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Constitutional protections of property and energy-efficient housing in Croatia\*\*\*

*Abstract*

*The aim of this article is to present the energy-efficiency building requirements in general and their relationship with the constitutional protections of property afforded by the Croatian Constitution and the European Convention of Human Rights (ECHR), and the reconstructions and energy-efficiency retrofitting of existing buildings and the relationship between these measures and the constitutional protections of property.*

**Keywords:** constitutional protection, energy-efficient buildings, energy-efficiency, Croatia.

## 1. Introduction

Although the legal system of Croatia, including its constitutional law and property law, is relatively young,<sup>1</sup> numerous factors have made it subject to constant and dramatic changes that have created increasing difficulties in its design and interpretation. On the one hand, Croatian property law developed on the remnants of social ownership and consequently had to both rebuild itself as a modern European system grounded in the institution of private ownership (while dealing with all the peculiarities of transition) and adapt itself to current and changing societal conditions. On the other hand, Croatian constitutional law had to position itself as a stronghold of protections upholding the rule of law and fundamental rights in a new political environment. In particular, this meant developing cogent interpretations of constitutional provisions as well as receiving long-standing doctrines from the European Court of Human Rights (ECtHR) and, more recently, the European Court of Justice.

Furthermore, the development of the entire Croatian legal system in the last fifteen years has been characterized by intensive and comprehensive revamping dominated by EU law. Energy policies are one area of particular concern. This area demonstrates all the complexities that arise when property, constitutional, and EU laws interact.

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Tatjana Josipović – Hano Ernst: Constitutional protections of property and energy-efficient housing in Croatia. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2023 Vol. XVIII No. 35 pp. 178-198, <https://doi.org/10.21029/JAEL.2023.35.178>

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\*\*\* *This study has been written as part of the Ministry of Justice programme aiming to raise the standard of law education.*

<sup>1</sup> The Croatian Constitution, enshrining inviolability of property as one of the fundamental values, was passed in 1990, and entered into force on December 22, 1990. See Constitution of the Republic of Croatia [hereinafter Constitution] art. 3. The Croatian Act on Ownership and Other Property Rights was passed in 1996 and entered into force on January 1, 1997. See Ownership and Other Property Rights Act [hereinafter Ownership Act].



<https://doi.org/10.21029/JAEL.2023.35.178>

The role of EU law in energy efficiency has been paramount in the reform of Croatian law in many areas. The fundamental source of EU energy efficiency law is the Energy Efficiency Directive<sup>2</sup> along with supplementary secondary legislation, including the Directive on the Energy Performance of Buildings,<sup>3</sup> the Ecodesign Directive,<sup>4</sup> and the Energy Labelling Directive.<sup>5</sup> Tackling the problem of efficient use of energy, as one of the main tools for fighting climate change under the Kyoto Protocol, is notoriously associated with energy-inefficient buildings. It has been repeatedly reiterated that buildings account for 40% of the total energy consumption in the EU<sup>6</sup> and that targeting the building sector is needed to reduce the EU's energy dependency and greenhouse gas emissions.<sup>7</sup> Residential buildings account for 75% of the total building stock in Europe;<sup>8</sup> hence, they are obviously the most viable choice for implementing energy-efficiency measures.

It makes sense in this context that EU legislation has imposed stringent requirements for new buildings, including nearly zero energy standards. However, for the most part, such legislation has left it to the national legislatures to implement policies, without requiring them to impose a duty to retrofit the very large number of non-compliant existing buildings. National legislators face difficult political and legal choices. The Croatian legislature implemented EU law via the Building Act and the Energy Efficiency Act, which also impose a strict energy-efficiency regime for new buildings but, importantly, make a seemingly small intervention in domestic property law concerning co-owners' voting rights in decision-making about energy-efficiency retrofitting. This intervention, however, raises important constitutional issues involving the conflict between property rights as fundamental rights and environmental protection as a public interest, which we analyze further.

The rest of the paper proceeds as follows: In Part II, we discuss energy-efficiency building requirements in general and their relationship with the constitutional protections of property afforded by the Croatian Constitution and the European Convention of Human Rights (ECHR), to which Croatia is a signatory. In particular, we analyze the construction of energy-efficient buildings and the relationship between novel requirements under the Building Act and the constitutional protections of property. In Part III, we discuss reconstructions and energy-efficiency retrofitting of existing buildings and the relationship between these measures and the constitutional protections of property. Part IV concludes.

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<sup>2</sup> Directive 2012/27/EU of the European Parliament and of the Council of October 25, 2012, on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [hereinafter EED].

<sup>3</sup> Directive 2010/31/EU of the European Parliament and of the Council of May 19, 2010, on the energy performance of buildings (recast) [hereinafter EPBD].

<sup>4</sup> Directive 2009/125/EC of the European Parliament and of the Council of October 21, 2009, establishing a framework for the setting of ecodesign requirements for energy-related products (recast).

<sup>5</sup> Regulation (EU) 2017/1369 of the European Parliament and of the Council of July 4, 2017, setting a framework for energy labelling and repealing Directive 2010/30/EU.

<sup>6</sup> EPBD rec. 3.

<sup>7</sup> *Ibid.*

<sup>8</sup> See European Commission 2022.

## 2. Energy-efficiency building requirements and the constitutional protections of property

### 2.1. Construction of energy-efficient buildings

The Croatian Building Act<sup>9</sup> contains numerous provisions on energy efficiency, not least because it explicitly implements the EPBD.<sup>10</sup> One of the fundamental rules under this act is a requirement that each structure be constructed such that during its lifetime it meets the basic structural requirements provided by legislation and regulation.<sup>11</sup> Traditionally, these include strength and stability, fire resistance, and sound insulation, among others. BA Article 8 specifically includes energy management and heat conservation, as well as the sustainable use of natural resources. Energy management and heat conservation requirements include ensuring that the amount of energy “remains at a low level, considering the users and climate conditions of the location of the structure”<sup>12</sup> and that “structures must also be energy-efficient such that they use as little energy as possible during construction and degradation.”<sup>13</sup> The requirement of sustainable use of natural resources means that structures must ensure (1) the reuse or recycling of structures, their materials, and parts after removal; (2) durability; and (3) the use of environmentally acceptable raw and secondary materials.<sup>14</sup>

The BA further contains detailed rules on the energy performance of buildings, applicable to buildings with roofs and walls for which energy is used to achieve certain indoor climate conditions.<sup>15</sup> All buildings must be designed, constructed, and maintained such that during their use they meet the energy efficiency requirements provided by law,<sup>16</sup> and that it is possible, without significant costs, to ensure individual metering of the consumption of energy, energy products, and water, with remote reading ability for specific building units.<sup>17</sup> Most importantly, energy efficiency requirements include (1) nearly zero energy, (2) electromobility, (3) regular inspection of heating and air-conditioning systems, and (4) energy performance certification.

