

Croatian Property Law After Eu Accession

– Adjustment of property law to EU market freedoms –

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1. Introduction

The process of adjustment of Croatian property law to the law of the European Union started long before the Republic of Croatia formally became the 28th Member State of the EU¹, even a long time before Croatia began negotiations on EU accession² and signed the Stabilisation and Association Agreement with the EU.³ Property law reform started with the adoption of the new Constitution of the Republic of Croatia⁴ in 1990 which, in terms of

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¹ On 1 July 2013, Croatia became the 28th Member State of the EU, after an accession referendum held on 22 January 2012 and after all EU Member States had ratified the EU Accession Treaty.

² Accession negotiations started on 4 October 2005. The process of screening, analytical overview and review of the degree of harmonisation of Croatian legislation with the *acquis communautaire* started on 4 October 2005 and finished in October 2006. On 24 June 2011, the European Council called for completing the negotiations by the end of June and signing of the Treaty of Accession by the end of 2011. The accession negotiations formally ended on 30 June 2011. The EU accession treaty was signed on 9 December 2011.

³ The Stabilisation and Association Agreement between the European Communities and its Member States and the Republic of Croatia on Behalf of the European Community (signed on 29 October 2001) was in force from 1 February 2005. The English version can be found at <http://narodne-novine.nn.hr/clancimedunarodni/328068.html>.

⁴ Official Gazette NN 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/1

property law regulation, was a real “Copernican Revolution” compared to the collectivistic and pluralistic regulation of ownership in the former socialist Croatia.⁵ The Constitution proclaimed only one type of ownership – private ownership based on the individualistic concept and on the doctrine of the social component of ownership. Private ownership was proclaimed as one of the highest values of the constitutional order of the Republic of Croatia (Article 3) protected as one of the fundamental rights in the Croatian constitutional order (Article 48(1)).⁶ The constitutional proclamation of only one type of ownership right and the inviolability of ownership was the basis for the property law reform set forth in the Act on Ownership and Other Property Rights (hereinafter: Property Act/PA)⁷ which entered into force on 1 January 1997. Its adoption was the beginning of extensive property law reform with two basic goals: adjustment to a market economy and to EU law. The reform also continued following the adoption of the PA with numerous amendments and with the passage of a series of separate acts. The reforms related to adjustment to a market economy and to EU law were mostly carried out simultaneously and in parallel because their main goals overlapped. All reforms were aimed at establishing conditions for the maintenance of a market

⁵ In the former socialist Croatia there were two models of ownership: social ownership and private ownership. In principle, property, particularly real estate, was socially owned (e.g. building lots, agricultural land, forests, buildings, flats and so on). Socially owned property was defined in a very specific way as “property that belongs to everybody and nobody”. Individuals and various legal entities had only some specific subjective rights to this property (the right to use, dispose of and manage). On socially owned real estate, the principle of its legal unity (*superficies solo cedit*) was also abandoned because the building was legally separated from the land. It was owned by a private person, whereas the land continued to be socially owned. The owner of the building was only entitled to use the land.

⁶ Although ownership gives its holder total and exclusive private legal power, owners are obligated to contribute to general welfare (Article 48(2) of the Constitution). In the interest of the Republic of Croatia, ownership can be restricted or expropriated only upon payment of compensation equal to its fair market value (Article 50(1) of the Constitution). Exceptionally, the exercise of property rights may be restricted by law for the purpose of protecting the interests and security of the Republic of Croatia, or for protecting nature, the environment and public health (Article 50(2) of the Constitution).

⁷ Official Gazette 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12.

economy as a prerequisite for the inclusion of the Croatian market in the EU internal market and for the unrestricted and non-discriminatory exercise of the European market freedoms. However, adjustment to a market economy, and in particular transition to a new property regulation based on the market economy, called for some specific interventions into Croatian property law which were different from those aimed at adjusting to EU market freedoms. Therefore, the journey of Croatian property law towards a modern property law regulation adjusted to EU law was more difficult than that of the EU Member States with classical property law regimes based on traditional property law principles whose property law had already been adjusted to the market economy. What those EU Member States had to do was to adjust their property law by harmonising it with the specific demands of the EU internal market (prohibition of discrimination, prohibition of non-proportional restrictions, a free market competition and the like).

2. Adjustment to a market economy

2.1. Gradual adjustment of property law to a market economy

The main characteristic of Croatian property law reform, aimed at its adjustment to a market economy, is the segmented and successive approach to its execution. The reform has not been carried out by the adoption of a new civil code but by successive adoptions of numerous general and separate acts and their subsequent amendments.⁸ After the Property Act came into force on 1 January 1997, as the main and basic

⁸ Croatia has never had its own civil code. When it was part of the Austro-Hungarian Empire, the Austrian civil code was applied in the Croatian territories. In socialist Croatia, there was no general jurisdiction for the adoption of a civil code because the jurisdiction for individual civil law areas was divided between the federal state (Yugoslavia) and its republics. After Croatia's independence, there were theoreticians who advocated the adoption of a Croatian civil code but the idea has not been realised to this day and there have been no plans for starting preparations for a civil code. Some civil law areas are regulated by separate acts such as the Obligations Act (2006), the Inheritance Act (2003), the Family Act (2003), the Property Act (1996) and others.

source of property law in the Republic of Croatia,⁹ the reform continued with the adoption of a series of separate acts. They introduced some new forms of property rights into Croatian property law, as well as the new and specific legal regulation of some types of movables and immovables which enjoy special protection and are of particular interest for the Republic of Croatia.

