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Restrictions of Fundamental Rights in Private Law Relations in the Special Legal Order, with Exceptional Regard to the Specific Circumstances Caused by the Epidemic

- **ABSTRACT:** *In this text, the author analyses the intervention measures within the realm of private law relations that were aimed at alleviating or possibly also eliminating the consequences of the serious epidemic. The author presents and analyses the measures introduced in Croatian law to protect private law entities in their private law relations affected by the consequences of the pandemic and the public health measures. The author's focus is on the impact of these measures on the protection and restriction of fundamental rights in private law relations to establish whether they met all the necessary requirements when allowing for such restrictions of fundamental rights in private law relations. The aim of this paper is to consider the criteria for the assessment and proportionality of these measures which in private law relations restrict people's fundamental rights while being imposed to protect people's health in a serious epidemic.*
- **KEYWORDS:** fundamental rights, specific circumstances, epidemic, private law, rights restrictions, proportionality, balancing test.

1. Introduction

A very serious epidemiological situation caused by the COVID-19 pandemic called for diverse and extremely restrictive intervention measures to protect public health. These protective measures have had a serious impact on societies and on almost all aspects of people's lives, their businesses, the operation of legislation, public administration, and judiciaries, as well as the functioning of educational and cultural institutions and health and social systems of countries worldwide. Any decisions on how to organise

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the content and the intensity of these measures against such a serious epidemiological situation have been very challenging for all national legislators because never before have they been confronted with such a complex and dangerous health crisis.

When it started, the situation called for urgent establishment of a system to ensure optimal and efficient protection of people's health and a fast reaction to prevent further spreading of the infection. However, it was very important to organise the necessary measures in such a way that their implementation would not result in a total standstill of all social, cultural, educational, and economic activities; a complete cessation of the work of public administration and the courts; and the loss of jobs, collapsed businesses, bankruptcies, insolvencies, and over-indebtedness because of unemployment. The implemented measures were aimed at restricting the movement of people, the operation of companies, the provision of services, and the usual activities of the courts and public bodies. Other types of measures were also introduced to give support to specific social groups that faced the greatest exposure to infection (e.g. monetary subsidies were given to employers to preserve workplaces, to protect them from insolvency, to free people from having to fulfil their financial commitments or to postpone the payment of their tax obligations and other expenses). It was also very important to think immediately of alternative ways of doing business (e.g. electronic delivery of court submissions and applications to administrative bodies, online court trials, online conferences, and the like). All the protective measures had to be organised in such a way as to observe all fundamental democratic values, the rule of law, and fundamental human rights as integral components to any democratic society. The content of the imposed measures and their intensity had to be carefully selected, so as not to infringe on people's fundamental rights or to do so to the least extent possible. If the restrictions were unavoidable and absolutely necessary, they had to be justified and proportionate to the goals the measures were meant to achieve.²

In this text, the author analyses the intervention measures within the realm of private law relations that were aimed at alleviating or possibly also eliminating the consequences of the serious epidemiological situation caused by COVID-19. The author presents and analyses the measures introduced in Croatian law to protect private law entities in their private law relations affected by the consequences of the pandemic and the public health measures. The author's focus is on the impact of these measures on the protection and restriction of fundamental rights in private law relations to establish whether they met all the necessary requirements when allowing for such restrictions of fundamental rights in private law relations. The aim of this paper is to consider the criteria for the assessment and proportionality of these measures which in private law relations restrict people's fundamental rights while being imposed to protect people's health in very serious epidemiological circumstances. A question arises whether it is possible to apply a traditional and well-known test of proportionality, usually applied in vertical relations regarding the measures restricting fundamental rights, or whether

² See e.g. Council of Europe-Information Documents, 2020, p. 2. See Ludwig Boltzman Institut Menschen Rechte, Universität Wien, 2020, p. 5.

the criteria for assessing the allowability of restricting fundamental human rights should be determined by specific private law relations and in particular by the circumstances in which they are created, achieved, and terminated by the will of equal private law entities.

2. Protective measures and private law

The consequences of this serious epidemiological situation and the implementation of protective measures to remove them or to mitigate them had a serious impact on the position of private law entities in their private law relations from the very beginning of the crisis. In a whole series of private law relations, and particularly those involving residential lease contracts, commercial lease contracts, credit contracts, residential mortgage loan contracts, and other private law relations characterised by a relationship between debtor and creditor, significant changes have occurred in the economic positions of the parties. Because of this health crisis followed by an economic crisis, many debtors were suddenly no longer able to fulfil their commitments. The pandemic and the measures aimed at prohibiting or restricting the operations of economic enterprises resulted in decreases of their expected income, and it became difficult for them to regularly meet their contractual obligations or to pay their outstanding debts. As a result, already at the outset of the epidemiological crisis, it was necessary to modify contracts, to terminate them, to seek forced collection of debts, or to activate various private law instruments which protect creditors in cases of failed or irregular fulfilment of financial obligations.

However, because of very specific circumstances caused by the pandemic, its scope and intensity, as well as its unpredictable duration, it was obvious that the application of traditional private law rules and instruments providing for market relations cannot fully and efficiently solve the existing problems in private law relations caused by the pandemic, nor can their application prevent potential problems in the fulfilment of private law commitments.^{3,4} It became clear that acting in accordance with the general private law rules providing for the duty to act in good faith and fair dealings in performing a free market obligation, using traditional remedies for non-performance, termination of a contract, forced collection of claims, forced evictions from rented flats and business premises, institution of insolvency proceedings, or any similar method,

3 Alderman, R. et al., 2020, p. 438; Wiewiórowska-Domagalska, 2020; Ganuza and Gómez Pomar, 2020; Schmidt-Kessel and Möllnitz, 2020.

4 The same was the case during the financial crisis of 2008 when, because of a high rate of unemployment and over-indebtedness, it was impossible to collect debts or to fulfil the obligations arising from a loan contract, a contract for public services, and the like. Not even then was it possible to remove the consequences of the crisis reflected in private law relations through the classical private law provisions, but specific *ad hoc* measures were adopted to write off debts, to postpone enforcement, to protect people's homes in enforcement proceedings, or to convert foreign currency loans. See e.g. Josipović, 2019.

would lead to an even deeper social and economic crisis or to even greater restrictions and violations of some fundamental rights (the right to a home, the freedom to conduct a business, the right to property, the right to an effective remedy). The application of traditional rules which in the national private law provide for a change or termination of private law relations, an agreed change or modification of contractual relations, or an exemption from the obligations or any other such measure would not adequately protect the parties in these specific circumstances caused by the pandemic. Not even the application of private law provisions on the stipulation of private law relations, such as the interruption of the limitation period for special circumstances; the termination or alteration of a contract when its fulfilment is impossible or more difficult because of some *force majeure*; or unpredictable and suddenly changed circumstances (*clausula rebus sic stantibus*) that could not be prevented, removed, or avoided would not always lead to an efficient and just solution to a problem in private law relations caused by an epidemiological crisis.⁵ In most cases, the application of such private law provisions is based on the parties' agreement, or on a court decision by which an individual private law relationship is terminated or modified in some extraordinary circumstances.⁶ All this requires negotiations; readiness of all parties to amend the contract; or voluntary omission to take measures to collect outstanding claims or, if there is no agreement, to take account of any expenses and arrears, to bring court actions to settle disputes arising from *force majeure* or extraordinary circumstances. In addition, the traditional enforcement law provisions, including special rules on the exemption from enforcement and its postponement in the cases provided for by law cannot ensure a full protection of debtors who, because of the pandemic, are prevented from paying their outstanding debts. Although all these rules usually take into consideration the difficult social, family, or economic situation of debtors, the reasons for their application cannot always be equated with the circumstances caused by the pandemic. Possible postponement or exemption from enforcement must be decided by the court depending on the circumstances of every individual case.

