INVOLVEMENT OF THE MANAGEMENT BOARD IN PRIVATE LAW

PRE-BANKRUPTCY RELATIONS

Larisa MASTILOVIĆ
PhD, Bosnia and Herzegovina
E - mail: larisa.mastilovic@hotmail.com

Davor TRLIN
Assistant Professor, International Burch University Sarajevo
Bosnia and Herzegovina
E- mail: davor.trlin@ibu.edu.ba

Abstract

The extraordinary administration procedure is considered a type of bankruptcy procedure. The authors question whether the high degree of authorisation granted to the administrative authority in extraordinary administration procedures is justified. The Agrokor company is an example of how the operations of a private company can maintain the economic stability of the entire state economy and vice versa, how its untimely bankruptcy can cause the collapse of the entire system (social policy). It is precisely the social and economic consequences of eventual bankruptcy that legitimize the high degree of interference of the administrative authority in the procedure of extraordinary administration. The characteristics of private law and public law procedures are presented through the prism of the extraordinary administration procedure. A parallel is drawn between the procedure of extraordinary administration and administrative procedures of confiscation and nationalization.It was concluded that the concession of the extraordinary administration has elements of both bankruptcy proceedings and administrative ones, which makes the powers granted to the administrative authority justified.

Keywords: *confiscation, nationalization, pre-bankruptcy proceedings, extraordinary administration, administrative proceedings, Agrokor, Croatia*

Introduction

In the first part of the scientific work, readers are presented with brief characteristics of administrative procedures (expropriation, nationalization), bankruptcy and pre-bankruptcy procedures, and extraordinary administration procedures. The procedure of extraordinary administration is the central issue of this scientific work, and it has elements of both bankruptcy law (private law) and administrative law (public law). For this reason, it was necessary to conduct research into which similarities and differences exist between the mentioned procedures, with special reference to the comparative aspect, especially to German and Italian law. Given that public law and private law have been legally demarcated for centuries, we tried to find an answer to the obvious conflict in the regulation of procedures. The administrative elements can be seen in Article 11 of the Act on the Procedure of Extraordinary Administration in Companies of Systemic Importance for the Republic of Croatia (in further text: Law on Extraordinary Administration) (PP/No. 32/2017.), which regulates that "The Extraordinary Commissioner shall be appointed by the court at the proposal of the Government of the Republic of Croatia", and in Article 12 (9) that "The Extraordinary Commissioner is obliged, starting from the day of appointment, every month until the settlement is accepted submit a report to the central body of state administration responsible for economic affairs (hereinafter referred to as: the Ministry), the advisory body, the court and the creditors' council on the economic and financial condition of the debtor and on the implementation of the measures provided for in this Act", as well as through paragraph 11 which regulates that "The extraordinary commissioner is obliged to obtain the prior approval of the Ministry regarding the appointment of the adviser" or in article 16 (1) "The head of the Ministry appoints an advisory body within 15 days from the appointment of the extraordinary commissioner" and article 16(4) "One of the members of the advisory body is appointed by the head of the Ministry president who directs the work of the advisory body". All this is something that is typical for public law in legal regulation. At the same time, the said extraordinary administration procedure also has private bankruptcy elements, which we see in article 12.(1) that "The extraordinary trustee has the rights and obligations of the debtor's body" and in paragraph 8 that "The extraordinary trustee cannot make a decision or take any action without the consent of the creditors' council actions with the aim of disposing of the debtor's real estate, shares or shares in subsidiaries and other companies and the transfer of the economic entity, if the value exceeds HRK 3,500,000.00" and in Article 19 (2) "The Creditors' Council participates on behalf of the creditor in drawing up and preparing the settlement and gives consent to the extraordinary commissioner on the final text of the settlement". From all of the above, we see that the relationship between individual fairness (which is regulated by bankruptcy law) and collective (administrative fairness), which is regulated by the public law field, is legally delicate.

In the introductory part, it should be pointed out that although administrative procedures have similarities with the procedure of extraordinary

administration, there are noticeable and obvious differences. First, the administrative procedure of expropriation cannot be initiated by a private legal entity (including the owner), while the procedure of extraordinary administration can be initiated by the debtor (owner). Second, the state of the Republic of Croatia did not acquire the ownership right (share) through the process of extraordinary administration, and the very fact of having the authority to nominate a candidate for extraordinary administrator cannot be brought under nationalization because its management is temporary, and its legal decisions are not limited by the rules on nationalization. Nationalization is an act of confiscation of private ownership of real estate by the state, the company Agrokor, the state did not nationalize anything. Third, unlike the extraordinary administration procedure, the classic bankruptcy procedure does not create negative consequences for third parties. Fourth, the parties to the Agreement are private law entities (debtor and creditors) and not public law entities (administrative body), although the public law entity (the state) is the largest beneficiary of the Agreement (maintaining the business of the largest taxpayer). However, what is common with the expropriation procedure is that the settlement had to be concluded primarily in the public interest, although the public law entity is not a party to that legal relationship, but private law entities (creditors and debtor).

