Review article

CITY OF ZAGREB'S MODEL FOR MUNICIPAL WASTE COLLECTION: AN EXAMPLE OF BEST PRACTICE? (AN INTERDISCIPLINARY APPROACH)*

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ABSTRACT

The aim of the paper is to analyse the model of providing the public service of municipal waste collection on the territory of the City of Zagreb. The level of public service that must be provided in order for the municipal waste collection system to fulfil its purpose, be economically viable and ensure the safety, regularity and quality of the public service is extremely difficult to achieve. A particular problem is posed by apartment buildings, where the spatial conditions make it very difficult to organize a sensible billing system in which individual users are billed according to the amount of waste produced. The analysis assumes that a fair balance must be struck between the interests of the individual and the community whereby the municipality has a certain degree of discretion in determining waste management measures. From a legal per-

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spective, the decision of the City of Zagreb must be assessed in the context in which it was taken and the objectives pursued. The current solutions seem to us to be largely acceptable. From an economic point of view, we believe that the imposition of a contractual penalty on service users who separate municipal waste in apartment buildings due to co-owners who do not do so is not made on objective and justified grounds. Therefore, the existing legal solution or justification in relation to the objective and effect of the measure under consideration is not considered in accordance with the principles common in democratic societies. The authors' tendency is to highlight the complexity of the problem through an interdisciplinary approach, to initiate a dialog on the quality of housing, the relevant role of the state, regional and local government and citizens, and on appropriate implementation mechanisms.

***Keywords**: healthy environment, municipal waste, public service, public interest, proportionality*

1. INTRODUCTION

In the case submitted to the European Court of Human Rights (hereinafter: ECHR), a violation of the right to respect for the home (Article 8) was found, as the Italian authorities have long been unable to ensure the proper functioning of the waste collection, processing and disposal service.[1] Since the principle of precedent and thus of case law as a formal source of law is confirmed by the ECHR, the adoption of the Decision on the Method of Providing the Public Service of Municipal Waste Collection in the Territory of the City of Zagreb (hereinafter: the Decision) is certainly to be welcomed.[2] The Decision itself consists of 23 chapters. The Decision was adopted in February 2022. It entered into force after eight days with the exception of Article 7 (7), Article 8 (3, 4, 6) and Article 23 which entered into force on October 1st, 2022. From a practical and empirical point of view this is an aggravating circumstance, since the *vacatio legis* is short, considering the complexity of its implementation.[3] We believe that the legislator should have chosen a relatively longer *vacatio legis* so that the addressees could better prepare for its application.

Although this Decision is quite comprehensive and has fundamentally changed the model of municipal waste collection, the public debate and the existing vagueness of the regulations clearly show which areas and topics urgently need to be regulated or reformed. The existing literature does not provide answers, useful explanations and suitable solutions to the problem of an adequate municipal waste

1 Judgment *di Sarno and Others v. Italy*. ECLI:CE:ECHR:2012:0110JUD003076508, April 10, 2012.

2 Decision on the Method of Providing the Public Service of Municipal Waste Collection in the Territory of the City of Zagreb, Official Herald of City of Zagreb, 07/22, 19/22, 33/22.

3 Effective spatial planning – including technically sound environmental impact studies, extensive consultation and public information – is no guarantee of success, but it is essential to combat the delay caused by the "not myproblem" attitude.

collection model. Therefore, this study will be the first systematic and scientifically sound analysis of the possible reform of the existing problem.

The aim of this analysis is to find an answer to the question of whether the existing legal framework complies with the relevant standards of EU law. Administrative protection was considered as the basic and primary legal protection (from the point of view of both individual and public interests) together with legal protection in court proceedings. Although the existence of the waste management system in itself fulfils the formal requirement of the rule of law, the question of the effectiveness of actions of the control bodies inevitably arises. The analysis points to the weakness of the procedural rules *per se* and with regard to the subsidiary application of the administrative procedural rules. In this context, it is essential to point out that, at the time of writing this paper, there was not enough practical experience available in order to analyze the aforementioned novelties from a critical point of view. Therefore, the authors will limit themselves to some problems based on previous experience in the management of apartment buildings, without a detailed consideration of numerous and diverse concrete specific solutions in municipal waste management that would go beyond the planned scope of this paper. The subject of this paper is not a detailed analysis of the Decision that follows the legal provisions. The analysis deals with those provisions that define mandatory terms (and where there is a need for improvement), but above all the analysis deals with provisions that are not fully harmonized with the economic laws of living in residential buildings. For the purpose of the analysis, telephone interviews were also conducted with the representatives of the co- owners. The interviews conducted with targeted respondents serve as an additional check on the credibility of the results of this analysis.

Following the presentation of the methodological and analytical framework of the study, the relevant legal sources for the management of apartment buildings and the separation of municipal waste are summarized in the second part. Furthermore, the role of the co-owners representative or other person authorized by the users of the service in certain municipal waste segregation tasks is analysed. This part of the paper also addresses some problems of placing the bins assigned to the service user within the service user's property as well as it examines the problem of video surveillance of bins in a multi-apartment buildings. The justification for imposing a contractual penalty on service users for non-compliance with the regulations is also analysed. The paper ends with recommendations suggesting possible solutions to the previously identified problems.