Private law provisions are based on private autonomy and the freedom to enter into contracts. The concept of stipulation of private law relations in national legal orders is based on their stipulation in situations which enable the parties to act in the usual way, to do business, to find permanent jobs, and to avail themselves of legal remedies to protect their rights before the courts. It is the aim of private law provisions, in accordance with the values and principles on which the national legal order is based, to balance the parties' rights and obligations in various private law relations, to ensure the legal freedom of contract, and to efficiently protect their rights. The application of the private law provisions establishes a balance between the parties' rights and obligations and results in the adjustment of these relations to the expectations the parties

5 Alderman, R. et al., 2020, pp. 438–440.

6 For a comparative overview of amending or terminating contracts because of the changed circumstances in individual national legislation in Europe, see von Bar et al., 2009, pp. 737–741.

had at the time of their establishment.⁷ However, all these rules, designed for normal circumstances, cannot adequately solve or prevent all the problems in private law relations arising from the pandemic, problems that seriously endanger people's lives and health, their property, and their economic activities, and finally result in extensive economic damage.⁸

These circumstances caused by the pandemic have a drastic impact on people's capacity to fulfil their obligations, by changing the legal position of lessees, workers under labour contracts, and creditors who must collect their outstanding claims. The nature of the affected private law relations varies, and they call for special *ad hoc* measures to regulate them, to avoid even greater damage for the parties and for all parties to achieve a new just balance in their private law relations in accordance with special circumstances caused by the pandemic.

Since the beginning of the pandemic, countries have intervened in various ways in private law relations, and a number of public law measures have been introduced to protect the population's health. It was also important to maintain and continue all business activities, preserve the validity of the existing contracts,⁹ and the fulfilment of contractual obligations,¹⁰ as well as to ensure some fundamental rights (the right to a home, the right to work, freedom to conduct a business, the right to property). The applied approach determined the private law areas where such immediate intervention was necessary (loan agreements, lease agreements, and the like).

The introduced measures addressed a number of very complex issues such as the financial protection of debtors from enforcement and compulsory claim collection, the termination of credits, loan defaults, financial protection of creditors from insolvency, loss of income and/or money caused by non-payment of debts, as well as the protection of consumers from aggressive debt collection. Some measures were aimed at maintaining the *status quo* in contractual relations,¹¹ or at facilitating the debtor's position. Some of them targeted the position of debtors, or were aimed at temporary relief of the obligations of consumers and companies experiencing financial distress, enabling debtors to keep their businesses going, making it possible for debtors to protect their homes and families, and generally raising consumer awareness of these new financial challenges. Indeed, the measures were very diverse, but they were all informed by a close dialogue between the legislators, particular industries, consumer and business associations, government, and independent regulators. However, the most common measures were such legislative measures as specific new laws or amendments to the existing laws to address the problems of the standstill, or postponement of the exercise of people's rights, as well as the implementation of the parties' private law commitments. It is often necessary to extend, for at least a short period of time, the existing

7 Menezes Cordeiro and Menezes Cordeiro, 2020.

8 The same in Alderman, R. et al., 2020, p. 439.

9 Ganuza and Gómez Pomar, 2020.

10 Wiewiórska-Domagalska, 2020.

11 Some authors emphasise that such measures are based on the principle of risk crystallisation – see Menezes Cordeiro and Menezes Cordeiro, 2020.

contractual relations (e.g. in lease contracts, mortgage credit contracts, etc.) and/or postpone the pending court proceedings for the payment of claims (in enforcement or bankruptcy proceedings).¹² In addition to all the above measures, various government measures and policies, court and supervisory guidance systems (independent regulators), national bank recommendations, professional associations' rules, voluntary guidance, company policies, as well as measures of special market supervision, were introduced.

The main characteristics of such measures have been temporary duration (for a clearly specified time limit), possibility of extension, application to only some specific private law relations such as loans or lease agreements with lists of exceptions stipulated by law. In most cases, such measures have consisted either of a voluntary or a mandatory moratorium on the rights and the fulfilment of obligations arising from contractual relations (measures related to the existing and/or new agreements),¹³ to temporarily postpone forced payments (enforcement) or delay the institution of bankruptcy proceedings (measures related to insolvency):

12 See Alderman, R. et al., 2020, pp. 441–445. In Austrian law, temporary suspension to terminate residential lease contracts and short-term extension of contracts (up to 1/7/2022) are regulated. See Ofner, 2020, pp. 107–108. Slovak law provides for temporary suspension to terminate residential lease contracts from 1/4/2020 to 30/6/2020. See Gajdošová, 2020. Portuguese law provides for temporary suspension to terminate residential lease contracts (up to 30/9/2020), postponement of paying rent, postponement of evictions for residential and non-residential tenancies (up to 29/5/2020), and a moratorium for credits. See da Costa Afonso, 2020; Menezes Cordeiro and Menezes Cordeiro, 2020.I

British law provides for special notice periods when cancelling lease contracts for non-payment. See Beale and Twigg-Flesner, 2020. German law provides for the right to temporary rejection of the fulfilment of the contract by the consumer or SMSs from essentially long-term contracts concluded before 8 March 2020, temporary postponement of the right to cancellation of a lease contract for non-payment, *ex lege* postponement of the obligation for three months under consumer contracts, and the right of organisers of leisure activities to issue vouchers instead of refunding the costs to users of services. See Schmid, 2020, pp. 114–115; Schmidt-Kessel and Möllnitz, 2020. Greek law regulates, among other things, *između ostalog*, temporary postponement of paying rent from residential lease contracts; see Dacornia, 2020. Spanish law provides for the postponement of evictions from residential buildings and rented flats, extension of lease contracts for six months, postponement of the payment of rent, and a moratorium on the payment of rent. See Gómez-Ligüerre and Milà-Rafel, 2020. Swiss law regulates time limits for paying rent prolonged in residential lease contracts. See Wolf and Minnig, 2020. Italian law introduced postponement of evictions of lessees from residential buildings. See Pertot, 2020, p. 138. Lithuanian law regulated, for example, exclusion of the right of the consumer to abandon a contract because of non-payment of the obligations from the contract on event services and issuance of vouchers. See Mikelėnas, 2020. Russian law has special rules on postponement of paying the obligations from a loan agreement, the debtor's right to change the conditions of a loan agreement, the lessor's obligations to change the lease agreement to lower the rent, and postponement on paying the rent. See Dmitrikova and Sychenko, 2020. Polish law has special rules on the extension of lease contracts, prohibition on increasing the amount of rent, consumers' vouchers for cancelled events, and suspension of the payment of obligations from a loan agreement. See Wiewiórowska-Domagalska, 2020.