The scientific community raised the question of whether the Law on Extraordinary Administration is discriminatory against companies without systemic significance. The Croatian legislator established high and specific criteria for the existence of systemic significance (in order to initiate the procedure of extraordinary administration, the existence of more than 5,000 employees and a debt of 1 billion euros is required) in order to minimize the number of such procedures, given that the Government and administrative bodies participate in them. In other words, high criteria narrow the room for discretionary decision-making by administrative bodies, which has its advantages and disadvantages, but also similarities and differences in relation to administrative procedures of expropriation and nationalization. The question of qualifying a company as systemically significant is a key issue in the regulation of extraordinary administration procedures because it creates a hierarchy of companies and grouping them into those that were previously ungrouped in the legal sense. The introduction into the legal system of a new category of legal entities (systemically significant companies) and subjecting them to different legal regulation should not be so problematic. The scientific community should question whether the criteria have been correctly assessed, that is, whether the number of employees and the amount of debt should be higher or lower than the existing ones. The intervention of the administrative authority is justified at the point where a possible bankruptcy could cause public law consequences. It should also be noted that the Law on Extraordinary Administration will remain in force even after the Agrokor case and will be applied to other companies of systemic importance. Agrokor is not the only company that met the aforementioned criteria until the passing of the Law on Extraordinary Administration, but it is the only one that faced bankruptcy.

Thus, for the first time, the public system encountered the phenomenon that a private company could cause the collapse of the entire system. As a result, there was a need to pass the Law on Extraordinary Administration in order to avoid negative consequences for the entire state system, regardless of the fact that it is a private company. Not all companies have systemic importance for the economy of a country, so it is not fair that they have the same position. On the other hand, each country has a specific number of unemployed, which would cause the collapse of the economy, which represents a public interest and gives the administrative authority the right to interfere in such a procedure. It is not important at all whether this causes the bankruptcy of one company of systemic importance or several (cumulative effect of companies without systemic importance).

II Previous questions

Doctrine and norm - nationalization and expropriation

In relation to the administrative and legal ways of appropriating private property by the state, a distinction should be made with the administrative contract. An administrative contract is a bilateral act by which the public authority enters into a legal relationship with a third party, with the aim of achieving a special goal of broader public interest, and which has the conditions given by special regulations for its subject matter. It is concluded in the name of a public entity and is subject to the regime of public law. They appeared for the first time at the end of the 19th century and the beginning of the 20th century (Borković, 2002, p. 34). They are the most widespread in French legal theory (the most common are: contracts for the execution of public works, procurement contracts, concession contracts for the performance of a public service and a contract for the occupation of public property (Kamarić, Festić, 2004 p. 176). It was French legal theory which gave the broadest theoretical elaboration of the essential elements of administrative contracts (Aviani, 2013, p. 352) (subjects, goal or purpose and special rules that apply when concluding and executing these contracts). In Bosnia and Herzegovina, they are not regulated as such, but, what is important for this paper, they are in the Croatian Law on Administrative Procedure (German experts (Medvedović, 2009, p. 31) participated in the working group for drafting the Law on General Administrative Procedure of Croatia, and Germany is, after France, the country in which administrative contracts are the most developed). They were introduced in Croatia by the Law on Administrative Procedure, which came into force in 2010, with scant elaboration and the absence of a definition (Crnković, 2014, p. 1036) It is possible that, when determining whether is it an administrative contract, to rely on the conditions prescribed by the Law on Administrative Procedure - subjects, conditions for concluding and the subject of the administrative contract, its nullity, modification and termination and objection to such a contract (Aviani, 2011, p. 479)). Administrative contracts

are not the same as contracts of administration (contracts concluded by the state administration). In legal theory, it is especially emphasized that administrative contracts are legal transactions with certain characteristics, which distinguish them from other contracts concluded by the state administration. According to Ivančević, this distinction is made in the following way: "Every administrative contract is an administration contract, but not every administration contract is also an administrative contract." (Ivančević, 1969, p. 73) .

International documents allow expropriation, if it is permitted by law, for public purposes and if there is adequate compensation for the expropriated property. Expropriation is a system of administrative means for the appropriation of private property by the state. It is about forced and legally regulated confiscation of property from a physical private person. States define public interest in different ways. In the simplest terms, it is property that is intended for the benefit of the state, not an individual or group. The former owner ceases to be its holder with a certain compensation or by giving some other property. It is always regulated by normative solutions that expropriation is followed by adequate compensation for the confiscated property, which is actually the market value of the confiscated property (in the former Yugoslavia, the so-called fair compensation was given, and before 1990, its framework was determined by the constitutions, which in today's civil society, which is based on individualistic constitutional principles, it would not be acceptable) (Jelušić, Šarin, 2015, p. 814) . It takes place, therefore, in three basic phases: 1.) the procedure for determining the general interest, 2.) the procedure for making a decision and 3.) determining compensation (Kamarić, Festić, 2004, p. 230). Expropriation is used to build airports, roads, water supply systems, sewers... It is a sign that economic and general social interests could not be reconciled, so "the public authorities reached for an unpopular but necessary instrument" (Staničić, 2009, p. 144). Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was also accepted by Croatia, stipulates in Article 1 that no one can be deprived of property, except in the public interest and under the conditions stipulated by law and general principles of international law. After the breakup of Yugoslavia, Croatia also took over a large part of the regulations from the former system, along with adapting it to a multi-party, democratic and market system. The Law on Expropriation of the Socialist Republic of Croatia, which was in force until the adoption of the new Law on Expropriation in 1994, was also adopted. The positive Law of Croatia has been in force since July 22, 2017 (PP 69/17, 98/19). Certain special laws also regulate expropriation (Law on Protection and Preservation of Cultural Property, Law on Public Roads...), but only partially. Nationalization is the act of confiscation of private ownership of real estate, land, buildings or, for example, factories by the state. The opposite process of nationalization is privatization. In Croatia, the Law on compensation for property confiscated during the Yugoslav communist rule is in force[1], which

[1] PP 92/96, 39/99, 42/99, 92/99, 43/00, 131/00, 27/01, 34/01, 65/01, 118/01, 80/02, 81/02, 98/19.

regulates the conditions and procedure of compensation for property that was confiscated from the previous owners by the Yugoslav communist authorities, and which was transferred to the general public property, state, social or cooperative property through confiscation, nationalization, agrarian reform and other regulations and methods specified in the Law. According to this Law, compensation for property confiscated from previous owners is, in principle, payment in money or securities (shares or shares and bonds), and, exceptionally, in kind (para. 2. art. 1).

