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## WHO IS AN ONLINE TRADER FROM THE CONSUMER LAW PERSPECTIVE? FROM SERBIA TO THE EU AND BACK

**Abstract:** *The author seeks to answer the following research question: If a natural person is not a registered entrepreneur but does sell goods or services online regularly and for-profit, does that make that person a trader for the purposes of consumer law? The method applied is legal dogmatic. It is a search for the meaning of one of the key notions in consumer law, the trader. The meaning of this notion in Serbian legal literature has been taken for granted, or it has been controversially interpreted by certain consumer protection organizations, and the relevant case law does not exist, making this analysis even more needed. The author concludes that the definition of a trader from Serbian Consumer Protection Act may be interpreted encompassing a natural person who is not an entrepreneur, who sells goods or services online to consumers, depending on the circumstances of the case. The conclusion is based on the analysis of relevant CJEU case law and the case law of some EU Member States.*

**Key words:** trader, consumer law, Kamenova, platform economy, online sale of goods.

### 1. INTRODUCTION

When I was preparing one of my lectures on Consumer law, I stumbled across a webpage edited by certain Serbian consumer organizations. On this web page, there was a warning saying that an online seller must be registered with the Serbian Business Registers Agency and that buyers lose consumer law protection when they buy goods from an unregistered seller.<sup>1</sup> This warning implies that the online seller

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1 Potrošač.info, 2020, *Crna lista internet trgovaca* [Blacklist of internet merchants], (<https://potrosac.info/novosti/1542-crna-lista-internet-trgovaca>, 01. 02. 2023).

is a trader within the meaning of the Consumer Protection Act only insofar as they are registered.

On the other hand, the definition of the trader from the Consumer Protection Act (CPA) may give way to a different interpretation of the notion of trader. The relevant norm of the CPA reads as follows: A trader is a legal person, entrepreneur, or a natural person acting in the market within their professional activity or other commercial purposes, including those persons acting on behalf of the trader.<sup>2</sup> So the CPA distinguishes between an entrepreneur who is a natural person registered to conduct a business activity to gain profit,<sup>3</sup> and other natural persons acting in the market within their professional or other commercial activity.

The starting assumption is that the distinction was not made by mistake. The fact that in the previous version of the CPA, the definition of trader did not include this distinction between entrepreneurs and other natural persons operating in the market<sup>4</sup> reinforces that assumption. It did not mention entrepreneurs, only natural persons. Thus, the question is raised whether the purpose of the changes in the definition was to provide consumer protection to consumers buying goods and services from unregistered natural persons selling goods and services as their commercial activity. It would make sense to do just that in an online environment, where anyone can register on an online platform such as eBay, or Amazon, or local platforms in Serbia, such as Kupindo or Limundo, not to mention social media, and sell goods regularly regardless of their legal status.

So, the research question essentially is: if a natural person is not a registered entrepreneur but does sell goods or services online regularly and for-profit, does that make the person a trader for the purposes of consumer law?

Serbian consumer organizations say no, but the CPA at least allows for an affirmative answer. This paper will look at in Serbian case law and relevant literature. Later, the search for the answer to this research question led abroad. Naturally, the first stop was the EU Consumer Rights Directive (CRD),<sup>5</sup> then the case law of the Court of Justice of the European Union (CJEU), which also led to other sources. The findings will be dis-

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2 Zakon o zaštiti potrošača [Consumer Protection Act], *Official Gazette of the RS*, No. 88/21, Art. 5, para. 1, item 2.

3 Zakon o privrednim društvima [Companies Act], *Official Gazette of the RS*, Nos. 36/11, 99/11, 83/14 – state law, 5/15, 44/18, 95/18, 91/19 and 109/21, Art. 83, para. 1.

4 Zakon o zaštiti potrošača [Consumer Protection Act], *Official Gazette of the RS*, Nos. 62/14, 6/16 (state law), 44/18 (state law), Art. 5, para. 2, item 1.

5 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council

cussed in the following parts of this paper, and the conclusions will be given at the end.