The principal goal of energy-efficient construction is to achieve the prevalence of nearly zero energy buildings – hence, all new buildings must be nearly zero energy.<sup>18</sup> These buildings have very high energy performance, and nearly zero or very low amounts of energy are covered to a significant extent by energy from renewable sources, including

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<sup>9</sup> Building Act [hereinafter BA].

<sup>10</sup> See BA art. 1(2)–(3).

<sup>11</sup> See BA art. 7(1).

<sup>12</sup> BA art. 14(1).

<sup>13</sup> Ibid.

<sup>14</sup> See BA art. 15.

<sup>15</sup> See BA art. 19a; cf. EPBD art. 2(1)(1) (defining a building as a roofed construction having walls, for which energy is used to condition the indoor climate). The EPBD contains minimum requirements and does not prevent member states from maintaining or introducing more stringent measures (art. 1(3)).

<sup>16</sup> See BA art. 20(1).

<sup>17</sup> See BA art. 20(2).

<sup>18</sup> See BA art. 21(1); cf. EPBD art. 6 and 9.

energy from renewable sources produced on-site or nearby.<sup>19</sup> The specifications for achieving a nearly zero energy status are prescribed by technical regulations,<sup>20</sup> and they include a comprehensive set of measures for regulating space heating, domestic hot water supply systems, insulation and ventilation, condensation control, lighting, and building automation and control, as well as the mandatory use of renewable energy sources.<sup>21</sup>

Electromobility is achieved by implementing the requirements for the installation of infrastructure for recharging electric vehicles in buildings.<sup>22</sup> These include installing a minimum number of recharging points and ducting infrastructure (conduits) for a certain number of parking spaces, depending on the type and size of the building and the size and location of its car park.<sup>23</sup> Regular inspections of heating and air-conditioning systems include the obligation of the owner of the building or its unit to ensure inspections for heating systems or systems for combined space heating and ventilation with an effective rated output of over 70 kW, such as heat generators, control systems, and circulation pumps, once every 10 years, and inspections for air-conditioning systems or systems for combined air-conditioning and ventilation, with said effective rated output every 10 years.<sup>24</sup>

Energy performance certification is important not only to guarantee that energy-efficiency requirements have been met<sup>25</sup> but also to guarantee transparency in the housing market. The EPBD emphasizes providing correct information about the energy performance of the building to prospective buyers and tenants,<sup>26</sup> not only to properly assess the value of the property but also to encourage awareness of energy efficiency and possible improvements.<sup>27</sup> The BA contains a detailed set of provisions on energy certification, including those on the licensing and training of energy certification experts and the review of the energy certificates.<sup>28</sup> The fundamental requirement is that developers or owners have an energy performance certificate issued prior to the issuance of an occupancy permit.<sup>29</sup> In addition, owners have the obligation to have an energy

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<sup>19</sup> See BA art. 3(1)(39); cf. EPBD art. 2(1)(2).

<sup>20</sup> See Technical Regulation on Rational Energy Use and Heat Protection in Buildings [hereinafter *Tech. reg.*]

<sup>21</sup> See *ibid.*

<sup>22</sup> See BA art. 21a; cf. Directive 2014/94/EU on the deployment of alternative fuels infrastructure. See Farkas-Csamangó 2020 (discussing the Hungarian context).

<sup>23</sup> See BA art. 21b–21d; cf. EPBD art. 8(2)–(7).

<sup>24</sup> See BA art. 22a (1)–(2) and 22b(1)–(2); cf. EPBD art. 14(1) and 15(1). These include an assessment of the efficiency and sizing of the heat generator compared with the heating requirements of the building and, where relevant, a consideration of the capabilities of the heating system of the system for combined space heating and ventilation to optimize its performance under typical or average operating conditions. Further, these also include an assessment of the efficiency and sizing of the air-conditioning system compared with the cooling requirements of the building and, where relevant, a consideration of the capabilities of the air-conditioning system or of the system for combined air-conditioning and ventilation to optimize its performance under typical or average operating conditions.

<sup>25</sup> Energy certificates are issued after an energy certification inspection. See BA art. 26.

<sup>26</sup> See EPBD rec. 22.

<sup>27</sup> See *ibid.*

<sup>28</sup> See BA arts. 27–45; cf. EPBD, art. 11–13.

<sup>29</sup> See BA, art. 24(1); cf. EPBD, art. 12(1)(a)

performance certificate issued for all buildings prior to the sale or leasing of the building or its unit and to deliver such certificates to the (prospective) buyer or lessee,<sup>30</sup> as well as to explicitly state the energy performance indicator in the advertisement for sale or lease of the building or building unit published in the media.<sup>31</sup>

The obligations of landowners described above clearly represent regulatory restrictions on land use. Such restrictions are extremely common and comparable to other restrictions set out in the BA, which prescribes basic structural requirements intended to guarantee safety. The Constitution does not guarantee unlimited ownership. It contains four separate sets of provisions covering the constitutional protection of property rights.<sup>32</sup> Article 48(1) of the Constitution stipulates that “*ownership is guaranteed*”<sup>33</sup>; however, this guarantee is immediately qualified in section (2), which stipulates that ‘ownership obliges’ and that “*property owners and users have a duty to contribute to the common good.*”<sup>34</sup> This language, mirroring the German Constitution,<sup>35</sup> sets out the doctrine of social obligations of property ownership, which is typical of modern constitutional property design.<sup>36</sup>

The Croatian Constitutional Court has interpreted the above provision in the context of other provisions relating to property—namely, Articles 50(1), 50(2), and 52 of the Constitution. Article 50(1) allows both expropriation (taking) and limitations on ownership, but only by law, in the interest of the Republic of Croatia, and against market-value compensation.<sup>37</sup> Under Article 50(2), limitations on ownership are constitutionally acceptable only if they are prescribed by law and have the purpose of protecting the interests and security of the Republic of Croatia, nature, the human environment, and human health.<sup>38</sup>

Finally, Article 52 contains specific rules for “*goods of interest to the Republic of Croatia*” that are grouped into two categories. The first comprises the sea, the coast and islands, water, airspace, minerals, and other natural resources, all of which are directly designated by the Constitution as goods of interest to the republic. The second category includes land, forests, plant and animal life, other parts of nature, real property and property having significant cultural, historical, economic, and ecological value, which are designated by law as being of interest to the republic. The use and exploitation of these categories of property by rights holders, as well as compensation for the restrictions they are subject to, must be prescribed by law.

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<sup>30</sup> See BA, art. 24(2); cf. EPBD, art. 12(1)–(2).

<sup>31</sup> See BA, art. 24(2); cf. EPBD, art. 12(4). The duty to state the energy performance indicator equally applies to licensed real estate agents. See BA art. 24(4).

<sup>32</sup> See generally Marković et al. 2011, 618–623; Radolović 2010; Gavella 2002.

<sup>33</sup> Constitution art. 48(1).

<sup>34</sup> Constitution art 48(2).

<sup>35</sup> See Grundgesetz für die Bundesrepublik Deutschland art. 14(2).

<sup>36</sup> See Thiel 2011; Lubens 2007; Gavella et al. 2008, 354–357. See also Lähteenmäki-Uutela et al. 2021, Walsh 2021; Degens 2021; Mautner 2020.