Bankruptcy and pre-bankruptcy proceedings

Historically speaking, the Bankruptcy Law of the Republic of Croatia and the Law on Financial Operations and Pre-Bankruptcy Settlement differ in the bodies that conduct settlement procedures. Croatia decided not to entrust the pre-bankruptcy settlement procedure to the courts but to a financial institution, i.e. a legal entity with public powers (FINA). It is a precedent in the entire Croatian history of procedures related to liquidity since 1840 that FINA, as a part of administrative authority, not judicial, can make decisions that are traditionally made by courts (bankruptcy and pre-bankruptcy). Since 2015, the Bankruptcy Law of the Republic of Croatia has introduced the most important novelties, the articles of Title II (Art. 21-74 of the Civil Code), according to which the provisions on pre-bankruptcy settlement are transferred from the Law on Financial Operations and Pre-Bankruptcy Settlement to the Civil Code as a pre-bankruptcy procedure, according to which FINA would remain the body of the pre-bankruptcy procedure that now only provides technical and administrative assistance to the court (Grbić, Matić, Bodul, 2016, p. 31).

Companies of systemic importance

In 2017, the Agrokor concern ran into financial problems, so bankruptcy threatened all companies that depended on Agrokor. The Government of the Republic of Croatia intervened urgently, and the Law on the Procedure of Extraordinary Administration in Companies of Systemic Importance for the Republic of Croatia (PP 32/2017) , also known as "Lex Agrokor", came into force. Based on this law, on April 10, 2017, an extraordinary administration was introduced in Agrokor[2]. It was legally terminated over 22 affiliated companies of Agrokor only on August 21, 2019, by the Decision of the Commercial Court in Zagreb, although initially its duration was planned for no more than 15 months (12 + 3). Bosnia and Herzegovina and Serbia did not recognize the procedure provided for by the Law, with the explanation that it threatens the individual's right to litigate. Article 1. Paragraph 1 Lex Agrokor states that "this Act is enacted to protect the sustainability of business operations of companies of systemic importance for the Republic of Croatia,

[2] Another country of the former Yugoslavia, Slovenia, takes as a criterion for such situations the realized profit, and not the company's debt, as was the case here.

which, through their operations independently, or together with their dependent or affiliated companies, affect the overall economic, social and financial stability in Republic of Croatia". Article 4 paragraph 2 states that "a joint-stock company of systemic importance for the Republic of Croatia is one that, independently or together with its subsidiaries or affiliated companies, cumulatively meets the following conditions: - that in the calendar year preceding the year in which the proposal for the opening of the extraordinary administration procedure independently or together with its subsidiaries or affiliated companies employs an average of more than 5,000 workers and - that the existing balance sheet liabilities independently or together with its dependent or affiliated companies amount to more than HRK 7,500,000,000.00, i.e. in the case of balance sheet liabilities that are denominated in another currency, if they amount to more than the HRK equivalent of HRK 7,500,000,000.00, counting on the date of submission of the proposal for the opening of the extraordinary administration procedure". One of the proponents before the Constitutional Court of the Republic of Croatia points out that "the Government passed a law that refers to a narrow circle of entrepreneurs, which classified entrepreneurs outside the category of 'systemically important companies' into 'less important commercial entities'. In their opinion, such a procedure by the Government is against basic principles of free market and equality of all before the law... and that "already ... the very selection" of companies into those of systemic importance and those that are not "unconstitutional because it is discriminatory and is carried out ex lege according to arbitrary and voluntaristic criteria"[3]. Lex Agrokor "applies to all companies of systemic importance for the Republic of Croatia, it is no secret that it is a law that was passed as a reaction to the crisis in which Agrokor d.d. found itself and its related companies"[4]. The proposer, Franck d.d. Zagreb, states as one of the objections to the Croatian law on extraordinary administration that "it is not known what the systemic significance is for the Republic of Croatia."[5]. The government explained in the Explanation of PZ/116 that: "The systemic significance... derives from its size in terms of the number of employees, business connections with other business entities in the economy, branching of operations in the entire territory of the Republic of Croatia and/or dominant economic position in part of the territory of the Republic of Croatia..." Uncontrolled collapse" of such a company can cause a "chain reaction" that can potentially "seriously threaten the entire economic system of the Republic of Croatia."[6] In the Government Statement of September 22, 2017, it was pointed

[3] Constitutional Court of the Republic of Croatia, Decision U-I-1759/2018 of 19 July 2018.

[4] Constitutional Court of the Republic of Croatia, Decision U-I-1694/2017 and others of 02 May 2018

[5] Constitutional Court of the Republic of Croatia, Decision U-I-1759/2018 of 19 July 2018.