2. LEGAL SOURCES FOR THE MANAGEMENT OF APARTMENT BUILDINGS AND THE SEPARATION OF MUNICIPAL WASTE

The management of apartment buildings is regulated by law, in particular by the Act on Ownership and Other Proprietary Rights – hereinafter: AOO.[4] The abovementioned law regulates the mutual relations between the co-owners of a building or other type of property. All other laws determine what, how and when coowners have to do in the management and maintenance of their own building or property.[5] As clear as it is that the AOO (in principle) has the status of a general law and the Waste Management Act – hereinafter: WMA[6] that of a special law, the example of these two laws does not exclude cases in which the conclusion is reversed or at least clearly different.[7] The WMA thus regulates issues, relationships and legal institutions that are of common interest to all waste management activities or relate to several types of waste. Issues related to waste regulation at local and regional level are regulated by specific resolutions, but it seems that many "com-

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4 There is no uniform definition of the term "residential building" in Croatian legislation. The Construction Act (Official Gazette, No. 153/13-125/19) defines two types of buildings. Accordingly, buildings are enclosed and/or roofed structures intended for human habitation, housing animals, plants and things (a building is not considered a single building within the infrastructural building system). A building for public purposes is a building or part ofa building used by a public authority to carry out its activities, a building or part of a building for communal housing and a building or part of a non-residential building in which several people live or which serves a largernumber of people. The Ordinance on the Energy Inspection of Buildings and the Issuance of Energy Performance Certificates (Official Gazette, No. 88/17-45/21) defines a residential building as a building that is entirely (or more than 90% of the gross floor area) intended for residential purposes, i.e., that has no more than 50 m² of net floor area for other purposes. A building with apartments in a tourist area is also considered a residential building. A reference to the term "residential building" without uniform terminology and concrete definition canalso be found in the: Act on Energy Efficiency (Official Gazette, No. 127/14-41/21), the Act on Reconstruction (Official Gazette, No. 24/96-98/19), the Act on Reconstruction of Earthquake Damaged Buildings in the City of Zagreb, Krapina-Zagorje County, Zagreb County, Sisak-Moslavina County and Karlovac County (Official Gazette, No. 21/23), the Act on Renting Apartments (Official Gazette, No. 91/96-105/20), the Act on Real Estate Tax (Official Gazette, No. 115/16, 106/18) and the Act on Lease and Sale of Business Premises (Official Gazette, No. 125/11-112/18).

5 For example, the Enforcement Act (Official Gazette, No. 112/12-06/24) regulates the mandatory collection of reserves, the Act on Energy Efficiency (Official Gazette, No. 127/14-41/21) regulates some issues regarding renovation of the facades of apartment buildings, andthe Heat Energy Market Act (Official Gazette, No. 80/13-86/19) regulates some issues of changing the heating model of an apartment building.

6 Waste Management Act, Official Gazette, No. 84/21-142/23.

7 The provisions of the WMA establish a waste management system and measures to prevent or reduce the harmful effects of waste on human health and the environment. The main objective (ratio legis) of the adoption of the WMA was the further obligation to harmonize Croatian legislation with the European Union acquis in order to create a harmonized and more detailed prescribed and regulated system and responsibilities in waste management.

prehensive" national plans ignore the reality "on the field", resulting in the quality and coherence of waste management plans being implemented very differently at different levels of government. Responsibility for municipal waste management at regional level is generally decentralized and delegated to cities and municipalities. Since both regulations (WGA and the Decision) intervene in (co-)ownership relations, the WMA is certainly important as a general (*lex generalis*) regulation. At the same time, it should be taken into consideration that it is one of the most complex laws in the Croatian legal system, both because of its internal structure and because of the extremely sensitive nature of the subject it deals with. It is a systemic organic law characterized by a pronounced internal coherence and interplay of its provisions. However, the analysis of the existing regulations, including the Decision, in the area of housing regulations shows that a high housing quality cannot be achieved in the long term without appropriate state measures, i.e., without the adoption of a new regulation governing both housing and maintenance of residential buildings.[8]

2.1. The role of the co-owners representative or other person authorized by the service users in certain municipal waste separation tasks

It is significant that the administrator of the building is not mentioned anywhere in the Decision, as he is a legal or natural person registered for administrative functions and managing the building on behalf of the co-owners (Articles 44, 45, 378 and 379 of the WMA). It would be legally logical for him to have some jurisdiction in relation to the issue in question, especially when experience shows that a large number of buildings do not have co- owner representatives (because they are not legally obliged) but must have an administrator (because they are legally obliged). Furthermore, in accordance with the provisions of the WMA, the local self-government unit appoints an administrator of the building if the co- owners have elected an administrator within the (transitional) period specified in Article 385 of the WMA (i.e., within 12 months of the entry into force of the WMA, therefore, by January 1st, 1998. According to the provisions of Article 93 of the

[8] When it comes to housing, there are numerous topics in the literature, so there is no doubt that the issue of housing quality encompasses a much larger number of topics that are no less important than those mentioned here. It is therefore hoped that the potential Act on Management and Maintenance of Residential Buildings will reflect a systematic, practical and coherent approach to housing issues, given the elaboration of the subject, and eliminate the harmful consequences of inconsistent definitions of residential buildings that affect legal certainty. The draft of the Act on Management and Maintenance of Residential Buildings is available from the authors and represents the draft published by the Ministry of Construction and Physical Planning in February 2020. See: Bodul, Dejan, *"Towards a new regulation of housing conditions in the Republic of Croatia: an adequate standard of civilization?"* Anali Pravnog fakulteta Univerziteta u Zenici, No. 26, 2020, pp. 165-188.