A thorough reform of property law which began with the adoption of the PA only confirmed the earlier commitment of the Croatian legislator, proclaimed in the Constitution, that property law should be regulated in accordance with the individualistic concept of the ownership right and on the traditional principles of the property law regulation. The task of the reform has been to bring Croatian property law closer to other contemporary European property law orders. The model for reform has mostly been Austrian law which previously and traditionally had a decisive impact on Croatian property law. Some aspects of property law have also been taken over from German and Swiss bodies of property law.

2.2. The goals of the modernisation of property law

The reform was primarily directed at the creation of a new property law framework aimed at contributing to the development of an efficient market by means of the practical application of property law rules (particularly in combination with other modern Croatian civil law rules). This has been done through the modernisation of Croatian property law in several directions.¹⁰ First, by the introduction of separate rules in the PA,

⁹ Besides the PA, an important act for the regulation of property law is the Land Registration Act/LRA (Official Gazette 91/96, 68/98, 137/99, 114/01, 100/04, 107/07, 152/08, 126/10, 55/13, 60/13). The LRA and the PA entered into force on 1 January 1997.

¹⁰ Before the entry into force of the Property Act, property law had been regulated by the Act on Basic Ownership Relations (ABOR) adopted as late as 1980. In its 90 articles, this Act regulated only some basic property relations. It was applied in a very limited way, only to relations between persons who were able to be private owners. The ABOR did not provide for all property rights. Therefore, the Austrian Civil Code/ACC continued to be important for property law relations and until 1980 it was the most important source (although indirect) of property law. After 1980, the ACC paragraphs subsi-

the process of privatisation of social ownership came to an end and its transformation into private ownership was completed. The PA provided for the transformation of rights on things under the former social ownership for all types of property for which the process of privatisation had not been carried out prior to this Act.¹¹ This goal of the property law reform was among the most complex and most demanding ones. On the one hand, in the process of transition to the new property law regulation, the protection of rights acquired on things in former social ownership had to be taken into account.¹² On the other hand, the transition had to be carried out efficiently and expeditiously, without unnecessary judicial and administrative proceedings but in accordance with the provision of maximum legal security.¹³ Another important step of the reform was the

diarily applied as legal rules to all property law relationships not regulated by the ABOR. For more on the impact of the ACC on the development of Croatian real property law, see Josipović, T.: 200 Jahre der ABGB-Anwendung in Kroatien – 135 Jahre als Gesetz und 65 Jahre als „Rechtsregeln“, Festschrift 200 Jahre ABGB, Wien, 2011, p.157-174.

- ¹¹ The transformation/privatisation of social ownership was also a gradual and long-lasting process within Croatian legislation. It had already started in 1991 and was carried out on different legal bases and in various ways: by the privatisation of social enterprises, by the nationalisation of social property, by denationalisation, and by the transformation of the rights on social property to private ownership. In 1991, an act on privatisation/transformation of social enterprises was passed, called the Act on the Transformation of Publicly Owned Enterprises, Official Gazette 19/91, 45/92, 83/92, 16/93, 94/93, 2/94, 9/95). According to this Act, social enterprises were transformed into joint stock companies and limited companies and they thus became private owners of the former socially owned property. On the other hand, in some cases involving particular types of socially owned immovables (e.g. agricultural land, forest land), separate acts were passed under which social ownership was *ex lege* transformed into state ownership. In the case of property that had been nationalised and confiscated, privatisation was carried out by returning property to its former owners (e.g. Act on the Compensation for the Assets Seized during the Yugoslav Communist Rule (Official Gazette 92/96, 92/99, 80/02, 81/02). For further details, see: Josipovic, T. *Immobiliarsachenrecht in Kroatien, Wien 2002*, p. 4-6.
- ¹² Recognition of the principle of acquired rights required the transformation of rights on socially owned things into the right of ownership. Former holders of rights over socially owned property rights on things, and their heirs or other successors, became owners of these rights under the PA (Arts 354-365). All the PA rules on the protection and proof of ownership applied to their property.
- ¹³ For this reason, the basic concept of transformation of ownership was the emergence of its legal effects, *ex lege*, i.e. by the entry into force of the transitional and final provisions

return to traditional and fundamental continental European principles of property regulation as a basis for the free movement of goods in a market economy, the security of market transactions and the protection of fundamental human rights. The principle of *superficies solo cedit*, the principle of the protection of *bona fide* purchasers in legal transactions, and the principle of the social component of ownership were re-introduced into Croatian real property law.¹⁴ The return to traditional principles of property law (e.g. the principle of *superficies solo cedit*) also called for the special regulation of the transition of old ownership relations to a new property system.¹⁵ Yet another important step in the reform was the strengthening of the protection of trust in legal transactions. Different from the former socialist property law, in the new law protection of trust was expressly regulated in such a way that *bona fide* acquirers were offered a significantly higher level of protection than non-owners when acquiring property rights.¹⁶ In addition, the *numerus clausus* of property rights was significantly extended. Some new property rights were introduced (e.g.