[6] Constitutional Court of the Republic of Croatia, Decision U-I-1759/2018 of 19 July 2018., 6, 7.

out that "the Agrokor system employs about 56,000 people in the country and abroad, which makes up 4.78 percent of the total number of employees in legal entities in the Republic of Croatia. In the territory of the Republic of Croatia alone, the Agrokor system employs about 28,000 employees or 2.4 percent of the total number of employees in legal entities. The size, territorial distribution and interweaving of the operations of the Agrokor system with the operations of a large number of economic entities in the rest of the Croatian economy showed the strength of the possible spillover of difficulties from systemically important trading companies to the rest of the economy and economic entities. Namely, only Konzum, as only one of the components of the Agrokor system, had more than 2,500 suppliers with around 150,000 employees (which makes up 12 percent of the employees in legal entities, or 10.9 percent of the total employees in the Republic of Croatia)."[7]. Of course, such figures additionally justify the participation of the administrative authority in the procedure of extraordinary administration.

The Government particularly emphasized that the proponent's claim "that the Law currently applies only to the company Agrokor d.d. is correct, but considers that this is not proof that it was adopted with the intention of applying it exclusively to one company. In this sense, it repeated that according to the available data of FINA- and for the year 2015, there are ten trading companies in the Republic of Croatia that, together with their related or dependent companies, meet the criterion of a trading company of systemic importance for the Republic of Croatia".[8] Nevertheless, the proponents before the Constitutional Court believe that "now ... it is indeed already a notorious fact that the Law was passed with the intention of applying it exclusively to Agrokor", because the formal criteria (number of employees and the value of the company's liabilities) were set "so that the company Agrokor, without any in-depth analysis of the proponents of the Law, what constitutes systemic risk."[9] However, it should be emphasized that it has not been proven that the formal criteria are such for the purpose of saving only the Agrokor Group, but it has only been proven that at the time of the adoption of the Lex Agrokor, only Agrokor was the only company at that moment that cumulatively met the qualification criteria of systemic importance, and at the same time, bankruptcy reasons arose in relation to Agrokor. Lex Agrokor will remain in force even after the Agrokor case and will be applied to other companies of systemic importance if they fall into financial difficulties. It should also be emphasized that it is neither fair nor economically based to compare societies of systemic importance with societies without systemic significance and to observe them through the prism of discrimination, because the former produce both public

[7] Constitutional Court of the Republic of Croatia, Decision U-I-1694/2017 and others of 02 May 2018, 122.

[8] Constitutional Court of the Republic of Croatia, Decision U-I-1694/2017 and others of 02 May 2018, 141.

[9] Constitutional Court of the Republic of Croatia, Decision U-I-1694/2017 and others of 02 May 2018, 105.

and private law consequences, while the latter produce only private law consequences so it is also fair that they do not have equal legal status. On the other hand, each country has a specific number of unemployed, which would cause the collapse of the economy, which certainly represents a public interest and gives the administrative authority the right to interfere in such a procedure. Of course, such companies will most often be international concerns and that the largest concern in the country will most likely meet the criteria of systemic importance and that its financial characteristics will be taken into account by the legislator. Nevertheless, the remarks that the legislator gave an unjustified, in the opinion of many authors, privilege only to the Agrokor group, all in order to grant administrative bodies the right to interfere in the procedure, are surprising. The proponents before the Constitutional Court and the scientific community criticize not so much the criteria for qualifying a company as systemically important, but rather the very existence of the extraordinary administration procedure and the right to participate in it.

The issue of qualifying a company as systemically important is a key issue in the regulation of extraordinary administration procedures because it creates a hierarchy and groups companies that were previously ungrouped in the legal sense. In addition, depending on these criteria, the regulation of the degree of participation of administrative bodies in the mentioned procedures also depends, given that the extraordinary administrator, who has the role of bankruptcy administrator, in accordance with Article 11 of Lex Agrokor, is appointed "by the court on the proposal of the Government of the Republic of Croatia" although at the same time, in accordance with Article 12, paragraph 1, the extraordinary administrator "has the rights and obligations of the debtor's body". Agrokor Group is one of 10 companies that are of systemic importance, but it is the only one that, in addition to that, also met the criterion of existence bankruptcy and pre-bankruptcy reasons (certain degree of financial difficulties at that specific moment). This is why Lex Agrokor is not a discriminatory law and was not adopted only with the aim of saving one specific business entity, because the Agrokor group is not the only company of systemic importance. It follows from this that the state apparatus is not obliged to save all other companies, if they are not of systemic importance, only on that basis because at the specific moment only one company of systemic importance was in financial difficulties. Also, the very meaning of the introduction of the criterion "company of systemic importance" implies that companies without systemic importance will be treated differently from companies of systemic importance. In no case does it follow from this that the state apparatus is obliged to save companies without systemic significance just because at the moment only one company of systemic importance (Agrokor group) meets the financial criteria for initiating the extraordinary administration procedure.

