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LIMITATIVE EFFECT OF ELECTRONIC COMMUNICATION IN THE LAND REGISTRY PROCEDURE

Before the Act on Amendments to the Land Registration Act entered into force, parties could submit proposal for entry of a registrable right to the land register court in several ways. The proposal for entry could be submitted electronically, either by email or the e-Citizens digital platform, by submitting it directly to the court registry or sending it by postal service. After the Act entered into force, such a proposal can be submitted only in electronic form through the information system, that is, through the Joint Information System of the Land Registry and Cadastre. In this case, the parties' communication with the court is conditioned by the submission of a proposal for entry to a notary public or a lawyer, who are mandatory users of electronic communication with the court. Before the Act entered into force, the parties could directly submit a proposal for entry to the court and request the registration of their right, which was the most common way of the proposal submission. The proposal used to be submitted in writing and its content was not significantly limited.

Keywords: land registry, proposal for entry, information system, electronic communication.

1. INTRODUCTION

The topic of this paper is the submission of a proposal for registration in the land register in electronic form as determined by the Act on Amendments to the Land Registration Act (AALRA/22).¹ The Act introduced significant changes to the Croatian legal system, its provisions exclude any other form of proposal submission, which was previously possible and allowed. As a consequence, this has a certain limitative effect for the applicants of registration in the land register because it is mandatory to submit a proposal in electronic form, with certain requirements related to signing it with a qualified electronic signature. Their right to submit proposals in any other form is no longer permitted. Imposed restrictions are being analysed in the scope of Article 6 of The European Convention on Human

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¹ Act on Amendments to the Land Registration Act, *Legal Gazette*, no. 128/2022– AALRA/22.

Rights (the Convention) and case law of The European Court for Human Rights (ECtHR). An overview of the legal frame and subordinate legislation in the Croatian legal system that served as the basis for the implementation of electronic communication in the land registry procedure is given. The importance of the order of priority for registration is emphasized and the consequences that could occur in the case of a delay in the submission of the proposal, i.e., its connection to the principle of trust or public faith in the land register. The positive effect of electronic communication aims to modernize and accelerate the procedure itself and to abandon the current written form of interaction with the court. Since the new legislative solution excludes any other form of proposal submission, which was previously possible, the new legal frame brought up restrictions which can be connected to excessive formalism and even the individual's right to access the tribunal. Restrictions which collide with principal rights may be considered deficiencies in, almost, every legal system.

2. ELECTRONIC PROPOSAL IN THE SCOPE OF THE RIGHT OF ACCESS TO A COURT AND EXCESSIVE FORMALISM

With the entry into force of AALRA/22 applicants, who submit proposals for registration in the land register, have limitative right of submission regarding the prescribed form. The proposal for registration in the land registry now can only be submitted in electronic form through a notary public or a lawyer. Before the act came into force, applicants could submit a proposal for registration in several ways. The proposal could also be submitted electronically, either through an e-mail or the e-Citizens platform or by handing it directly to the court registry, even through a postal service provider. The submission itself, in this sense, is conditioned and limited by the amendments. It is conditional because the proposal must be submitted only through an intermediary and it is limited because the applicants can no longer directly submit the proposal to the court or using the e-Citizens platform. Notaries and lawyers are mandatory users of electronic communication with the court and it takes place through the Joint Information System of the Land Registry and Cadastre.² Considering that, the right of participants in the legal transaction of real estate to directly address the court is limited, due to the imposed indirect communication via intermediaries. The intermediaries in communication with the court are notaries public and lawyers, as the only authorized users of electronic communication.

In the scope of Article 6 of The Convention,³ i.e. in the broader sense of the right of access to a court, it can be argued whether the right of access to a court is restricted by the new legislative form. The fact is that applicants are not allowed to submit their proposals directly to the court and the fact is that an intermediary is being introduced in communication between applicants and the court. On the other hand, this is the only legal possibility to execute the registrable rights. If the proposal is submitted directly to the land registry court it will be rejected due to the lack of procedural requirements.

² Republika Hrvatska – Ministarstvo pravosuđa, uprave i digitalne transformacije. Podnošenje e-prijedloga za upis u zemljišnu knjigu. Available at: <https://mpudt.gov.hr/podnosenje-e-prijedloga-za-upis-u-zemljisnu-knjigu/14341> (10. 10. 2024).

