.gov.rs/obavestenje/33408/nacrt-zakona-o-izmenama-i-dopunama-zakona-o-parnicnom-postupku-1952021-godine.php

22 The problem of "repetitive cases" is mentioned, but only in the context of the proposed amendment to Article 90 of the current Civil Procedure Law, which envisions the authorization of the courts to require notarized power of attorney if there is a doubt that the power of attorney is not authentic, with the explanation that the court practice has shown that prevention of abuse of a power of attorney is of special significance for so called repetitive (standard) cases when the signatory is deceased before filing of a lawsuit or is unaware that a litigation is led in his/her name (explanation of Article 23 of the Draft Law)

23 Article 27 of the Draft Law, which added new Article 98b

24 Application of the provisions of Article 3 and 4 of the Law on Court Fees ("Official Gazette of RS", no. 28/94, 53/95, 16/97, 34/2001 - other law, 9/2002, 29/2004, 61/2005, 116/2008 - other law, 31/2009, 101/2011, 93/2012, 93/2014, 106/2015 and 95/2018)

rule is the subject to special estimate of the courts as to whether the claim was unjustifiably divided into several litigations.[25]

The explanation of this provision of the Draft is that the proposed approach is the implementation of "sanctioning of the abuse of the right of the plaintiff who submits two or more lawsuits with two or more claims that could have been stated in the same lawsuit, in a way that enables the plaintiff to request compensation of costs only for the litigation proceeding that was initiated first".[26] It has been proposed for the trials against the Republic of Serbia, autonomous province or the local self-government unit and their bodies, to be under territorial jurisdiction of the court where a plaintiff has a registered place of residence or is seated. [27] In addition, it is envisioned that in the disputes for protection of consumers and beneficiaries of financial services, the sole jurisdiction shall be on the court where the consumer or beneficiary of financial services has a registered place of residence.[28] The aim of both proposed solutions is the decrease of the workload of courts that are particularly burdened, considering the general rules of territorial jurisdiction based on the place of seat of the defendant. Finally, transitional provisions of the Draft Law envision the application of the new procedural rules to the court proceedings that have been initiated but have not been completed until the date this new law came in force.[29]

Stated proposals of these new legal solutions, based on the contents and provided explanation, lead to the conclusion that their primary goal is to decrease the workload of the courts, particularly in Belgrade, through change of rules on territorial jurisdiction, but also by placing new obstacles for access to court, or by sanctioning the actions estimated by the legislator as abuse of procedural law. Based on that, the idea for solving the problem in the context of mass litigations, which has been indirectly made concrete in the Draft amendments to the Civil Procedure Law, comes down to decrease of the case inflow, that is, attempt to decrease the number of these cases through some type of deterrence of the citizens that have the need for judicial protection of rights. Collective lawsuit, or any other type of collective protection of rights or protection of collective rights is not envisioned by this Draft.

After presentation of the Draft Law to the public, negative reaction of the professional community followed, including the critiques of the proposed solution. In its announcement of June 2021, the Judges' Association of Serbia stated that the Draft Law contained several disputable solutions, including those that applied to conditioning of submission filing by simultaneous payment of the court fee under the threat of assumption that the submission has been withdrawn, as well as compensation of the costs of proceeding to the party that has lost the dispute in certain cases, narrowing the possibility to file a revision through suspension of the proprietary census and disabling revision against the decision of higher and second-instance courts. In addition, there are also disputable solutions of transitionary and final provisions of the Law on application of the new Civil Procedure Law to terminate powers of attorney in already initiated proceedings, and regarding E-justice[30] deadlines that are too short. The reactions of the professional community, and especially the attorneys, have been even harsher, and recently rendered decision on suspension of the work of the attorneys of Belgrade Bar Association, along with the requests regarding above analyzed legal standpoints of the Supreme Court of Cassation, also include a request for withdrawal of this Draft Law in its entirety, examining justification to adopt the amendments to the Civil Procedure Law, and in case the amendments are necessary to state the reasons, and establishing of a new working group of the Ministry of Justice, where the attorneys from this Bar would be adequately represented.[31] At the moment of preparation of this report, it is still unclear what the further course of the preparation of the amendments to the Civil Procedure Law is, and the outcome in terms of final normative solutions, but continuation of that legislative initiative should be expected during 2022.

25 Article 50 of the Draft Law, amending Article 155 of the Civil Procedure Law
26 Explanation of Article 50 of the Draft Law
27 Article 10 of the Draft Law, amending Article 40 of the Civil Procedure Law
28 Article 12 of the Draft Law, amending Article 45 of the Civil Procedure Law
29 Article 136 of the Draft Law
30 https://www.pravniportal.com/saopstenje-drustva-sudija-srbije-o-izmenama-zakona-o-parnicnom-postupku/
31 Decision no. 11262/2021 rendered at the Assembly of Belgrade Bar Association on December 21, 2021

IV. COLLECTIVE PROTECTION OF CONSUMERS

One of the key characteristics of the private legal protection in European continental law is that it is based on the individual lawsuits for the purpose of protection of infringed subject matter law, which is, by the rule, arising from the contractual relations. Contractual obligation, as well as the decision rendered in such litigation, shall have legal effect only among the litigation parties (*inter partes*). Individual lawsuit in civil matters is deeply rooted in the European legal processes. It still presents the basic paradigm of legal protection, but contemporary economic and political circumstances have opened the doors to introduction of other mechanisms of collective protection (*collective redress*), primarily based on the receipt of Anglo-Saxon mechanism of class action. The area that has experienced necessity for examining and development of mechanisms for collective legal protection is the field of consumer protection.

Primarily, we should focus on the specifics of the problem of access to justice in consumer matters. Namely, a consumer – an individual seeking legal protection in consumer related matter – during access to court must face several uncertainties, as well as material obstacles. It should be kept in mind that consumer cases have relatively small value, and the costs of the proceedings could be significantly higher than the value of the subject matter of the disputes, particularly the costs of representation and expert witnesses' reports. In a consumer dispute, the plaintiff would have to be exempt from payment of the court fee, but this rule is also not applied thoroughly in practice. There is not enough court practice in regards to consumer disputes, it is sporadic and does not provide the assurance about the possibility and certainty of protection of individual rights and interests. The data on consumer disputes are unreliable, because the proceeding based on the lawsuit of a consumer is not specifically categorized in court registries, which disables analytical processing of these cases in court statistics, although the Civil Procedure Law recognizes this procedure and contains certain specific procedural rules.[32] The most frequent complaints heard from the representatives of consumers' organizations that provide legal support to the consumers in court cases are that the courts rarely and insufficient accept merit of the Civil Procedure Law, that wrong and incorrect application of its rules are not rare, that the advantage was given to application of sectoral rules, even when they are not at the rank of the laws, and that frequently there is no sufficient knowledge of consumer law. Moreover, the rules on presentation of evidence constitute a special problem, habitually ignoring legally defined burden of evidence carried by the merchant when examining compliance of the goods or services, within legally prescribed deadline of its responsibility for lack of compliance.[33]

There is an especially problematic approach to adequate legal assistance in individual legal protection of the consumers, because the attorneys' fees are relatively high compared to the value of the claims, and rarely anybody decides to proceed with this in practice. On the other hand, the consumers' organizations provide professional assistance through advising before initiation of the proceedings, but the representatives of the consumers' organizations are not authorized to take part in the litigation proceedings as legal representatives of the parties, not even when the

32 Chapter XXXV "Procedure in consumer disputes", Article 488 to 493 of the Civil Procedure Law

33 D. Protić, *Protection of consumers in Serbia – which are possible directions for progress*, CEP, 2020, pg. 14-15

proceeding is led based on the special rules of the consumer dispute.[34] Finally, starting from the basic paradigm of the relation between a consumer and a merchant, which is the reason of construction of the entire system of consumer law, which is economic inequality in favour of the merchant, and by the rule, higher level of professional knowledge and information on the side of the merchant, there is a dilemma how to provide a solution on the consumer disputes "at the same level".

Thus, a consumer who believes that his/her right has been infringed, faces legal insecurity at the first step of judicial protection, including significant financial obstacles, problem of legal assistance, with, by the rule, significantly more powerful opponent, which are some of the key circumstances that prevent the consumers from initiating judicial protection of their rights in individual litigations.

IV.1. PRACTICE OF PROTECTION OF COLLECTIVE INTERESTS OF THE CONSUMERS AND THE NEED TO IMPROVE THE EXISTING SYSTEM

The first form of collective legal protection in the national law occurred precisely in the field of consumer protection, based on previous Law on Consumer Protection (2010), which prescribed a possibility of initiating a court proceeding for ban of unfair contractual provisions in consumer contracts and unfair business practices, due to infringement of collective interests of the consumers, in a special litigation proceeding for protection of collective rights and interests of the citizens.[35] However, as early as during 2014, legal provisions on which this procedure was based, were placed out of force. This first, for now unsuccessful, attempt to introduce collective judicial protection into our legal system will be discussed later.