WMA, the administrator may be appointed outside this period either by the co-owners of the building or by the court, as the appointment of the administrator outside the transitional period is not provided for.

However, the Decision talks about the representative of the co-owner and this person is authorized to represent the other co-owners in relation to the administrator, i.e., third parties, and the limits of his powers are determined by the agreement between the owners, which is governed by the provisions of the AOO. His/hers appointment is decided exclusively by the co-owners by majority vote. In practice, it is a person who is the link between the administrator and the co-owners of the building, and since the legislator has not defined a specific name for the person who represents the co-owners *vis-à-vis* the administrator and third parties, the usual name is "representative of the co-owners" or "representative of the tenants". The co-owners in the co-ownership contract should determine the powers and duties of the representative (and whether he is responsible to the co-owners), as the AOO does not contain such a provision. Since the person who lives in the building must be a co-owner in order to perform this task, i.e., they must be the owner or co-owner of the apartment in which they live. A tenant who lives in an apartment in the building and is not the owner or co-owner of that apartment cannot be a co-owner representative. The co-owners of the building may freely appoint one or more representatives and freely determine the nature and scope of the powers they confer on these representatives. The same co-ownership contract should define the rights and powers of the deputies of these representatives. If these powers are not expressly set out in the contract between the owners, it is assumed that the substitutes have the same powers as the representatives they may replace. In any case, it would be useful to specify in the co-ownership contract the conditions under which the deputies will represent the co-owners, in particular the circumstances of how long the absence of the representative must last for the deputy to assume the power of representation. However, as already mentioned, the building does not have to have a co- owner representative, but an administrator, so the question arises as to what happens if the building does not have a co-owner representative. Indeed, the Decision speaks of "the representative of the co-owners or another person authorized by agreement by the users of the service" (Article 14 (8) or Article 19 (4) of the Decision). Therefore, it is not clear who this other person is, does it have to be the owner/co-owner, by what agreement did they set it up and by what majority of the co-ownership shares? Is this person perhaps a representative of the administrator? In this sense, we refer to the position of the Constitutional Court of the Republic of Croatia[9] on the quality of legal norms

[9] Decision of the Constitutional Court of the Republic of Croatia No.: U-I-722/2009, Official Gazette, No. 44/2011.

in the light of the rule of law, which states: *"(...) the requirements of legal certainty and the rule of law in Article 3 of the Constitution demand that the legal norm be accessible to the addressees and foreseeable for them, i.e., in such a way that they can actually and concretely know their rights and obligations in order to be able to behave towards them. (...) However, the requirement of certainty and precision of a legal norm is not fulfilled if citizens, as conscientious and reasonable persons, speculate about its meaning and content and practitioners often judge its interpretation and application differently in individual cases (...)."*

Furthermore, the Article 26 of Decision states: *(...) "If the bins cannot even be placed within the service user's property, the service user or, in the case of apartment buildings, a representative of the co-owner or another person authorized by the service users by mutual agreement, must submit a written request to the service provider to obtain an opinion on the need to place a bin in a public area. In relation to the request from paragraph 3 of this article, the service provider, through its employees, together with the service user, i.e., a representative of the co-owner or a person authorized by the service users sharing the bin, must inspect the location of the settlement point to determine the possibility of placing the bins assigned to the service user within the service user's property (...)."* However, the question remains as to whether this is the work of ordinary or extraordinary administration in the management of a residential building? According to the AOO (Article 41), the co-owners decide on matters relating only to ordinary administration by majority vote (whereby this majority is calculated according to the co-ownership shares and not according to the number of co-owners). At the same time, it should be emphasized that if the required majority cannot be reached and it is necessary to carry out some work of ordinary administration in order to maintain the operation, the decision is made by the court at the request of one of the co- owners. The consent of all co-owners is required for tasks of extraordinary administration (e.g., changing the purpose of the property, major repairs, additions, extensions, conversions, sale of the entire property, renting or leasing the entire property for more than one year, creating a mortgage on the entire property or pledging a movable property, creating real and personal easements, encumbrances in rem or building rights on the entire property) and for their execution. When it comes to solving problems of interpretation, the criterion that stands above all other criteria is the criterion of justice. Therefore, the wording of the Decision (Article 26 (4)): *"based on the request from paragraph 3 of this article, the service provider, through its employees, together with the service user, i.e., a representative of the co-owner or a person authorized by the service users sharing the bin, shall examine the location of the settlement point in order to determine the possibility of placing the tanks allocated to the service user on the service user's property"* must be interpreted in accordance with the applicable national rules on (co- or