³ European Convention on Human Rights.

When it comes to the lack of procedural requirements it is well known that the ECtHR, and its case laws, underline the importance of the right of access to a court and this right can't be subordinate to any procedural requirements.⁴ In Article 6, the word court is used in the term tribunal. The notaries public and lawyers can't be considered as a tribunal according to the case law of the ECtHR. They don't have the power to issue a binding decision⁵ and they don't have full jurisdiction over the case⁶ in the electronic communication with the land registry court, when they receive a proposal in a written form. They also don't have the ability to determine matters within their competence on the basis of rules of law, following proceedings conducted in the prescribed manner.⁷

Apart from restricting direct communication with the court, the formality of the proposal's content is also imposed. Before the act came into force the applicants could submit a proposal directly to the court, requesting the registration of their right. The proposal was submitted in a written form and its content was not significantly limited. The form as a presumption of the proposal's validity was not a requisite condition because it was stipulated that, due to the fact that the proposal was not submitted on the prescribed form, the proposal will not be rejected if it can be acted upon.⁸ When formality is introduced into out-of-court proceedings and indirect communication is imposed, this can represent additional obstacles for the applicants in exercising their rights, and in some cases, additional costs.

The changes can be justified by efforts to modernize and accelerate the procedure itself and to abandon the current written form of interaction between the parties and the court, which is replaced by electronic communication. The question arises whether problems will occur when the parties' approach to the court is restricted by introducing an intermediary. This primarily refers to the content of the proposal, which will be drawn up by a notary public or a lawyer. In that case, can it be considered that the amendments lead to excessive formalism since the applicants can no longer directly submit a registration proposal whose content was not a requirement for its acceptance? The formalism can be, also, discussed due to the fact that before the amendments entered into force, the proposal could not be rejected only because it was not submitted in the prescribed form.

When it comes to the proposal submission, if the proposal is submitted directly to the court in a written form or using e-Citizens digital platform, even an e-mail, it will be rejected because it has to be submitted in electronic form by an intermediary. According to the ECtHR the right of access to a court is an inherent aspect of the safeguards enshrined in the European Convention on Human Rights, referring to the principles of the rule of law and the avoidance of arbitrary power which underlie much of the Convention.⁹ In this sense, the fact is that electronic form is a procedural rule or requirement

⁴ Council of Europe. 2023a. Excessive Formalism by Courts. Available at: <https://rm.coe.int/thematic-factsheet-excessive-formalism-courts-eng-docx/1680aae7f4> (10. 10. 2024).

⁵ ECtHR, *Bentham v. the Netherlands*, No. 8848/80, 23 October 1985, paras. 40 and 43.

⁶ ECtHR, *Galina Kostova v. Bulgaria*, No. 36181/05, 12 November 2013, para. 59.

⁷ ECtHR, *Sramek v. Austria*, No. 8790/79, 22 October 1984, para. 36.

⁸ Art. 105 and 109 of the Land Registration Act, *Legal Gazette*, no. 63/2019.

⁹ Council of Europe. 2023b. Implementation of ECHR judgments: new thematic factsheet on excessive formalism by courts. Available at: <https://www.coe.int/en/web/human-rights-rule-of-law/-/>

and it has to be submitted to an intermediary, who is not considered a tribunal. When a court rejects a proposal on the basis of procedural rules or requirements, the applicant's right to address the court can be considered restricted.

3. ELECTRONIC COMMUNICATION IN THE LAND REGISTRY PROCEDURE

Notaries public and lawyers in the legal transaction of real estate, as authorized persons in land registry procedure, were introduced back in 2013, when the Act on Amendments to the Land Registration Act (AALRA/13)¹⁰ entered into force. That legislation introduced significant changes when it comes to electronic communication. The changes also related to the submission of entry proposals in electronic form (see Articles 9 and 33), which was previously not possible. They also referred to the implementation of registration based on an electronic document, delivery in electronic form, as well as the issuance of an electronic land register extract (see Articles 4, 15 and 31), and it is stipulated that land registers are kept in electronic form. It is prescribed that submission of a proposal for entry, electronic delivery of a decision, and issuance of an electronic land registry extract are tasks which could be performed by notaries public and lawyers as authorized users, through the information system. This legislation is also important because its provisions served as the basis for the introduction and establishment of an information system, through which electronic communication between the court and the parties takes place. This system is called the Joint Information System of Land Registers and Cadastre (JIS).¹¹ According to Art. 25 Paragraph 1 AALRA/13 it is an information system in which land register and cadastre data are stored, maintained and preserved, and it consists of data stored in the Land Registry Database, land register data and land cadastre data (LRDB).¹²