Comparative aspect of the qualification of companies as systemically important

The criteria for qualifying a company as systemically significant differ from legal system to legal system. In addition, the criteria themselves change depending on the changing macroeconomic situation. "Article 2 of Decree 270/1999 in the Republic of Italy provides for a necessary number of 200 employees, while the previous Decree 95/1979 provides for a number of 300 employees. Between 2000 and 2008, the number of employees of companies that initiated extraordinary administration was 25,308" (Danovi, 2010, p. 64). Lex Marzano predicts a lower limit of 1,000 employees (within 12 months) and a debt amount of 1 billion euros (Beye, Joanna, 2008, p. 98,99). The strict objectified criteria for defining companies from systemic risk do not allow companies that do not formally meet the criteria, but meet them from an economic and practical point of view, to be subject to the law on extraordinary administration procedures, and vice versa (Čulinović-Herc, Zubović, Braut Filipović, 2018, p. 1459,1464,1465, 1466, 1469). In its Decision of May 2, 2018, on page 4, the Constitutional Court of the Republic of Croatia defined that systemic risk is defined not only through the number of employees, but also through the existence of a dominant economic position and the company's relationship with other companies (Čulinović-Herc, Zubović, Braut Filipović, 2018, p. 1452, 1461). On the other hand, strictly objectified criteria limit the possibility of the state apparatus to qualify a private law company as systemically significant, which reduces the possibility of abuse of law. For this reason, the Croatian legislator established high criteria for initiating the extraordinary administration procedure. Another reason is the desire to minimize the number of such procedures, considering that the Government and administrative bodies indirectly participate in them, because their excessive participation in the private law sphere, where business should be free, is traditionally subject to criticism. This alone prevents the creation of legal uncertainty and prevents discrimination between companies by making discretionary decisions about which company can be considered to be of systemic importance and which one is not. It is important to point out that the application of Lex Agrokor is not conditioned by the type of activity performed by the company. This testifies to the fact that Lex Agrokor was enacted to save the social and economic situation as a whole (public law goals), and not to give preferences to certain types of businesses on the market or specific companies. Art. 21. paragraph 1 Lex Agrokor regulates the set of authorized persons for initiating the extraordinary administration procedure: the debtor, or the creditor of the debtor and/or the debtor's related and dependent companies, with the consent of the debtor. The Italian model has changed significantly over time. At first, the Prodi-bis Law allowed creditors, debtors, the public prosecutor and the court to initiate the procedure, while the Marzano Law allowed only the debtor (Panzani, 2009, p. 301-310) to initiate the procedure, and the procedure had to fit into the two-year period (Čulinović-Herc, Zubović, Braut Filipović, 2018, p. 1459,1464,1465, 1466, 1469). In accordance with Article 2497-bis of

the Italian Civil Code, jurisdiction is determined according to the place of the center of basic interests of the company that exercises control over subsidiaries, and in the absence of such a center, jurisdiction is determined according to the place where the company has the largest debt according to the last financial report (Callegari, 2019 p. 547). Lex Marzano defines the goal of the extraordinary administration procedure as 'ensuring the rescue of companies that have the potential to generate profits in the future and the continuation of business'. In article 1 paragraph 1 of Lex Agrokor it is not mentioned anywhere that the goal is to regulate the relationship between debtor and creditor. Every bankruptcy law must also aim to satisfy the needs of creditors, in addition to possible restructuring and rehabilitation, because this is the essential and primary reason for conducting any insolvency procedure (Garašić, 2017, p. 5-8). Can public and administrative law interests be one of the goals of pre-bankruptcy proceedings?

Jurisprudence of the European Court Jurisprudence of the European Court for human rights

In connection with the powers granted by the administrative bodies and the executive power on the basis of the Lex Agrokor, we raise the question of the legitimacy of their powers towards a private-law company (Agrokor Group) in extraordinary administration procedures and in administrative procedures of nationalization and expropriation. In other words, after interference with the property by the administrative authority, the question of legality arises. The interference must be proportionate, so as not to violate Article 1 of Protocol I to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Interference with property is justified when it meets two criteria. The first must be legal (according to national law) and the second must be legitimate. It is not enough to comply only with the Law, but also with the public interest and the general interest. When it comes to compliance with domestic law, the European Court of Human Rights has set criteria - domestic rules must be accessible and precise[10]. In the James v. United Kingdom case, a distinction was made between public and general interest[11]. The verdict also established that the public interest can be the interest of another individual[12]: "confiscation of property carried out in accordance with the fulfillment of a legitimate social, economic or other policy can be "in the public interest", even if the wider community does not have direct use or enjoyment of the confiscated

[10] ECHR, James v. The United Kingdom, judgment of 21 February 1986, Series A no. 98 para. 67.

[11] ECHR, James v. The United Kingdom, judgment of 21 February 1986, Series A no. 98 para. 43.

[12] ECHR, James v. The United Kingdom, judgment of 21 February 1986, Series A no. 98 para. 39.

property."[13] . The concept of public interest is broad. Definitions of public interest and general interest vary from state to state. In Scotts of Greenock, the applicants complained about the conditions in which a nationalized company, owned by them before nationalization, was subsequently re-privatised. In the opinion of the European Commission, reprivatization "was intended to achieve a complete reorganization of the industry, and was considered likely to provide the most satisfactory basis on which to establish the competitiveness of the industry [...] However, given the political judgment required to formulate a policy such as nationalization industry, it is inevitable in a democratic society that the political perception of such a policy, and therefore the policy itself, can change from time to time"[14]. The commission found that "therefore it was not established that the resale could bring the public interest of the original nationalization into doubt"[15]. As for the historical granting of authority to the administrative body of FINA in pre-bankruptcy proceedings, we can analyze the given legal phenomenon through Article 6. European Convention for the Protection of Human Rights and Fundamental Freedoms. Namely, it states that just decisions can be made by a court established by law, which means that the organization of the judiciary must be regulated by law. In the case of Zand v. Austria (judgment of May 16, 1977, no. 7360/76), the European Commission found that˝ The aim and purpose of the provision of Article 6, paragraph 1, which requires that courts be˝established by law, is to the organization of the judiciary in a democratic society must not depend on the discretion of the executive power, but must be regulated by the law passed by the parliaments. However, this does not mean that delegated regulations as such are unacceptable in matters related to judicial organization. Article 6., paragraph 1. does not require the legislator to regulate every detail in this area if the legislator sets at least the organizational framework of judicial activity.˝[16] Nevertheless, it is added that the court does not necessarily imply the need for the persons and bodies leading the proceedings to formally belong to the state judicial authority (the court in the formal sense), but it is required that in the specific case it has the characteristics of independence and impartiality, and that its organization and work be prescribed by pre-determined rules (court in the material sense)… and that with the concept of an independent and impartial court, there is a wide and well-established judicial practice in accordance with which we can conclude that in pre-bankruptcy proceedings the settlement council within the FINA, as a legal entity with public powers , does not fall under the term "court" (Grbić, Matić, Bodul,, 2016, p. 32, 39) . The EHCR defined the term court in the case of Belilos v. Switzerland: ... The term court must also meet the following requirements - independence, especially from the executive;