## 2. SERBIAN CASE LAW

I tried to find any case law which could provide insight into how the courts in Serbia interpret the notion of trader in consumer law cases. I used the electronic case law database of *Službeni glasnik (Official Gazette)*. In the search queries under “regulations”, I entered Consumer Protection Act. Under “words and phrases in the title” I first tried “trader” and then “seller.” That search resulted in three cases unrelated to the topic of this paper. Then I tried the same in the field “words and phrases in the text” but still, there were no hits. Then in the same field, I typed “natural person that acts in the market” which yielded one result, but unrelated to the topic. Therefore, my, admittedly limited, research of relevant case law showed that no cases dealt with the meaning of the notion of trader in consumer transactions.

I also investigated the decisions of the Ministry of Trade of the Republic of Serbia, adopted in the course of proceedings for the protection of the collective interests of consumers. All the adopted decisions were against legal persons,<sup>6</sup> so the topic of this paper did not come up in this kind of procedure either. Therefore, based on these findings it can be concluded with a high level of certainty that there are no decisions by competent authorities that would offer a definitive answer to the research question that is the topic of this paper.

## 3. SERBIAN LEGAL LITERATURE

I have limited my literature review to textbooks and monographs on consumer law as these are the types of publications that would have to address the definitions of basic concepts of consumer law, such as the concepts of consumer and trader. No articles specifically dealing with the notion of trader were found.

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Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Directive 2011/83/EU).

6 See Serbian Ministry of Domestic and Foreign Trade, Consumer Protection (<https://must.gov.rs/tekst/376/zastita-potrosaca.php>, 02. 02. 2023), and Serbian Ministry of Trade Tourism and Telecommunications, Decisions on violations of collective interests of consumers (<https://arhiva.mtt.gov.rs/informacije/zastita-potrosaca/resenje-o-povredi-kolektivnog-interesa-potrosaca/>, 02. 02. 2023).

When it comes to textbooks and monographs, authors are either explicit that the natural person must be registered as an entrepreneur to have the status of a trader within the meaning of consumer law,<sup>7</sup> restate the definition in more words underlining that the trader is a professional party without further interpretation whether this may encompass unregistered natural persons performing commercial activity,<sup>8</sup> or they do not deal with the definition of the trader at all and focus on the notion of the consumer.<sup>9</sup> The latter seems to take the notion of trader to be clear and undisputed. Therefore, the literature review did not offer any clue to how the definition of the trader is to be interpreted in the context of the research question.

#### 4. THE SEARCH ABROAD

Since Serbia bound itself to harmonize its laws with the EU *acquis*,<sup>10</sup> meaning legislative acts and CJEU case law, Serbian consumer law is shaped by this harmonization process. It therefore made sense to look for the definitions of trader in consumer directives and interpretations of those definitions in the CJEU case law. Given that the CRD offers definitions of the consumer and the trader for contracts concluded between these two classes of subjects, including contracts concluded in an online environment, the definition of the trader in this document was the obvious starting point.

CRD defines the trader as “any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes

7 Jovanović Zattila, M., 2013, *Pravo potrošača*, Niš, Centar za publikacije Pravnog fakulteta Univerziteta u Nišu, p. 29.

8 Mićović, M., Mićović, A., 2022, *Potrošačko pravo*, Kragujevac, Pravni fakultet Univerziteta u Kragujevcu, p. 30.

9 Perinčić, D., 2014, *Ostvarivanje prava potrošača*, Beograd, Zadužbina Andrejević, pp. 13–24; Perinčić, D., 2019, *Provizorijum pravne zaštite potrošača*, Beograd, Zadužbina Andrejević, pp. 14–24.