Chronologically, the second form of collective protection of consumers, but with a different procedure and jurisdiction of the authorities, was envisioned by the Law on Consumer Protection of 2014.[36] Starting from the intention to adopt the European consumer law, which presents the basis for the entire legislation in this field, within a wider attempt of legal harmonization with the EU *acquis*. The starting point for definition of this mechanism and its basic solutions is contained in the Directive 2009/22/EC aimed at protection of collective interests of the consumers[37]. For the first time, the provisions of this Law define the criteria of collective interest that is the subject of legal protection, both in quantitative and qualitative form. Infringement of collective interest occurs when the rights of the total number of at least ten consumers are infringement by identical actions or in identical way by same entity, and that right is guaranteed by this law or in legally defined instances of unfair business practices or unfair provisions in consumer agreements.[38] The procedure of protection of the collective interests is initiated and led by competent Ministry of Trade, upon a request of an authorized individual or *ex officio*, and the proceeding is undertaken in accordance with general or special rules of administrative procedure. The capacity of a person authorized to submit the request for initiation of the proceeding belongs solely to consumers' organization, entered in the special records of the Ministry of Trade. This

34 Article 85, paragraph 3 of the Civil Procedure Law envisions the possibility that the legal representative of the employee in a labor dispute could also be a representative of the union that employee is a member of. The precondition is that the person needs to have a BA in Law with passed Bar exam. Consumer dispute, as well as litigation arising from labor issues, belongs to a group of special litigation procedures, while the union is the organization that represents and provides legal aid and protection for the workers, i.e. employees, similar to the consumers' organizations in respect of the consumers. That is why it is unclear why this legal discrimination occurs through exclusion of the possibility to exercise the legal aid in a special consumer proceeding through qualified representative of the consumer's organization- author's comment.

35 Article 137, paragraph 2 of the Law on Consumer Protection ("Official Gazette of RS" no. 73/2010) and Article 494 to 505 of the Civil Procedure Law ("Official Gazette of RS" no. 72/2011)

36 Law on Consumer Protection ("Official Gazette of RS" no. 62/2014)

37 Article 2 of the *Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests* stipulates that Member States could designate the jurisdiction of the administration, along with the courts, to rule in the proceedings that are the subject of the Directive, in so far as that the proceeding (administrative or judicial, author's comment) entails issuing of an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decision.

38 Article 145 Of the Law on Consumer Protection ("Official Gazette of RS" no. 62/2014)

proceeding finishes with an administrative decision confirming whether there was an infringement, and if it is established that there was an infringement, with imposing of an administrative measure. A measure of protection of the collective interests may be used to impose a person against whom the proceeding was led to have or to be prohibited from certain behaviour, and particularly to stop with infringement of the provisions of this law or other regulations, which threaten collective interests of the consumers and to refrain from it in the future, to remove established irregularity, to suspend unfair business practice or to be prohibited from such or similar behaviour in the future, as well as to immediately suspend agreeing unfair contractual provisions. An administrative proceeding may be initiated against the decision adopted in the process of protection of collective interests.[39]

Recently adopted new Law on Consumer Protection (2021) implements further modification of collective protection, but in a way that is headed in the opposite direction from the development of this institution, by exempting unfair business practice from the scope of protection of collective interests.[40] Unfair business practice is a category of typical infringement of collective interests of the consumers, since these practices affect the interests of certain groups of consumers or all consumers, and present trans-individual infringements, and thus a specific subject of the collective protection based on the Directive 2009/22/EC.[41] Being deleted from the scope of the procedure of collective protection, unfair business practice remains only the subject of inspection supervision implemented by market inspection, which is not efficient considering the purpose and nature of inspection supervision.[42] In addition, consumers' organizations are exempt in the same way from the procedure regarding unfair business practice, because they neither have nor could have the capacity of a party in the procedure of inspection supervision, their requests and the procedural proposals are at a level of initiatives, they lose a possibility to take part in the procedure, to be notified of their course and outcome, obtain access in the case files, participate in evidentiary activities, as well as the right to submit legal remedies. Thus, legal novelties in this segment lower the category of unfair business practice from the rank of *collective interest of consumers* to the level of *individual matter,* which is the subject of inspection supervision, and significantly decreases the active role and significance of consumers' organizations in prevention of such events, without clear reasons and contrary to the results achieved in implementation of the current law.

The procedure of collective protection, in a form implemented during the term of the Law on Consumer Protection (2014), as well as based on the current narrowed down subject of the proceeding, is a separate administrative proceeding, which is predominantly inquisitorial, since it is led by an administrative authority that simultaneously gathers evidence and undertakes the proceedings against the merchant or association of merchants due to infringement of the collective interests of consumers. However, unlike the proceeding of inspection supervision, the proceeding of protection of collective interests has certain contradictory elements when it is initiated by an authorized individual. This is because a consumers' organization that has submitted a request has a capacity of a party in a proceeding, and thus the right to propose evidence, take direct part in the proceeding, and to use relevant legal means (lawsuit in administrative proceeding). Stipulated measures partially meet the requests referred to in the Directive 2009/22, since they envision the possibility of imposing ban

39 Article 146-150 of the Law on Consumer Protection ("Official Gazette of RS" no. 62/2014)

40 Law on Consumer Protection ("Official Gazette of RS" no. 88/2021); Article 170 contains an unchanged criterion of infringement of the collective interests of the consumers, with deleted unfair business practice compared to previous legal solution.

41 *Directive 2009/22/EC on injunctions for the protection of consumers' interests*, item (3) of the Introduction: "Current mechanisms available for ensuring compliance with those Directives, both at national and at Community level, do not always allow infringements harmful to the collective interests of consumers to be terminated in good time. Collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement."

42 The purpose of inspection supervision is examining implementation of the law and other regulations through direct access to business operations and actions of individuals and legal entities and, depending on the results of supervision, imposing relevant measures (Article 18, Law on Public Administration, "Official Gazette of RS" no. 79/2005, 101/2007, 95/2010, 99/2014, 47/2018 and 30/2018 - other law); inspection procedure is specific due to the needs of controls in the field, implementation of planed supervision based on the risk analyses in the specific administrative field, which is the subject of control, as well as preventive actions, and the subject of inspection supervision is certainly not protection of the rights of individuals, that is, of consumers in this case (author's comment)

of certain behaviour of a merchant, then, publishing of the decision on the Internet page of the Ministry, but do not include a possibility to impose any form of financial sanction or other obligation to pay certain amount to secure implementation of the rendered decision. Additionally, in respect of the collective protection criteria, it could be confirmed that the quantitative criterion, that being at least ten individual cases of the same type with the same merchant, does not essentially constitute protection of collective interests, but a group of individual interests, which could, but does not have to point out to the existence of infringement of the collective interests, as trans-individual.

Bearing in mind that the procedure for the protection of the collective interests of consumers was defined for the first time by the Law on Consumer Protection of 2014, which was adopted shortly after the provisions of the Civil Procedure Law regulating the collective lawsuit were placed out of force by the decision of the Constitutional Court, it can be stated that it is undoubtedly a matter of the legislator's attempt to substitute the judicial procedure, by prescribing a special administrative procedure with elements of contradiction. That attempt succeeded to a certain extent, because relevant administrative practice in this area was developed, knowledge and experience in the matter of protecting the collective interests of consumers was deepened, consumers' organizations that initiated and participated in those proceedings gained valuable experience. Moreover, in terms of the scope and quality of decisions, the administrative practice of collective protection proceedings was probably the most successful type of implementing the protection mechanisms of the current Law on Consumer Protection: in the period from 2015 to the end of 2021, 25 decisions were made that determined the existence of infringements, mostly against merchants with the capacity of services providers of general economic interest (telecommunication companies, utility companies).[43] Although, as a rule, corrective actions followed in accordance with the decision, it should be noted that this form of collective protection does not have a compensatory character, that is, that consumers were not able to obtain any compensation on these grounds.

IV.2. EXPANDING THE REACH OF THE CONSUMER DISPUTE TO LITIGATIONS FROM THE PROTECTION OF THE RIGHTS OF THE BENEFICIARIES OF FINANCIAL SERVICES

The aforementioned examples of massive "banking" lawsuits indicate that the need for collective protection is particularly evident in the area of protecting beneficiaries of financial services. However, this area of consumer rights is currently regulated by special legislation, namely the Law on the Protection of Beneficiaries of Financial Services [44] and the Law on Protection of Beneficiaries of Financial Services with Long Distance Contracting.[45] Moreover, the Law on Consumer Protection (2021) explicitly excludes the application of that law to the protection of beneficiaries of financial services, and this area is only subject to the rules of special legislation, and they do not even foresee the corresponding application of the rules on consumer protection[46]. The Law on Protection of Beneficiaries of Financial Services contains certain rules that are similar to the general rules of consumer protection, including the prohibition of unfair business practices and unfair contractual provisions, but does not provide for a collective protection proceedings, but the supervision of these infringements is carried out as part of the administrative supervision carried out by the National Bank, in accordance with that law.[47] Therefore, *de lege lata*, the beneficiaries of financial services, who have the status of consumers, are currently denied the possibility of using even the existing mechanism of collective protection of interests in the above described administrative proceedings. Based on the same exemption from the application of the Law on Consumer Protection, lawsuits arising from requests for the protection of the rights of beneficiaries of financial services, such as the so-called banking cases, cannot be the subject to the special rules on consumer disputes.

43 https://arhiva.mtt.gov.rs/informacije/zastita-potrosaca/resenje-o-povredi-kolektivnog-interesa-potrosaca/

44 Law on Protection of Beneficiaries of Financial Services ("Official Gazette of RS", no. 36/2011 and 139/2014)

45 Law on Protection of Beneficiaries of Financial Services with Long Distance Contracting ("Official Gazette of RS", no. 44/2018)

46 Article 4. pg. 6. of the Law on Consumer Protection ("Official Gazette of RS" no. 88/2021)

47 Article 41 of the Law on Protection of Beneficiaries of Financial Services ("Official Gazette of RS", no. 36/2011 and 139/2014)

IV.3. LEGAL HARMONIZATION WITH THE EU ACQUIS ON COLLECTIVE LEGAL PROTECTION

The reception of the class action in the countries of the European Union, i.e. as part of the EU legal system, began with the adoption of the *White Paper* of April 2008, which proposes introduction of a collective compensatory action in protection of competition, in one of two proposed forms: representative lawsuit filed by qualified subjects (such as consumers' associations, government bodies or trade associations) on behalf of a specific or determinable circle of subjects, or so-called opt-in class actions that would allow injured parties to expressly choose to combine their individual claims for compensation of damages into a single action.[48] However, efforts by the European Commission to impose collective redress as a supplement to individual mechanisms for enforcing EU competition rules have so far been unsuccessful. *Directive 2014/104/EU on actions for damages under national law for infringements of the competition law provisions of the Member States (Directive on compensation of damages against monopoly*), which was signed on November 26th, 2014, expressly delivers that Member States are not required to introduce collective redress mechanisms to implement Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

On the other hand, in the area of consumer protection, significant progress has been made, and the first step was the Green Paper on Consumer Collective Redress.[49] The main purpose of this paper was to assess the current state of redress mechanisms for consumers in the EU, concluding that the existing options at the time were unsatisfactory and prevented a large number of consumers affected by infringements from exercising their rights.