Based on Art. 34 AALRA/13, the Ordinance on technical and other conditions of electronic data processing in land registers was adopted (Ordinance/15),¹³ and it entered into force on 2 November 2015. The mentioned regulation was applied only in procedures of electronic issuing of the verified land registry extracts at the request of a party through an authorized user.¹⁴ Authorized users, in addition to notaries and lawyers, could also be legal entities with public authorities, which was later changed. Although the mentioned regulations introduced significant changes regarding electronic communication in land registry data processing, Ordinance/15 only prescribes the possibility of issuing a land registry extract in electronic form.

implementation-of-echr-judgments-new-thematic-factsheet-on-excessive-formalism-by-courts (10. 10. 2024).

¹⁰ Act on Amendments to the Land Registration Act, *Legal Gazette*, no. 55/2013 – AALRA/13.

¹¹ Republika Hrvatska – Ministarstvo pravosuđa, uprave i digitalne transformacije. Uređena zemlja – katastar. Available at: <https://oss.uredjenazemlja.hr/> (10. 10. 2024).

¹² Art. 25 Paragraph 1 of the AALRA/13.

¹³ Ordinance on technical and other conditions of electronic data processing in land registers, *Legal Gazette*, no. 119/2015 – Ordinance/15.

¹⁴ Art. 3 of Ordinance/15.

Submission of electronic proposal for entry was regulated by the subordinate legislation only in 2017, with the amendment of Ordinance/15, although the legislation act entered into force much earlier. The Ordinance on amendments to the Ordinance on technical and other conditions for electronic data processing in land registers (Ordinance on amendments/17),¹⁵ prescribes the procedure, method and conditions for submission of electronic proposals to the land registry. Before that, notaries and lawyers were only authorized to issue electronic land registry extracts, as already stated.

For comparison, the Austrian legal system introduced electronic communication in 1990 as a means of communication with the parties and their counsel that would be equivalent to submissions in hard copy. In introducing this system, Austria was the first country in the world to establish Electronic Legal Communication.¹⁶ The communication is taking place via the Austrian e-Justice digital platform and the platform allows online communication between the courts and the public prosecutors' offices on the one hand and the parties on the other, in the same way as in paper form. It can be used for all types of proceedings. There are no proceedings which must always be initiated online.¹⁷ According to the § 83 of the Federal Law of 2 February 1955 on Land Registers (General Land Register Act 1955 – GBG. 1955),¹⁸ it is allowed to submit a proposal in written form and even in the form of a court record. It can be seen that electronic communication doesn't have to exclude written nor other forms, such as the case with e-Citizens digital platform in Croatian legal system. Especially if that kind of a restriction can be seen as limiting principal rights guaranteed by the Convention. There's no explicit provision, like the one of Article 105 AALRA/22, demanding that a proposal must be submitted in electronic form via intermediary, although the communication is taking place via e-Justice. If a proposal is submitted in written form directly to the court, it should not be rejected due to the lack of procedural requirements.

3.1. Electronic Communication Through the Joint Information System

Electronic communication takes place through the JIS subsystem and personal user account. Proposals for entry must be signed by a qualified electronic signature¹⁹ which is considered equal to a handwritten signature and a stamp, relating its legal effect. It was important to assimilate the effects of a handwritten signature and stamp with a qualified electronic signature as notaries public and lawyers, outside electronic communication,

¹⁵ Ordinance on Amendments to the Ordinance on Technical and Other Conditions for Electronic Data Processing in Land Registers, *Legal Gazette*, no. 23/2017.

¹⁶ Federal Ministry of Justice. Available at: <https://www.bmj.gv.at/public.html> (10. 10. 2024). See more: Austrian Federal Ministry of Justice. 2023. IT Applications in the Austrian Justice System. Available at: <https://www.justiz.gv.at/file/2c94848b6ff7074f017493349cf54406.de.0/IT%20Applications%20in%20the%20Austrian%20Justice%20System%20Stand%2007.09.2023.pdf?forcedownload=true> (10. 10. 2024).