10 Sporazum o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica, s jedne strane, i Republike Srbije, s druge strane [Stabilization and Association Agreement between the European Communities and their Member States, on one hand, and the Republic of Serbia on the other], Art. 78, para. 2, item b, in: Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica, s jedne strane, i Republike Srbije, s druge strane [Act on the Ratification of the Stabilization and Association Agreement between the European Communities and Their Member States, and the Republic of Serbia], *Official Gazette of the RS – International Treaties*, No. 83/08.

relating to his trade, business, craft or profession”.<sup>11</sup> Therefore, it does not distinguish between entrepreneurs and other natural persons, unlike its Serbian counterpart. However, it too allows for the same interpretative dilemma. A natural person acting for purposes relating to their trade, craft, or profession does not necessarily mean entrepreneur or any registered form. The same definition is found in the Croatian language version of the CRD,<sup>12</sup> and in a bit linguistically simplified and more elegant way has been transposed into the Croatian CPA.<sup>13</sup> It is believed that this definition encompasses so-called free professions (artists, independent scientists, doctors, attorneys, etc.).<sup>14</sup>

Such a view could explain the distinction in the Serbian definition made between entrepreneurs and other natural persons acting for the purposes of their craft, trade, or profession. Perhaps the intention was to ensure that both entrepreneurs and natural persons acting within a free profession are encompassed by the notion of trader. Although the Serbian Companies Act (CA) extends the status of an entrepreneur to natural persons registered in a special register and acting within a specially regulated free profession, it does so for the purposes of the CA only.<sup>15</sup> Perhaps the Serbian legislator felt the need to make the same extension to apply the CPA. Either way, the dilemma remains.

Furthermore, the CRD definition of trader does not offer any more guidance as to the scope of the meaning of the term trader, than the Serbian CPA. This would not be the first time someone asked about the criteria for determining whether a person is acting for purposes related to their trade, craft, or profession.<sup>16</sup> The same question arose in CJEU case C-105/17 (*Komisia za zashtita na potrebitelite v. Evelina Kamenova*).<sup>17</sup>

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11 Directive 2011/83/EU, Art. 2, para. 1, item 2.

12 <https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32011L0083&from=EN>, 07. 02. 2023.

13 Zakon o zaštiti potrošača [Consumer Protection Act], *Narodne novine*, No. 19/22, Art. 4, para. 1, item 34, (<https://www.zakon.hr/z/193/Zakon-o-za%C5%A1titi-potro%C5%A1a%C4%8Da>), 07. 02. 2023).

14 Bilić, A., 2022, Trgovac, poduzetnik i trgovački ugovori, *Zbornik PFZ*, Vol. 72, No. 1–2, p. 650.

15 Companies Act, Art. 83, para. 2.

16 Twigg-Flesner, C., Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law, in: Franceschi, A. de, 2017, *European Contract Law and the Digital Single Market*, SSRN, ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3039952](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3039952)), 14. 03. 2023), p. 7.

17 CJEU case C-105/17, *Komisia za zashtita na potrebitelite v. Evelina Kamenova*, Judgment of the Court (Fifth Chamber) of 4 October 2018, ECLI:EU:C:2018:808. In this case the object of interpretation was the definition of trader in Art. 2, para. 1, item b of the Unfair Commercial Practices Directive 2005/29/EC, which is essentially the same as the definition of the trader from the CRD. Both Directives define a trader

The case is about Evelina Kamenova, a Bulgarian national, who registered the profile “eveto-ZZ” on the website www.olx.bg, and published a total of eight advertisements for the sale of various products.<sup>18</sup> One of those products was a watch bought by a consumer, who upon delivery determined that the watch did not correspond to the description in the advertisement and thus sought to return the watch and recover the money.<sup>19</sup> Ms. Kamenova refused to take the watch back and return the money. The consumer lodged a complaint with the Bulgarian Commission for the Protection of Consumers (CPC), which fined Ms. Kamenova for breaching several articles of the Bulgarian CPA, among them the duty to inform the consumer of their right to withdraw from a distance contract, etc.<sup>20</sup> Ms. Kamenova brought an action against the decision of the CPC before the District Court in Varna which annulled that decision on the grounds that Ms. Kamenova was not a trader within the meaning of the CPA.<sup>21</sup> The CPC appealed against that decision before the Administrative Court in Varna which stayed the proceeding and referred the matter to the CJEU for a preliminary ruling.<sup>22</sup> The Administrative Court in Varna essentially asked the CJEU “whether a natural person who simultaneously publishes on a website a number of advertisements offering new and second-hand goods for sale may be classified as a ‘trader,’ within the meaning” of the Unfair Commercial Practices Directive (UCPD), and of the CRD.<sup>23</sup>