13 See Ganuza and Gómez Pomar, 2020.

<p>INSOLVENCY-RELATED MEASURES</p>	<ul style="list-style-type: none"> • special moratorium for insolvency proceedings (<i>ex lege</i>, on the debtor's request without the creditor's consent) • suspension of the obligation to file for insolvency • suspension of directors' obligations to file for bankruptcy proceedings • suspension of the creditors' right to sue debtors for insolvency • suspension of the fulfilment of a restructuring plan • a new right of a debtor to apply for a conversion of the bankruptcy liquidation process to a restructuring or a settlement process • protection in bankruptcy proceedings for newly granted loans (loans are not considered as disadvantageous to creditors)
<p>ENFORCEMENT-RELATED MEASURES</p>	<ul style="list-style-type: none"> • temporary restrictions on debt collection and the enforcement proceedings moratorium • moratorium on the execution against pledged property • unblocking debtors' accounts • measures to stop the enforcement of monetary debts • moratorium on evictions • moratorium on public auctions • suspension of limitation periods for debt-collection system
<p>MEASURES RELATED TO EXISTING AGREEMENTS</p>	<ul style="list-style-type: none"> • temporary relief from loan repayments • obligation to offer new repayment terms for the existing credit obligations • statutory rescheduling of consumer loan payments • voluntary repayments/restructuring programme for loans – loan extension • temporary restrictions on interest, fees, charges associated with late payments or loan defaults • temporary prohibition against withdrawing, cutting off, or suppressing loans • temporary prohibition against terminating agreement unilaterally or judicially because of breach of payment obligations by the affected business entity • suspension of landlords' rights to terminate leases/tenancy/rent agreements if the failure to pay is due to the effects of COVID 19 • short extension of fixed-term residential tenancy agreements • extension of time limits for paying rent • easily accessible, prompt, and fair relief options from contractual obligations • nullity of debtor's transactions on transferring property and undertaking obligations during the moratorium • suspension of the effects of defaults and delays of payments • suspension of payment obligations arising from loans • suspension of the prescription for claims • suspension/extension of procedural time limits for remedies • issuing travel vouchers for travel package contracts • prohibition on rent increases • reduction or fixed prices for utilities, electric power, water supply, gas

MEASURES RELATED TO NEW FINANCIAL AGREEMENTS	<ul style="list-style-type: none"> • new COVID financial instruments accessible via digital means with low interest • new transparency rules • special protection in bankruptcy
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Table 1 Measures for the protection from insolvency/debt problems caused by COVID-19¹⁴

As already noted, the organisation of measures or the mitigation of the consequences of the pandemic when it comes to private law relations required a very specific approach aimed at balancing the conflicting subjective private rights of the parties to achieve a just balance between them in the difficult conditions arising from the pandemic. Namely, these are measures with so-called horizontal legal effects because they apply equally to natural or legal persons whose subjective private rights deserve the same level of protection. In addition, the application of these measures may also have an effect on the exercise of fundamental rights of the participants in private law relations (the right to a home, the right to freely conduct business, the right to an effective remedy). Some of these fundamental rights may be restricted.¹⁵ In some cases, the achievement of optimum balance between these fundamental rights is very difficult (such as between the right to property and the right to a home). This is why the approaches to the stipulation of these measures by national legislators were different for specific private law relations.

In some cases, national legislators regulated measures with *ex lege* moratorium effects without any possibility of lifting the moratorium or measures with the possibility of lifting the moratorium in whole or only in part *vis-à-vis* a concrete consumer or business entity (if not affected by the COVID 19 crisis). In some cases, these have been individual measures determined by the court or an administrative body on the basis of a general regulation. Some measures have had an 'opt in' effect (voluntary application on request), while others offered an 'opt out' effect (voluntary exclusion, application of ordinary rules on request). At the same time, there are also differences in the organisation of the personal and substantial area of application of the measures. Some of them apply only to particular types of contracts (for example a residential lease contract), or only to consumer contracts, in other words, the protection of natural persons as consumers. Other measures apply solely to the claims arising from the COVID-19 crisis, while some relate to all claims existing before and during the COVID-19 crisis.

¹⁴ Data in the table categorised based on the data on the measures taken in individual countries were published in the following publications: Squire Patton Boggs, 2020a; Squire Patton Boggs, 2020b; European Commission Directorate-General Justice and Consumers Directorate A: Civil and Commercial Justice Unit A.1 : Civil justice, 2020a; European Commission Directorate-General Justice and Consumers Directorate A: Civil and Commercial Justice Unit A.1 : Civil justice, 2020b.

¹⁵ See Alderman, R. et al., 2020, p. 444; United Nations Human Rights Special Procedures (2020). It arises from the recommendation in the document that through the measures taken in individual countries regarding a moratorium on the payment of obligations from loan agreements and eviction documents, the fundamental housing rights of renters and mortgage payers are protected.

3. Protective measures in Croatian private law

Because of the coronavirus pandemic, the Republic of Croatia has not activated Article 17 of the Constitution according to which, during a state of war, or any clear and imminent danger to the independence and unity of the Republic of Croatia, or in the event of any natural disaster, fundamental rights and freedoms may be restricted.^{16,17} Such a decision is normally made by a two-thirds majority of the Croatian Parliament or, if the Croatian Parliament is unable to convene, at the proposal of the government and with the countersignature of the Prime Minister, by the President of the Republic (Art. 17/1). When introducing protective measures, Croatia also did not file an application pursuant to Article 15 of the European Convention on Human Rights providing for a derogation from the obligations under the Convention in time of war or other public emergency threatening the life of the nation.

In the Croatian legal order, the adoption of measures to protect the health of its population in the circumstances of an epidemic is based, on the one hand, on the official proclamation, made on 11 March 2020 by the Minister of Health, for the entire territory of the Republic of Croatia about the existence of COVID-19.¹⁸ Pursuant to Article 1 of the Act on the Protection of Citizens against Infectious Diseases,¹⁹ the COVID-19 epidemic is considered to be an infectious disease whose prevention and suppression is of interest for the Republic of Croatia. Therefore, the Minister of Health and the Civil Protection Headquarters of the Republic of Croatia²⁰ are authorised to order special safety measures to protect the population from the pandemic. Such measures may differ: from organising a quarantine and self-isolation; to a prohibition against travelling or movement of people; to restrictions or prohibitions on circulation of certain types of goods and products; to the prohibition on using particular facilities, equipment, and means of transport.²¹ The Civil Protection Headquarters of the Republic of Croatia and its members have adopted numerous decisions to prevent the infection from spreading in specified segments of society, business entities, and educational and healthcare institutions.²²

16 Arts. 17/2,3 of the Constitution laid down that, in such cases, ‘the extent of such restrictions must be adequate to the nature of the threat, and may not result in the inequality of citizens with respect to race, colour, gender, language, religion, national or social origin. Even in cases of clear and present danger to the existence of the state, no restrictions may be imposed upon the provisions of this Constitution stipulating the right to life, prohibition of torture, cruel or unusual treatment or punishment, and concerning the legal definitions of criminal offences and punishment, and the freedom of thought, conscience and religion.’

17 See Bodul and Nakić, 2020a, p. 2.

18 See the Decision on the Proclamation of the COVID-19 epidemic caused by SARS-CoV-2. This Decision was rendered based on Art. 2, para. 4 of the Act on the Protection of the Population from Infectious Diseases and Art. 197 of the Healthcare Act.

19 Official Gazette/*Narodne novine* (OG) 79/07, 113/08, 43/09, 130/17, 114/18, 47/20

20 If an epidemic of an infectious disease is involved, it is proclaimed by the World Health Organization to be a pandemic

21 See Art. 47 Act on the Protection of Citizens against Infectious Diseases

22 See decisions of the Croatian Civil Protection Headquarters

On the other hand, the adoption of protective measures is based on the new concept of ‘*special circumstances*’ (*posebne okolnosti*) introduced in the Croatian legal order particularly because of the introduction of the measures against the pandemic. These are the circumstances which, because of the urgent need to protect the population’s health, require the adoption of special decisions and instructions by competent authorities and sometimes even an intervention into private law relations to protect people’s health and lives. All these protective measures are taken on the basis of amended, new, and separate laws adopted because of the pandemic, and they establish the existence of such ‘*special circumstances*’ as their basis. However, the restrictions on fundamental rights regulated by protective measures adopted on the basis of separate laws because of ‘*special circumstances*’ are not based on Article 17 of the Constitution because Croatia has not proclaimed a state of emergency. Special regulations which, because of ‘*special circumstances*’, provided for restrictions of fundamental rights are based on Article 16 of the Constitution laying down that fundamental rights and freedoms, among other things, may be restricted for the protection of people’s health but that they, in each individual case, must be proportionate to the nature of the need for such a restriction. Therefore, protective measures may be subject to constitutional law review in regard to the legitimate goal of the measure, its intensity, and justification of the restriction of citizens’ fundamental rights and freedoms.²³