[13] ECHR, James v. The United Kingdom, judgment of 21 February 1986, Series A no. 98 para. 45.

[14] Eur. Comm. H.R., report of 17 December 1987, Scotts of Greenock Ltd and Lithgows Ltd v. the United Kingdom, No. 9482/81, DR 58, p. 22, para. 104.

[15] Ibid.

[16] ECHR, Zand v. Austria, judgement of 12 October 1978, para. 69.

impartiality; certain duration of the term of office of its employees; the existence of procedural guarantees - several of which are also found in the text of Article 6., paragraph 1.˝ Belilos v. Switzerland, Judgment, 29 April 1988, Series A, no. 132 (Grbić, Matić, Bodul, 2016, p. 31). There are authors who even believe that due to the overload of the courts, it would be more expedient to direct the problem of informal reorganization almost entirely to the administrative bodies under the competent Ministry of Finance, and hand over the final confirmation to notaries, bodies "not so far from the administration" (Vilašević, 2009, p. 287). In the judgment of 28 June 1984, Series A, No. 80 in the case of Campbell and Fell v. the United Kingdom, the ECHR stated what exactly it takes into account when considering the claim of independence and guides that In deciding whether a body is independent - specifically from the executive and litigants - the European Court examines the manner in which judges are selected, the duration of their mandate, the existence of protection against external pressure and whether such a body appears to be independent. In the case of extraordinary administration procedures, in accordance with Lex Agrokor, the executive or administrative authority cannot dismiss judges, but can propose to the court a candidate for an extraordinary commissioner, who is formally appointed by the court. However, we should not forget that pre-bankruptcy or bankruptcy reasons have already occurred and that even within traditional bankruptcy and pre-bankruptcy procedures, bankruptcy trustees are not appointed by the court, but, depending on the legal system, by creditors or by lottery (system of random selection).

III Is AGROKOR group nationalized?

The law provided for a settlement if the extraordinary commissioner deemed it appropriate. It should be noted that the importance of certain companies led to the fact that the Croatian legislator had a different approach for them. A typical example is the Law on Strategic Investment Projects of the Republic of Croatia, which clearly prescribes the urgency of dealing with the preparation and implementation of a strategic project, which is different in terms of deadlines compared to projects that are not subject to the application of that Law.

One of the research questions we asked and which we try to answer in this paper is whether the Agrokor group is have ennationalized. We encountered several limitations here. The first is that there is not a large number of professional and scientific works and monographs available on this topic in Croatia and the region[17]. The crisis occurred relatively recently, its consequences are still being felt and have not been fully remedied, so it is completely understandable why scientists have not dealt with aspects of Agrokor to a greater extent until now.

[17] The only systematic work is the master's thesis defended in 2020 at the Faculty of Economics of the University of Zagreb: https://repozitorij.efzg.unizg.hr/islandora/object/efzg%3A4835/datastream/PDF/view

The lack of literature is one of the reasons why we decided to shed more light on the extraordinary management at Agrokor. What is also a limiting factor is that a lot of documentation is secret and only the Tax Administration of Croatia has access to it in the sense that it internally monitors the current operations of the Forten Group. Also, a procedure is underway in which they are trying to resolve investment disputes. On February 14, 2020, Todorić's Dutch holding company Adria Group B.V. and Adria Group Holding B.V. started an arbitration process against the Republic of Croatia before the International Court for the Settlement of Investment Disputes ("ICSID"), which operates under the auspices of the World Bank, in Washington, the capital of the USA. On March 2, 2020, ICSID registered the Request for Arbitration and opened a dispute[18] in case no. ARB/20/06. In this case, the parties have proposed arbitrators and they have been appointed, but the president of the tribunal has not yet been appointed. Such procedures last for years. There has already been one arbitration proceeding for the case of Agrokor, where in June 2018 the Court of International Arbitration in London issued a final judgment which determined that Agrokor owed more than 60 million euros to Sberbank.

When Lex Agrokor came into force, at first glance, it seems that it really was about the nationalization of debts. The first argument would be that the debtor or creditors did not turn to the state and ask for forced administration. The second is that budget aid was not offered as an option at all, but only forced administration of a private company. Here the government acts as a receiver. The government referred to the imprecise provision of the Croatian Constitution that such moves can be made "if state interests are threatened". As one of the main claims that Lex Agrokor is necessary, it was argued that the two biggest creditors of Agrokor are Russian banks. Ivica Todorić claimed from the beginning that "politics stole Agrokor" from him, and that the company was nationalized[19] (also messages about "expropriation of private property"[20] were sent to the public). On the other hand, the Prime Minister of Croatia rejected those allegations and said that it was an "extraordinary administration for a limited period of time"[21].