The CJEU ruled that it was up to the national courts to assess, considering the circumstances of each case, whether a person such as Ms. Kamenova is to be considered a trader within the meaning of the UCPD, and the CRD.<sup>24</sup> However, the CJEU made a non-exhaustive list of criteria to aid the courts in this task. It said that

*the referring court will, in particular, have to verify whether the sale on the online platform was carried out in an organised manner, whether that sale was intended to generate profit, whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer, whether the seller had a legal status which enabled her to engage in commercial*

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as any natural or legal person acting for purposes of their business, trade, craft or profession, and as the CJEU underlines in paragraph 31 of the Judgment, the notion of trader is to be interpreted uniformly throughout consumer law.

18 *Ibid.*, para. 14.

19 *Ibid.*, para. 13.

20 *Ibid.*, para. 16.

21 *Ibid.*, para. 17.

22 *Ibid.*, para. 18.

23 *Ibid.*, para. 24.

24 *Ibid.*, operative part of the Judgment.

activities and to what extent the online sale was connected to the seller's commercial or professional activity, whether the seller was subject to VAT, whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity, whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated on a small number of goods.<sup>25</sup>

The CJEU underlined that this list is not exhaustive and not exclusive, meaning that the presence of one or more criteria does not necessarily make a seller a trader within the meaning of the UCPD and the CRD, and that the fact that the sale was for profit, or that the seller published several ads simultaneously does not qualify them as a trader within the meaning of these Directives.<sup>26</sup>

The Administrative Court in Varna then found that the CPC classified Ms. Kamenova as a trader solely on the basis of the fact that she published eight advertisements for the sale of goods.<sup>27</sup> Following the previously stated CJEU opinion expressed in the preliminary ruling, the Court upheld the decision of the District Court in Varna and concluded that the CPC could not classify Ms. Kamenova as a trader within the meaning of the CPA based solely on the fact that she had published eight ads for the sale of goods on the web platform.<sup>28</sup>

The obvious consequence of the CJEU's decision in *Kamenova* is that the mere fact that a natural person is selling goods online for profit does not automatically make that person a trader in the sense of consumer law. However, it is also obvious that the lack of legal status or formality, such as registration, does not necessarily absolve such a person from the duties of the trader under consumer law, because legal status is just a possible but not a necessary condition to be regarded as a trader within the meaning of consumer law.

It is claimed that such reasoning was not unusual in national case laws even before *Kamenova*.<sup>29</sup> As an illustration of this claim stands

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25 *Ibid.*, para. 38.

26 *Ibid.*, paras. 39 and 40.

27 Decision of the Administrative Court in Varna of 22 November 2018, para. 17, (<https://legalacts.justice.bg/Search/GetActContentByActId?actId=MGRjLbqemPY-%3D>, 28. 02. 2023).

28 *Ibid.*

29 Jablonowska, A., 2018, *Becoming a "trader" in the platform economy: CJEU rules in Kamenova*, (<http://recent-ecl.blogspot.com/2018/10/becoming-trader-in-platform-economy.html>, 02. 02. 2023).

a case from German case law. In its decision of 4 December 2008, the German Federal Supreme Court (BGH) upheld the decision of the Appellate Court that had found that a natural person selling goods online on eBay was acting for commercial purposes and thus was considered a trader.<sup>30</sup> The Appellate Court determined that the defendant offered 51 items for sale from mid-January to mid-February 2004, and then again 40 items in the period from 24 June to 1 July 2004.<sup>31</sup> The BGH further established that the defendant concentrated their offers on a few specific types of goods (jewelry, handbags, sunglasses, and shoes) and that they received reviews in connection to 74 transactions where in 66 cases the defendant was the seller, all this in a little less than a year.<sup>32</sup> Based on the high number of offers within a limited period of time, their frequency, their focus on the specific types of goods, and the number of feedback from buyers, the BGH concluded that this was a commercial activity<sup>33</sup> and that the defendant consequently was an entrepreneur within the meaning of paragraph 14 (1) of the German Civil Code.<sup>34</sup> Under this norm the term entrepreneur encompasses a natural person who, when concluding a legal transaction, acts for commercial or self-standing professional purposes.<sup>35</sup>