<sup>37</sup> See Constitution, art. 50(1).

<sup>38</sup> See Constitution, art. 50(2).

The two leading constitutional cases that interpret the constitutional protections of property are U-IIIB-1373/2009<sup>39</sup> and U-I-763/2009.<sup>40</sup> They discuss the scope of property rights,<sup>41</sup> ‘the three rules test’, and the application of the principle of proportionality to property rights. The Croatian Constitutional Court was obviously inspired by the opinions of the European Court of Human Rights in its application of Article 1 of Protocol 1 to the ECHR. In fact, it seems to have tried to interpret the provisions of the Constitution as if they had essentially the same structure and meaning as the comparable provisions in the ECHR.<sup>42</sup> This was principally attempted by applying ‘the three rules test’ to assess a potential violation of the constitutional protections of property. The ‘first rule’ is the general rule guaranteeing the substance of ownership (including the freedom of disposal and private use).<sup>43</sup> The ‘second rule’ prohibits unlawful expropriation and expropriation unsupported by a general interest, or market-value compensation.<sup>44</sup> The ‘third rule’ empowers the legislature with traditional police powers to impose limitations on ownership in order to protect the interests and security of the republic, nature, the human environment, and human health – without compensation.<sup>45</sup>

Under this interpretation, it appears that the Croatian Constitutional Court views the ‘first rule’ as corresponding to ECHR Protocol 1, Article 1(1), Clause 1 (stating that everyone “*is entitled to the peaceful enjoyment of his possessions*”). The ‘second rule’ corresponds to ECHR Protocol 1, Article 1(1), Clause 2 (stating that “*no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*”). This congruence is obvious because the ECtHR interprets

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<sup>39</sup> Constitutional Court of the Republic of Croatia [CCRC], U-IIIB-1373/2000, July 7, 2009. See Marković et al. 2011, 618–623.

<sup>40</sup> CCRC, U-I-763/2009, March 30, 2011.

<sup>41</sup> The scope of Article 48 includes ‘all patrimonial rights’ (assets). See CCRC, U-IIIB-1373/2009 (citing earlier opinions U-III-661/1999, March 13, 2000; U-III-72/1995, April 11, 2000; U-III-551/1999, May 25, 2000; and U-III-476/2000, June 14, 2000. This aligns with ECtHR case law. See, e.g., ECtHR, *Depalle v. France* [GC], para. 62; *Anheuser-Busch Inc. v. Portugal* [GC], para. 63; *Öneryıldız v. Turkey* [GC], para. 123. See Schabas 2015, 970.

<sup>42</sup> See Bagić 2016, 254–255, 263. See CCRC, U-III-3491/2006, July 7, 2010, para. 19.3 (noting that the ECHR is a constitutional instrument of European public order, citing to *Loizidou v. Turkey* [GC]); CCRC U-I-763/2009, para 17.1 (citing to *Kopecký v. Slovakia* [GC]). This approach was taken despite the fact that the ECHR was designed as an instrument guaranteeing the bare minimum of rights, particularly so for property, which failed to be included in the original document (hence its inclusion in the protocol). See generally, Praduroux 2013.

<sup>43</sup> See CCRC, U-IIIB-1373/2009, para. 8. See CCRC, U-I-763/2009, para 17. (noting that the guarantee in Article 48(1) is qualified by the common good stipulated in Article 48(2), such that limitations on ownership must not ‘go farther than necessary’ to achieve a legitimate goal).

<sup>44</sup> See CCRC, U-IIIB-1373/2009, para 8. See CCRC, U-I-763/2009, para. 17.1

<sup>45</sup> See CCRC, U-IIIB-1373/2009, para 8. See CCRC, U-I-763/2009, para. 17.1 (emphasizing the exceptional nature of such restrictions and the protective function of ownership). The literature has warned, however, that constitutional case law after this opinion has essentially failed to implement its principles and has not managed to build a recognizable approach to their application. See Bagić 2016, 265–266. See also Lengyel 2020 (discussing similar issues in Hungary).

the anti-deprivation clause of the ECHR as including various types of expropriatory measures.<sup>46</sup>

The ‘third rule’ appears to correspond to ECHR Protocol 1, Article 1(2), which provides that a state has the right “to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” There is also a fourth rule in the Croatian Constitution: Article 52. The Constitutional Court has plainly stated that this rule “explicitly constitutes a presumed interest of the Republic of Croatia (general interest) that may affect the way the owners of such goods and things may use and exploit them”<sup>47</sup> and that this entails ‘control of use’ that “may on a general level be compared to [this] part of Article 1(2) of ECHR Protocol 1.”<sup>48</sup>

In addition to the ‘three rules’ test, violations of constitutional protections of property are always assessed under Article 16(2) of the Constitution on proportionality. Under this provision any restriction on ownership must be proportionate to the need for such a restriction in each particular case, meaning that “in any particular case there must be a reasonable relationship of proportionality between the means used in taking or restricting ownership and the goals thereby intended to achieve [i.e.] interference with property must be proportionate to the nature of the need.”<sup>49</sup>

Suspected violations are assessed using a method received from the ECtHR, which includes discussing the following questions: (1) Has there been an interference with ownership? (2) Was the interference lawful? and (3) Was the interference proportional to the intended legitimate aim?<sup>50</sup> If we analyze the restrictions imposed on landowners using the energy-efficiency provisions of the BA, violations would most likely be assessed under Article 50(2) of the Constitution and Article 1(2) of ECHR Protocol 1 as valid regulatory restrictions on use. These restrictions are backed by a clear energy policy, both domestic and supranational, and environmental protection is specifically listed as a protected interest under Article 50(2) of the Constitution. Further to that, Article 32 of the Ownership Act provides, echoing Article 50(2) of the Constitution, that an owner cannot exercise ownership beyond the limits set out by law for all owners to protect national interests and security, the human environment, and human health. Such restrictions are not subject to any compensation because they are simply a function of the social obligations of property owners enshrined in Article 48(1) of the Constitution. Therefore, although energy-efficiency measures under the BA do represent interferences with ownership, they are most likely to be assessed as both lawful and proportionate to the legitimate aim they seek to achieve (environmental protection).

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<sup>46</sup> See, e.g. *The Holy Monasteries v. Greece*, paras. 60–61, *Sporrong and Lönnroth v. Sweden*, para 63, *Depalle v. France* [GC], para. 7.

<sup>47</sup> CCRC, U-IIIB-1373/2009, para 18.

<sup>48</sup> Id. It goes on to explain that the restrictions under Article 52(2) “are within the scope of restrictions under Article 50(1) (“the second property rule”), because both cases concern statutory restrictions of private ownership in the interest of the Republic of Croatia.” Id. para 19. This is, of course, problematic, because Article 50(1) corresponds to the anti-deprivation clause of the ECHR, not its control of use clause.

<sup>49</sup> CCRC, U-IIIB-1373/2009, para 8. See CCRC, U-I-763/2009, para. 17.1 (noting that there must be a “fair balance and an equalized relationship between private property and general or public interests”). See also U-I-1156/1999, January 26, 2000.