of the PA (1 January 1997). For all types of rights that existed on things in the former social ownership regime, and for various holders of such rights, the PA laid down the new property rights and their holders in accordance with the PA.

¹⁴ Croatian property law is based on classical property law principles: the principle of the absolute effect of property rights (*contra omnes*), the principle of a closed number or real property rights (*numerus clausus*), the principle of specificity, the principle of publicity, and the principle of *bona fide* protection in legal transactions. For more, see Gavella, N. et al.: *Stvarno pravo*, Vol.I. Zagreb, 2007, p.21-36; : *International Encyclopaedia for Property and Trust – Croatia*, suppl. 19 (2013), Walters Kluwer, p.33-37

¹⁵ In the former socialist property law system, the land and the building were legally separated. The land was socially owned and buildings, or flats in these buildings, were privately owned. The owners of a building were only entitled to the right to use the socially owned land on which the building was erected. With the entry into force of the PA (1 January 1997), the owner of the building erected on socially owned land *ex lege* became the owner of the land on which the building was erected. The owners of flats became the co-owners of the entire property (land + building). The general rules of the PA regarding ownership and condominium now apply to ownership/condominium acquired in such a way.

¹⁶ Articles 118, 122-125 PA, Art. 8 of the Land Register Act, For more see: *International Encyclopaedia for Property and Trust – Croatia*, suppl. 19 (2013), p. 62-65, 169; Josipović, T.: *Vertrauensschutz im Immobilienverkehr – österreichisches Modell nach kroatischer Art, Öffnung und Wandel – Die internationale Dimension des Rechts II*, Festschrift für Willibald Posch, Wien, 2011, p. 285-300.

the right to build/*Baurecht/pravo građenja*) which were very important for investments in immovables, particularly in public property.^{17, 18} Significant changes have also been introduced in the content of property law provisions. All property rights are regulated in great detail in the PA, and their essential content, protection, the basis for acquisition, modification or termination are expressly provided for.¹⁹ In the case of some property rights, there is a completely new and more modern regulation which corresponds to their role in a market economy (e.g. secured transactions).²⁰ The regulation of some property rights has been brought in line with new property law principles (e.g. condominiums).²¹ In brief, a new Croatian property law has been created to allow for the efficient development of a new Croatian legal and economic order. The needs both of the mar-

¹⁷ For some state-owned immovables (public roads, forest land), the principle of prohibition of alienation from state ownership applies. Therefore, investing in such immovables is realised through the right to build or by way of concessions. The right to build is one of the ways to realise public-private partnership on public property.

¹⁸ The right to build is regulated on the model of Austrian law. It is defined as a property right to another person's land authorising its holder to own a building erected on the plot or below its surface (Article 280(1) PA. For more details, see International Encyclopaedia for Property and Trust – Croatia, suppl. 19 (2013), p.118-127.

¹⁹ Whatever in the PA refers to ownership, applies accordingly to other property rights, unless stipulated otherwise (Art. 1(6) PA).

²⁰ Unlike the socialist property law, the PA deals with the regulation of secured transactions in about 40 articles. There is an exclusive regulation of liens where there is a differentiation of particular forms of liens on movables, immovables and property rights. Two of the most important principles in the regulation of secured transactions are the principle of accessoriness and the principle of judicial enforcement. A lien exists only if there is a claim secured by it (Art. 301 PA). In the interest of the greater protection of debtors, a lien, as a rule, is exercised only by a mortgagee in judicial enforcement proceedings (Art. 336 PA). Exemptions from the principle of officiality are expressly stipulated and they apply only to liens on movables (Art. 337 PA). On the other hand, the PA does not exclude the possibility of introducing other security rights such as fiduciary transfer of ownership, or retention of title as separate legal instruments for securing claims. The provisions on liens apply accordingly to these security rights (Art. 297(2) PA).