Directive 2009/22/EC on injunctions for the protection of consumers' interests has defined the requirement that Member States are obliged to give eligible entities the right to seek court orders requiring the cessation or prohibition of infringements of EU consumer legislation.[50] This Directive contained a catalogue of consumer directives enclosing substantive consumer rights to which the stipulated obligation applies.[51] In its application so far, Directive 2009/22/EC has proven to be more useful for preventing future damages than for correcting past damages. In its reports related to the implementation of the directive, the European Commission found that injunctions were a successful tool for market surveillance, but given the multi-year duration of the procedure, the consumers could be prevented from relying on a favorable decision based on which they would receive compensation for damages.[52] As stated above, the existing solution of collective consumer protection referred to in the Law on Consumer Protection is the result of partial legal harmonization with Directive 2009/22/EC.

In order to harmonize the rights of the Member States of the European Union and to enable unhindered access to justice and equal legal protection, in June 2013, the European Commission adopted the Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning infringements of rights granted under Union Law

48 White Paper on Damages Actions for Infringement of the EC Antitrust Rules COM(2008), 2.04.2008.

49 Green Paper on Consumer Collective Redress. COM (2008), 27.11.2008

50 Directive 2009/22/EC on injunctions for the protection of consumers' interests (Injunctions Directive)

51 Distance selling (Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises and Directive 97/7/EC on the protection of consumers in respect of distance contracts); Consumer credit (Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit); Television broadcasting (Directive 89/552/EEC on the co-ordination of certain provisions concerning the pursuit of television broadcasting activities); Package holidays (Directive 90/314/EEC on package travel, package holidays and package tours); Unfair contractual terms (Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Contract Terms Directive); Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive)); E-commerce (Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (E-commerce Directive)); Medicinal products for human use (Directive 2001/83/EC on the Community code relating to medicinal products for human use (Code for Human Medicines Directive)); Consumer financial services (Directive 2002/65/EC on distance marketing); Long-term holiday products (Directive 2008/122/EC on certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Long-term Holiday Products Directive)); Consumer goods and services (Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 2006/123/EC on services in the internal market).

52 https://ec.europa.eu/info/sites/info/files/studi_on_injunctions_directive_final_report-18_12_2011_en.pdf

(2013/396/EU)[53]. The goal of this Recommendation is to stop the infringement of human rights guaranteed by regulations of the European Union in mass infringements of rights, ensure equality in access to justice, prescribe procedural mechanisms that will enable collective protection and create conditions for efficient and economical resolution of cross-border disputes. Two mechanisms are recommended: injunctive collective action and compensatory collective action. The precondition for these actions is the existence of an association of persons seeking legal protection, which would lead the proceedings on their behalf. Class actions protect a collective, not an individual, interest.[54]

The latest development in this area recently adopted *Directive 2020/1828 on representative actions*.[55] The Directive stipulates the obligation for all Member States to provide a certain form of collective consumer protection, which meets the following minimum requirements:

- Opt-in or opt-out system: opt-in systems require individuals to choose to participate in litigation; in contrast, opt-out systems automatically include individuals within specified categories of individuals unless they choose otherwise. The Directive gives each Member State discretionary right to decide whether to introduce an opt-in or opt-out system, but they must implement a minimum harmonization procedure;
- Rule that "the loser pays the costs": standard rule in most litigations, although some countries apply statutory limits on the amount of costs awarded. The Directive provides for the principle of shifting costs according to local law, which is convenient for potential defendants;
- Certification phase: the Directive foresees that the courts will assess the conditions of admissibility of representative actions in accordance with national law and the provisions prescribed by this Directive, while it is up to individual Member States to set and apply their own conditions;
- Punitive or appropriate damages: it is foreseen that punitive damages will not be approved, that is, traditional compensatory principle is confirmed;
- Right to sue: the Directive is not entirely precise in this regard, with the requirement that Member States must ensure that the criteria are in line with the objectives of the Directive. The minimum conditions imply that the representative organization that files a class action must prove at least 12 months of actual public activity in the protection of consumer interests, its non-profit status and independence. Member States have the discretion to extend the provision of stricter qualification criteria, provided that this does not preclude the effective functioning of the requirements;
- Legal effect of the decision: the final decision on the (non)existence of an infringement can be used by both parties as evidence in the context of any other action seeking compensation "against the same merchant for the same infringement".

In addition to modernizing and supplementing the mechanisms referred to in Directive 2009/22/EC, the greatest contribution of Directive 2020/1828 is, at this moment, that it will force Member States that currently do not have a functional mechanism for the collective protection of consumer interests, to introduce it into their legislation and to ensure minimum standards set in the Directive. Stipulated deadline for the Member States to adopt the laws, regulations and administrative acts necessary to harmonize national legislation with this Directive is December 25, 2022.

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

54 Attachment of A.L. Vidojković

55 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

V. CLASS ACTION IN NATIONAL LEGISLATION AND COURT PRACTICE

Collective protection was first mentioned in our legal system in the Law on Consumer Protection of 2010 ("Official Gazette of RS" No. 73/2010). According to the provisions of Article 137 of this law, a consumer whose right or interest was infringed could submit a request for the initiation of proceedings for the prohibition of unfair contractual provisions in consumer contracts; due to the prohibition of unfair business practices; and for confiscation of unlawfully acquired gain. In addition to consumers, consumer associations and their alliances also had the right to initiate proceedings, and the aforementioned law prescribed judicial protection.

V.1. CLASS ACTION FROM THE CIVIL PROCEDURE LAW OF 2011

Chapter XXXVI of the Civil Procedure Law of 2011 ("Official Gazette of RS" No. 72/2011) regulated "Procedure for the protection of collective rights and interests of citizens". According to those provisions, associations, their alliances and other organizations had a right to sue for a certain group of citizens, if such protection was provided for by their registered or regulated activity, if the goal of the association or action referred to the common interests and rights of a large number of citizens, and if they were injured or seriously threatened by the actions of the defendant. The lawsuit could have been used to demand: a ban on undertaking of the activities that threatened to infringe the rights and interests of citizens; removing the existing infringement of the collective rights and interests of citizens or the harmful consequences of the defendant's actions and establishing the previous state, a state in which such an infringement could no longer occur, or a state that approximately corresponded the state that existed before the infringement; determining the inadmissibility of an action that infringed the collective interests and rights of citizens; and publication of the judgment on adoption of the claim. Also, it was allowed for the defendant to file a lawsuit in order to establish that they did not threaten or infringe collective rights and interests of citizens, or that they did not infringe them in an impermissible manner; to prohibit the plaintiffs from performing their activities in a way that infringe collective rights and interests; compensation for damage caused by untruthful presentation or transmission of claims; publication of the judgment. It was impossible to initiate another proceeding based on the same claim until completion of the proceeding based on the lawsuits. Individuals and legal entities could, in separate lawsuits for damages, have highlighted the infringement of collective rights and interests of citizens, which was established by a final judgment, and in those proceedings, the infringement of collective rights and interests of citizens, which was determined by a final judgment, could not have been disputed. These provisions also applied when a consumer-initiated proceedings due to unfair contractual provisions and unfair business practices in accordance with the law regulating consumer protection.

Both of the aforementioned laws did not precisely define collective interests, so the provisions on the procedure for the protection of collective rights and interests were declared unconstitutional by the decision of the Constitutional Court in May 2013. Namely, the Constitutional Court primarily states that the contested provisions of Art. 494 to 505 of the Civil Procedure Law do not regulate when a civil law dispute has the character of a dispute about collective rights that would be resolved according to the rules of this specially prescribed procedure,

that they do not contain reference norms from which it would be determined which disputes these provisions refer to, i.e. it is not prescribed which dispute, in the sense of these provisions, is considered a dispute about collective rights, nor is the concept of collective rights and interests regulated.[56] The pillar of the argumentation of this decision of the Constitutional Court is the demand for the specificity and precision of the legal norm, which is an integral part of the principle of the rule of law, so that citizens can really and practically know their rights and obligations from the content of the norm and adapt their behaviour to them, and the statement in the case of disputed provisions of the Civil Procedure Law, that requirement was not fulfilled in terms of meaning and content. The Court concludes that the requirement for the certainty and precision of the legal norm must be considered an integral part of the principle of the rule of law, because otherwise it threatens the principle of legal certainty as part of the principle of the rule of law, especially the requirement for the uniform application of the law, and these new legal norms have not been established to the extent that they could be considered an established part of the law through judicial practice.