<sup>50</sup> See Bagić 2016, 271–290.

A similar argument can be made regarding the owners' duty to conserve the building, including its energy-efficiency features, by maintaining it.<sup>51</sup> Unlike previous requirements that prohibited owners from building unless they complied with energy-efficiency requirements, maintenance requires them to further invest in the property. The Constitution does not distinguish between negative and positive restrictions, but the Ownership Act specifically recognizes the availability of prescribing statutory restrictions that require owners to 'take some action' with respect to their property.<sup>52</sup>

## 2.2. Reconstruction and certification of existing buildings

Thus far, we have discussed ownership restrictions for owners of undeveloped land. Current building owners are, however, also subject to novel rules regarding energy efficiency. These individuals have already built on their land and own a structure that does not meet the energy-efficiency requirements prescribed for new structures. The BA generally applies to all new structures on Croatian territory (with certain exceptions).<sup>53</sup> New buildings that must meet nearly zero-energy requirements are buildings for which applications for building permits were filed on or after December 31, 2019 (December 31, 2017, for buildings whose owners are public entities).<sup>54</sup> This means that buildings that fall outside the scope of the 'new buildings' definition do not have to meet energy-efficiency requirements, excluding certification. However, the BA does apply energy-efficiency requirements to reconstructions<sup>55</sup> and partially to major renovations.<sup>56</sup>

Owners who wish to reconstruct their buildings are in a position similar to owners of undeveloped land; hence, the arguments presented above on regulatory restrictions on use would most likely apply to such owners as well. For owners who engage in major renovations, the BA only applies the electromobility requirements.<sup>57</sup> This measure is certainly weaker than the nearly zero-energy requirements and would most likely be assessed as a valid restriction on use for the same reasons.

Finally, certification requirements apply to almost all buildings<sup>58</sup> and therefore represent the restriction that has the broadest impact. It is also special compared to others because it includes a restriction on disposal. As explained earlier, owners must obtain certification prior to any sale or leasing of a building or its units.<sup>59</sup> If they do not do so,

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<sup>51</sup> See Tech. reg. art. 2.

<sup>52</sup> See Ownership Act art. 32(3).

<sup>53</sup> See BA art. 2(1).

<sup>54</sup> See Tech. reg. art. 4(1)(21).

<sup>55</sup> See BA art. 2(2). Reconstruction is defined as the performance of construction and other work on an existing structure that affects the satisfaction of the basic requirements for such structure or that modifies the compliance of such structure with the zoning conditions it was built under (extension, addition, removal of external part of structure, construction work for change of use of a structure or a technological process or similar), or the performance of construction or other work on an existing dilapidated structure. See BA art. 2(1)(8).

<sup>56</sup> Major renovations are defined as building renovations in which more than 25% of the building envelope area is subject to renovation. See BA art. 2(1)(41).

<sup>57</sup> See BA art. 21c(1).

<sup>58</sup> See BA art. 23(1)(1) (listing exceptions).

<sup>59</sup> See BA art. 24(2).

they are criminally liable and subject to a fine<sup>60</sup> (albeit the contract itself remains valid). This restriction may also be classified under regulatory restrictions on use and may be justified for the same reasons as other energy-efficiency measures. Certification may look different because it does not directly improve the energy efficiency of the building but only provides information about it. This is also why it may seem difficult to find a strong link to the legitimate public interest that it seeks to support. However, certification, although it does not directly improve energy efficiency, enables energy-efficiency renovation of existing noncompliant buildings because such information is necessary for the project design. It also facilitates energy-efficiency renovation because it raises awareness about energy efficiency and calibrates the real estate market to reflect the value of energy-efficiency features.

### 2.3. Energy-efficiency retrofitting and the constitutional protections of property

As mentioned in the previous section, the BA does not impose a duty on current or future owners of multi-unit or other privately owned buildings to comply with new energy-efficiency requirements, such that they would be obligated to retrofit them. The BA required the government to pass a Long-Term Strategy for National Building Stock Renovation by 2050 (adopted in 2020)<sup>61</sup> and national programs for the energy renovation of buildings for 2021–2030.<sup>62</sup> The National Program for Energy Renovations of Multi-Unit Buildings for the Period 2021–2030 (adopted in 2021)<sup>63</sup> envisages various types of renovations (integral, deep, and comprehensive) that would affect approximately 6.2 million square meters within MUBs<sup>64</sup> and several models (for MUBs undamaged in the 2020 earthquake, MUBs damaged in the 2020 earthquake, and financial assistance for individuals at risk of energy poverty).<sup>65</sup>

There are two principal tools relevant for our analysis set out in the National Program and legislation: (1) public co-financing (grants for up to 60% for integral energy renovations and up to 80% for deep and comprehensive renovations, and 100% for individuals at risk of energy poverty)<sup>66</sup> and (2) reduction of the majority requirements for co-owners' decisions involving energy retrofitting.<sup>67</sup> The principal issue we further discuss is the second, legal tool.

Under the general provisions of the Ownership Act, co-ownership represents the fundamental legal doctrine of shared ownership, wherein co-owners participate in the ownership of a single property.<sup>68</sup> A subtype of co-ownership is condominium,<sup>69</sup> wherein co-ownership is modified such that condominium owners have the right to manage a unit in lieu of all co-owners, as if the unit were owned solely by the condominium

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<sup>60</sup> See BA art. 171(1)(4)–(7).

<sup>61</sup> See BA art. 47a. See Long-Term Strategy for National Building Stock Renovation by 2050.

<sup>62</sup> See BA art. 47b.

<sup>63</sup> See National Program for Energy Renovation of Multi-Unit Buildings.

<sup>64</sup> See *ibid.*, 6.

<sup>65</sup> See *ibid.*, 8–9.

<sup>66</sup> See *ibid.*, 6.

<sup>67</sup> See Energy Efficiency Act art. 29(1) and 30(2).

<sup>68</sup> See Ownership Act arts. 36–56.

<sup>69</sup> See Ownership Act art. 66–99. See generally, Josipović & Ernst 2015.

owner.<sup>70</sup> Co-owners (including condominium owners) have the right to participate in decision-making about all issues concerning the property<sup>71</sup>; however, the Ownership Act distinguishes between decisions involving ‘ordinary’ and ‘extraordinary’ management, wherein the former requires a simple majority of votes (calculated by reference to the size of a co-ownership share), while the latter requires unanimity.<sup>72</sup> The Ownership Act contains provisions classifying specific decisions into each category; however, in case of doubt, a decision is always presumed to fall into the ‘extraordinary’ category, thus requiring unanimity.<sup>73</sup>

Decisions on energy renovations were not specifically covered by the Ownership Act, and the Energy Efficiency Act<sup>74</sup> covered them by prescribing a majoritarian vote for a decision to enter into an energy renovation contract for an MUB.<sup>75</sup> Contracts may include both construction work and services for implementing energy-efficiency measures.<sup>76</sup> The majority required for this decision is the absolute majority of owners, calculated with reference to co-ownership shares,<sup>77</sup> which is the same voting regime as for ordinary management under the Ownership Act. The original version of the EEA contained a similar provision but used slightly different language, requiring a majority vote of all co-owners “*calculated by co-ownership shares and the number of co-owners.*”<sup>78</sup> A similar provision containing identical language was also passed for entering into energy performance contracts (EPCs) between an energy service company (ESCO) and MUB co-owners.<sup>79</sup> This is important because, last year, the Constitutional Court struck down both of these provisions,<sup>80</sup> and they were subsequently replaced with their current versions, which no longer reference the number of co-owners.