joint) ownership, which determine a sufficient majority of votes of the co- owners of the building, calculated according to co-ownership shares. Therefore, we consider that this is a system of ordinary management within the meaning of the provisions of the Article 86 of the AOO. We are aware that this legal reasoning will not be acceptable to everyone, but we believe that it is also supported by the principle of diligence and honesty, which is ultimately inherent in the concept of justice. We believe that the practice of applying the solution in question will lead to predictable circumstances and situations, so that no new questions will arise regarding the interference with (co-)ownership rights in the field of housing that will not be answered. In other words, there will be answers that will correspond to the modern concept of property rights and the right to peaceful enjoyment of property.

We say this because it is an indisputable fact (of life and experience) that the (co-) ownership of buildings is in most cases extremely complex (buildings with multiple entrances are particularly problematic). In addition, the ownership structure is unclear (hence the land register) and the education and participation of co-owners in important decisions are often at the lowest level. Therefore, any housing model, in order to be viable in the long term, must assume that the system should be sustainable, which ultimately means that this type of solution regarding necessary permits will make the separation of municipal waste only less problematic.

2.2. Some problems with the placement of bins allocated to the service user within the service user's property

Even leaving aside the fact that not all multi-family dwellings are architecturally adapted or designed for certain things, a problem may also arise in the solution "*via the installation of the bins allocated to the service user within the service user's property"* (Article 26 of the Decision), as this may lead to harmful imissions (e.g., odour nuisance). Protection against imissions is in fact regulated by the provisions of the AOO regarding the protection of property rights against disturbances (provisions of Article 167 and the provisions on neighbourly relations of Articles 100 to 113 of the AOO). The latter also include the provision of Article 110 of the AOO, which refers specifically to imissions. Neighbouring rights are the powers granted to the owner of a property and authorize him, in the exercise of his right of ownership, to demand that the owner of another property tolerates, refrains from or does what is legally determined in his interest on his property (Article 100 (1) of the AOO). Among other things, the owner is entitled to demand that the owner of another property does not expose his property to any (illegal) imissions.

Imissions control is somewhat broader in scope than the general protection of property against nuisance. The special feature of imissions control is that, in addition to means of a real legal nature, it is also achieved through mandatory legal norms, above all through the provisions on the demand to eliminate the risk of damage[10] and the provisions on non- contractual liability for damage. First of all, the property owner is not obliged to tolerate direct imissions, i.e., that someone disturbs him without authorization by directly transmitting any imissions to his property with special devices or in any other way, so that he is entitled to demand the cessation of this nuisance and compensation for the damage caused (Article 110 (4) of the AOO). If excessive indirect imissions arise from an activity for which the competent authority has issued a permit, the exposed property owners do not have the right to demand the activity cease for the duration of the permit. However, they can demand compensation for the damage caused by the imissions and the adoption of appropriate measures to prevent or reduce excessive imissions in the future (Article 110 (3) of the AOO).[11] The ECHR has also created a new right - the right to live in a healthy environment. For example, in the Oluić v. Croatia case, when dealing with the violation of a protected right (the right to respect for the home), the ECHR stated: *"... it includes not only the right to a specific physical space, but also to the undisturbed use of that space ... the undisturbed use of the home and violations of the right to respect for the home are not limited to physical violations (e. g. trespassing)...but also include odours or other forms of disturbance."*[12]

The problem of video surveillance of bins in apartment buildings

There could also be a problem related to the regulation of video surveillance systems in residential buildings to control the proper use of containers by users of public services (see Article 26 of the Decision). On April 27th, 2018, the Republic of Croatia adopted the Act on Implementation of General Data Protection Regulation (hereinafter: GDPR Act), which entered into force on May 25th, 2018.[13] Since the present case concerns video surveillance of residential buildings, the provisions of Article 31 of the GDPR Act are applicable. In particular, Article 31 stipulates that the installation of video surveillance in residential or commercial buildings requires the consent of the co-owners representing at least 2/3 of the co-

[10] See: Article 1047 of the Civil Obligations Act – hereinafter: COA (Official Gazette, No. 35/05-155/23).

[11] See: Mihelčić, G., Marochini Zrinski, M., *Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini,* Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 39, No. 1, 2018, pp.241-268.

[12] Omejec, J., *Zaštita okoliša u praksi Europskog suda za ljudska prava,* in Barbić, J. (ed.), Upravnopravna zaštita okoliša - gdje smo bili, a gdje smo sada?, Hrvatska akademija znanosti i umjetnosti (HAZU), 2015, Zagreb, p. 80.