The concept of ‘*special circumstances*’ was introduced to provide for a special and justified legal basis for various measures to prevent the COVID-19 epidemic in line with the Constitution both at the public law level and in private law relations. Already in March 2020, the Civil Protection System Act of 2015²⁴ was amended by a new Article 22a which defines ‘*special circumstances*’ and the powers of the Civil Protection Headquarters of the Republic of Croatia to make decisions and give instructions to protect the lives and health of people, their property, economic activities, and the environment, and to harmonise the actions of legal persons and citizens.²⁵ Subsequently, the same

23 The Constitutional Court of the Republic of Croatia analysed the alignment of some measures with the Constitution and law from the aspect of the justification and proportionality of these measures which restrict some fundamental rights. The Constitutional Court held that the decision of the Civil Protection Headquarters on the working hours and the work of shops banning them from working on Sundays from 27/4/2020 to 26/5/2020 was contrary to Art. 16 of the Constitution which lays down that any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case. The Constitutional Court also held that it was a justified restriction but that it was not in line with the principle of proportionality. See: Decision of the Constitutional Court of the Republic of Croatia (2020) No. U-II-2379/2020.

24 Act on Amendments to the System of Civil Protection Act, OG 31/20

25 The provision of Art. 22a. of the System of Civil Protection Act on the powers of the Civil Protection Headquarters of the Republic of Croatia to take measures in special circumstances has been challenged for allegedly being contrary to the provisions of the Constitution, of the European Convention on Human Rights, and of the Charter of Fundamental Rights of the European Union. That provision is also challenged *inter alia* because the legislator, when laying it down, failed to act in accordance with Art. 17 of the Constitution on the proclamation of a state of emergency by the decision of the Croatian Parliament. The Constitutional Court rejected all applications for the institution of the proceedings for the assessment of constitutionality. See Decision of the Constitutional Court of the Republic of Croatia (2020) No. U-I-1372/2020 et al.

concept of the development of protective measures because of '*special circumstances*' was extended to other separate acts, including those applied to private law relations.

'*Special circumstances*' are defined in all acts in the same way, regardless of whether those acts lay down the powers of public bodies introducing protective measures²⁶ or provide for private law relations.²⁷ '*Special circumstances*' are defined very generally, so that these rules are also applicable to other situations beyond the COVID-19 epidemic. '*Special circumstances*' imply '*an event, or a particular situation which could not have been foreseen or prevented, and which constitutes a danger for the citizens' lives and health, for their property of higher value, or which causes a significant damage to the environment, to economic activities, or sustains major economic damage.*' There is no doubt that such a definition of '*special circumstances*' also encompasses those caused by COVID-19 when, in conformity with Article 16 of the Constitution, the measures restricting fundamental rights and freedoms to protect people's health can also be taken.

In private law relations, by express stipulation of the impact of the special circumstances caused by COVID-19 on the parties' rights and obligations, the concept of '*special circumstances*' applies to a relatively small number of private law areas. These are private law relations in which the legislature held that by the general application of private law provisions, a speedy and appropriate protection of the parties could not be ensured because numerous legal relations were affected by the COVID-19 crisis, or because these specific legal relations are otherwise also governed by special rules on the parties' rights and obligations. An express intervention was necessary because the COVID-19 crisis could put the parties into a very difficult social and/or economic position whereby some of their fundamental rights might be violated. Specific regulation of the consequences of the epidemic by some public interests is connected with the fight against recession. This epidemic has had a strong impact on the private law relations in the economic sphere and in segments that are of crucial importance for Croatia (such as tourism and passenger transport). The impact of special circumstances caused by COVID-19 has thus been separately regulated only for travel package arrangements on which tourist services are mostly based, as well as for enforcement and bankruptcy proceedings. The legislature was of the opinion that through the application of the provisions of the Provision of Tourism Services Act on the protection of the parties to travel package contracts adjusted to the EU law²⁸ and by the subsidiary application of the provisions of the Obligations Act²⁹ on the cancellation of a contract for nonfulfillment,

26 See Art. 22a. System of Civil Protection Act, OG 82/115, 118/18, 31/20; Art. 12, p.12, Art. 57a Trade Act, OG 87/08, 96/08, 116/08, 116/08, 76/09, 114/11, 68/13, 30/14, 32/19, 98/19, 32/20

27 See Art. 25a Act on Execution of Enforcement over Monetary Assets, OG 68/18, 2/20, 46/20, 47/20; Art. 2. Act on Intervention Measures in Enforcement and Insolvency Proceedings during the Special Circumstances, OG 53/20, Art. 7 p. 24 Act on the Provision of Tourism Services, OG 130/17, 25/19, 98/19, 42/20.

28 The provisions of the Croatian Act on the Provision of Tourism Services are harmonised Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on travel package and linked travel arrangements (Art. 2 of the Act on the Provision of Tourism Services).

29 OG 35/05, 41/08, 125/11, 78/15, 29/18.

or its cancellation or modification for changed conditions or the like, the epidemic made it impossible to ensure the proper protection of the parties. The legislature also held that through the application of the general provisions of the law on enforcement on the protection of debtors (e.g. postponed enforcement, exclusion of particular things from enforcement, restriction of seizing a person's salary, and the like), it was not possible to ensure the protection of a large number of debtors affected by the epidemic because of numerous enforcement proceedings.³⁰

These specific circumstances caused by COVID-19 have had a negative impact on the Croatian economy and on the tourist sector in particular. Since tourism is the main branch of Croatia's economy and constitutes a large share of its GDP,³¹ the legislature expressly intervened in the contractual relations in the area of tourism precisely because of COVID-19.³² The rights and obligations arising from travel package contracts have been dealt with first to prevent the organisers of package tours from insolvency or bankruptcy caused by mass cancellations of their contracts because of the pandemic. The amendments to the Provision of Tourism Services Act lay down a new traveller's right to terminate travel package contracts which should have been performed after 1 March 2020 and the issuance of vouchers for non-performed travel package contracts because of special circumstances caused by COVID-19.³³ However, to prevent the organiser's insolvency, the consumer's right to terminate the contract is suspended upon the expiry of 180 days following the cessation of special circumstances. The traveller's right to a full refund on any payment against the organiser in case of termination of the contract is also provided for, as is the postponement of the traveller's right to a full refund of any payment against the organiser if the traveller has terminated the contract. The organiser is bound to refund the payment only within 14 days upon the expiry of 180 days from the cessation of special circumstances. During the postponement period, the organiser is bound, instead of refunding the payment, to issue a traveller's voucher which can be used for another trip or for a previously paid travel package arrangement upon the expiry of 180 days from the cessation of special circumstances.³⁴ Through the postponement of the right to cancel the contract and the

30 See Bodul and Nakić, 2020a, p. 2.

31 See data on estimates for the Croatian economy in the context of the COVID-19 crisis in the World Bank Group, 2020, p 50.

32 Act on Amendment to the Act on the Provision of Tourism Services, OG 42/20.

33 The right to terminate a contract for special circumstances caused by COVID-19 exists in parallel with the right of the traveller and the organiser to terminate the contract for extraordinary circumstances (Art. 37/6 and Art. 38/2 Act on the Provision of Tourism Services), aligned with the provisions of the Package Travel Directive for unavoidable and extraordinary circumstances, Art. 12 paras 2, 3 (b).

In addition, general provisions of the contract law referred to in the Obligations Act, Art. 369 apply also to travel package contracts on the termination of contract in case of change of circumstances (*clausula rebus sic stantibus*).

OG 42/20 (in force from 8/4/2020).