Based on these sources, it seems that the case law of the EU Member States and CJEU makes a good argument against the black-and-white approach taken by the consumer protection organizations mentioned at the beginning of this paper. It suggests that the research question should be answered with a maybe and that the definitive answer depends on the circumstances of the particular case. It is submitted that such an approach does give more substance to the meaning of the notion of the trader but, admittedly, does not remove legal uncertainty around it, which, according to the same author, should be the task of the legislator, not the judiciary.<sup>36</sup>

The EU legislator did intervene. The EU relatively recently adopted rules that require operators of online marketplaces, such as those mentioned above, to inform consumers whether a seller on their platform is a

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30 BGH, Urteil des I. Zivilsenats vom 4.12.2008, I ZR 3/06, para. 33, (<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=48382&pos=0&anz=1>, 02. 02. 2023).

31 *Ibid.*, paras. 24–25.

32 *Ibid.*, para. 25.

33 *Ibid.* paras. 24–25.

34 *Ibid.*, para. 33.

35 *Ibid.*

36 Jabłowska, A., 2018.

professional party.<sup>37</sup> This information is based on the declaration made by the seller to the provider of the online marketplace.<sup>38</sup> Directive 2019/2161 prescribes that a new Article 6a is to be added to the CRD.<sup>39</sup> Article 6a para. 1 item b prescribes this duty of the online marketplace provider.<sup>40</sup> This obligation is elaborated in the preamble of the Directive. Namely, recital 28 states that the provider of an online marketplace must acquire a declaration from the seller regarding their status, but is not required to verify the veracity of that declaration.<sup>41</sup> Furthermore, recital 27 the Directive requires the operator of the platform, where the seller has declared themselves as a non-trader, to issue a short statement that the consumer protection rules are not applicable to the contract at hand.<sup>42</sup>

This solution may be viewed as a way out of the case-by-case assessments of the seller's status, therefore increasing legal certainty. On the other hand, critics claim that it opens the door to abuse since nothing stops traders from declaring themselves as non-traders.<sup>43</sup> However, one behavioral study showed that the information that a seller is a trader and that consequently consumer law applies to the transaction increased the chances of such a seller being chosen by consumers.<sup>44</sup> This could motivate the sellers to be candid about their status. However, there are numerous examples of traders abusing online platforms to hide their identity.<sup>45</sup> One possible solution to false representation of the seller's status may be found in the very Directive 2019/2161. This Directive amended the UCPD by inserting Article 11a, which requires Member States to provide personal

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37 Đurović, M., 2020, *Adaptation of Consumer Law to Digital Age: EU Directive 2019/2161 on Modernisation and Better Enforcement of Consumer Law*, *Anali Pravnog fakulteta u Beogradu*, Vol. 68, No. 2, p. 67.

38 *Ibid.*

39 Art. 4(5), Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

40 *Ibid.*

41 *Ibid.*, recital 28.

42 *Ibid.*, recital 27.

43 Prastitou Merdi, T., *The 2018 New Deal on Better Enforcement and Modernisation of EU Consumer Law: An Actually Good Digital Deal?*, in: Synodinou, E-T., Jougleux, P., Markou, C., Prastitou, T. (eds.), 2020, *EU Internet Law in the Digital Era. Regulation and Enforcement*, Cham, Springer, p. 360.

44 Riefa, C., *Consumer Protection on Social Media Platforms: Tackling the Challenges of Social Commerce*, in: Synodinou, E-T., Jougleux, P., Markou, C., Prastitou, T. (eds.), 2020, *EU Internet Law in the Digital Era. Regulation and Enforcement*, Cham, Springer, p. 325.