[13] Act on Implementation of General Data Protection Regulation, Official Gazette, No. 42/18.

ownership shares. In addition, paragraph 2 of the same article stipulates that video surveillance may only cover access to entrances and exits of residential buildings as well as common rooms of a residential building. The most important information, namely information on the processing purposes, the identity of the data controller and the existence of the data subject's rights, as well as information on the main impact of the processing or processing that could surprise the data subject, the co-owners of the residential building can arrange by written co-ownership agreement in accordance with Article 85 (4) of the AOO in compliance with the GDPR Act and relevant provisions of Regulation (EU) 2016/679[14] on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. As a result, on December 12th, 2022, the Croatian Personal Data Protection Agency (hereinafter: CPDPA) adopted the Decision on Video Surveillance of Common Parts of Buildings Where Common Waste Garbage Bins are Located for the Purpose of Processing Personal Data of Tenants Who Illegally Dispose of Waste in Common Bins. The decision by the CPDPA[15] points out that when installing the video surveillance system, attention must be taken to ensure that the public area is not affected. The provision of Article 32 of the GDPR Act states that the surveillance of public areas by means of video surveillance is only permitted for public authorities, legal entities with public authority and legal entities providing public services only if required by law, if it is necessary for the performance of the tasks and duties of the authorities or for the protection of human health and property.

2.3. Imposing a contractual penalty on the service user for non-compliance with the regulations

Since the Decision states that "*the provisions of the COA apply to issues of contractual penalty that are not regulated in the WMA*" (Article 23 of the Decision), and since the WMA mentions but does not clarify the concept of contractual penalty, we consider it important to clarify the concept and purpose of contractual penalty in

[14] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119, May 4, 2016, pp. 1-88.

[15] See: Croatian Personal Data Protection Agency (CPDPA), *Videonadzor zajedničkih dijelova zgrade u kojima se nalaze zajednički spremnici za otpad u svrhu obrade osobnih podataka stanara koji neovlašteno odlažu otpad u zajedničke spremnike*, available at: [https://azop.hr/videonadzor-zajednickih-dijelova-zgrade-u-kojima-se-nalaze-zajednicki-spremnici-za-otpad-u-svrhu-obrade-osobnih-podataka-stanara-koji-neovlasteno-odlazu-otpad-u-zajednicke-spremnike/].

accordance with the COA.[16] The basic definition of the contractual penalty can be found in the provision of Article 350 (1) of the COA according to which a contractual penalty is a contractual provision (or an independent agreement) by which the debtor undertakes to pay the creditor a certain amount of money or to obtain another material benefit if he: a) does not fulfil his (main) contractual obligation, b) fulfils it late or c) does so irregularly. A contractual penalty: a) arises by agreement of the parties, b) it provides for a negative pecuniary consequence (usually a sum of money, but it can also be other material things), c) disorganizes the contracting party (debtor) who does not perform its obligation or does not perform it on time, and d) arises on condition that this party, i.e., the debtor, is guilty of non-performance, late performance or irregular performance of the contractual obligation. As this is a mandatory provision, the creditor can only demand payment of the contractual penalty if all of the above conditions are cumulatively met. As this is a question of *ius cogens*, the contracting parties can only agree a contractual penalty for the cases expressly provided for in the COA (non-performance, default and irregular performance).[17] The stipulation of a contractual penalty for any other case would be ineffective. In this specific case, we are dealing with a contractual relationship in which one of the contracting parties is the public sector.

In this context, it is an indisputable fact that additional initiatives for successful service users and tougher sanctions for non-compliance and poor service users (as well as better public information campaigns to involve the local population) are needed to create momentum at a local level. Therefore, the solution "*where the service user is found to have committed several acts for which the obligation to pay a penalty is prescribed under this Article, the service provider shall levy and collect a penalty for each of those acts"* (Article 23 of the Decision) is certainly justified. If the debtor fails to pay the penalty due and determined in money, he shall owe default interest thereon in accordance with Article 29 (1) of the COA. The contractual penalty owed is a monetary obligation like any other monetary obligation. In this context, it should be noted that the provisions on the method of determining the total contractual penalty are dispositive and it is up to the contracting parties to adapt the contractual penalty to their needs and wishes. In addition, the COA has left the possibility of regulating or correcting the amount of the contractual penalty through judicial

[16] It should be mentioned that the contractual penalty also exists in employment relationships. The Labor Act – hereinafter: LA (Official Gazette, No. 93/14-64/23) recognizes the statutory (Article 101 of the LA) and contractual non- competition clause (Articles 102-106 of the LA) between employees and employers. In the event of non- compliance with the contractual non-competition clause, the LA provides for the possibility of agreeing a contractual penalty (Article 106 of the LA). The basic rules for contractual penalties also apply in this case and the LA provides for some special features.

[17] See: Topić, G., *Ugovorna kazna prema Zakonu o obveznim odnosima*, Pravo i Porezi, No. 4, 2022, p. 80.

intervention in order to prevent the debtor from being punished too harshly, with the aim of protecting the principles of diligence and honesty, fairness and the prohibition of abuse of rights in the application of this legal institution.