34 See the new Art. 38a of the Act on the Provision of Tourism Services on the right to terminate a travel package contract and the issuing of vouchers because of special circumstances caused by COVID-19.

obligation of refunding the payments, a possibility is left to the organisers of the travel, when specific circumstances cease to exist, to stabilise their business's finances and reorganise the provisions of tourist services. On the other hand, travellers are given a guarantee that the invested money under a travel package contract will be reimbursed or used for another travel package in the future.

In the area of insolvency law, because of special circumstances caused by COVID-19, all enforcement and bankruptcy proceedings are suspended. The suspension is regulated by the measures that became effective *ex lege* through the entry into force of separate acts regardless of the decision made by the debtor or creditor, in other words, without the debtor's application and the creditor's agreement. Based on the Act on Amendments to the Act on Execution of Enforcement over Monetary Assets,³⁵ debtors' accounts which had been blocked because of enforcement of various claims were unblocked. In other words, because of special circumstances that arose due to COVID-19, the enforcement of monetary debts on citizens' accounts was stayed. The blockages of debtors-natural persons included craftsmen and individual tradesmen. In addition, through the entry into force of the Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances,³⁶ all other enforcement proceedings, such as wage garnishment and bankruptcy proceedings, were temporarily suspended.³⁷ The suspension of enforcement applied to all debtors (natural persons, private and public legal persons) and creditors (natural persons, private and public legal persons), both domestic and foreign, for all their debts and credits regardless of the legal basis of their existence (with some exceptions), and enforcement over any objects or things (movables, immovables, rights). Such a broadly determined area of the suspension of enforcement was explained by the necessity to alleviate the position of natural persons and business entities, to protect the lives and health of the parties in enforcement proceedings, and to prevent any economic damage.³⁸

Another important measure regarding debts of natural and legal persons was a provision that no legal interest would accrue during special circumstances.³⁹ The cessation of accrual of interest was also very broadly interpreted. No interest accrued on any debts regardless of whether the debtor was a natural or a legal person and regardless of

35 OG 47/20 (in force from 18/4/2020). The Act on Execution of Enforcement over Monetary Assets is amended by Art. 25a on the acting of the Financial Agency in special circumstances in terms of the execution of enforcement over monetary assets of debtors – natural persons.

36 OG 53/20 (in force from 18/7/2020).

37 See Art. 3/1, 4/1, 6/1 Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances. Art. 6 expressly provides that the reasons for bankruptcy arising during a special circumstances period are not a condition for filing a bankruptcy petition.

38 See Point II of the Proposal for the Act on Intervention Measures in Enforcement and Insolvency Proceedings during special circumstances, 2020.

39 See 25b. Act on Execution of Enforcement over Monetary Assets, OG 68/18, 2/20, 46/20, 47/20; Art. 7 Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances

whether the enforcement proceedings had commenced.^{40,41} This temporary suspension of enforcement and interest charges on arrears lasted from 18 April to 18 October 2020.

The consequence of the suspension of enforcement proceedings was an automatic unblocking of 97% of blocked citizens' accounts for a total of 1,089,620 enforcement titles and a total amount of 3,2 billion € (principal + interest).⁴² When the unblocking because of special circumstances took place (18 April 2020), 6.6% of Croatian citizens' accounts were blocked, in other words, those of every 17th citizen, or the accounts of 7% of working-age persons in Croatia, in other words, every 14th working-age person. All those people were, after unblocking, again able to freely access the monetary assets in their bank accounts. The suspension of all other enforcement proceedings also cancelled any *online* public auctions of selling flats and other immovables in enforcement proceedings, thus including evictions from immovables which could be up for auction. In short, by suspending the enforcement over debtors' assets, in terms of the use of the object of enforcement (monetary assets, immovables, and the like), the previous situation was restored that had been in place before the institution of enforcement. Debtors, whose monetary assets were unblocked, were in a particularly favourable situation. They were able to spend their money how they wanted, and they could pay their bills and debts that had accumulated during those specific circumstances. The act under which the monetary assets were unblocked did not restrict in any way the debtor's ability to dispose of the monetary assets in his or her accounts during specific circumstances to keep them for the creditors whose enforcement proceedings had been stopped because of special circumstances.

NUMBER OF (UN)BLOCKED ACCOUNTS 18.4.2020

UNBLOCKED ACCOUNTS	BLOCKED ACCOUNTS	SUSPENDED ENFORCEMENT TITLES	SUSPENDED DEBT PRINCIPAL	SUSPENDED DEBT INTEREST
244.865 DEBTORS NATURAL PERSONS	8.015 DEBTORS NATURAL PERSONS	1.089.620	2,30 billion €	0,90 billion €
97%	3%			

6.6% of Croatia's population had blocked accounts on 18 April 2020.

Table 2 The effects of the suspension of enforcement on bank accounts (debtors-natural persons).⁴³

40 See Opinion of the Ministry of Finance 2020.

41 The time limits referred to in separate acts were also not running. See Art. 25a/7 Act on Execution of Enforcement over Monetary Assets. These are the periods of blockades provided for by the Act on Execution of Enforcement over Monetary Assets, the time limits provided for in the Bankruptcy Act (OG 71/15, 104/17) for the applications to open bankruptcy proceedings, and the like. However, this provision does not provide for staying limitation periods provided for by the Obligations Act because this Act is not considered to be a separate act according to Art. 25a/7 Act on Execution and Enforcement over Monetary Assets. See Opinion of the Ministry of Finance.

42 Data taken from the publication of the Financial Agency, 2020.

43 Data taken from the publication of the Financial Agency, 2020.

In other areas of Croatian private law, no special private law measures were taken to restrict or change the rights of the parties because of special circumstances, whereas other countries have intervened in private law relations because of the pandemic (e.g. residential lease contracts, consumer credit contracts). In all other private law areas, the legislature left it to the parties, in the circumstances caused by the pandemic, to adjust their private law relations in conformity with the principle of private autonomy and freedom of contract (e.g. by voluntary reprogramming of debts, lowering leases, changing lease contracts for business premises, amending labour contracts and the like). In some cases, the state's assistance was offered in the form of special subsidies to fulfil, among other things, the obligations arising from various types of contracts (e.g. state subsidies to legal persons-entrepreneurs), through recommendations to negotiate a moratorium or reprogramming of credit obligations, or by changing the rules on the supervision of banks, so they do not institute foreclosures or activate collateral instruments against debtors.⁴⁴ For example, based on the recommendations of the Croatian National Bank, credit institutions, by their internal rules, developed the conditions for negotiating with debtors on voluntary repayment or restructuring of loan programmes. On the other hand, in some contracts, such as residential lease contracts, there was no need for any specific stipulation of the rights of lessees because the use of residential immovable, under lease contracts, is not a widespread practice in Croatia, or because the protection of lessees against the cancellation of a lease contract, or increased rent, is already stipulated elsewhere.⁴⁵

4. Fair balance between the restriction of fundamental rights in private law relations because of protective measures caused by the epidemiological situation

The intervention measures to protect the life and health of people and to eliminate and alleviate economic imbalances and reduce possible damages to the country's economy because of the epidemiological situation have had an impact on the exercise and protection of the fundamental rights of the parties in private law relations. These measures introduced in private law relations restricted the realisation of some subjective private rights (e.g. the postponement of exercising the right to cancellation of a contract for non-payment, moratorium on paying the obligations arising from a loan or a lease contract, no charging of interest, staying forced payments of claims, lower rent, prohibition of eviction, and the like). In some cases, there were restrictions on particular fundamental rights in private law relations, particularly the so-called fundamental economic rights such as the freedom to choose an occupation and the right to engage in work, freedom to conduct a business and freedom to enter into contracts, the right to

⁴⁴ See the information published by the Croatian National Bank, 2020.