²¹ The regulation of condominiums is aligned with the principle *superficies solo cedit* (Art. 66 PA). Condominium is a special form of co-ownership where the exercise of a co-owner's powers is concentrated on a flat owned by that co-owner. The owner of the flat exercises all his ownership rights over the flat, and all other co-owners of the respective immovable (the owners of other flats) are excluded from it. The owner of the flat is at the same time the co-owner of the entire immovable (the land with the building).

ket and of the social role of property rights in a market economy and in the protection of social values were taken into account. For this reason, special attention in the PA is given to rules on the general and particular limitations of ownership.²²

2.3. Continuation of the real property reform (1997 →)

The reform of property law by means of the PA was a huge step forward in the regulation of property law in the Republic of Croatia which, for the first time, had a consistent system of general property law regulation as a sound basis for the realisation of property law relations on the market. However, the PA only marked a starting point for the further development of property law adjusted to a market economy whose intensification called for new regulations to increase the protection of creditors when establishing and realising their security interests. On the other hand, the privatisation of economic and natural resources demanded that specific ownership relations involving particular types of immovables of importance for the Republic of Croatia (e.g. agricultural land, forest land, public roads, railway infrastructure, telecommunication infrastructure) be provided for in separate acts to ensure their efficient management and further privatisation.²³ All these separate regulations have resulted in a situation where the general property rights regulation

²² The limitations of ownership are divided into general and particular limitations. General limitations (e.g. the prohibition of misusing the right) apply to all owners (Art. 31 PA). Particular limitations (Art. 32 PA) apply only to owners of particular things that are under the State's special protection and they are imposed in order to protect the environment, health, and the interest and security of the State.

²³ Special state protection of the sea, seashore and islands, waters, air space, mineral wealth and other natural resources, as well as land, forests, fauna and flora, other parts of nature, real property and goods of special cultural, historic, economic or ecological significance are provided for in Article 52 of the Constitution of the Republic of Croatia. On the basis of Article 52, and in order to provide special protection, many separate laws have been passed. These laws provide separate legal regimes for a whole range of property, including maritime goods, islands, waters, forests, cultural goods, agricultural land and public roads. These laws contain a number of mandatory rules and public law restrictions by which owners are limited in their possession, use and legal disposition of property.

– the Property Act – is reduced to being an “accessory regulation” which is applied when a separate regulation of a particular type of property, or property rights, does not offer any express solution (*principle lex specialis derogat lex generali*). In the greatest number of cases, specific property rights, or property relations on particular types of things, are provided for by separate regulations.

The most significant breakthrough in comparison with the rules contained in the PA was made in the area of secured transactions. The legislator gradually introduced various new forms of security rights as alternatives to the traditional lien provided for in the PA. New subgroups of voluntary liens have been introduced which, because of the special form of a lien agreement, make it possible for creditors to settle their secured claims more expeditiously. The Enforcement Act (EA)²⁴ thus introduced some new forms of liens established on the basis of a lien agreement made in the form of a public document (court record/a notarial act).²⁵ The advantage of this approach, when compared to the “classic” type of lien, is that the payment of secured interest can be enforced at the moment of default. This has significantly accelerated enforcement proceedings, because enforcement may be sought immediately, without a civil lawsuit, in order to obtain the enforcement title.²⁶ In addition, some completely new forms of security of claims have been introduced. This includes fiduciary transfer of ownership that provides more protection for creditors. In the case of fiduciary transfer of ownership, the principle of judicial enforcement has been abandoned and notaries public have become competent for enforcement.²⁷ However, a major novelty in the

²⁴ Novelty has been introduced by the Enforcement Act/1996. The Enforcement Act of 1996 ceased to be valid when the new Enforcement Act of 2012 entered into force (Official Gazette 112/12, 25/13). The new EA took over all the provisions of the former EA/1996 on specific sub-categories of liens. See Arts 299-327 EA/2012.

²⁵ The so-called voluntary judicial or notarial lien. For more details, see Gavella, N.: *Stvarno pravo*, Vol. II, Zagreb, 2007, p. 268-291, 371-378, 456-462; Dika, M.: *Građansko ovršno pravo*, Zagreb, 2007, p. 746-782; *International Encyclopaedia for Property and Trust – Croatia*, suppl. 19 (2013), p. 227, 239, 250.

²⁶ Arts 301, 310 EA/2012.

²⁷ In the case of fiduciary transfer of ownership, enforcement proceedings are conducted by notaries public. The enforcement procedure may begin immediately upon default

system of security rights was the Act on the Register of Security Rights in Chattels and Rights before a Court or a Notary Public/Register Act of 2005 (hereinafter: Register Act).²⁸ This Act has introduced new security rights on movables and patrimonial rights – a registered pledge and registered fiduciary transfer of ownership, or transfer of patrimonial rights (claims, shares, stocks, intellectual property rights, etc.). The Register Act introduced a special public register for pledges and fiduciary transfers of ownership over movables and rights maintained by the Financial Agency (FINA).²⁹ Pledge/fiduciary transfer of ownership is acquired upon its registration in the Register. The advantage of this security right is that the charged movable remains in the debtor's possession. The Register Act made it possible to establish a specific type of "floating charge" – a registered pledge on all assets in a particular location (business premises, warehouses, etc.).³⁰ All these new security rights are established on the basis of an agreement made before the court or a notary public, in the form of a court record, i.e. a notarial act,³¹ so that enforcement is possible immediately upon default of a secured claim. At this moment, in practice, these new security rights dominate because they offer more protection to creditors and an accelerated settlement of claims. The "classical" lien provided for in the PA has been completely neglected in practice. The role of the provisions on liens is now only of a subsidiary nature. The PA provisions apply to new security rights only if separate provisions on these rights do not expressly provide differently. However, there are cases where it is not possible to apply the PA provisions subsidiarily to some aspects of the new security rights. In practice, this opens the door to various interpretations and even to legal insecurity. Indeed, the new