We could not agree with the thesis about nationalization. In the former Yugoslavia, nationalization was carried out by force of law, where the decisions were declaratory, not constitutive in nature, so the fact of the absence of a

[18] ICSID Case No. ARB/20/06."

[19]https://balkans.aljazeera.net/news/balkan/2017/10/8/todoric-odgovorio-plenkovicu-vlada-je-nacionalizirala-agrokor ; https://www.24sata.hr/news/nacionalizacija-agrokora-je-stetna-to-je-ravno-veleizdaji-541115; https://www.tportal.hr/biznis/clanak/todoric-progovorio-o-tome-kako-mu-je-politika-otela-agrokor-20180217 (reading 13. 08. 2022.)

[20]https://www.vecernji.hr/vijesti/agrokor-ivica-todoric-martina-dalic-1235644 (reading 13. 08. 2022.)

[21]https://www.jutarnji.hr/vijesti/hrvatska/plenkovic-nismo-nacionalizirali-agrokor-sberbank-je-od-nultog-dana-ukljucen-u-privremeno-vjerovnicko-vijece-imaju-sve-informacije-6627303 (reading 13. 08. 2022.)

decision on nationalization cannot annul the nationalization carried out ex lege[22]. There is no legal basis in Croatia, it is certainly not "Lex Agrokor". Nationalization never has a limited time duration. Furthermore, the one who claims that the property has been nationalized must prove it, in order to claim its return.

In this regard, we must analyze the possible court practice that exists in Croatia for the "Lex Agrokor" case. The Constitutional Court of Croatia had the final say when it comes to the constitutionality of this law. A request for the review of the constitutionality of this law was submitted to the Constitutional Court by 12 natural and legal persons (among them the owner Todorić and the largest creditor Sberbank). They were disputable with the passing of laws according to an urgent procedure, failure to assess the effect of regulations, failure to conduct a public hearing. A certain number of applicants believed that the Law violates the rights of the European Union on state aid. One proposal referred to discrimination against other companies in the country. On May 2, 2018, the Constitutional Court decided (with three separate opinions)[23] that the Law is in accordance with the Croatian Constitution (Article 141 c.). Therefore, the proposals for initiating this procedure were not accepted. With this decision, the Constitutional Court said that the Government would have acted unconstitutionally if it had not intervened, and that the Government's obligation was to intervene because Croatia is a welfare state[24].

Also, the European Commission for Justice did not see fit to initiate proceedings against the Government of Croatia, although it received a number

[22] Supreme Court of the Republic of Croatia, Decision Rev 4254/2019-2

[23] Constitutional Court of the Republic of Croatia, Decision U-I-1694/2017 and others of 02 May 2018

[24] Here we note that the Constitutional Court could have taken more into account the constitutional principles of proportionality and rationality, i.e. explain them more broadly. The inviolability of ownership is one of the greatest values of the constitutional order of Croatia, but this fact does not derogate from the provision from Article 16, para. 2 of the Constitution, which determines proportionality in limiting rights and freedoms in each individual case (cf. 124/00 - extended text, 28/01, 41/01 - extended text, 55/01 - amended, 76/10, 85/10 - extended text and 5/14 - Decision of the USRH). Mato Palić, assistant professor at the Department of Constitutional Law of the Faculty of Law, Josip Juraj Strossmayer, University of Osijek, expressed his opinion on the constitutionality of the Law on the Procedure of Extraordinary Administration in Business Companies of Systemic Importance for the Republic of Croatia and concluded that it was an unquestionably legitimate goal and that it was very clear proportionality in action (https://informator.hr/strucni-clanci/o-ustavnosti-zakona-o-postupku-izvanredne-uprave-trgovackim-drustvima-od-sistemskog-znacaja-za-republika-hrvatsku, reading 13. 08. 2022). It also seems to be too caught up in the economic system. Here it is unclear how the related company is of systemic importance (as measured by the number of employees, which de facto some societies are placed in a superior position to others) with the welfare state.

of complaints about Lex Agrokor. Even if it found that there was a violation of European law, the Commission had discretion whether to initiate proceedings against the member or not, or if it found that there was a violation of European law, it would allow the complainant to file legal remedies before other institutions.

At the end of this chapter, we can conclude that in the case of Agrokor, there are no legal arguments that the nationalization of the concern was carried out, nor that any illegal confiscation or restriction of ownership, entrepreneurship and market rights was carried out. In the case of Lex Agrokor, it was acted in the correct way when it comes to proportionality in the actions of state authorities towards legal entities. A legitimate goal was achieved with the smallest encroachment, the limitation of ownership rights was not permanent, and it should also be taken into account what measures were taken and what ownership rights are being limited. By carrying out the extraordinary administration procedure, it was simply a matter of limiting entrepreneurial freedoms and ownership rights. Ownership is not taken away or restricted as this is done only with compensation of market value. Article 49, para. 2. The Constitution of the Republic of Croatia prohibits monopolistic behavior (although this constitutional norm itself guarantees all entrepreneurs an equal position on the market). The Constitutional Court of the Republic of Croatia itself indicated that one sentence cannot be singled out from the constitutional text and interpreted independently (without relation to other constitutional norms that regulate the right to property, but also the rest of the constitutional text[25]). It seems that here the Croatian government was simply fulfilling its constitutional obligation to implement economic policy by undertaking various measures and policies, passing a law that was the only possible way to strike the economic system. We have not established that in the case of Agrokor it was about any other way of administrative legal restriction of ownership rights. There is also no mention of any administrative contract. We consider that the procedure was in accordance with the aforementioned paragraph 39 of the judgment of the ECtHR in the case of James v. United Kingdom (fn 10).