The main issue presented before the Constitutional Court was one of ambiguity of the language used, because, as explained by the court: “*it is considered undisputed that addressees of a legal provision cannot truly and concretely know their rights and obligations, nor foresee the consequences of their behavior unless the legal provision is sufficiently certain and precise. The requirement of certainty and precision of a legal provision represents “one of the fundamental elements of the principle of the rule of law” (...) and is key for the establishment and sustainability of the legitimacy of the legal system.*”<sup>81</sup> The court concluded that the use of double criteria for determining the majority of votes (i.e., referencing both co-ownership shares and the number of co-

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<sup>70</sup> See Ownership Act art. 66(2).

<sup>71</sup> See Ownership Act art. 39.

<sup>72</sup> See Ownership Act art. 41(1). Note that even under ordinary management, the decision is binding for all co-owners, which means that the outvoted co-owners may be burdened with financial obligations supporting such a decision.

<sup>73</sup> See Ownership Act art. 41(2).

<sup>74</sup> See Energy Efficiency Act [hereinafter EEA].

<sup>75</sup> See EEA art 30(2).

<sup>76</sup> See EEA art. 30(4).

<sup>77</sup> See *id.* The contracting parties are the co-owners of the building and the contractor. The contract is signed by the person designated in the decision, or by the building manager. See BA art. 30(3).

<sup>78</sup> See EEA art. 30(1).

<sup>79</sup> See EEA art. 30(2) (invalidated).

<sup>80</sup> See EEA arts. 29(1) and 30(1) (invalidated by CCRC, U-I/663/2020, March 23, 2021).

<sup>81</sup> CCRC, U-I/663/2020, para 5.1. (citing to CCRC, U-I-722/2009).

owners) was inadequate because the two criteria were mutually exclusive, or at least subject to various interpretations, and therefore unacceptable under the rule of law requirement of the Constitution.<sup>82</sup>

The court did not – nor was it asked to – engage in constitutional review of these provisions on grounds of constitutional property violations. However, such an analysis deserves attention, because the majority requirements under the EEA are an exception to the default unanimity rule under the Ownership Act. The principal constitutional issue with the introduction of the majoritarian model is its potential violation of the provisions of the Constitution and the ECHR that protect property. The first question in this analysis is whether the EEA introduced a novel restriction on ownership. Here we distinguish between the introduction of the majoritarian model for decisions involving energy-efficiency renovation on the one hand, and for those involving EPCs, on the other. We first deal with energy-efficiency renovation.

Energy-efficiency renovation, as explained earlier, involves significant construction work on buildings as a whole. *Prima facie*, decisions on such renovation would fall into the ‘extraordinary’ category, requiring unanimity. This is both because ‘larger repairs’ and ‘refurbishments’ are specifically listed as examples of extraordinary management,<sup>83</sup> and because extraordinary management is the default rule.<sup>84</sup> For condominiums, the Ownership Act provides an additional rule stipulating that ‘improvements of common areas’ fall under extraordinary management.<sup>85</sup> The fact that the EEA included a provision defining a simple majority also implies an intention to derogate from unanimity required by the Ownership Act.<sup>86</sup>

An alternative interpretation, wherein the EEA did not introduce a novel restriction on ownership, is, however, possible. It would entail that the EEA did not, in fact, derogate from the general provisions of the Ownership Act because energy-efficiency renovation falls under ordinary management. The Ownership Act does not provide a general definition of ordinary management. It does, however, define ordinary management in the condominium context such that it includes “*regular maintenance of common areas, including construction modifications necessary for maintenance*,”<sup>87</sup> and this could well apply by analogy to simple co-ownership. Therefore, ‘regular maintenance’ may include construction modifications if they are necessary for maintenance, so if energy efficiency renovation were to be classified as ‘regular maintenance’ then a simple majority would have sufficed under the Ownership Act, irrespective of Article 30 of the EEA. This article would then be interpreted as simply being inserted for clarification, confirming the existing position under the Ownership Act. The crucial issue here would of course be the one of classifying energy efficiency renovation as regular maintenance.

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<sup>82</sup> Ibid.

<sup>83</sup> See Ownership Act art. 41(1).

<sup>84</sup> See Ownership Act art. 41(2). Further to that, mortgaging the entire property is specifically listed under extraordinary management. See Ownership Act art. 41(1). This may be relevant if energy-efficient financing is secured, requiring a mortgage.

<sup>85</sup> See Ownership Act art. 87(1).

<sup>86</sup> The Energy Efficiency Bill does state this explicitly for the simple majority prescribed in Art. 29 concerning EPCs. Although this explanation is omitted for Art. 30, which concerns energy efficiency renovation, it seems the same logic was applied for both provisions.

<sup>87</sup> Ownership Act art. 86(1)(1).

In support of such an interpretation, it could be argued that energy efficiency has become a standard practice under current societal conditions that recognize the importance of energy efficiency as one of the principal tools in fighting climate change. Therefore, the argument proceeds, renovating buildings to become energy-efficient is simply a function of maintaining that building because maintenance does not just include maintaining the state of the building as it was when it was originally built but also includes maintaining it in a state that meets current societal conditions – including energy efficiency.

Conversely, it could be argued that achieving energy efficiency is not maintenance because it does not maintain the status quo but involves an improvement. Regular maintenance is a defined term under the Maintenance of Structures Regulation<sup>88</sup> and includes “*such construction that prevents the loss of features of the building and its functionality as defined in the project, as well as construction for replacement or replenishment of parts of the building in the intervals and scope as designated in the project or due to impaired features or functionality of such parts that are not caused by an extraordinary event.*”<sup>89</sup> Hence, the preceding argument is difficult because it requires an expanded understanding of maintenance to include fixing inadequacies outside the scope of the original project.

Furthermore, the Ownership Act, at least in the condominium context, provides a derogation from unanimity for common area improvements, where a simple majority is sufficient for such improvements if the majority decides to fully finance the costs thereof, or such costs may be covered from common funds without risking the coverage of regular maintenance expenses and if such improvements do not excessively harm the outvoted co-owners.<sup>90</sup> Therefore, just because the Ownership Act legislates the power of the majority to outvote the minority, it does not give the majority the power to impose any financial or other excessive burdens on that minority.