45 Prastitou Merdi, T., 2020, p. 360, fn. 63.

redress to consumers when they fall victim to unfair commercial practices.<sup>46</sup> Personal redress is understood as at least the right to terminate the contract and as a non-contractual remedy – a right to seek damages.<sup>47</sup> As the seller who would falsely declare themselves as a non-trader would probably be in breach of Article 6(1)(g) UCPD,<sup>48</sup> the consumer would have the right to terminate the contract with such a seller. This would mean that the court would have to establish whether the seller was a trader or a non-trader before deciding if the termination is well founded. This means going back to the *Kamenova* criteria and case-by-case assessments, at least where sellers falsely declare their status in online marketplaces.

## 5. BACK TO SERBIA

Serbian consumer organizations claiming that one must be a registered entrepreneur in order to be a trader within the meaning of consumer law relied on the Law on Electronic Commerce (LEC).<sup>49</sup> They referred to Article 6(1) of the LEC, which prescribes the duty of the seller to provide information on their name and surname, or business name, seat, contact details, and data on registration with the Business Register, or other public records, etc.<sup>50</sup> From this, they deduce that if a seller provides all the data from Article 6(1) LEC and if they is correct, it is safe to buy from such a seller “meaning that in such a situation the provisions of the Consumer Protection Act apply.”<sup>51</sup> This deduction is not valid because the CPA is applicable to transactions between traders and consumers.<sup>52</sup> As was already seen from the definition of the trader in the CPA, the status of the trader does not depend on the fact that a seller did or did not provide information

46 See Directive (EU) 2019/2161 Article 3 para. 5; and UCPD Article 11a, in the consolidated version.

47 *Ibid.* It is notable that such redress in Serbia is already possible under general contract law, by virtue of Art. 65 of the Law of Contracts and Torts (Zakon o obligacionim odnosima, *Official Gazette of the SFRY*, Nos. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia, and 57/89, *Official Gazette of the FRY*, No. 31/93, *Official Gazette of SCG*, No. 1/03 – Constitutional Charter, and *Official Gazette of the RS*, No. 18/20).

48 Twigg-Flesner, C., 2018, Bad Hand? The ‘New Deal’ for EU Consumers, p. 12, SSRN, ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3178952](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3178952), 13. 03. 2023).

49 Zakon o elektronskoj trgovini [Law on Electronic Commerce – LEC], *Official Gazette of the RS*, Nos. 41/09, 95/13 and 52/19.

50 Art. 6 (1), LEC.

51 Potrošač.info, 2020, *Crna lista internet trgovaca* [Blacklist of internet merchants], (<https://potrosac.info/novosti/1542-crna-lista-internet-trgovaca>, 01. 02. 2023), translated by author.

52 Art. 4(1), CPA.

to the consumer, but on the fact that the seller enters a contract with the consumer within their professional or other commercial activity.

Nevertheless, there is another provision in the LEC that could support the view that only a natural person registered as an entrepreneur could have the status of a trader in online consumer transactions. Article 3(1)(2) LEC prescribes that the provision of information society services<sup>53</sup> for commercial purposes is reserved for natural or legal persons registered for the performance of such activities.<sup>54</sup> On the other hand, there is a view that strict application of such a rule would mean that the trader could avoid duties that come with the status of trader, such as those meant to protect consumers, simply by not registering with the public registry, and that registration should not be seen as a precondition of acquiring the status of the trader but as a duty of the person acting in the capacity of a trader.<sup>55</sup> The LEC itself facilitates such a view by prescribing that the norms of the LEC shall apply to consumer protection if they are more favorable for consumers.<sup>56</sup> This leads back to the research question. If a definition of the trader in the CPA could be interpreted to encompass unregistered natural persons selling goods and services online as their commercial activity, then Article 3 para. 1 item 2 of the LEC would not be more favorable for consumers, and contrary to the view of certain consumer protection organizations, the CPA would apply to the online sale of goods or services between a consumer and a natural person acting for commercial purposes, regardless of their legal status. It would, of course, be up to the courts to determine in each case whether a natural person acted for commercial purposes or not.