of a secured claim. If the sale does not succeed, the creditor becomes the owner of the charged property. Thereby, the creditor is not obliged to return to the debtor the difference in the value of property which exceeds the value of the secured claim (Art. 322 EA/2012).

²⁸ Official Gazette 121/05.

²⁹ The Register is absolutely public and insight is provided electronically. For more details, see: <http://zaloznaprava.fina.hr/>.

³⁰ Article 38 of the Register Act.

³¹ The so-called judicial or notarial fiduciary transfer of ownership. For more details, see: Gavella, N.: *Stvarno pravo*, Vol. II, p. 496-551; Dika, M.: o.c. p. 784-821; *International Encyclopaedia for Property and Trust – Croatia*, suppl. 19 (2013), p. 254.

security rights, given their intention to offer more protection to creditors at the time of a severe economic crisis, have proven to be increasingly unfavourable for debtors and are, therefore, often exposed to criticism. In enforcement proceedings, debtors have very limited possibilities of protecting their rights. At present, there is a growing tendency to introduce special rules in the realisation of these new security rights to ensure better protection of the most endangered debtors.

3. Adjustment to EU law

3.1. Harmonisation with EU directives

The harmonisation of Croatian property law with EU directives, i.e. harmonisation with the *acquis communautaire* in the field of property law, is mostly being carried out through the adoption of separate laws by which the European directives were implemented. As a rule, the text of individual directives has been transposed verbatim into these separate laws. Even at the time of the negotiations, all EU directives relating to the harmonisation of some, albeit very specific, property law segments were being implemented in the Croatian national property law system. All national regulations by which Croatian property law was harmonised with EU law had started to apply several years before the country became a Member State. Further, all amendments to EU directives dealing with property law were already being duly transposed into Croatian legislation in the course of negotiations, ensuring the continuous harmonisation of Croatian property law with the *acquis communautaire*.

The strongest impact on Croatian property law was that of harmonisation with the directives in the area of commercial transactions, the financial market, consumer protection and transactions involving cultural goods. The direct or indirect purpose of all these directives was to remove obstacles to market freedoms in Croatia. With their inclusion in Croatian property law, the process of reform aimed at adjustment to a market economy and the process of integrating the Croatian market

with the EU market continued. A major step in adjustment to EU law was the incorporation into national law of the Directive on financial collateral arrangements.³² This Directive was implemented in the Act on Financial Collateral Arrangements which entered into force on 1 January 2008.³³ In 2012, the Act was aligned³⁴ with the amendments to the Directive³⁵ whereby the scope of financial collateral arrangements was broadened by the inclusion of credit claims as a possible object of financial collateral arrangements. The Obligations Act (OA)³⁶ implemented the Late Payment Directive of 2000³⁷ which, among other things, provides for the retention of title as a seller's security measure in cases of late payment.^{38, 39} The provisions on retention of title in the OA are in conformity with the later Directive on combating late payment in commercial transactions of 2011,⁴⁰ replacing the Directive issued in 2000 where the same provision on retention of title was kept.⁴¹ As for consumer protection in property law relations, particularly important was alignment with the first Timeshare Directive⁴² implemented in the Consumer Protection Act of

³² Directive 2002/47/EC on financial collateral arrangements (OJ L 2002, 168, p. 43).

³³ Official Gazette 76/07.

³⁴ The Act on Amendments to the Act on Financial Collateral Arrangements, Official Gazette 59/12.

³⁵ Directive 2009/44/EC amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims (OJ L 2009, 146, p. 37).

³⁶ Official Gazette 35/05, 41/08, 125/11.

³⁷ Directive 2000/35/EC on combating late payment in commercial transactions (OJ L 2000, 35, p. 35).

³⁸ See Art. 462 *et al* of the OA.

³⁹ Retention of title was not a new Croatian substantive law concept. It had existed in the PA (Art. 34/4,5) even before the OA was adopted in a way which had guaranteed its *contra omnes* effect by its registration in corresponding public registers (e.g. land register). For more details, see Gavella, N.: *Stvarno pravo*, Vol II, p. 551-562.

⁴⁰ Directive 2011/7/EU on combating late payment in commercial transactions (OJ L 2011, 48, p. 1).

⁴¹ See Art. 9 of the Late Payment Directive/2011.