If we were to accept that the EEA did impose a novel restriction on ownership, its substance would be the loss of voting power because, under unanimity, each co-owner had to consent to energy-efficient renovation, essentially holding veto power against all other co-owners. Therefore, each co-owner’s freedom was curtailed by removing such power and redistributing it among co-owners in proportion to their co-ownership shares.<sup>91</sup>

What, then, is the nature of the restriction in terms of its classification under the Constitution and the ECHR, and, consequently, does it represent a permissible restriction? It is obvious that the restriction did not destroy co-ownership (total taking),<sup>92</sup> impose an easement or lease (incomplete taking),<sup>93</sup> or impose a restriction amounting to

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<sup>88</sup> Maintenance of Structures Regulation, OG no. 122/2014, 98/2019.

<sup>89</sup> See *ibid.* art. 2(1)(2).

<sup>90</sup> See Ownership Act art. 87(2).

<sup>91</sup> Note that this could most likely be avoided if the measure only applied to future owners. This could be achieved by requiring renovation only after an ownership transfer. Practically, this would probably mean that owners would retain veto power for the duration of their ownership, while future owners would, when purchasing a co-ownership share, implicitly agree to the new voting rules.

<sup>92</sup> See Ownership Act art. 33(1).

<sup>93</sup> See Ownership Act art. 33(1).

expropriation (regulatory taking);<sup>94</sup> hence, it may be classified as a restriction on use (control of use) under Article 1(2) of ECHR Protocol 1, Article 50(2) of the Constitution, and Article 32(1) of the Ownership Act. As previously noted, these restrictions are common because they allow for the proper functioning of society. The constitutionality and compatibility with the ECHR of such restrictions are assessed by applying a justification test that includes lawfulness and proportionality, the latter inquiring both whether the restriction aims to achieve a legitimate public interest and whether a fair balance was struck between the general interest of the community and the individual's property rights.<sup>95</sup>

Lawfulness requires that a measure be prescribed by law and that such law meets certain standards associated with the rule of law – most importantly, such precision and certainty that is sufficient for foreseeability.<sup>96</sup> The EEA simply prescribed voting requirements in decision-making about concluding an energy-renovation contract, without reference to the Ownership Act. This raises questions about how this rule fits the general framework. The Ownership Act distinguishes between ordinary and extraordinary management but also contains additional provisions that afford certain rights to outvoted co-owners, which depend on the classification of the decision under its nomenclature. As mentioned previously, in the condominium context, the Ownership Act provides that improvements of common areas, classified as extraordinary management, may be approved by a majority vote if the majority fully finances them or their costs may be covered from common funds without excessively reducing them.<sup>97</sup> The EEA, however, did not classify the decision on concluding an energy-efficiency contract as either ordinary or extraordinary management. If it were classified as extraordinary management, then the financial burden would fall exclusively on the majority, unless common funds were sufficiently large to cover both energy renovation and regular maintenance. Conversely, if it were classified as ordinary management, the financial burden would be distributed pro rata among the co-owners.<sup>98</sup> Outvoted co-owners have the right to request declaratory relief from a court in non-contentious proceedings<sup>99</sup> if they believe that the distribution of costs does not comply with these rules. Hence, the jurisdiction of a court also depends on such a classification.<sup>100</sup> Furthermore, it is unclear what the scope of the decision made by the majority actually is in the context of energy-efficiency renovation. Most importantly, it is not clear whether a majority vote is sufficient for taking out loans to (partially) finance energy-efficiency renovations because loans (particularly secured loans) are considered extraordinary management by default under the Ownership Act, whereas the EEA requires a majority for concluding an energy renovation contract that includes provisions on financing (but

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<sup>94</sup> See Ownership Act art. 33(3).

<sup>95</sup> See generally, Christoffersen, 2009.

<sup>96</sup> See CCRC U-I-659/1994 (discussing legal certainty and legitimate expectations); U-I-3843/2007 (discussing certainty and precision). Cf. ECtHR *Lekić v. Slovenia* [GC]; *Beyeler v. Italy* [GC]; *Hentrich v. France*; *Imeri v. Croatia*.

<sup>97</sup> See Ownership Act art. 87(2).

<sup>98</sup> See Ownership Act art. 89(1).

<sup>99</sup> See Ownership Act art. 89(4).

<sup>100</sup> See Varaždin County Court, GŽ-2708/2016 (dismissing a petition for declaratory relief in non-contentious proceedings for lack of jurisdiction).

is not a loan agreement itself).<sup>101</sup> These objections, if taken seriously, could lead to a court concluding that the (revised) provision of the EEA is still insufficiently precise because of its unforeseeable consequences for the affected co-owners, so as to violate the requirement of lawfulness, making the measure stand in violation of property protection afforded by the Constitution and the ECHR.

The existence of a public interest (environmental protection) does not seem problematic because it is fairly obvious.<sup>102</sup> The issues of adequacy and fair balance, however, present themselves as much more vexing. The problem of decision-making in a simple co-ownership or condominium scheme is notoriously difficult because it manifests most incidents of the collective action problem. Co-owners who must consent to a decision (on energy-efficiency renovation) hold an extremely powerful grip over the collective<sup>103</sup> and may be prone to use it for various reasons, including bargaining over other issues, lack of interest, and even exercising a personal vendetta. The literature has noted that this problem is pervasive in most European countries and has called for progressive review of property law.<sup>104</sup> The European Commission was aware of this issue, and the EED specifically requires in Article 19(1)(a) that member states take appropriate measures to remove regulatory and non-regulatory barriers to energy efficiency, without prejudice to the basic principles of property law of the member states, particularly with regard to the split of incentives among owners, with a view to ensuring that these parties are not deterred from making efficiency-improving investments that they would otherwise have made by the fact that they will not individually obtain the full benefits or by the absence of rules for dividing the costs and benefits between them, including national rules and measures regulating decision-making processes in multi-owner properties. The model adopted in the Croatian EEA can therefore be viewed as a simple tool for facilitating decision-making. By introducing the majority rule, it redistributes power between co-owners in favor of an environmentally friendly majority who may outvote the environmentally unfriendly minority.

The problem with the above argument lies in the relationship between restrictions and the aims it seeks to achieve. The majority rule does not guarantee that renovation will in fact be sought or achieved. The rule still requires a majority vote. Hence, if the majority are environmentally unfriendly, there is no rule mandating a retrofit.

The Constitutional Court has consistently held that proportionality demands that both measures are appropriate to achieve a legitimate aim and strike a fair balance between public and private interests.<sup>105</sup> Similarly, the ECtHR has consistently held that a

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<sup>101</sup> See EEA art. 30(5).

<sup>102</sup> See U-I-763/2009 (discussing the notions of general interests and public interests); See Staničić 2018. Cf. ECtHR, *Bélané Nagy v. Hungary* [GC] para. 113, *James and Others v. the United Kingdom* para.45; *Grozđanić and Gršković-Grozđanić v. Croatia* paras. 102-103 and 113; *G.I.E.M. S.R.L. and Others v. Italy* [GC] para. 295; *Hamer v. Belgium* para. 79, *Strezovski and Others v. North Macedonia* para. 75.