The solution according to which… *if several users of the service use a common bin, the resulting obligation to pay a contractual penalty in the event that the responsibility of a single user is not established shall be borne by all users of the service who use a common bin in proportion to the shares in the use of the bin*... may turn out to be controversial. First, it must be examined whether this type of solution (i.e., punishment) is proportionate/necessary with regard to the legitimate objective pursued (i.e., better collection of municipal waste). It follows from the constitutional and administrative procedural principle of proportionality that the content of this principle can be determined by three elements: 1) legitimacy of the measure, 2) the necessity of the measure and 3) determination of proportionality in the strict sense, which is reflected in the search for a balance between the measure that restricts the guaranteed rights in order to achieve a specific objective and the permissible degree of interference with the guaranteed rights. If one of these questions is answered in the negative, the restriction of rights is generally considered unjustified, i.e., it is not proportionate to the objective pursued.

However, we will not go into this analysis, as the Constitutional Court of the Republic of Croatia[18] has already ruled in a substantially similar case[19], which states:

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[18] Decision of the Constitutional Court of the Republic of Croatia No.: U-II-2492/2017, Official Gazette, No. 31/2021.

[19] On May 25th, 2017 the Government of the Republic of Croatia adopted the Municipal Waste Management Regulation – hereinafter: Regulation (Official Gazette, No. 50/17) which entered into force on November 1st, 2017. On September 5th, 2019 it was amended (Official Gazette, No. 84/2019) and entered into force on September 14th, 2019 (with the exception of Article 7 which entered into force on January 1st, 2020). The 2017 Regulation and its 2019 amendment were challenged by numerous complainants, on the one hand by consumer protection associations and natural persons, and on the other by local government units and their utility companies, requesting that the Regulation's compatibility with the Constitution and the law be examined. At the meeting of March 23rd, 2021, the Constitutional Court decided to repeal Article 4 (1) (7) in part "which are divided into the category of household users and subcategories of non-household users", Article 4 (8-9), Article 14 (11-12), Article 20 (2) in part "and the price of the contractual penalty", Article 20 (10-11) and Article 24 of the Regulation. The repealedarticles of the Regulation expired on September 15th, 2021. See also the transitional provision (Article 41) of theOrdinance on Waste Management (Official Gazette, No. 106/22). It is worth mentioning that the Constitutional Court concluded that, although the Regulation and the Sustainable Waste Management Act – hereinafter: SWMA (Official Gazette, No. 94/13-98/19) prescribe the obligation of the user of the public service to act in accordance with the law and the regulations issued on the basis of the law, as well as the responsibility for handling waste and bins (at the settlement point and in the common bin), it follows that the manner in which the contractual penalty is prescribed as part of the price structure of the public service (as prescribed in the Regulation) does not comply with the powers conferred on the Government of the Republic of Croatia by the SWMA.

"Article 20 (9) of the Regulation, as amended, reads that if several users of the service use a common container, the resulting obligation to pay a contractual penalty in the event that the responsibility of a single user is not established shall be borne by all users of the service who use the common container, in proportion to the shares in the use of the container. Within the meaning of Article 7 (5) of Regulation the petitioners state that most apartment buildings do not have suitable areas for the placement of garbage bins within the co-owner's building, but that the garbage bins are located in a public area and are therefore accessible to anyone, and that the joint and several liability of all tenants of the apartment building is imposed, although it is not specified whether it is joint or several liability, and that it is evident that all co- owners of an apartment building are responsible for the actions of a single person. The petitioners state that the Regulation does not impose the obligation on local government units to provide co-owners with lockable waste bins to prevent unauthorized persons from having access to the disposed waste. Since the Regulation provides for the responsibility of the co- owner of an apartment building for any illegal waste treatment, this in turn results in the co- owner being punished for the actions of third parties and not for his own. The petitioners also believe that it is incomprehensible why a co-owner should be responsible for the actions of another co-owner who refuses to cooperate with the communal administrator in order to avoid paying a fine and thus pass on the cost of the penalty to other co-owners. The petitioners believe that the contractual relationship between an individual user and a service provider is unrelated to the contracts of other users and service providers, and that one user cannot be charged for obligations that another user has not fulfilled at the same billing date.

The Constitutional Court notes that the petitioner's objections based on the unconstitutionality of this provision refer to the fact that certain conditions for the equitable application of this provision have not been established (i.e., regarding the responsibility of the public service user for handling waste, the responsibility for handling third parties, the lack of sufficient equipping of users with appropriate bins obligation to pay a contractual penalty as a result of the irresponsible behaviour of the public service user). Therefore, based on this aspect of the petitioners' objections, which question the application of said provision and, in this sense, question its unconstitutionality, the Constitutional Court considers that these reasons do not indicate that said provision would be controversial nor that the provision of Article 7 (5) of the Regulation (in conjunction with Article 20 (9) of the Regulation) is incompatible in this sense with the Constitution and the relevant provisions of the WMA."