⁴² Directive 94/47/EC on the protection of purchasers in respect of certain aspect of contracts relating to the purchase of the right to use immovable property on a timeshare basis (OJ L 1994, 280, p.83).

2003.^{43,44} Subsequently, the second Timeshare Directive⁴⁵ replacing the Directive of 1994 was implemented in the new Consumer Protection Act of 2007 through its amendments.⁴⁶ Property relations involving cultural objects have been harmonised with the Directive on the return of cultural objects unlawfully removed from the territory of a Member State⁴⁷ and its amendments. The conflict of law rule from this Directive was incorporated in Article 12 of the Protection and Preservation of Cultural Heritage Act according to which ownership of a cultural object upon its return must be governed by the law of the requesting Member State.⁴⁸

The structure of property law felt various impacts through its harmonisation with EU directives. First of all, by being harmonised with EU law through numerous separate regulations, Croatian property law has become even more segmented and complicated. This has additionally impaired an already seriously fragmented property law system. Beside the existence of numerous separate laws whose creation marked the reform after 1997, harmonisation with EU directives in the area of property law has resulted in an increased number of such separate regulations. They, as *lex specialis*, have precedence in application over general regulations of property law, the law of obligations and enforcement law. In every concrete case, the parties, the courts and other public authorities must establish very carefully which regulations are relevant for a particular property law case, and what their mutual relationship is. When it comes

⁴³ See Arts 72-80 of the Consumer Protection Act, Official Gazette 96/03.

⁴⁴ The Consumer Protection Act/2003 had a special provision providing that a timeshare could be entered in the land register, thus protecting its acquirer from third persons (Art. 73).

⁴⁵ Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, a long-term holiday product, resale and exchange contracts (OJ L 2009, 33, p. 10).

⁴⁶ See Arts 87-95 of the Consumer Protection Act, Official Gazette 79/07, 125/07, 79/09, 89/09, 133/09, 78/12, 56/13/ See Arts 95-105 of the Consumer Protection Act, Official Gazette.

⁴⁷ Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a member state (OJ L 1993, 74, p. 74).

⁴⁸ Cf. Art. 70 (d) of the Protection and Preservation of Cultural Heritage Act, Official Gazette 66/99, 151/03, 157/03, 100/04, 87/09, 88/10, 61/11, 25/12, 136/12, 157/13.

to the application of regulations by which EU directives are implemented, the task is even more difficult because it must first be established, in every individual case, whether it belongs to the substantial and personal field of application of EU law. Sometimes, precisely this determination will lead to a decision whether to apply a separate regulation by which a directive has been implemented, or some other regulation which is applicable to domestic cases.

Adjustment to EU directives has also changed the content of property law. New legal institutions, essential novelties and significant deviations from the traditional property law principles have taken place. Such changes call for a more systematic approach to the implementation of directives, namely the regulation of numerous other matters that have not been expressly regulated in EU directives but are necessary to provide legal security. A purely nomotechnical approach of merely adopting the content of directives into national implementing regulations turned out to be unsuitable for the further development of property law. This is particularly clear in segments where, via directives, completely new and original instruments, previously unknown to Croatian law, have been incorporated in the national property law (e.g. financial collateral, timeshare). In practice, the best indicator is the implementation of the Directive on financial collateral arrangements and in particular its amendments by which the area of its application is extended also to credit claims. Its implementation has undoubtedly broadened the *numerus clausus* of property rights in Croatian law. Special security rights on financial instruments have been introduced whose regulation is different from the traditional regulation of liens and even from the fiduciary transfer of ownership/rights for security. In the case of financial collaterals, significant priority is given to creditors (collateral takers). The protection of creditors is much greater than that offered to lienors under traditional Croatian property rules. Lienors enjoy maximum privilege in the realisation and settlement of their claims not only in comparison with debtors (collateral providers), but also in comparison with other creditors whose claims against the same debtor are not secured in such a way. Therefore, in most cases, the general rules of property, enforcement, bankruptcy law or the law of

obligations on security rights cannot be applied, not even subsidiarily, to financial collateral arrangements. Their application is always excluded if, in such a way, the creditors' right to priority in enforcement proceedings, in the enforcement in bankruptcy proceedings, or in exercising other rights arising from financial collateral arrangements, are infringed.⁴⁹ Under this Directive, the procedure of establishment, disposition and enforcement of financial collaterals is simplified to the maximum; it has become very expeditious and totally informal. This undoubtedly provides a better and stronger protection of creditors and, as a result, loan risks are diminished. However, the question of how financial collateral protects debtors in the proceedings of informal enforcement has remained open. Their protection is reduced to *ex post* protection that can be realised only after the creditor has settled his claim. In Croatian law, there are no special rules for the protection of debtors in such specific cases but the general rules of property law and the law of obligations could possibly be applied. In practice, however, the application of general rules is not always appropriate for an expeditious and complete protection of debtors in such specific cases. These problems could certainly have been prevented had the approach to the implementation of the Directive been systematic regarding the regulation of new security rights, and the rights and duties of debtors and creditors arising from financial collateral. A similar problem arises in the application of the rule on the protection of consumers in timeshare contracts (Arts. 87-95 of the Consumer Protection Act). The Croatian legislator has taken over all the provisions of the Timeshare Directive and has incorporated them in the Consumer Protection Act. However, timeshare is a completely new legal institution in Croatian law and it has not been systematically regulated. The legal nature of the acquirer's "right to use one or more overnight accommodation for more than one period of occupation", arising from a timeshare