<sup>103</sup> See generally *Heller* 1998.

<sup>104</sup> See Weatherall et al. 2018 (concluding that an individualistic approach to property ownership underlies most governance barriers); See also Bright and Weatherall 2017; Anda et al. 2015; Lujanen, 2010.

<sup>105</sup> Disproportionality exists even when “*there is obviously no reasonable relationship between the method and scope of the restriction ... and the aims sought in the public interest. Proportionality may only exist in case the*

measure must strike a fair balance between the demands of the general interest of the community and the requirements for the protection of the individual's fundamental right to the peaceful enjoyment of possessions.<sup>106</sup> It stressed that an assessment of proportionality includes whether other less intrusive measures could reasonably be resorted to in the pursuit of the public interest.<sup>107</sup> The court has not, however, specifically examined whether the measure can fail because it is too weak. It could be argued that a fair balance entails that the measure should be appropriate to achieve the aim sought and that the strength of the measure should be sufficient to establish the link between the measure and the intended aim. If the measure does not achieve its aim, then even a weak restriction could be assessed as overly intrusive because a sufficient connection between the restriction and legitimate public interest is missing. In this sense, proportionality depends on the strength of the measure relative to its actual protection of the public interest.

In the case presented, the legislature obviously chose a weak measure, even though other models were available. For example, a slightly stronger version of the majority rule would have been to require a relative majority. This would have required all co-owners to be present at meetings to cast their votes. Under such a scenario, even an (absolute) minority could make a binding decision on energy-efficiency renovations, whereas under the current rule, a majority cannot be formed with absentees or abstainers.<sup>108</sup>

Another, much stronger model would have been to not only introduce the majority rule but to also prescribe a duty for all co-owners of energy-efficiency non-compliant MUBs to renovate their buildings within a certain period after legislation was passed.<sup>109</sup> Such a duty would require its own constitutional analysis, but supposing it was constitutionally acceptable, it would have provided a strong link between the public interest and restrictions. This was the situation in France, where the Energy Transition

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*applied measures are not more restrictive than it is necessary to secure a valid (legitimate) interest.*" CCRC U-I-3610/2010, December 15, 2010, para 14.2 See also CCRC, U-I-763/2009 para. 53.1 (preference for less intrusive measures that achieve the same goal). See CCRC U-III-36100/2009; U-III-2709/2010; U-III-5501/2013; U-III-5208/2013; U-III-7203/2014 (discussing fair balance).

<sup>106</sup> See *Beyeler v. Italy* [GC] para. 107; *Ališić and others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* [GC] para. 108).

<sup>107</sup> See *James and Others v. United Kingdom* para. 51; *Koufaki and Adedy v. Greece* (dec.) para. 48.

<sup>108</sup> See Weatherall et al. 2018 (noting that one of the most profound barriers to energy-efficiency decision-making in apartment blocks is the need to reach and engage apartment owners who may have no interest or who are difficult to contact).

<sup>109</sup> The co-owners would still need to vote, particularly on issues of when and how to proceed with a particular renovation project (or choose among several proposals), even though they would be under a statutory duty to renovate. This model would, however, require, sanctions against co-owners or collectives who fail to perform their renovation duty within the prescribed time frame.

Act of 2015<sup>110</sup> introduced both a renovation duty<sup>111</sup> and a relative majority in voting.<sup>112</sup> Although the renovation duty was applied only to the most energy-inefficient buildings, while the voting requirements were applied to all buildings, the existence of the renovation duty can be said to have been fully supportive of the voting measure, at least in the case of such energy-inefficient buildings. The French set of measures can also be viewed as a gradual scheme, wherein for the most energy-inefficient buildings, ownership is more severely restricted by imposing a renovation duty, whereas for others that present a lower degree of social harm, the weaker measure suffices. Under Croatian law, however, such arguments are unavailable, because no renovation duty is prescribed. Hence, it could be argued that by leaving the decision to renovate to co-owners, the government has delegated the power to assess whether the public interest needs protection to private actors – the majority of co-owners in each individual case (who might not even be aware of exercising this prerogative). By doing so, it failed to prioritize the public interest it has a constitutional mandate to protect and relied on the environmentally friendly majority of co-owners, even though it not only had no guarantee of existence but also deferred to the environmentally friendly minority when it did not. Therefore, the argument proceeds, because the restriction remains disconnected from the public interest it seeks to achieve, it stands in violation of the Constitution and the ECHR.

These arguments may be criticized in a number of ways. First, it could be argued that the measure is sufficiently strong to justify the existence of a link with the public interest. Although the measure does not go so far as to require renovation, it does remove a barrier in the decision-making process to achieve it. By making the decision-making process easier for the environmentally friendly majority, the measure makes energy-efficiency renovation much more probable. Removing veto power from any single co-owner is sufficiently strong to break arbitrary holdouts that are statistically much more probable than situations in which the majority oppose the retrofit.

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<sup>110</sup> See Loi n° 2015-992 du 17 août 2015 relative à la transition énergétique pour la croissance verte.

<sup>111</sup> See *id.*, art. 5 (requiring that all privately owned buildings classified as energy efficient categories F or G undergo energy renovation before 2025). Interestingly, the same act contained an even stronger restriction, providing in its Art. 6 that “*from 2030 all privately owned residential buildings must undergo an energy renovation when they are transferred ... subject to the availability of adequate financial tools.*” The French Conseil Constitutionnel struck down the article imposing the renovation duty, as in violation of art. 34 of the French Constitution that protects property, because “*the legislature has pursued an objective of general interest ... however, by defining neither the scope of the obligation which it has set, nor the financial conditions of its implementation, nor those of its application in time, the legislature has not sufficiently defined the conditions and the modalities of this infringement of the right to dispose of one’s property.*” Décision du Conseil constitutionnel n° 2015-718 DC.

<sup>112</sup> See *id.* art. 14 (modifying art. 24 of Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis). The majority was later modified, and current French law requires an absolute majority of votes for energy-efficiency renovations under Article 25 of said statute. However, under Article 25-1 of said statute, if such a majority is not reached, and the project received at least a third of the votes of all co-owners, then a second vote is immediately taken, wherein a relative majority suffices.

Second, it could be argued that the measure is not in fact weak at all but exactly represents a fair balance between the need to protect ownership and the need to protect the environment. Under this view, the government did not fail to prioritize the environment but performed an ex-ante proportionality test, resulting in a weaker measure because it took existing property rights into account. By prescribing reduced majority requirements, the government did not delegate its environmental protection power to co-owners but simply recognized their property rights relative to the public interest, striking a fair balance between them.

Finally, recall that the measure is supported by public assistance, which not only makes energy-efficiency renovation attractive but also significantly reduces the financial obligations for the outvoted co-owners. If we assess the measure as an integral part of a larger scheme that includes public financing, which it is,<sup>113</sup> then the measure is even weaker in terms of restricting ownership because the harmful consequences of being outvoted are financially disproportionate to the benefit received by energy renovation, particularly in the case of individuals who are at risk of energy poverty, where projects are fully backed by public financing. The link between the measure and public interest is, however, much stronger because the measure impacts the decision involving energy-efficiency renovation co-financed by public funds.