⁴⁵ According to the census of 2011, only 5.7% of all flats in Croatia were occupied on the basis of a lease agreement. See the publication of the Croatian Bureau of Statistics, 2017, pp. 18 and 32.

property,⁴⁶ and the like. There were cases in which, because of intervention measures applied to the relations involving private law subjects, a conflict occurred between their mutually opposed fundamental rights, which are normally protected and exercised in such private law relations. A conflict happens when different fundamental rights of individual parties in a private law situation are recognised (e.g. freedom to conduct business on the part of a creditor/lessor/credit institution, and, on the other side, the right to a home on the part of a debtor/lessee/mortgagor). There were also cases in which a conflict arose between the same fundamental rights recognised for both parties in a private law relationship. Indeed, in all such situations, because of intervention measures aimed at protecting people's health, or protecting a fundamental right of one party, the other party's fundamental right was restricted. Such interventions intended to protect the parties' fundamental rights in their private law relations were legitimate if all the prerequisites for their implementation, stipulated in the national law, and in the commitments made under international treaties, had been met.⁴⁷ The protective measures restricting the fundamental rights of the parties in private law relations, to be allowed, had to be implemented in accordance with the principle of proportionality. Every measure had to have a legitimate goal, and it had to be appropriate and necessary to achieve its goal (e.g. protection of health in the circumstances of the pandemic). In addition, any introduced measure had to achieve a fair balance between its legitimate goal and the restriction of a person's fundamental right in such a way as to avoid any excessive burden on an individual and not to destroy the very essence of the respective right (the so-called 'proportionality' in the narrower sense).⁴⁸

In private law relations, the criterion for assessing whether a fair balance has been achieved is determined by the equal status of the parties who have conflicting fundamental rights. Therefore, it is necessary to establish, on the one hand, whether the restrictions of individual fundamental rights of the conflicting parties are justified by a public interest because of which a measure has been imposed (e.g. the protection of life and health). On the other hand, it is then important to assess whether the restrictions of individual fundamental rights in a particular private law relationship are well balanced. The impact of an intervention measure aimed at the protection of health and alleviation of economic disruptions caused by the pandemic lead to a change in the balance between the rights and obligations of the parties in private law relations which they have established in conformity with the principle of private autonomy and freedom of contract or which is established by a law providing for that particular type

46 See Articles 15–17 of the Charter of Fundamental Rights of the European Union. Protocol No.1, Art. 1 of the European Convention on Human Rights.

47 In the documents of the Council of Europe, the necessary preconditions for the legitimacy of measures for the protection of health because of the pandemic are the following: the rule of law (the principle of legality); limited duration of the measure; limited personal and substantial scope of the measure, i.e. the principle of necessity; and judicial control of measures. See Council of Europe, 2020, pp. 3–4.

48 See Bagić, 2016, pp. 67–68; Collins, 2014, p. 49; Bodul and Nakić, 2020b, pp. 2–4. See Art. 52/1 Charter of Fundamental Rights of the European Union.

of private law relationship. Therefore, besides the assessment whether a fair balance has been established between public interest because of which the measure is imposed and the fundamental right of a party (the protection of health → right to property or freedom to conduct business), it is necessary to do a specific balancing test to verify whether a balance has been achieved between the conflicting fundamental rights of the parties. Such a balancing test is particularly important when no fundamental right of either party takes precedence over a fundamental right of the other party (e.g. freedom to conduct business ↔ right to property). The balancing test must be carried out at two levels: first, in the correlation between public interest for which the measure has been imposed and every fundamental right of both parties and, second, between their mutually conflicting fundamental rights. Only then can it be established whether, in the context of the public interest involved, the fundamental rights of the parties exclude or restrict one another; whether such mutual restriction is justified, necessary, and proportional; and whether, through the protective measure, it imposes an excessive restriction or burden on one of the parties. It finally results in a situation in which the proportionality test is not conducted only in relation to the public interest achieved by the measure. It is important to apply the proportionality test in relation to the restriction of every individual fundamental right in regard to the public interest but also in regard to the fundamental rights of the other party. The concept of the proportionality test, which implies that only one party has fundamental rights affected by a measure imposed in the public interest, would not be appropriate in the context of private law relations. Indeed, it is necessary to conduct several parallel proportionality tests in regard to every fundamental right exercised within a private law relationship (the so-called double-proportionality test)⁴⁹ and then compare the seriousness and the intensity of the restriction of fundamental rights.

The criteria to assess whether, through a public law measure protecting people's health, an appropriate balance is achieved in the context of private law relations are very complex. Attention must be paid to whether, in terms of all fundamental rights exercised within a private law relationship, all prerequisites for justification, necessity, and proportionality of that measure are achieved, and a just balance is established between them in bearing the risk and burden caused by the pandemic. In that regard, what is particularly sensitive is the assessment of the impact of the measures by which, within private law relations, a fundamental right of one party is ultimately protected by restricting, at the same time, a fundamental right of the other party. To make an assessment, it will often be important to determine how the intervention measure affected the content and the manner of exercising the already acquired rights in a private law relationship and whether the core of the fundamental rights of all parties is preserved. Sometimes it will be necessary to assess how the prerequisites for the implementation of the intervention measure have been established; whether the area of implementation of the measure is reduced to the private law relationship where

49 For the same see also Collins, 2014, pp. 49–50.

it is necessary to intervene to protect people's health; whether the legislature, when developing an intervention measure, also provided for some new rights and obligations of the parties to consolidate or to alleviate the restriction of a fundamental right of one of the parties as the consequence of an intervention measure. It is important to know how the personal area of the application of the measure is organised, what its duration is, and whether some exceptions from its application are prescribed, as well as whether the implementation of a measure or an exemption is at the disposition of one of the parties, whether the measure has been applied *ex lege*, or whether the party must opt for its implementation. It may also be important to know whether a party to a private law relationship, because of an excessive burden due to some other measure, has been compensated for its loss in this particular relationship (e.g. the loss of interest in arrears by a state subsidy given to entrepreneurs because of the loss of income). It may also be important to know whether, because of an excessive burden imposed by a measure, a party to a private law relationship has been relieved of the loss by some other measure (e.g. compensation for the loss of the accrued interest by a subsidy granted to entrepreneurs because of their losses). At the same time, to preserve the core feature of private rights, it is necessary to preserve the parties' decision-making freedom, their equality and disposition at the time of establishment, realisation, and termination of their rights and obligations. Finally, it is also important to ensure the corresponding social justice dimension in private law relations affected by specific circumstances caused by the pandemic.

In the context of private law relations, the balancing between various fundamental rights affected by protective measures against the pandemic at the national level was carried out in various ways. The main goal has been, in the situation caused by the pandemic, to adjust the private law relations to the newly existing circumstances in such a way that the risks and burdens caused by the pandemic are equally shared between the parties (owners and lessees, creditors and debtors, employers and employees), so that neither party bears an excessive burden or loss. As a rule, the main idea has been to preserve the status quo in private law relations. The priority has been to maintain the already established private law relations with the contracted content of their rights and obligations. Therefore, the emphasis was laid on only short-term postponement of the fulfilment of obligations and/or short-term postponements of forced repayment of debts. In the context of a proportionality test, such measures may be considered to be less restrictive and less aggravating than the measures that would finally lead to a cessation of a contract, to the maturity of the entire debt, or to a reduction of contractual obligations or some other interventions in the context of the rights and obligations.⁵⁰ From the national measures imposed to mitigate the negative consequences of the pandemic arises that the various circumstances have

50 It is emphasised in theory that because of a long-term benefit and costs, a moratorium is a less aggressive instrument of intervention into a valid contract than its cancellation or reducing the debt. On the other hand, it is also emphasised that these are measures to preserve liquidity and to make short-term financing possible. See Ganuza, Gómez Pomar, 2020.