IV Conclusion

The Law on the Procedure of Extraordinary Administration in Business Companies of Systemic Importance for the Republic of Croatia introduced a new type of procedures and a new type of companies into the legal system - the procedure of extraordinary administration and business companies of systemic importance. The extraordinary administration procedure has characteristics of both administrative procedures (public law) and bankruptcy and pre-bankruptcy procedures (private law). The powers assigned to administrative bodies in the procedure of extraordinary administration are related to increasing and guaranteeing the fairness and effectiveness of such an extremely complex

[25] »Therefore, no constitutional provision can be taken out of context and interpreted independently.«: Decision from fn 27, item. 8. 2.

restructuring procedure of a large trading company of the concern, which found itself in a hopeless financial situation. It is in the interest of all fair legal entities to maintain the business of the company, which is also the fundamental goal of the mentioned Law. The criteria for qualifying a company as systemically important differ from legal system to legal system. This means that two companies with the same financial indicators, which belong to different legal systems, depending on the development of the economy of the country in which they are registered, will be considered as companies of systemic importance in one, while in the other they will be considered as companies without systemic importance. The mentioned criteria will not be the same in all legal systems, which means that this legal phenomenon is national-centric, not global-centric. This is proven by the fact that a legal system may not recognize the procedure of extraordinary administration and initiate ordinary pre-bankruptcy or bankruptcy proceedings at the local level. The criteria for the qualification of a company as systemically significant are certainly public law by their legal nature. Although the priority of the extraordinary administration procedure is the preservation of the debtor's business versus the interests of individual (individual) creditors, all for the sake of the interests of the entire national economy, the interests of creditors were taken into account to the maximum extent possible. Given that the judicial body "can transfer rights and obligations to third parties who do not participate in the procedure and without their consent", we can state certain elements of public law procedures such as expropriation and nationalization. Although both the expropriation procedure and the extraordinary administration procedure imply the protection of collective interests, not the interests of individuals, we cannot bring the extraordinary administration procedure under it either, because expropriation also implies compensation for expropriated property. Persons in relation to whom bankruptcy and pre-bankruptcy reasons occurred should not have the same legal status as solvent persons, who have no debts, so we consider it fair that their legal status should not be identical to the status of solvent legal persons, especially if insolvent persons have incurred large debts. It means that out of 3 mandatory elements for expropriation (compensation, existence of regulations and protection of public interest), the extraordinary administration has only one (protection of public interest). Of course, we cannot reduce extraordinary administration to a subtype of nationalization either, because the Republic of Croatia did not acquire majority ownership of Agrokor. The settlement in the case of the Agrokor Group was concluded primarily in the public interest, although the public-law entity is not a party to that legal relationship but private legal entities (creditors and debtor). Although the final beneficiary will also be a public-law entity (the state) as a tax beneficiary of such a large private-law Settlement, certainly the secondary beneficiaries are all other private-law groups and individuals including, first of all, groups of creditors and individual creditors from the concrete private-law and pre-bankruptcy relationship with the debtor.

The procedure of extraordinary administration and the administrative procedure of expropriation have in common that there is a lower degree of influence of

private law subjects on the procedure itself (in the procedure of extraordinary administration, lower influence of creditors, debtors and owners, while in administrative procedures, lower influence of the owner) than they would have in a class pre-bankruptcy procedure. However, the administrative expropriation procedure cannot be initiated by a private legal entity (including the owner), while the extraordinary administration procedure can be initiated by the debtor. In addition, the Republic of Croatia, as a public law entity, did not acquire majority ownership of Agrokor Group in the procedure of extraordinary administration, and the authority was given to the administrative body to propose a candidate for extraordinary commissioner to the court, so it cannot be considered an element of nationalization because its management is temporary (temporary argument the Government also pointed out), and its effects are not limited by the legal framework of nationalization, so the procedure of extraordinary administration cannot be reduced to a subtype of expropriation or nationalization procedure, nor can it be subsumed under them. The fact is that the state temporarily managed the assets of a private business entity and that it certainly took care of its macroeconomic interests, but that management was in the interests of debtors and creditors, and not the management of its own assets. In fact, private law and public law interests coincided. It should also be pointed out that the Settlement, as a result of the extraordinary administration procedure, cannot be brought under an administrative contract either because the state is not a party to the proceedings (the administrative authority did not enter into a legal relationship with a third party (Agrokor), although the goal of both the administrative contract and the Settlement (which is the result of the procedure of extraordinary administration) - the achievement of a wider public interest. When we talk about the expropriation procedure, the confiscation of property is always aimed at the benefit of public legal goals, not individual ones. In addition, in the case of expropriation, the former owner ceases to be its owner with a certain compensation or giving of some other property, which is not possible within the extraordinary administration procedure (the state does not have the right to give any compensation to the owner of a company subject to the extraordinary administration procedure). In the expropriation procedure, the general interest must be established, while the Law on Extraordinary Administration implies the existence of a general interest if the company can be brought under under a company of systemic importance for economy (specific financial criteria) and if bankruptcy or pre-bankruptcy reasons have occurred.

Given that bankruptcy and pre-bankruptcy legislation (which are private law) are applied subsidiarily to extraordinary administration proceedings, we can state that private law norms are applied to extraordinary administration proceedings if there are legal gaps in the Act on Extraordinary Administration itself. The settlement, which was concluded as a result of the extraordinary administration procedure, cannot be classified as an administrative contract, even though both contracts have an identical goal - the protection of the wider public interest.

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