In this context, the practice of the Constitutional Court (in each country) is particularly important, which must be as consistent as possible, which essentially

means that it decides in accordance with previous decisions in the same or substantially similar cases. This is also important because we are bound by Constitutional Court's interpretation of the law, which it expresses in the reasons for its decisions.[20] In cases where the position on an important point of law is changed, it is necessary to explain in detail (i.e., clearly and precisely) the reasons for such a position and why the circumstances of the specific case differ from all previous cases in which the position on an important point of law was applied. Otherwise, the opposite approach could lead to legal uncertainty and undermine public confidence in the judiciary, which is contrary to the principle of the rule of law. Since a certain subjectivism and an interpretation of value based on it cannot be avoided, we believe, in connection with the previous explanation of the concept of contractual obligation, that (...*if several users of the service use a common bin, the resulting obligation to pay a contractual penalty in the event that the responsibility of a single user is not established may be borne by all users of the service using the common bin in proportion to the shares in the use of the bin*, Article 23 of the Decision) it cannot be said (in connection with the agreed contractual penalty) that the debtor is guilty of non-performance or improper performance of the contractual obligation. The wording *contractual penalty* is the amount stipulated in the Decision, which the user of the service must pay in the event of non-performance or improper performance of the obligation (Article 2 (1) (21) of the Decision). It is in fact contradictory to the wording ...*if several users of the service use a common bin, the resulting obligation to pay a contractual penalty in the event that the responsibility of a single user is not established shall be borne by all users of the service using the common bin in proportion to the shares in the use of the bin* (Article 23 of the Decision), since the concept of the debtor is unclear.

As already mentioned, the contractual penalty also arises on condition that this party, i.e. the debtor, is guilty of non- performance or improper performance of the contractual obligation. Since this is a mandatory provision, the creditor can only demand payment of the contractual penalty if everything has been cumulatively fulfilled. Consequently, it is indisputable that the debtor/user of the ser-

[20] Article 31 (1), Article 76 (1) and Article 77 (2) of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette, No. 99/99-49/02), which expressly provide that the competent judicial or administrative body, the body of local and regional government or the legal person with public powers, when adopting the new law, is obliged to observe the legal positions of the Constitutional Court expressed in the decision on the repeal of the law that violated the constitutional right of the proponent of the constitutional complaint. Furthermore, decisions of a declaratory nature bind all state authorities, including the courts, which are obliged to take all measures within their jurisdiction that are necessary to remedy the violations of constitutional rights identified by the Constitutional Court and set out in its reasoning. See, for example, the Decision of the Constitutional Court of the Republic of Croatia (Official Gazette, No. 124/2011).

vice is obliged to pay a contractual penalty in the event of non-performance or improper performance of contractual obligations. However, we consider that the debtor cannot be determined by the wording *all users of the service*, i.e., the user of the service cannot be the entire residential building (which is neither the debtor nor the building *ipso iure* has legal personality).[21] Due to the uncertainty it creates, the imprecision of its content and the unpredictability of its effects, such an obligatory breach of contract puts the users of the service who comply with their obligations in a significantly less favourable legal position *vis-* à-vis the other contracting party (the provider of the public service), which is unacceptable. In the authors' opinion, this is contrary to the principles of diligence and good faith, as it constitutes an obvious inequality in the rights and obligations of the parties to the detriment of the service user who sorts the municipal waste. It also remains unclear whether a contractual penalty can be imposed on the service user if it fails to fulfil its obligations under the decision in a timely manner. It should be noted that the creditor has the right to demand a contractual penalty only for the case for which it was contractually agreed. For example, if it has been agreed for the case of non-performance, it cannot be demanded for the case of improper performance or default, or if it has been agreed for the case of default, the creditor cannot demand it for the case of non-performance. Furthermore, the debtor is not liable if the impossibility or default (i.e., the improper performance) has occurred not only due to *force majeure* but also due to the impossibility of performance not being attributable to either party, if there is only fault on the part of the creditor and in all cases in which the debtor is not responsible. In this sense, the debtor is only liable if he is responsible for the non- performance, late performance or improper

[21] Positive law does not recognize the legal capacity of a residential building as such. The provisions of the AOO, which link legal capacity to the status of a natural or legal person, clearly deny legal personality to a residential building. Without denying the inextricable link between substantive and procedural legal relationships arising in connection with the management of residential buildings, it should be noted that where substantive law is conditionally restrictive, the rules of procedural law offer certain solutions. The decisions of the Civil Procedure Act - hereinafter: CPA (Official Gazette, No. 4/77-155/23), Article 77 (3), provide that *"the civil court may exceptionally recognize the party status and the forms of associations that would otherwise not have party status with legal effect in a given legal dispute if it finds that they essentially meet the essential requirements for acquiring party status in relation to the subject matter of the dispute, in particular if they have enforceable assets".* In contrast to the AOO, which does not permit the possibility of new persons with legal capacity, the CPA thus leaves the circle of persons with party capacity open. See: Dika, M., *Stranke, njihovi zastupnici i treći u parničnom postupku*, Narodne novine, 2008, Zagreb, p. 31. In addition, Article 77 (3) of the CPA stipulates that the court "may" (i.e., does not have to) recognize party capacity in any form, even if the necessary requirements are met, which is a practical problem given the need to standardize court practice and create predictable criteria for party capacity. However, regardless of the reasoning behind the court decisions in a particular case, one gets the impression that the party's capacity for residential buildings is often not recognized. See: Bodul, D., *Should a residential building acquire de jure legal personality,* Informator, No. 6530, 2018, p. 3.