influenced national legislators when trying to balance the fundamental rights of private law entities. Sometimes the type of a private law relationship, or the reason why the parties have established a particular private law relationship, is crucial, as well as the circumstances and problems affecting the fulfilment of their obligations. This has been decisive when deciding which fundamental right will be given priority. For example, because of a very obvious social component and the need to protect the right to a home of a lessee and his or her family, national legislators have given priority to the protection of residential lease contracts over the lessor's right to property. On the other hand, in the case of contracts on leasing business premises, the rules on any change of contractual relations caused by the pandemic have been more restrictive to balance the rights of lessors and lessees in a different way.⁵¹ In some legal orders, no measures to intervene in the lease contracts on business premises have been imposed, but it was left to the parties to agree on possible amendments to their contracts.⁵² On the other hand, when dealing with residential lease contracts, some kind of a balance was achieved between the conflicting fundamental rights of the parties through an express provision that a moratorium on the cancellation of a lease contract was not absolutely recognised but was only recognised on the ground of a failure to pay rent because of financial problems caused by the pandemic (with a different solution regarding burden of proof to supply evidence justifying non-payment.)⁵³ In the same way, in the case of residential lease contracts, there were no measures to write off a debt accrued by not paying the rent but only the obligation to repay the outstanding amount based on an express stipulation.⁵⁴ National legislators have had a similar approach when alleviating the fulfilment of obligations arising from a loan contract. To balance the rights and obligations of the parties to the contract and the fundamental rights of the parties, a moratorium on the repayment of a loan, a stay of the application of the statutes of limitation, or a moratorium on enforcement proceedings were enacted, as less burdensome measures, as opposed to a cancellation of the contract for non-payment, smaller instalments, or debt forgiveness. Sometimes, such moratoria were also conditioned by the circumstance that a difficult debtor's situation was caused by the pandemic (which meant unemployment was also caused by the pandemic).⁵⁵ In some cases, before referring to special circumstances, the parties were invited to negotiate and to try to

51 In Spanish law, a moratorium on lease contracts is provided for only a particular category of lessees, i.e. for self-employed tenants and SMEs and only if the pandemic has had a negative impact on their business (business activity was suspended because of government measures; because of the pandemic, income fell by 75%). See Gómez-Ligüerre, Milà-Rafel, 2020.

52 In Austrian, Swiss, and German law, no special measures are prescribed for a lease agreement for business premises. It is left to the parties to apply the general provisions of a lease agreement because of the circumstances caused by the pandemic. See Ofner, 2020, p. 109,112; Schmid, 2020, p. 115; Wolf, Minnig, 2020, pp. 124–126.

53 For Austrian law, see Ofner, 2020, p. 107. For German law, see Schmid, 2020, p. 114; Schmidt-Kessel, Möllnitz, 2020. For Slovak law, see Gajdošová, 2020. For Russian law, see Ekaterina Dmitrikova et al., 2020.

54 See Schmid, C. U. (2020) 'Corona und Mietrecht in Deutschland', 114.

55 For Russian law, see Dmitrikova et al., 2020. For Lithuanian law, see Mikelėnas, 2020.

change their private law relations.⁵⁶ Whether in every individual case such balancing did achieve a fair balance in the protection of the conflicting fundamental rights in private law relations cannot be judged only on the basis of the content of a concrete intervention measure but also in connection with other measures taken to protect people's health whose application affected the legal, economic, and social position of the parties in a particular private law relationship.

In principle, the Croatian legislature has had a similar approach when balancing the conflicting fundamental rights in private law relations to which the adopted protective measures applied because of special circumstances caused by the pandemic. The legislature in Croatia was guided by the provision of Article 16/2 of the Constitution, pursuant to which any restriction of freedom or right must be proportionate to the nature of the need for a restriction in every single case, and Article 50/2 of the Constitution providing that '*free enterprise and proprietary rights may be exceptionally restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature and the human environment and human health.*' In addition, the case law of the Constitutional Court has established some very important criteria for the implementation of a proportionality test, and within it also a balancing test in the framework of private law relations. As a rule, the Court holds that the restrictions to a party's fundamental right for an unlimited period of time, or those that place an excessive burden on only one party to protect and exercise the fundamental rights of the other party in private law relations, are excessive.⁵⁷

In some separate regulations on intervention measures, the Croatian legislature has tried to find a balance between the parties' rights and obligations in two ways. On the one hand, for some private law relations, because of special circumstances

56 For example, because of the pandemic, a debtor lost his job and could no longer fulfil his obligations arising from a contract. For Romanian law, see Alunaru and Bojin, 2020.

57 See, e.g., Decision of the Constitutional Court of the Republic of Croatia (1999) No. U-I-673/1996 et al. in which the Constitutional Court said that a measure, by which a protected lessee was recognised for an unlimited period of time of pre-emption if the owner wanted to sell a flat returned to him in the process of denationalisation, is unproportional. See Bagić, 2016, pp. 95–96.

See, e.g., Decision of the Constitutional Court of the Republic of Croatia (1998) No. U-I-762/1996 et al. in which the Constitutional Court held that the restrictions imposed on flat owners in the Residential Lease Act regarding the cancellation of the lease agreement of a protected lessee's restrictions of ownership, because they bind the owner to ensure a corresponding flat for the protected lessee under the same conditions (favourable rent, unlimited duration of the lease, limited grounds for cancelling the lease agreement), were a heavy burden for the owners who, because of special regulations adopted in the process of transformation of the tenancy right on socially owned flats, cannot possess or occupy their flats.

See Decision of the Constitutional Court of the Republic of Croatia (2020) No. U-I-3242/2018 et al. in which the Court interpreted the provisions of the amended Residential Lease Act on the termination of protected lease contracts by 1 September 2023 and a gradual increase of the rent as not in line with the principle of proportionality. The Court held that there was no appropriate balance between the fundamental right to ownership and the right to a home because the state had transferred the whole financial burden to the protected lessees who were required to solve this complex relationship between lessees and owners.

caused by COVID-19, new rights and obligations of the parties are laid down to achieve a new balance because of the pandemic. For example, in travel package arrangements, a balance in terms of the protection of the right to property and the right to freedom ought to be established in a way that counterbalances the right of a traveller to terminate the contract (and thus to protect the organiser from insolvency) in the form of a voucher received from the organiser of the travel. Such a voucher is a guarantee for the payment whose reimbursement is also postponed (upon the expiry of 180 days from the cessation of the special circumstances). Possible problems connected with the establishment of a fair balance between the traveller's fundamental rights and the organiser's rights (right to property ↔ freedom to conduct business) may, however, arise because of the restriction of the traveller's right to choose the method of reimbursement for the paid package. Namely, the traveller is not given an option of requesting a monetary reimbursement or some other form of reimbursement, but his only possibility of protecting his financial interest is to accept a voucher.⁵⁸

In other cases, the Croatian legislature has envisaged *ex lege* postponement of exercising a person's rights without intervening in the very content of private law relations (e.g. postponement of enforcement, unblocking the debtor's accounts, postponement of enforcement proceedings). The legislature has opted for a very simple method of postponing enforcement. The stay of enforcement happens automatically without it being necessary to decide, in every single case, on a moratorium or on the justification of a suspension. Such intervention measures are taken regardless of whether the creditor and/or debtor is a natural or a legal person and regardless of the legal relationship from which a debt ensues (a consumer contract, a commercial contract, any other contract, or the like). The legislature was also of the opinion that in special circumstances, the protection of a debtor from forced repayment of debt was a public interest⁵⁹ and that creditors must bear a greater risk and burden as a result of special circumstances caused by the pandemic. The legislature has also tried to find a balance between creditors' rights and the restrictions they face, in succeeding with their claims by expressly stipulating the exemptions from temporary suspension of enforcement for particular claims to protect some creditors (child or spousal support, unpaid wages, interim measures under criminal procedural law, and urgent proceedings). It is also expressly provided that in other cases and under special circumstances, the court may decide, when the circumstances of a case dictate, to conduct enforcement proceedings.⁶⁰ During the period of suspension of enforcement proceedings, creditors were able to institute enforcement proceedings for the payment of their claims to preserve

58 The European Commission, because of such stipulation of the rights of travellers in special circumstances, instituted infringement proceedings against Croatia for the violation of Article 12(4) of the Package Travel Directive. The problem was the exclusion of the traveller's right to choose whether to request money for his cancelled trip or some other form of refund which was contrary to EU law. See European Commission, 2020.