In addition, the Constitutional Court calls into question the possibility for the law regulating civil proceedings to regulate substantive legal issues, such as the types of civil protection that the plaintiff can exercise in litigation for the protection of collective rights and interests, unless otherwise stipulated by special regulations, although at the same time states that such provisions are not generally unconstitutional. It is further noted that the provisions of the Civil Procedure Law show that the general civil procedure is intended to protect individual subjective rights, and that the provisions of Art. 494 to 504 of the Law regulate the procedure in litigations in which the collective rights and interests of citizens should be protected in an abstract way, that is, the rights and interests of the entire social group (collectivity, association) should be protected. An argument was also presented regarding the right to sue by consumers' organizations, that challenges such authorization, given that these organization, in the sense of this law, are voluntary and non-governmental, non-profit organizations based on the freedom of association of several individuals or legal persons, established for the purpose of achieving and improving a certain common or general purpose and interest, which, according to the opinion of the Court, means that organizations are not organized under this law for the realization of collective rights, but for the realization of the non-profit goals of common interest.

Based on the reasons referred to in the decision of the Constitutional Court, it could be concluded that the principal complaints regarding constitutionality of the provisions of a special litigation procedure for protection of collective rights and interest of the citizens are subject of the proceedings and rules of procedure, right or lack of right to sue, as well as the term of collective interest as the subject of protection. However, it could be observed that the Court, despite giving relatively free evaluations of unconstitutionality of contested provisions, basing them predominantly on a wide understating of constitutional principle of the rule of law and unity of the legal system, does not determine infringement of specific substantive provisions of the Constitution, nor does it find that the class action is not permitted pursuant to the current Constitution.[57]

56 Decision of the Constitutional Court, IUz number 51/2012 of May 23, 2013, published in the Official Gazette of RS, no. 49/2013 of June 5, 2013

57 Explanation of the quoted decision of the Constitutional Court, in only one case, of the rules referred to in the provisions of Article 500, paragraph 1 of the Civil Procedure Law on the possibility for the counterclaim by the merchant, along with plaintiff in the class action, to also include the persons authorized to represent that organization or association, confirms that it is contrary to the specific Constitutional provisions, more precisely Article 36 of the Constitution guaranteeing equal protection of rights before the courts.

V.2. THE CASE OF CLASS ACTION OF EFEKTIVA OF 2013

However, the national court practice has recorded one occurrence of a class action dispute, based on then current provisions of Articles 494-505 of the Civil Procedure Law. Namely, the first and so far, the only class action was submitted by the consumers' organization *Efektiva*, against three national banks, due to unpermitted contracting of currency clause in Swiss francs and unilateral change of interest rates and interest margins. Class action was submitted in February 2013, in the interest of 10,000 clients of the sued banks that had loans in Swiss francs, and in order to implement pre-indexing of the value of these loans in EUR or dinars. This would have avoided the paradox that occurred in practice, that after several years of repayment, a loan beneficiary would have owed more money than on the date the loan was withdrawn. The lawsuit was initially filed before the First Basic Court in Belgrade, which declared not to have jurisdiction and directed the lawsuit to the Commercial Court, which subsequently also declared lack of jurisdiction. Once the case was sent to the Supreme Court of Cassation, the decision on the jurisdiction of the Third Basic Court was rendered.[58]

However, soon after filing of the lawsuit, the Constitutional Court adopted the quoted decision on unconstitutionality of the provisions referred to in Chapter XXXVI of the Civil Procedure Law, which regulated a special procedure for protection of collective rights and interests of the citizens.[59] Based on this decision of the Constitutional Court, on June 23, 2014, the Third Basic Court in Belgrade, rendered the decision on rejection of the class action submitted by the Association of bank clients *Efektiva*.[60]

58 *Constitutional-judicial instructor, no.* 6/2014, published on April 16, 2014

59 Decision of the Constitutional Court, IUz number 51/2012 of May 23, 2013, published in the Official Gazette of RS, no. 49/2013 of June 5, 2013

60 https://efektiva.rs/aktuelnosti-efektiva/aktuelnosti-krediti/kolektivna-tuzba-odbacena-kao-nedozvoljena/

VI. COMPARATIVE EXPERIENCE IN CERTAIN COUNTRIES OF THE EUROPEAN UNION AND THE REGION

Introduction of class action in civil matters is linked to the United States of America, where this mechanism has been used as a group lawsuit or representative action where one of the parties is a group of people jointly represented by one member or members of that group. In the European civil law, there was a resistance to the reception of this mechanism for a long time and it is only recently that the mechanisms have begun to appear that enable fulfilment of interests of a larger number of persons. The needs of a modern society, and development of new fields of law, such as personal data protection or environmental law, have led to the states finding ways to solve these issues more efficiently, in the interest of a larger number of people. In the civil law system, the examples of France and Germany are interesting, as similar legal systems from the aspect of civil law, as well as the situation in several countries in the region. Therefore, some relevant comparative legal solutions will be discussed in the text below.

VI.1. FRANCE

The mechanism for collective protection of interests is an issue that has long been the subject of discussion in the French expert community. Ever since the 80s, attempts have been made to find a legislative solution that would enable introduction of such a mechanism into the French legal system.[61] The first significant step was made by adoption of the so-called *Hamon* Law in 2014, which regulated this issue in the field of consumer law.[62] Later, this mechanism was also introduced in the areas of protection against discrimination, environmental law, protection of patients' rights[63] and personal data protection.[64]

It should also be mentioned that previously existing mechanisms for exercising of consumer rights, were not often used due to their procedural shortcomings. French legislator has envisioned the possibility of protection of collective interest[65], and protection of interests through joint representation[66]. However, these two mechanisms are rarely used in practice, since they are intended for registered and accredited consumers' organizations, which thus achieve practically symbolic compensation for damages.[67]

61 Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe, Comparative Study, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn, 2018, p. 43

62 *Loi Hamon*, no. 2014-344 of March 17, 2014

63 Law no. 2016-41 of January 26, 2016

64 Issues of personal data protection, patient rights and environmental law and adequate collective protection of these rights and interests are regulated by Law no. 2016-1547 of November 18, 2016, which aims at modernization of judiciary in the 21St century.

65 In French regulations, this type of protection of rights and interests in the proceedings is called *action d'intérêt collectif* and is regulated by Articles L621-1 to L623-32 of the Consumer Code (*Code de consommation*)

66 In this case, protection of interests through joint representation (*action en représentation conjointe*), is regulated by Articles L622-1 to L622-4 of the Consumer Code (*Code de consommation*)

67 *See* Article L621-1 of the Consumer Code which (translated into English) reads: "Regularly declared associations, where its stated statutory purpose is to defend the consumer interests, may exercise the rights granted to parties in civil proceedings related to facts that directly or indirectly concern the collective interests of consumers, if those associations exercise the rights and interests granted to them for that purpose in accordance with Article L. 811-1."

In addition, in the case of joint representation of consumers' interests, the proceeding brings together individual consumers who have each, individually, suffered the same infringement of rights, and it is necessary to have their individual submissions, which makes this procedure somewhat inefficient.[68] With collective interest of consumers, in this context, we should keep in mind the guideline that is the result of jurisprudence, that it, is "the interest that lies between individual interests of several consumers and the general interest of all citizens" and that "the collective interest of consumers in consumer law is the same as the general interest in criminal law or the collective interest of the profession in labour law."[69]

Therefore, the sectoral approach of the French legislation, as mentioned before, provides an adequate mechanism for protection of collective interests in certain areas that should overcome the weaknesses of previous solutions. Thus, the above-mentioned *Hamon Law* prescribes protection of consumers in the way that should bridge the problems of the above-mentioned mechanisms. This Law has regulated collective procedural mechanisms and stipulated that accredited representative consumer protection organizations on national level are the only ones authorized to represent the interests of individual consumers, whose legal or contractual rights have been infringed by another party, and to demand compensation for material damages, while non-material ones cannot be compensated this way.[70] The consumers' organizations must fulfil certain regulations in terms of representativeness, registration, membership and other prescribed requirements in order to be considered authorized for such procedural acts. In respect of the consumer interest being protected, French law states that it is necessary to have individual consumers in the same or similar situations who have suffered infringement of legal or contractual rights by one or more of the same merchants.[71] This system of compensation of damages for consumers, among other things, envisions a so-called *opt-in* system for the persons whose interests are protected, and the proceeding is conducted according to the general procedural rules of civil proceedings, which includes the possibility of imposing a measure (*injunction*), in line with the principles of compensation of damages and the general rules of evidentiary procedure.[72] A simplified procedure for protection of consumer interests is applied when identical damage is caused to all clearly defined consumers in the procedure (in terms of identical amount of damage, or in terms of identical time period of causing damage, or the damage caused in the identical length of time), in which case the court would order the other party to compensate such damage directly to the injured parties, within the timeframe it sets.[73]

French system includes mechanisms for the competition rights, but besides already mentioned conditions for consumer protection proceedings, it also includes conditions related to possibility of conducting proceedings only after the adoption of the final decision of the national body for competition, the European Commission or the court that has determined the existence of non-competitive behaviour, and also establishes a period of five years after the adoption of these decisions in which it is possible to initiate the proceeding for collective protection of rights.[74]

In terms of protection of the rights and interests of patients, compensation of damages could be requested by accredited associations of patients or beneficiaries for individual damages suffered by beneficiaries of the healthcare system in the same or similar situations.[75] As with the consumer protection, the damage must be caused by infringement of

68 *See* Article L622-1 of the Consumer Code which (translated into English) reads: "When several identified consumers have suffered individual damage caused by the same party providing professional services or goods, and which have the same origin, each association registered and recognized as a representative on national level in accordance with Article L. 811-1 may, if authorized by at least two such consumers, seek compensation before any court on behalf of these consumers."
69 Court of Cassation of France, First Civil Council, judgments of September 26, 2019
70 *La loi no 2014-344 du 17 mars 2014 relative à la consommation* (Loi Hamon), Art. L623-1
71 *Ibid.*
72 Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe, Comparative Study, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn, 2018, p. 44
73 Article L623-14 of the Consumer Code
74 *See* Articles L623-24 – L623-26 of the Consumer Code
75 Law no. 2016-41 of January 26, 2016 on modernization of our healthcare system, Healthcare Code (*Loi n ° 2016-41 du 26 janvier 2016 de modernisation de notre système de santé, Code de la sante publique*), Article L1143-3

legal or contractual obligations by a manufacturer or supplier of medical devices and products.[76] However, the weakness of this solution is reflected in the duration of the proceedings, since the injured parties have up to five years from the moment the damage occurred to join the group that demands compensation of damages.[77]

When we talk about collective protection against discrimination, procedural framework was defined in 2016 through *the Law on Modernization of Judiciary in the 21st Century*.[78] In this case, as in the previous ones, associations registered to fight against discrimination, as well as unions, may initiate a proceeding for compensation of damages before the court in the case where several persons in the same or similar situations have suffered indirect or direct discrimination.[79] The law also envisions the possibility of a simplified procedure under certain conditions, including mediation. Finally, it should be mentioned that the French system also envisions this type of collective protection of interests in terms of personal data protection, in the field of financial services, as well as in the field of environmental rights.