The international research showed that the stance that consumers may rely on consumer law protection only when the online seller, who is a natural person, is registered as an entrepreneur is too rigid. Although the CJEU case law is not a formal source of law in Serbia, it makes sense, given that Serbia is a candidate for EU membership, to interpret the laws adopted within the process of harmonization with the EU *acquis* in line with the CJEU case law. A consequence of the reasoning in *Kamenova* is that the legal status of the seller is only one of many criteria to consider when judging whether a natural person selling online is to be deemed a trader or not. Furthermore, it is not a necessary criterion. Additionally, Serbia has not yet transposed Directive 2019/2161, so the operators of online marketplaces are not required to ask sellers to declare in what capacity

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53 This notion encompasses online trade as explicitly stated in Art. 3(1)(1) LEC.

54 Art. 3(1)(2), LEC.

55 Bilić, A., 2022, p. 651.

56 Art. 4(3), LEC.

they act, and consumers do not receive information on whether consumer law applies to their online transaction or not. But even when Directive 2019/2161 is transposed, as was seen, the Kamenova criteria would not become redundant because, it will still be possible to encounter situations in which the courts will have to assess whether a natural person acted as a trader or not. One such situation would be the case of a false declaration of one's status.

## 6. CONCLUSION

The objective of this paper was to answer the research question regarding whether a natural person not registered as an entrepreneur may be deemed a trader when selling goods or services online to consumers, regularly and for profit. Essentially this research question aimed to interpret the definition of the trader as is provided in the Serbian CPA, and the method used was legal-dogmatic. The result of the research is that the answer to the research question is that a definition of the trader in the CPA should be interpreted so that a natural person who is not an entrepreneur may have the status of a trader within the meaning of the CPA when selling goods or services online depending on the circumstances of a particular case. This answer is based on the analysis of the CJEU case law, and relevant cases in two other EU member states. The CJEU case law yielded several criteria to aid national courts to assess the circumstances of each case. What is clear from this case law, and the case law of some other EU member states, is that the form or legal status, such as the status of an entrepreneur, is not a necessary condition to be deemed a trader in a transaction with a consumer. The same was noted in the case of Germany. If the definition of the trader in the Serbian CPA is to be interpreted in line with the answer to the research question, then the argument of consumer organizations who relied on the LEC, that the CPA is not applicable to transactions between consumers and natural persons who do not have the status of an entrepreneur, is not well founded. This is because the applicability of the CPA is determined by the status of the parties to a transaction. It will be applicable if the transaction is concluded between the trader and a consumer. And if a natural person not having the status of an entrepreneur selling goods or services online to a consumer according to the circumstances of the case may be deemed a trader, then the CPA will be applicable to that transaction regardless of the norms of the LEC, which itself prescribes that its provisions are applicable to consumer transactions – unless there are rules more favorable to the consumer.

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KO JE TRGOVAC U ONLAJN OKRUŽENJU  
IZ PERSPEKTIVE POTROŠAČKOG PRAVA?  
OD SRBIJE DO EU I NATRAG

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APSTRAKT

Autor nastoji da u radu odgovori na sledeće istraživačko pitanje: Ako fizičko lice nije registrovani preduzetnik, ali redovno i u cilju zarade prodaje robu ili usluge posredstvom interneta, da li se to lice, za potrebe potrošačkog prava, može smatrati trgovcem? Metod koji će se primenjivati je pravno dogmatski. U pitanju je potraga za značenjem jednog od ključnih pojmova u potrošačkom pravu – pojma trgovac. U srpskoj pravnoj literaturi je značenje ovog pojma ili uzeto zdravo za gotovo ili su ga kontroverzno tumačile neke organizacije za zaštitu potrošača, a relevantna sudska praksa ne postoji, što ovu analizu čini još potrebnijom. Autor zaključuje da se, u zavisnosti od okolnosti slučaja, definicija trgovca iz srpskog Zakona o zaštiti potrošača može tumačiti tako da obuhvata fizičko lice koje nije preduzetnik, a koje potrošačima prodaje robu ili usluge posredstvom interneta. Zaključak je zasnovan na analizi relevantne sudske prakse Suda pravde EU i sudske prakse nekih država članica EU.

**Ključne reči:** trgovac, potrošačko pravo, Kamenova, platformska ekonomija, *online* prodaja robe.

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