Another way to look at the issue could also be to imply a duty to renovate. Although the EEA did not prescribe such a duty, it could be implicit in the substance of ownership of an energy-inefficient building.<sup>114</sup> Ownership is defined under Article 33 of the Ownership Act as a property right inherently limited by statute and third-party rights. General statutory restrictions on ownership are also defined and include prohibiting (1) the exclusive use of property to cause harm, (2) exclusion under necessity, and (3) reach into useless airspace and underground space.<sup>115</sup> A corollary of these restrictions is further elaborated in the law of neighbors, particularly nuisance law.<sup>116</sup> If energy-inefficient use of a building is viewed as use that is exclusively harmful to others (in that particular aspect), then it could be argued that no owner or co-owner has the right to use their building in an energy-inefficient manner, and hence the duty to renovate. It could then be argued that there was no interference with or restriction of ownership because there was nothing to restrict; that is, the restriction was already implied in the very substance of ownership.

Similarly, necessity prevents an owner from prohibiting such interference with the property, which is necessary to remove the threat of imminent harm if such harm is disproportionately greater than the harm caused to the owner.<sup>117</sup> If energy-inefficient buildings are viewed as an imminent threat to the environment, then prohibiting energy-efficiency renovation would be prohibited itself, if the harm from energy-inefficient use was assessed as disproportionate to the harm (principally financial) to the renovating

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<sup>113</sup> The BA explicitly states in art. 30(1) that energy renovation of MUBs is carried out in accordance with national programs of energy renovation of MUBs and that the users of public funds provided by these programs are MUB co-owners.

<sup>114</sup> See generally, Guimont 2022; Klein 2007.

<sup>115</sup> See Ownership Act art. 31.

<sup>116</sup> See Ownership Act art. 110.

<sup>117</sup> See Ownership Act art. 31(1)(2)

owners. The balancing of harms, as well as the fact that necessity gives owners the right to damages,<sup>118</sup> would require a separate analysis of the value of harm for co-owners, particularly because renovation involves both expenses (partially publicly funded) and benefits (in terms of property valuation); however, such an analysis is beyond the scope of this paper.

The problem with this line of argumentation, however, remains in that it implies that individual property rights belonging to all co-owners as a collective are still more valuable than the collective right to a healthy environment belonging to everyone, including the co-owners themselves, because even with public funding and a majority vote, an opposing majority prevails. In other words, the measure itself could be criticized as being overprotective of property rights, even though it does not violate any constitutional protection of property.

This may lead to attacking the measure on other grounds. If we accept that energy-inefficient buildings cause harm to the environment, then it could also be argued that the right to a healthy environment of the outvoted minority, guaranteed implicitly by the Constitution and the ECHR in the right to respect private and family life,<sup>119</sup> is violated by the EEA, which fails to impose a duty to renovate and force the minority to live in an energy-inefficient building. This would require a test be conducted under ECHR Article 8, but a violation would, however, be far less likely unless energy-inefficient housing was considered a sufficiently severe nuisance or threat to prevent co-owners from enjoying their homes so as to affect their private and family life adversely and the state had a positive duty to take reasonable and appropriate measures to secure the co-owner's rights.<sup>120</sup>

Finally, recall that the EEA also includes a majority vote provision for EPCs. This measure, unlike the previous one, does not in our opinion require as much attention in the context of a discussion on property rights violations. Even though this measure and its link to the public interest could also be regarded as weak, the degree of interference with property rights is so low that it would be difficult to justify finding a violation. This is a logical consequence of EPC design. The BA defines an EPC such that the energy efficiency investment is repaid relative to the level of energy-efficiency improvement or other criteria, such as financial savings.<sup>121</sup> Energy savings are guaranteed;

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<sup>118</sup> See Ownership Act art. 31(1)(3).

<sup>119</sup> See Constitution art. 35. and ECHR art. 8. See Mihelčić & Zrinski 2018; Mišćević & Dudaš 2021.

<sup>120</sup> See e.g. López Ostra v. Spain; Çiçek and Others v. Turkey (dec.); Ivan Atanasov v. Bulgaria; Kyrtatos v. Greece; Fadeyeva v. Russia; Cordella and Others v. Italy; Hatton and Others v. United Kingdom [GC]. Note, however, that in Hamer v. Belgium the ECtHR observed in relation to property rights that “*while no provision of the Convention is specifically designed to provide general protection of the environment as such ... in today's society the protection of the environment is an increasingly important consideration ... [and that] financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard. The public authorities therefore assume a responsibility which should in practice result in their intervention at the appropriate time in order to ensure that the statutory provisions enacted with the purpose of protecting the environment are not entirely ineffective.*” Hamer v. Belgium para. 79.

<sup>121</sup> EEA art. art 4 (2)(67).

that is, the ESCo bears the risk of achieving such savings,<sup>122</sup> the value of such savings must be greater than or equal to the ESCo's remuneration,<sup>123</sup> and the remuneration is only paid once savings have actually occurred.<sup>124</sup> The investment is entirely funded by the ESCo,<sup>125</sup> and the ESCo must maintain parts of the building improved as a result of such investments.<sup>126</sup> Furthermore, every co-owner can contest the savings individually.<sup>127</sup> This design is obviously beneficial, or at least neutral, for all co-owners; therefore, it is difficult to see interference as being disproportionate.

### 3. Conclusion

Contextualizing property rights in the age of fighting climate change is challenging. Traditional views of property law emphasize the individual as standing in opposition to the world because property is exclusionary. Environmental protection, on the other hand, requires collective endeavors to save the world. There is little doubt that individual property rights today must defer to environmentally friendly goals and that the EU's –and consequently Croatia's – energy efficiency policy targeted at MUBs is but another legitimate public interest that weakens individual property rights for the benefit of the community. The particular issues we discussed in this paper, however, demonstrate that the method for achieving that public interest is as important as good intentions that motivate governmental action.

Croatia's relatively minor intervention in domestic property law, modifying the co-ownership voting model, is a good example. Although there are many arguments that speak to the lawfulness and proportionality of the intervention, there remains at least a suggestion of a doubt that the measure is too weak to support its relationship with the proclaimed public interest, both from the ownership and community perspectives, indicating that perhaps a bottom threshold for proportionality has been breached. It also demonstrates that implementing EU policies into national property law, even when designed with an idea of balancing property rights against public interests, may miss the mark under constitutional review if national law is modified haphazardly and without serious systemic considerations. This may particularly be the case when the center of balance is not identical at the national and supranational levels due to differences in both legal and political factors involved in policy design and lawmaking.

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<sup>122</sup> EEA art. 29(3)(2).

<sup>123</sup> EEA art. 29(3)(1).

<sup>124</sup> EEA art. 29(3)(5).

<sup>125</sup> EEA art. 29(3)(3).

<sup>126</sup> EEA art. 29(3)(1).

<sup>127</sup> EEA art. 29(5).

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