VI.2. GERMANY

In Germany, there is no general system of judicial protection of collective interests of persons, but there is rather a sectoral approach to the purpose and field of rights. Certainly, German procedural law recognizes the possibility of combining proceedings according to general rules,[80] however, larger groups of plaintiffs also require appropriate specially designed legal solutions. Therefore, the legislator introduced solutions in the fields of consumer law, competition law, and in the case of protecting the interests of investors.[81]

In terms of the consumer rights protection, as in the case of France, registered organizations, that is, associations for consumer protection may present arguments in favor of protection of consumer interests before the court, while individual consumers may join the proceedings not later than one day before the main court hearing, in accordance with provisions of the *Law on the Declaratory Action*.[82] The regulations also provide for the possibility of initiating proceedings by chambers of commerce. A declaratory claim filed through a class action in accordance with local regulations is limited to the value of EUR 250,000.[83] The double limitation set in this way (in terms of predetermined form of claim and the value of litigation) speaks in support of the specificity of the field of application and protection of consumer interests.

There is a noticeable efficiency of imposing the measures (*injunctions*) in order to prevent further harmful behavior of merchants and infringement of consumer interests provided, among others, by *the Law against Unfair Competition, the Law on Temporary Measures for Protection of Consumers' Rights and other Infringements,* as well as *the Civil Procedure Law*.[84] In the case of smaller groups of identified consumers, it is possible to demand concrete compensation for damages, or a specific action, and the consumers are represented by accredited organizations that bear the costs of the proceedings, while the proceeding is conducted according to general procedural rules.[85]

However, such legal mechanism did not always exist in the German system. Namely, only after the so-

76 *Ibid.*
77 Law no. 2016-41 of January 26, 2016 on modernization of our health system, Healthcare Code (*Loi n ° 2016-41 du 26 janvier 2016 de modernisation de notre système de santé, Code de la sante publique*), Article L1143-4; Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe, Comparative Study, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn, 2018, p. 49;
78 Law no. 2016-1547 of November 18, 2016 on modernization of judiciary in the 21st century. Healthcare Code (*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle. Code de la sante publique*)
79 Law no. 2016-1547 of November 18, 2016 on modernization of judiciary in the 21st century. Healthcare Code (*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle. Code de la sante publique*), Articles 62-64.
80 Civil Procedure Code (Zivilprozessordnung (ZPO)), Sec. 59 ff
81 Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe, Comparative Study, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn, 2018, p. 51
82 Dr Katarina Jovičić, *The* Dieselgate *Affair and its impact on collective protection of consumers in Germany and the European Union*, in Protection of collective interests of consumers, Collection of works, UDK 343.53:366.542, Faculty of Law of the Union University, Belgrade, 2021, p. 218
83 *Ibid.*
84 *Ibid.*
85 Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe, Comparative Study, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn, 2018, p. 55

called "*Dieselgate Affair*" in 2015, urgent need was recognized for a system of collective protection of consumer interests. Due to inconsistent delivery of vehicles by Volkswagen U.S., it was necessary to protect the infringed interests of a considerable number of consumers. However, unlike the United States of America, where the legal culture of consumer protection and compensation of damages is generally much more developed, the EU did not have an adequate and sufficiently effective mechanism at a time, that would ensure protection of interests of a large number of consumers, but Germany managed to find an urgent solution through the adoption of appropriate regulations.[86]

In the field of competition protection, German regulations also ensure for the collective protection of interests of a large number of persons in the proceedings, according to the provisions of the Law against Unfair Competition (UWG) in situations when there has been an alleged infringement of competition rules or inadequate business ventures.[87] In these situations, the plaintiffs may request compensation of damages, adoption of appropriate measures or partial confiscation of the profit. General procedural rules apply in the proceedings, but the party requesting the adoption of a measure must inform the debtor beforehand of that intention and give them an opportunity for peaceful resolution of a dispute. In any case, in order to maintain the necessary balance in the market, the German legislator has envisioned a possibility for initiating competition protection proceedings. In these situations, even though there is no specifically designed mechanism, it is possible to combine the proceedings in the case of direct economic or legal relations.[88]

Finally, German law has also provided a legal framework for situations of infringement of interests of a large number of persons, investors in the financial market. The Model Act on Settlement of Proceedings with Investors (*Kapitalanleger-Musterverfahrensgesetz)* prescribes rules in cases of wrong or deceitful information in the financial market, denial or absence of information.[89] Through detailed regulation of situations when it is possible to initiate a proceeding, as well as through possibility of conducting a so-called "test proceeding" to determine certain legal or factual issues brought before the court by an interested party (whether an investor or a defendant), the legislator has regulated this extremely sensitive field in modern business law. This way, the legislator has tried to protect legally weaker party (investors) who based on the outcome of the test proceeding, could have an idea of potential future success in a dispute, or at least an idea of a direction in which such proceeding would go. In this case, as well as in the previously mentioned systems for resolving class actions in the German system, an *opt-in* approach was chosen in terms of the participants in the proceedings.

VI.3. COLLECTIVE PROTECTION IN THE REGION

Class actions, or protection of collective interests, are regulated differently in the region of Southeast Europe, where this mechanism has been introduced and development in the last decade, same as in other parts of the European continent.

Croatia is an "early adopter" of the model of collective protection, since it regulated the mechanism of class action with amendments to the *Civil Procedure Law* back in 2011.[90] Article 502a of the said regulation states that associations, institutions, bodies or other organizations established in accordance with the law, which, as part of their registered or stipulated activities, are engaged in protection of the collective interests and rights of citizens established by law, may, when such authorization is given by a special legal provision and under conditions prescribed by that law, file a lawsuit (a lawsuit for protection of collective interests and rights) against an individual or legal entity which,

86 Dr Katarina Jovičić, *The Dieselgate Affair and its impact on collective protection of consumers in Germany and European Union,* in Protection of collective interests of consumers, Collection of works, UDK 343.53:366.542, Faculty of Law of the Union University, Belgrade, 2021, p. 212

87 Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe, Comparative Study, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn, 2018, p. 56

88 Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe, Comparative Study, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn, 2018, p. 57;

89 Collective Redress Mechanisms in Consumer Protection in the European Union and South East Europe, Comparative Study, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bonn, 2018, p. 58;

90 Civil Procedure Law, OG SFRY 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, and NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19. Chapter thirty-two, Lawsuit for protection of collective interests and rights, Article 502a

through performing a certain activity or through general operations, actions, including omissions, seriously injures or seriously threatens such collective interests and rights. The same article closely defines the types of interests that may be protected this way and refer to healthy environment, moral, ethnic, consumer, anti-discrimination and other interests guaranteed by law, and it also defines the degree of infringement of these interests. Namely, it is stated that such interests must be seriously infringed or threatened by the defendant's activity or actions in general. As in other situations, the general rule applies here too, that if no special procedural rules are prescribed in the specific chapter, the general regime of procedural provisions previously established by the Law will be applied.[91] The legislator also leaves room for the rule *lex specialis derogat legi generali,* and prescribes that the provisions of this chapter, and of the said law in general, will not be applied if a special law prescribes something else in the field of collective protection of rights and interests. In accordance with Article 502b, a claim may be submitted to require confirmation of an infringement, that is, threat to the interests, prohibition of certain actions, order a certain action (including the return to the previous state), as well as have the judgment made on the basis of all the aforementioned requests published in the media at the defendant's expense. Through analysis of these provisions in legal theory, it was concluded that these requirements were not mutually exclusive and that they could be presented cumulatively.[92] As in the case of France and Germany, Croatian regulations also provide for the possibility of imposing a measure that would stop certain actions of the defendant or prevent the occurrence of a certain harmful situation, which the plaintiff must prove to be probable before the court.[93]

In the case of North Macedonia, there are sectoral mechanisms for collective protection provided by the *Law on Consumer Protection*[94]*, the Environmental Law*[95] and *the Law on Prevention and Protection against Discrimination*.[96] According to the provisions of the Law on Costumer Protection, a class action for protection of interests may be filed by the state inspectorate, at the initiative of a consumer association or *ex officio*.[97] On the other hand, if there is an infringement of rights and interests in the environment, the Environmental Law prescribes that an individual or legal entity, as well as a citizens' association established for the environmental protection, which is directly threatened or suffers the consequences of the environmental damage, has the right to request the return of the environment to the previous state, or compensation for the environmental damages from the operator before the relevant court, in accordance with the general regulations for compensation of damages if the return to the previous state is not possible.[98] In the case of protection against discrimination, associations and foundations, institutions and other civil society organizations that have a justified interest in protection of collective interests of a certain group, or that deal with the protection of the right to equal treatment within the framework of their activities, may request the protection of collective interests.[99] As in other countries, the Macedonian legal framework chose the opt-*in* system for the right to sue. However, it should be noted that in the case of a class action for protection against discrimination, it is not possible to demand compensation of damages, because a joint lawsuit is filed for the protection of a specific group, and therefore aims at abstract preventative protection.[100]