performance, and his fault is presumed.[22] Therefore, if the technical requirements for the execution of the Decision are not met, the debtor cannot be held liable. Therefore, we ultimately believe that the Constitutional Court will change the point of view applying the evolutionary method[23] of interpreting constitutional values and starting from the fact that their content is understood and accepted by a modern state and a developed democratic society at the time of interpretation.[24]

3. IN LIEU OF A CONCLUSION

Doctrine and practice show that the "polluter pays" principle is a simple and logical rule that, in its original sense, means that the person who produced the waste must also bear the costs of its collection, transportation and disposal. It becomes problematic when it comes to finding a fair, accurate and equitable way of calculating the costs of waste management. However, it seems an impossible puzzle to apply a simple rule to the complex reality of a country full of different circumstances in a relatively small area. A particular problem is posed by multi-family dwellings, where the space available makes it very difficult to organize a sensible billing system in which individual users are charged according to the amount of waste they produce, which inevitably requires the organization of shared bins. If everyone disposes their waste in common bins, then the common price for the public service is paid, which subsequently demotivates those who invest additional effort in separating individual types of waste, i.e., it exposes them to the possibility of paying the contractual penalty jointly. From an economic and legal perspective, the context in which the Decision was made and the objectives pursued must be taken into account when evaluating it. The current solutions seem to us to be largely acceptable. We take this view, although we respect the extraordinary and notorious complexity of the choice taken and accept the fact that in such complex and multi-faceted issues there are arguments for both options. In addition, we respect that the final commitment will depend on the factors attributed to both sets of arguments, although it can be argued that the determination of these factors is a subjective and seemingly arbitrary act. Time will indicate whether the Decision would pass the "sieve" of the constitutional courts if someone initiates

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22 Gorenc, V. *et al.*, *Komentar Zakona o obveznim odnosima,* Narodne novine, 2014, Zagreb.

23 The original constitutional authority for the evolutionary interpretation and active action of the Constitutional Court is derived from Article 3 of the Constitution of the Republic of Croatia (Official Gazette, No. 56/90-5/14). It states: *"Freedom, equality, national equality and gender equality, peacekeeping, social justice, respect for human rights, inviolability of property, protection of nature and the human environment, the rule of law and a democratic multi-party system are the highest values of the constitutional order of the Republic of Croatia and the basis for the interpretation of the Constitution."*

24 See: Bodul, D., *Some questions related to municipal waste collection: the decision of the City of Zagreb as an example of good practice for apartment buildings?,* IUS INFO, October 4, 2022, p. 6.

a constitutional review proceeding or initiates an administrative proceeding. The decision to impose a contractual penalty on service users who separate municipal waste in apartment buildings because the co-owners do not do so seems doubtful for the time being. It is therefore undisputed that by agreeing on a contractual penalty, the contracting parties strengthen their binding relationship and at the same time create a mechanism for quick, efficient and undisputed compensation in the event of non-performance or defective performance of the contractual (i.e., main) obligation. However, we consider that the imposition of a contractual penalty on service users who separate municipal waste in apartment buildings due to co-owners who do not do so is not based on objective and justified grounds. By doing so, the existing legal solution or justification in relation to the objective and effect of the measure in question is not taken into account in accordance with the principles usually prevailing in democratic societies. An indication of this is also the Decision of the Constitutional Court of the Republic of Croatia[25] which annulled the provision of the WMA, according to which the utility company can impose a fine on all co- owners using a common tank if it cannot be determined who does not separate this waste. The Constitutional Court also concluded that the disputed legal solution and the provision that when a common tank is used by several users, the resulting obligation to pay a contractual penalty in the event that the liability of a single user is not established is borne by all users of the service who use the common tank in proportion to their usage share. In addition, the Constitutional Court argues that the determination of a single user liable for breaches of the contract for the use of a public service is particularly difficult in multi- apartment buildings where there may be a significant number of individual users of a public service. It is the same in cases where individual multi-apartment buildings do not have sufficient space to accommodate the storage tank within the enclosed part of the co-owner's building, but the tanks are located in a public area, so they are accessible to all, not just the users of a particular tank. In addition, the Constitutional Court decision disturbs the balance of the objective legal order, as the user of the service can be punished twice for unlawful conduct: 1) with a fine/ contractual penalty resulting from the breach of the contract itself (Article 23 of the Decision of the Constitutional Court); 2) with a penalty resulting from his liability for an administrative offense (Article 164 (1) (42) of the WMA in conjunction with Article 23 of the afore-mentioned decision). Telephone interviews with the representatives of the co-owners were also conducted for the analysis. The data collected indicates practical problems in the implementation of certain legal solutions in the initial phase of the application of the new legislation. The views of

[25] Decision of the Constitutional Court of the Republic of Croatia No.: U-I-2934/2022, Official Gazette, No. 142/2023

the individual interviewees are based on the knowledge and experience they have gained in the practice of applying the previously applicable legislation on municipal waste management, (which is certainly an important factor in assessing the improvement), but also the degree of optimization of the existing legal framework for municipal waste management at the level of the City of Zagreb.

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