59 See Bodul and Nakić, 2020b, p. 3.

60 See Art.3/2,3. Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances

priority, or cancel the period of limitation for their claims. Regarding the suspension of bankruptcy proceedings, *ex lege* postponement is 'eased' by the recognition of the debtor's right to institute bankruptcy proceedings alone.⁶¹ In this connection, one viewpoint in the literature holds that in terms of the postponement of enforcement and bankruptcy proceedings, all the preconditions for such intervention measures, to be considered as legitimate and proportionate, had been fulfilled.⁶²

Although it is indisputable that the temporary measures have alleviated the position of debtors and have fulfilled the requirements for social justice in special circumstances, Croatian law has not exhausted all the possibilities to establish a fair balance between the parties' fundamental rights. A justification existed for the introduction of some additional exemptions from suspensions of enforcement to achieve an even better balance between the fundamental rights of creditors and debtors in cases of forced repayment of claims and to equate the approach of all debtors. It would, on the one hand, be useful if all separate measures on the postponement of enforcement were based on the same criteria. The Act on Amendments to the Enforcement Act prescribes the suspension of enforcement on accounts by unblocking only the debtors' accounts (as natural persons). There are no provisions on unblocking the accounts of debtors who are legal persons. To the extent that it was possible under the general regulations, the monetary assets of legal persons continued to be blocked.⁶³ On the other hand, the Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances provides for postponing enforcement for all debtors, both natural and legal persons. Such an approach resulted in a situation in which debtors-legal persons are treated differently, depending on whether enforcement of their accounts has been instituted or enforcement over some other kind of assets. A question arises here whether it was justified to differentiate between the position of creditors and debtors-legal persons depending on which part of the debtor's property had been subject to enforcement proceedings before the pandemic. In addition, no special preconditions existed in any separate act for the postponement of enforcement, except for what was generally provided, that enforcement may be postponed because of special circumstances caused by the pandemic. The approach to the postponement of enforcement is not individualised in any way in terms of whether special circumstances or some other circumstances have had any negative impact on labour law, business, or the financial position of a debtor. The postponement of enforcement became effective *ex lege* and for all. However, the Court had the possibility to execute enforcement if it assessed it as necessary. There were no provisions in the separate act laying down clear and objective criteria when the execution of enforcement would be considered as necessary. Such an exemption from the postponement of enforcement, although its

61 See Art. 6/2. Act on Intervention Measures in Enforcement and Insolvency Proceedings during Special Circumstances

62 See Bodul and Nakić, 2020b, pp. 2–4.

63 The legal persons were protected to such an extent that no bankruptcy proceedings could be instituted except at the request of the insolvent legal persons.

aim may well be to achieve fair balance in special circumstances, between the interests of debtors and creditors, could turn into arbitrary action by the Court. Namely, the separate act does not expressly provide for any legal remedies that would be available to the parties in case enforcement proceedings continue in terms of providing efficient and fast protection in the special circumstances of the pandemic. A question arises whether it was justified to postpone, without any reservation, all enforcement proceedings for the payment of claims regardless of who the debtor was and what the reasons are for the financial problems of the debtor. For instance, enforcement proceedings were postponed against debtors, both natural and legal persons who were not even affected by the special circumstances caused by the pandemic. Finally, no account was taken of the fact that on the creditor's side, there were creditors – natural persons – for whom it was very important to have their claims paid to be able to maintain their financial stability in such special circumstances of the pandemic. The fact that there were such creditors on the other side was completely neglected. It seems that a selective approach to provide for the suspension of enforcement depending on who is the debtor or who is the creditor, along with the stipulation of special conditions for such suspension, would be socially more just; it would constitute a lesser burden for creditors in terms of their risks at the time of the pandemic; and it would be less restrictive of their rights. Indeed, such an approach would require a different organisation and action by the courts to deal with enforcement proceedings, make decisions on the postponement of enforcement, and assess the preconditions for enforcement in every individual case. However, in these special circumstances caused by the pandemic, the Croatian legislature opined that the public interest for the protection of debtors in the context of the current situation required fast and efficient instruments for their protection in enforcement proceedings.

5. Conclusion

Special circumstances and the epidemiological situation caused by the COVID-19 global pandemic have revealed a series of questions connected with the protection of fundamental rights in all spheres of life. When adopting measures to protect people's health, national legislators have come across various challenges. One of the most difficult challenges has been to maintain an appropriate balance between public interests aimed at the protection of people's health and the restriction of fundamental rights of individuals that were inevitable during the imposition of various protective measures. The seriousness and the scope of the pandemic called for urgent protection measures and emphasised their role in facilitating citizens' fundamental rights in private law relations. It was possible to achieve this only on the basis of separate and urgent laws to alleviate the consequences of the pandemic. The general private law rules were

inappropriate for such an urgent and fast adjustment of private law relations to these special circumstances caused by the pandemic.⁶⁴

A targeted intervention by separate laws in individual private law relations, in which the parties were very much affected by this epidemiological crisis, turned out to be a successful method of overcoming the problem. However, this was also a very challenging task for every legislator. A decision had to be made in which private law relations to intervene and in what way. A fair balance had to be achieved between mutual restrictions of the parties' fundamental rights recognised in particular private law relations. The experience acquired is very valuable, and it may have a significant impact on further development of private law even in the aftermath of this pandemic. On the one hand, it was obvious that when stipulating private law relations, it was very important to ensure a corresponding protection of the parties' fundamental rights. The circumstances caused by the pandemic have increased the awareness of how it is necessary, when laying down private law relations (not only at the time of crisis), to take account of fundamental rights, as well. On the other hand, it is well known that when dealing with private law relations, the balancing test is much more demanding and complex. Because of the nature of private law relations, a different approach is necessary to balance the conflicting fundamental rights of the parties. To implement a balancing test, it is very important to take into consideration the equality of the parties involved and that their legal relations are based on private autonomy and freedom of contract. These are extremely important determinants for a balancing test. Balancing the protection of fundamental rights in private law relations also calls for particular sensitivity in terms of the content and the scope of the parties' private autonomy. Therefore, the balancing test should also be conducted with respect to the scope and intensity of the restriction of private autonomy aimed at the protection of fundamental rights. The stipulation of fundamental rights within private law relations must not destroy the essence of subjective private rights and the basic values protected in private law relationships. These are the equality of the parties, freedom of contract, and autonomy. Possible restrictions of the parties' private autonomy because of the protection of fundamental rights must also be justified, necessary, and proportionate.

Although in the circumstances of the pandemic, the requirement for a specific balance in the stipulation of fundamental rights in private law relations has been particularly expressed, such an approach to the protection of fundamental rights is very much needed in the usual circumstances, as well. It is to be expected that the national legislators will apply their dramatic experience of implementing *ad hoc* intervention measures in these special circumstances also in the future, to further enhance and redefine the protection of fundamental rights in private law relations.

64 See also Alpa, 2020.

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