91 *Ibid.*

92 Mladen Pavlović, *Importance of the lawsuit for protection of collective interests and rights*, Collective works of the Law Faculty in Split, year. 52, 3/2015., p. 799.- 818, p. 810

93 Civil Procedure Law, OG SFRY 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, and NN 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19. Chapter thirty-two, Lawsuit for protection of collective interests and rights, Article 502g

94 Official Gazette of RM, no. 38/04, 77/07, 103/08, 24/11, 164/13

95 Official Gazette of RM, no. 53/05, 81/05, 24/07, 159/08, 83/09, 48/10, 124/10, 51/11, 123/12, 93/13, 187/13, 42/14

96 Official Gazette of RM, no. 50/10, 44/13

97 T. Zoroska Kamilovska, T. Shterjova, *Procedures for Protection of Collective Rights and Interests with overview of the situation in the Republic Macedonia*, LAW – theory and practice, Number 07–09 / 2014, UDK: 347.91/.95 (497.7), BIBLID: 0352-3713 (2014); 31, (7–9): 42–58, p. 53

98 Environmental Law, *Official Gazette of RM*, no. 53/05, 81/05, 24/07, 159/08, 83/09, 48/10, 124/10, 51/11, 123/12, 93/13, 187/13, 42/14, Article 159

99 Environmental Law, *Official Gazette of RM*, no. 53/05, 81/05, 24/07, 159/08, 83/09, 48/10, 124/10, 51/11, 123/12, 93/13, 187/13, 42/14, Article 41

100 T. Zoroska Kamilovska, T. Shterjova, *Procedures for Protection of Collective Rights and Interests with overview of the situation in the Republic Macedonia*, LAW – theory and practice, Number 07–09 / 2014, UDK: 347.91/.95 (497.7), BIBLID: 0352-3713 (2014); 31, (7–9): 42–58, p. 54

Through analysis of the regulations of Bosnia and Herzegovina, it can be concluded that the collective protection of interests appears in terms of protection against discrimination, and consumer rights protection. In terms of protection against discrimination, the relevant law prescribes the possibility of filing a class action by an association or other organization established in accordance with the law, which deals with the protection of human rights, i.e. the rights of a certain group of persons, against a person who has infringed the right to equal treatment of a larger number of persons who predominately belong to the group whose rights are protected by that plaintiff.[101] The claim may demand establishment of infringement of the right to equal treatment by the defendant against members of the group whose rights are protected by that plaintiff, it may request prohibition of actions that infringe or may infringe the right to equal treatment or carrying out actions that eliminate discrimination or its consequences in relation to the members of the group, and that the judgment establishing an infringement of the right to equal treatment be published in the media, at the expense of the defendant.[102]

In Montenegro, regulations include only a collective consumer protection mechanism, as per the provisions of the Law on Consumer Protection, which offers protection in case of unfair contractual provisions, business practices, as well as when a merchant infringes consumer rights in any other way which infringes the collective consumer interest.[103] This way, the conclusion is that this is a preventative protection by prohibition of further harmful behaviour, since this procedure does not allow seeking compensation of damages for potential infringement of consumer rights. These procedures are conducted in court and the civil procedure rules apply here. Entities with the right to sue and initiate proceedings are the Ministry and the state administration bodies authorized to implement this law, and the consumers' organizations, chambers, and appropriate trade associations. The existence of a dispute for the protection of the collective interests of consumers is not an obstacle for the individual consumer claim for compensation of damages. If the court finds an infringement of rights, it will also describe the manner and consequences of the said infringement and order the defendant to stop certain actions or prohibit those actions and order publication of the decision. When an individual consumer lawsuit is filed against a defendant who falls within the scope of the class action judgment, the court is bound by the final decision in the proceeding for protection of the collective interest of the consumers.[104]

101 Anti-Discrimination Law, (Official Gazette of Bosnia and Herzegovina), number 66/16), Article 17

102 *Ibid.*

103 Law on Consumer Protection (Official Gazette of Montenegro, number 2/14, 43/15, 70/17 and 16/19), Chapter I, part IV

104 In more detail, Nikola Dožić, "*Collective Protection of Consumers in Montenegro – de lege lata* and *de lege ferenda*", *Protection of the collective interests of consumers*, 2021, p. 178-192

VII. DISCUSSION OF REPORT FINDINGS AND POSSIBLE LEGAL SOLUTIONS

The phenomenon of mass lawsuits causes unfathomable legal and economic consequences and opens numerous ethical questions. Thousands of mass lawsuits, which burden curtain courts, paralyze the work of the courts, and negatively affect their overall efficiency, which brings into question implementation of the right to a trial within a reasonable time. The unevenness of court practice is also noted, which undermines legal certainty and calls into question compliance with standards for fair trial. Mass lawsuits also have profound economic consequences from the aspect of public interests, and, in their final effect, they affect all the citizens.[105]

Class action is certainly not the only possible response to this phenomenon. In practice, there are so-called group lawsuits where a large number of persons appear as co-litigants on the side of the plaintiff, against the same defendant.[106] As part of the public debate on amendments to the Civil Procedure Law, an initiative was mentioned for introduction of a "pilot judgment" system for the purpose of solving mass litigations, modelled after the practice in the European Court of Human Rights, which presents a technique for determining systemic deficiencies in the legislation of the sued state which appear as the cause of repetitive cases before that court[107]. The initiative for introduction of the pilot judgment mechanism in the civil procedure was advocated by the Association of Judges and Prosecutors, but, with the exception of short narrative explanations and statements of individual members, no specific proposal for a normative solution or a more detailed description of that concept in the context of the Civil Procedure Law was made available to the public until that proposal found its place in the Draft Law that was presented to the public.[108]

As mentioned above, certain efforts were made during the creation of the Draft Law on Amendments to the Civil Procedure Law in order to solve the problem of an excessive inflow of cases and overburdening of certain courts, especially in Belgrade. *Ratio legis* of the proposed amendments referring to advance payment of court fees at each important step of the proceeding, transfer of the burden of court fees to the plaintiff in case of unjustified division of claims into several lawsuits, as well as amendments to the rules on local jurisdiction, is primarily the raising of obstacles to access the court through changes in the mechanisms for determining and collecting court fees, because that is the only way to interpret the connection between these amendments and the claims of the proponents that they affect the number of cases. Thus, otherwise problematic realization of the citizens' right to access to court is made even more difficult, which, among other things, implies the existence of reasonable procedural conditions

105 Nevena Petrušić, "Legal protection in cases of mass infringements of rights: lessons learned and challenges", Open Doors of Judiciary, 2020

106 There are known cases of such lawsuits for collecting war wages for participants in the 1999 war, against the Republic of Serbia

107 First pilot-judgment of the ECHR in the case of *Broniowski v. Poland* in June 2004 found a systemic obstacle to exercising property rights on land and compensation for the denial of that right for about 80.000 citizens of Poland. To date, the Court has developed a significant and relevant court practice of pilot-judgments. https://www.echr.coe.int/documents/fs_pilot_judgments_eng.pdf

108 https://www.paragraf.rs/dnevne-vesti/260221/260221-vest7.html

for initiating proceedings and reasonable conditions regarding the payment of court fees.[109] The problem of mass litigations is not explicitly mentioned in the explanation of the Draft Law, but it can be seen indirectly in the context of the aforementioned proposals for legal solutions related to the reduction of the quantum of inflow, and its redistribution to less burdened courts. However, even if we accept that there is such implicit objective of the legislator, once again the occurrence of "mass lawsuits" is viewed exclusively from the point of view of the burden on the courts, and not from the aspect of the ways and conditions for exercising judicial protection of subjective rights. This is supported by the situation that according to the proposed new litigation rules for property claims, the plaintiff would be required at the very beginning of the proceedings to pay the court fee for the claim, which in these cases, as a rule, amounts to a maximum of RSD 97,500, which can be a significant financial obstacle for access to court. That way, even though the proposed amendments supposedly "target" mass and unnecessary litigations, they actually "hit" the hardest the property and other high-value litigations, which certainly do not fall into the category of mass or repetitive litigations.

In order to ensure effective access to justice and provide efficient and economical legal protection in cases of mass infringements of rights, and to protect the judicial system from collapsing, it is necessary to immediately start establishing an adequate mechanism for collective protection of rights. It is quite certain, and experience confirms it, that standard litigation is not adapted to protection of rights in cases of mass infringements, since it is created in line with the individual lawsuit model. Therefore, in different parts of the world, various mechanisms for the collective protection of rights have been developed, such as class actions, organizational actions, representative actions, etc. Each of these mechanisms allows for thousands of individual lawsuits to be replaced by one in cases of mass infringements of rights, which can be joined by everyone who wants to receive adequate redress.[110]