⁴⁹ The application of these rules under the Act on Financial Collateral Arrangements in such cases is even expressly excluded. Article 5(1) of the Act provides that neither the provisions of other acts on the establishment of collaterals nor the provisions of acts on the enforcement of secured claims apply to liens to the extent that their application would violate the right to priority of settlement of the receiver of the collateral as provided for by the Act on Financial Collaterals.

contract (Art. 2(1a) Timeshare Directive), has still not been defined in Croatian property law.

3.2. Liberalisation of the acquisition of real estate by the nationals of EU Member States

At the time when Croatia started the process of EU accession, very restrictive rules on the acquisition of real estate by foreign nationals were in force, discriminating foreign nationals in acquiring immovables (real estate) in Croatia. The Property Act prescribed special conditions to be met by foreign nationals acquiring immovables.⁵⁰ The acquisition of some types of immovables by foreign nationals was expressly prohibited.⁵¹ Therefore, one of the obligations in the process of EU accession was full liberalisation of the acquisition of real estate by nationals of the EU Member States, i.e. the elimination of discriminatory restrictions on the acquisition of real estate. The process of liberalisation was a gradual one and it started at the time when the Stabilisation and Association Agreement entered into force (1 February 2005). On the basis of Article 60 SAA, Croatia had to liberalise the acquisition of real estate by nationals of Member States in accordance with the principle of free movement of capital in the European Union (now Article 63 of the Treaty on the Functioning of the European Union/TFEU). This obligation was to be met gradually. Ever since the entry into force of the SAA, Croatia was ob-

⁵⁰ After the property law reform of 1997, the legal position of foreign nationals in real estate transactions was regulated by Articles 354-358 of the PA/1997. Special requirements for the acquisition of real estate were different depending on the legal basis of their acquisition, i.e. whether it involved inheritance, *inter vivos* contract, court decisions or another body's decision, or laws. A special requirement for the acquisition of real estate by way of inheritance was the principle of reciprocity (Article 356(1) PA/1997). As for other legal bases (e.g. contracts, court decisions, laws), a foreign national could acquire ownership if two special prerequisites were fulfilled: reciprocity and consent obtained by the Minister of Foreign Affairs of the Republic of Croatia which was granted on the basis of a prior opinion given by the Minister of Justice (Art. 356(2) PA/1997).

⁵¹ A foreign national could not own: immovables in specific areas (Art. 358(1) PA/1997), agricultural land (Art. 1(3) of the Agricultural Land Act/2001, certain protected areas of nature (Art. 40(3) of the Natural Protection Act/1994), and forest land (Art. 1(3) of the Forests Act/1990).

liged to allow nationals of Member States to acquire real estate in Croatia by observing the full and purposeful application of current procedures. It was bound to apply the then valid provisions on the acquisition of ownership of immovables in favour of foreign nationals in a way that would guarantee expeditious and simple acquisition. The only areas that were excluded from acquisition were agricultural land and protected areas of nature (Art. 60/2 SAA, Annex VII).⁵² Full liberalisation regarding the acquisition of real estate in Croatia had to be carried within four years from the entry into force of the SAA (Art. 60(2) SAA).

The first step in the fulfilment of the obligations referred to in the SAA was the simplification of the administrative procedure of consent given by the minister competent for acquisition. This was introduced with the amendments to the PA of 2006⁵³ aimed at ensuring full and purposeful application of the existing regulations. The procedure for foreign nationals when applying for consent for acquiring ownership of immovables was simplified by transferring jurisdiction to only one ministry (Art. 357 PA/2006). It had to be given by the Minister of Justice of the Republic of Croatia (Art. 356 PA/2006). Without the necessary consent granted by the Minister of Justice, the legal transaction aimed at the acquisition of ownership was null and void (Art. 357(1) PA/2006). In the first phase, the conditions for the acquisition of ownership of real estate by foreign nationals did not change. The amendments only shortened the procedure for granting consent as a result of only one ministry being involved.

Discriminatory restrictions on the acquisition of real estate were abolished by the amendments to the PA of 2008.⁵⁴ They became effective on 1 February 2009, i.e. upon the expiry of a four-year period prescribed in the SAA during which Croatia was obliged to secure equal treatment in the acquisition of real estate by foreign nationals and its own nationals. From 1 February 2009, nationals and legal entities from

⁵² Croatia was also obliged not to introduce any new restriction regarding free movement of capital, including restrictions on real estate transactions (Art. 60(3) SAA).