The courts of the Republic of Serbia are constantly overburdened with mass litigations. The types of these litigations change periodically, i.e., the substantive and legal relationships between the parties and the alleged infringement of rights are different. Currently, the most numerous are the lawsuits between loan beneficiaries and banks due to loan processing costs. In the past, there were the following mass litigations on the territory of the Republic of Serbia: war-time military reservists against the Republic of Serbia for determining discrimination; beneficiaries of unemployment compensation against the National Employment Service; military pensioners against the SOVO Fund (Social Insurance Fund for Military Personnel); beneficiaries of services against preschool institutions; war-time military reservists against the Republic of Serbia for payment of daily wages, etc. Likewise, on the territory of certain courts, there is a larger number of lawsuits resulting from infringement of the rights by a public company at the local level. In the opinion of Judge Ana Lukić Vidojković, given in the attachment to this report, introduction of a collective protection solution only for infringement of consumer rights would not solve the problem of all mass litigations considering the types of mass litigations that have been presented so far. Therefore, it is necessary to introduce a unique mechanism of collective protection regardless of the infringed right and the substantive legal relations, in order to reduce the number of cases before the courts and achieve an even decision-making. We should have in mind that collective protection as described by the Civil Procedure Law of 2011 and similar to the current class action under the Civil Procedure Law of the Republic of Croatia, mean only determination of the infringement and ordering of its termination, while compensation of damages is not the subject of the collective protection. According to one of the standpoints, a class action would be an efficient mechanism only in the event when infringement of collective rights and interests is not determined, if such decision has the effect of a resolved previous legal issue in individual lawsuits.[111] This is because it is unlikely that a compensation of damages lawsuit would be filed if it was previously determined that the defendant was not responsible for the damage. In a situation where the infringement is determined by a judgment in a class action, the problem of mass litigations would only be partially resolved, since the courts would still be burdened with individual

109 ECHR judgements *Kreuz v. Poland* and *Kievska v. Poland*

110 Nevena Petrušić, "Legal protection in cases of mass infringements of rights: lessons learned and challenges", Open Doors of Judiciary, 2020

111 Attachment by Judge Ana Lukić Vidojković, Forum of Judges

lawsuits for compensation of damages. However, the proceedings for compensation of damages would be shorter and would be limited only to determining of the amount of damage, but the problem of courts burdened with numerous cases would not be resolved. A judgement confirming infringement in a collective dispute would fully prevent the courts from acting differently, so, that way, there would be no uneven court practice or infringements of the right to a fair trial. [112]

According to the above-mentioned opinion, it is necessary to introduce the possibility of a class action for all substantive legal relations, not only to protect the consumer interests, but to clearly and precisely define the collective interest, the right to sue and actual jurisdiction of the courts to act. Also, it is necessary to consider the option of introducing mandatory mediation after passing of the judgment confirming the infringement of the collective interest. Mandatory mediation would allow a person who has been found to have infringed collective interests, to reach an agreement on the amount and dynamics of compensation payments to individuals before initiation of individual lawsuits for compensation, which would prevent the costs of court proceedings.[113]

The very fact that, in practice, there are numerous similar litigations, typically against the same subject, indicates that there is a certain common legal interest or a common denominator of legal interest that connects all plaintiffs. Whether this phenomenon constitutes the collective interest of that group at the same time, or whether there is a need for special legal definition of the collective interest that is the subject of protection, depends largely on the modelling of the conditions of collective protection. Taking into account the opinion expressed above about the need for a universal solution for collective legal protection, this collective interest is the most conspicuous or there is a possibility of its reliable and precise identification in the field of consumer protection, at the same time it is accompanied by frequent cases of mass litigations arising from legal relations governed by regulations in that field. Thus, these are probably also the reasons why this area is the cradle of the modern development of European collective protection mechanisms. In this context and in further discussion, the matter of consumer protection includes protection of the rights of the beneficiaries of financial services, which, according to the current national legislation, are artificially separated, primarily due to the exclusivity of the jurisdiction of legal regulation of the area and supervision over the work of banks and other financial organizations, which the National Bank insists on. Therefore, we will further consider the legal possibility of modelling *de lege ferenda* of collective legal protection after and starting from elements and experiences in the area of consumer protection, as a substantive legal sector that would be the starting point for the development of this complex legal mechanism in our legal system.

The basic and constitutive characteristic of collective interest is that it is a trans-individual legal interest that exceeds individual interests, and cannot be reduced to their sum.[114] It is precisely this trans-individuality the *differentia specifica* that sets this phenomenon apart from other, individual types of legal interest, which probably conditioned the comparative legislative practice that the collective interest is not defined positively, but negatively, as an interest that does not include the sum of the interests of individuals who are injured by the infringement of rights.[115] Therefore, it is a common interest that forms the community, and not the opposite, because it is not an interest that any community formulates as a common interest through democratic decision-making or other means of articulating a common will. The concept of collective interest defined in this way does not ensure the same meaning in all situations, nor uniformity in the practice of application, moreover, it implies different forms, first of all, considering its origin. Thus, a common interest can be a result of the same legal situation of a large number of persons, which is the result of the same contractual relationship with the other party, for example in the case of mass consumer contracts with the same service provider. Another case of origin are some legally relevant facts and circumstances such as, for example, participation in a war (the above-

112 *ibid.*

113 *ibid*.

114 Marija Karanikić Mirić, "Collective Consumer Protection in Serbian Law", Annals of the Faculty of Law of the University of Zenica, 2014, no. 14, p. 65

115 Branka Babović, "Protection of Collective Rights of Consumers," Annals of the Faculty of Law in Belgrade, 2014, vol. 62, no. 2, p. 215-228

mentioned example from national judicial practice) or the purchase of the same product that has some deficiency (products for mass consumption), or an injury that occurs as a result of the same harmful action of a person (e.g. in the case of environmental mass litigations). In connection with the emergence of a common interest, there is also a differentiation to collective interests with a specific or determinable community of persons, which can therefore be identified, and who are linked by a mutual legal relation or a legal relation to another person, on one hand, and those that are determined as a diffuse collective interest, where it is not always possible to determine who makes the community, given that its occurrence is linked to a certain circumstance.[116]

The collective interest is unfailingly identified especially in the field of consumer protection, given that it is engrained in the occurrences of unfair contractual provisions in typical user contracts with providers of telecommunication services (mobile and cable operators), utility services, electricity distribution, etc.[117] This is a special category of merchants, who are defined by consumer protection regulations as providers of services of general economic interest, i.e. services the quality, conditions of provision or price of which are regulated or controlled by a state authority or other holder of public authority, especially due to a high value of initial investments, limited resources necessary for its provision, sustainable development, social solidarity and the need for uniform regional development, with the aim of satisfying the general social interest.[118] Some characteristic forms of unfair contractual provisions are reflected in prohibited contractual limitations or exclusions of consumer rights due to total or partial unfulfillment, implied extension of the fixed-term contract if the consumer does not make a statement in an unreasonably short period of time, giving the merchant the authority to transfer its contractual obligations to a third party without a consumer's consent, and such infringements apply equally to all consumers with whom the user contracts containing such provisions have been concluded. Therefore, it is the same legal relation between all users and the specific service provider, and such infringement applies to all of them equally.

In addition to the infringement of consumer rights in the form of unfair contractual provisions, a characteristic generator of infringements of the consumers collective interest also occurs in the unfair business practices of merchants. This phenomenon is determined by the same action that is taken towards a larger number of consumers, which constitutes such an action as a practice, and not an isolated case or incident. Unfair business practices include aggressive and misleading practices, i.e. situations when a merchant, by means of harassment, coercion, or undue influence, infringes or threatens to infringe the freedom of choice or the behaviour of the average consumer in relation to a certain product and thus induces or threatens to induce the consumer to make an economic decision that he/she would not have made otherwise. [119] Unlike unfair contractual provisions, unfair business practice is directed towards an indefinite number of consumers and can be related equally to goods or services and depends on the facts and circumstances of the case, so it appears as a source of infringement of a diffused collective interest.

Based on the aforementioned, it could be concluded that consumer protection is an area with the existing conditions for successful definition of collective interest, both on the legislative level and in the practice of collective protection. After all, it is the field where a certain form of collective protection has existed for several years, which is carried out in a special administrative procedure before the ministry responsible for trade. This has additionally determined the occurrence of this phenomenon in practice, primarily through the prism of the proceedings against merchants who have the characteristics of providers of services of general economic interest, such as telecommunication utility companies. However, the future legal solution

116 T. Zoroska Kamilovska, T. Shterjova, *"Procedures for Protection of Collective Rights and Interests with overview of the situation in the Republic Macedonia",* LAW - Theory and Practice, Number 07–09/2014 p. 45

117 Law on Consumer Protection, Rules on protection of consumers in exercising the rights from the contract containing unfair contractual provisions, Articles 40-44

118 Law on Consumer Protection prescribes special rules for providers of services of general economic interest, Articles 82-92; in particular, services in the field of energy, drinking water supply, treatment and drainage of atmospheric and waste waters, transportation of passengers in domestic public transport, electronic communication services, postal services, municipal waste management, management of cemeteries and burials, chimney-sweeping services, etc.

119 Law on Consumer Protection, Rules of unfair business practice of merchants, Articles 16-25

of class action in national law should certainly not stop at this sectoral form. It is necessary to develop an appropriate universal solution for all substantive legal areas in which there are mass litigations or mass infringements of subjective rights in the same situations, where those experiences and practice that would be developed on the basis of a class action in consumer law, would serve as valuable landmarks on the road to defining an adequate legal solution.

In addition to trans-individuality, another important feature of collective interest, especially in the field of consumer protection, is that the interests of individual subjects are so small that they do not represent a sufficient incentive for the subject to initiate proceedings for protection of that right, or such protection cannot be adequately provided if you are protecting individual interest of only one subject. These are situations with a small probability that a consumer would even seek protection in court proceedings, where the legal effect of the judgment is limited exclusively to the parties in that proceeding. Thus, the deterring effect of classic mechanisms of individual protection is not strong enough in a mass consumer context.[120] Namely, the value of an individual consumer dispute based on such an infringement can be extremely low compared to the costs of the proceeding, especially the costs of legal aid. Civil Procedure Law provides special rules of procedure for consumer disputes, based on the procedural rules of small value disputes, and the Law on Consumer Protection envisions that a consumer shall not pay court fees for lawsuits and judgments. Thus, from the point of view of the consumers, the economic threshold for access to justice in individual consumer matters is usually very high. In connection to this, the unequal economic position of the consumer and the merchant should also be brought up, where the merchant is a much stronger economic entity with appropriate professional and financial resources and the data, all of which is almost inaccessible to the individual consumers. The incentive to start a proceeding for judicial protection occurs through education of a group with the same "problem", which is then solved through a joint effort, often with mediation provided by a consumers' organization, and not through an individual "adventure". This way, conditions are created for effective access to justice in cases that, without a class action, would remain completely outside of real judicial protection.