⁵³ Act on Amendments to the PA, Official Gazette, 79/06.

⁵⁴ Act on Amendments to the PA, Official Gazette 146/08.

EU Member States may acquire ownership of immovables (excluding agricultural land and natural resources) under the same conditions that apply to citizens of the Republic of Croatia and legal persons seated in Croatia (Art. 358a/1 PA/2008). Equal treatment was also established for all legal transactions by nationals of EU Member States entered into prior to the entry into force of the PA (1 February 2009).⁵⁵ On the other hand, the discriminatory system stipulated in the PA/2006 for nationals and legal entities from third (non-EU) countries was kept both with regard to special requirements and the type of real estate that foreign nationals were not allowed to acquire.

After 1 July 2013, when the Republic of Croatia became a Member State of the EU, the process of liberalisation for nationals and legal entities from EU Member States continued. In accordance with the obligations under the Accession Treaty, the equal treatment established as early as 2009 was maintained. However, after the accession, nationals and legal entities from EU Member States were only excluded from acquiring agricultural land. Nationals and legal entities from EU Member States may now acquire natural resources just like Croatian nationals. The Accession Treaty laid down a transitional measure for agricultural land, i.e. the postponement of the application of the TFEU provisions on free movement of capital (Art. 63 *et al* TFEU) for a period of seven years.^{56, 57} Upon the expiry of the transitional period, the Commission will decide, at Croatia's request, on an extension of the transitional period for another three years if there is sufficient evidence that there will be serious disturbances, or a threat of serious disturbances, on Croatia's agricultural land

⁵⁵ For these transactions, the PA/2008 prescribed convalidation regardless of the fact that consent by the Minister of Justice had not been obtained (Art. 6 of the Act on Amendments to the PA of 2008). Secondly, it was strictly prescribed that any procedures to obtain consent initiated before the PA/2009 entered into force must be stalled *ex officio* (Art. 5 of the Act on Amendments to the PA of 2008).

⁵⁶ See Annex V (a list referred to in Article 18 of the Act of Accession: transitional measures) of the Accession Treaty.

⁵⁷ Self-employed farmers from EU Member States who wish to establish themselves and reside in Croatia are not subject to the transitional measures, so that they may acquire agricultural land like the nationals of Croatia (Annex V of the Accession Treaty, OJ L 2012, 55, p.10).

market.⁵⁸ Regarding nationals and legal entities from third countries, the restrictive rule for the acquisition of real estate remained because, in their case, Croatia was not obliged to liberalise the rules of acquisition during the process of acquisition. The only obligation that Croatia has assumed under the Accession Treaty in relation to third countries is that no new restrictions will be introduced for the free movement of capital for their nationals and legal entities beside those that were in force on 31 December 2002.⁵⁹ Therefore, in the future, Croatia will not be allowed to restrict legal transactions with real estate beyond the limits that existed on 31 December 2002. In relation to third countries, only liberalisation of legal transactions involving immovables is possible, but not the introduction of any new restrictions or prohibitions.

The journey to modern property law was only partially completed by the time of Croatia's accession to the EU. Indeed, at that stage, Croatian property law was already fully harmonised with all the requirements that were important for the functioning of the EU internal market and its market freedoms. After accession, Croatian property law became one of 28 national private law systems within the EU and it continued to develop in conformity with modern European trends. However, there are some specific requirements Croatian property law is faced with

⁵⁸ See Annex V of the Accession Treaty; D. Declaration by the Republic of Croatia concerning the transitional arrangement for the liberalisation of the Croatian agricultural land market (Accession Treaty).

⁵⁹ Such an obligation for Croatia arises from Art. 64 TFEU which prohibits any national restrictions on free movement of capital in relation to third countries which existed on 31 December 2002. Art. 64 of the TFEU was supplemented by express provisions that in respect of restrictions existing under Croatian domestic law, the relevant date is 31 December 2002 (Art. 12 of the Accession Treaty). For more on the allowed national restrictions on free movement of capital in relation to third countries, see Schwarze, J. (Hrsg). *EU-Kommentar*, Baden-Baden, 2012, p. 952; Callier/Ruffert *EUV•AEUV, Kommentar*, München, 2011, p. 1016-1019; Strinz: *EUV/AEUV*, München, 2012, p. 850-853.

even after accession, mostly ensuing from the huge economic crisis and the very difficult financial situation of Croatian citizens. Therefore, the development of Croatian property law following accession to the EU is characterised not only by continued adjustment to EU market freedoms but also by its transformation to ensure corresponding social justice on the market. The demands for the balanced protection of entrepreneurial freedom and property rights are constantly increasing and so is the need to protect the fundamental human rights of Croatian citizens who are less and less able to cope with the burden of severe crisis. At present, these demands seem to be the biggest challenge for the Croatian legislator in the continuing process of reform and property law development, as well as in the development of the entire Croatian legal system.