The issue of the right to sue is one of the central problems of the class action. As stated above, in comparative European and regional law, there are different solutions to the problem of the right to sue in a class action, with the common feature being that a certain type of representativeness is required in relation to the collective interest being protected. In the context of consumer protection, this implies a special authorization for consumers' organizations, prescribed by law, which simultaneously requires the appropriate form of their official records that would allow verification of their status. According to the described comparative models, the right to sue in collective legal protection proceedings is predominantly based on the principle of representativeness, i.e., legal interest based on substantive regulation (as is the case with consumers' organizations or organizations for protection of the rights of certain categories of citizens). Another form of the right to sue arises from a justified interest in collective protection of a certain group of persons, most often with the so-called diffuse collective interest.

Inadequate legal regulation of the right to sue is one of the shortcomings indicated by the decision of the Constitutional Court on the unconstitutionality of the provisions on class action in the Civil Procedure Law of 2013. The provided reasons do not call into question constitutionality of the concept of representativeness in class action, but a specific legal solution regarding such authorization for consumer associations. In addition, the same decision calls into question the way the collective interest was defined in the legal solution at the time, especially in terms of vagueness and imprecision, which makes it impossible for citizens to know their rights and obligations from the content of the norms. These reasons, in the light of other mentioned issues relevant for adequate legal regulation of class action in the current constitutional context, represent milestones for the current and upcoming efforts to find a new, adequate, and functional legal solution for class action in the national legal system.

In respect of the legal effect of the decision made in the proceeding of collective protection, it could be observed that the above discussed existing

120 Marija Karanikić Mirić, "Collective Consumer Protection in Serbian Law", Annals of the Faculty of Law of the University of Zenica, 2014, no. 14, p. 60

collective protection of consumers in administrative proceeding, still offers key elements for determining the features of the legal effect of a judgment in a collective protection (of consumer rights) dispute and the future modelling of a class action, despite having inherent limitations in relation to the effect of the court decision[121]:

- that the defendant ceases the infringement of legal provisions that threatens the collective interest (of consumers), as well as to refrain from future infringements;
- that they have the obligation to eliminate the established irregularity;
- that they immediately suspend the contracting of unfair contractual provisions (if it is an infringement that has been established in the proceeding);
- and to appropriately announce to the public that an infringement has been established (in the aforementioned example of a special administrative proceeding, the decision is published on the website of the Ministry).

In addition, it is necessary to consider the problem of expansion of the subjective effect of the court decision. In particular, this implies the possibility that court decisions, made in a class action, can be referred to in individual lawsuits, when relevant. Such characteristic situation occurs if the existence of an infringement is determined in a collective dispute, and in a subsequent individual claim the compensation of damages is requested on that basis, provided that the plaintiff in the individual lawsuit belongs to a group or category of persons that is covered by the effect of the decision made in the collective dispute. An example of such a legal effect would be a judgment in a collective dispute which determines that the merchant is responsible for unfair contractual provisions in the contracts with the beneficiaries, the same judgment establishes the nullity of specific provisions, prohibits their future contracting, and such judgment is publicly announced. However, since this decision does not provide compensation for damages to the injured beneficiaries of that contract, it is necessary for them to exercise that right in individual proceedings, based on this judgment which has already established the responsibility of the merchant, so it is only necessary to determine the amount of compensation of damages. On the contrary, if the class action in the above example was rejected, the merchant could refer to that decision in other current or future individual lawsuits regarding the same legal matter, as *res iudicata* in relation to the claim of the existence of concrete infringement. This way, the subjective effect of a judgment rendered in a collective dispute is extended, where such effect needs to be explicitly and precisely regulated by a corresponding legal solution.

Finally, as part of consideration of the elements of the class action model, it is necessary to emphasize the importance of certain procedural issues, such as the subject matter and territorial jurisdiction of the court and preliminary examination of the lawsuit. In terms of subject matter jurisdiction, comparative models do not indicate the need for special regulation of subject matter jurisdiction of the court for class action, but they imply application of general rules. In terms of territorial jurisdiction, there is also a possibility for application of general rules, but in those cases, it is also possible to apply the rules on the delegation of territorial jurisdiction. This occurs when judicial authorities intend to establish some type of "specialization" of certain competent courts. In addition, preliminary examination of the lawsuit would be an important procedural moment, especially considering the examination of the right to sue of the representative of the collective interest (in the case of a representative class action). The legal solution should certainly precisely regulate the issue of the right to sue, but the fulfillment of those conditions will require consideration and will be an important issue in each individual case of a class action.

121 M. Karanikić also criticizes the existing solution for collective protection in the Law on Consumer Protection and states that only litigation proceeding could be used to determine that a contractual provision does not have an effect in the sense of legal obligation, that is, it does not obligate consumers ("Collective Consumer Protection in Serbian Law", Annals of the Faculty of Law of the University of Zenica, 2014, no.14, p. 70)

CONCLUSION

Mass litigations are a specific phenomenon which requires special approach that implies a step outside of a traditional litigation procedure model. The direction should be the examination of legal opportunities for introduction of collective judicial protection in national legal system. Negative consequences of a large number of identical, repetitive litigations, include:

- substantial burden on certain courts that can be disproportionate and sometimes such that almost completely disables regular functioning of the court, considering the available personnel and technical conditions;
- problem of absence of legal predictability, due to possibility of uneven judicial practices in these identical cases;
- making access to justice more difficult for the citizens, due to overburdening of courts, and to deterrent effect of independent appearance in otherwise complex and potentially long lasting and expensive proceedings.

Class action is not the only possible answer to the problem of mass litigations, nor can it entirely solve it. Besides the existing possibilities for grouping claims through co-litigation on the plaintiff's side, there is a suggestion to introduce the system of "pilot judgments", as well as the existing practice of delegating cases to other, less burdened courts, or change of rules on territorial jurisdiction of courts for purpose of more even distribution of these cases. In that respect, there are no obstacles for simultaneous application of all these solutions, in addition to introduction of possible models of collective protection.

In order to solve the abovementioned problems of effective access to justice, to ensure efficient and economical legal protection in cases of mass infringements of rights, and to prevent fatal overburdening of individual courts, it is necessary to start defining a new legal solution for mass litigations. Previous legal solution from the Civil Procedure Law, although nullified by the Constitutional Court's decision, represents a significant experience in terms of identifying obstacles and problems in creation of a new model of class action. In addition, comparative models from the countries which have civil law system and belong to this region, as well as relevant European Union regulations, provide reliable basis for defining an adequate model in the context of national legal system.

The field of consumer protection, including the protection of beneficiaries of financial services, is the priority for application, and maybe even piloting of the future model of class actions. This is exactly the field where sectoral collective protection is currently introduced as the only or as the first form of class action in certain countries of the European Union and the region. In addition, the specificities of the field of consumer protection related primarily to possibility of precise definition of collective interest and the right to sue for representatives of that interest through authorized consumers' organizations, offer a ground for development and testing of the future model of national class actions.

Initiative for introduction of class actions into national legal system, which is presented and explained in this report, comes at the time of ongoing activities related to preparation of the amendments to the Civil Procedure Law and it gives its own contribution to modelling of adequate legal solution.

RECOMMENDATIONS FOR INTRODUCTION OF CLASS ACTIONS

In order to create conditions for solving the problem of mass litigations and a better access to justice for citizens in typical, identical or similar repetitive cases, and/or for purposes of judicial protection of collective interests of citizens, including the infringements of citizens' rights that are relatively small in value and thus discourage them from initiating individual lawsuits, but collectively present a significant unlawful behavior, it is necessary to start creating a new legal solution for class actions.

When defining a class action model that would find its appropriate place in the national legal system, and especially in the context of procedural legislation, it is necessary to take into account the following essential elements:

It is necessary to define an adequate way to identify threats to collective interest, i.e., common legal interest, based on which a group of subjects can be formed to seek collective legal protection;

The right to sue implies selection of an authorized representative for submission of class action, based on previously established legal criteria that include regulating the manner and conditions for representing a collective interest the protection of which is the subject of the claim;

Special procedural regulations should include, among other things, previous examination of fulfilment of conditions for initiation of a class action, adequate solution for the issue of court jurisdiction, legal means, and other specific rules of class action;

It is necessary for the legal effect of a judgment made in a class action to include an obligation to discontinue the infringement determined in the proceeding that infringes collective interest, to eliminate the established irregularity, as well as to abstain from repeating the same infringement in the future; in addition, the judgment rendered by the court in the class action should have an effect on all persons included in the common legal interest group in the specific case related to the specific infringement established or rejection of the said lawsuit;

Judgment adopted in a class action must be fully made available to the public through publication on the court website or in some other way, so that all interested persons can be informed about it and refer to it in the current or future individual lawsuits;

In the process of creation of a new class action model, it is necessary to provide appropriate answers to the remarks included in the Constitutional Court's decision, which established unconstitutionality of the previous legal solution for the collective lawsuit in the Civil Procedure Law.

It is necessary to investigate a possibility to first start creating a sectoral mechanism for collective legal protection, specifically in the field of consumer protection, through description of a special proceeding for protection of collective rights and interests of consumers, as part of the upcoming amendments to the Civil Procedure Law. The next step, based on experiences from practical application of this mechanism, could be creation of a universal solution that would satisfy the needs for collective protection in other areas, including the field of environmental protection, exercising of rights in the area of social protection and pension insurance, and other legal matters.

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