¹⁷ E-justice Europa. Online processing of cases and e-communication with courts. Available at https://e-justice.europa.eu/content_automatic_processing-280-at-en.do?member=1 (10. 10. 2024).

¹⁸ Federal Law Consolidated: Complete Legal Provision for the General Land Register Act 1955, Version of 30.10.2024 (Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Allgemeines Grundbuchsgesetz 1955, Fassung vom 30.10.2024). Available at: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001941> (10. 10. 2024).

¹⁹ Art. 12 Paragraph 1 of the Ordinance.

use a handwritten signature and stamp. This is their legal obligation since their signature and seal are evidence of the document's authenticity and the authenticity of the statements they draw up or the duty they carry out.²⁰ The signing of documents and statements by electronic signature in the notary public service, still, represents an exception because this method of signature can be used only when pursuant to a separate law.²¹ Considering the lawyer's practice, such restriction is not regulated.²² The reason for this lies in the specific elements of the public service they carry out, which gives them different authorities when it comes to drawing up documents.

Communication takes place through a personal user account assigned by the administrator. In this case, the administrator is the competent ministry and the request for creating a personal user account is submitted through the Chamber of Notaries or the Chamber of Advocates.

The Ordinance on electronic data processing of users and authorized users of the land registers (Ordinance)²³ is currently in force. Its provisions stipulate that land registry extracts, which used to be issued exclusively by the land registry court, can be issued by notaries public and lawyers. In that matter, a part of the data-related affairs in the land registry was transmitted to extrajudicial services. Likewise, the possibility of submitting proposals in electronic form is prescribed (see Article 27 and Article 105 of the LRA).

The submission of the proposal in electronic form was introduced into the legal system on 15 March 2017, when the Ordinance on Amendments/17 entered into force. The proposals submission form and the procedure conducted by notaries public and lawyers, when they receive a proposal, have not changed significantly. The applicants shall submit their proposals and the documents based on which registration is requested to a notary public or to a lawyer in written form. They shall convert them in electronic form by scanning, verify all important facts relevant to the registration, draw up the proposal for registration, sign the proposal and all the attached documents with a qualified electronic signature and deliver them to the Land Registry Court. The time of the proposal's receipt shall be considered to be the time when it is received in the recipient's information system, i.e., when it is recorded on the recipient's server.

4. PROPOSAL SUBMISSION AND DELIVERY

The proposal and all attachments based on which the registration is requested must be converted into electronic form by scanning and signed with a qualified electronic signature, even those documents that have already been prepared in electronic form.²⁴ A

²⁰ Art. 12 The Attorneys Act, *Legal Gazette*, no. 9/1994, 117/2008, 50/2009, 75/2009, 18/2011, 126/2021 – AA and Art. 44 of the Notaries Public Act, *Legal Gazette*, no. 78/1993, 29/1994, 162/1998, 16/2007, 75/2009, 120/2016, 57/2022 – NPA.

²¹ Art. 18 Paragraph 11 of the NPA.

²² Art. 12 Paragraph 1 of the AA.

²³ Ordinance on Electronic Data Processing of Users and Authorized Users of the Land Registers, *Legal Gazette*, no. 108/2019 – Ordinance.

²⁴ Art. 12 of the Ordinance.

qualified electronic signature means an advanced electronic signature that is created by a qualified electronic signature creation device, and which is based on a qualified certificate for electronic signatures.²⁵ A qualified signature creation device represents the appropriate computer equipment and supporting programs used to create an electronic signature, while a qualified certificate is related to the issuer of such a signature, which must meet certain requirements.

Entry proposals must be signed, as well as all documents based on which the registration is requested, whether they are official or private documents. The legal effects of an electronic signature are equal to a handwritten signature, and a document signed with an electronic signature has the same provable value as a private document signed by hand.²⁶

It is considered that the proposal is received at the land registry court when it is registered on the recipient's server, which records the day, month, year, hour and minute of the proposal's arrival.²⁷ The mentioned indications are important because of the order of priority that determines the order in which the entry in the land register will be carried out. Those indications are, also, rendered visible (by lead seal) in the land registry file and they show the date and time when the proposal was received by the land registry court, and the number of the diary of land registry submissions under which it was received (diary number).²⁸ In this way, the publicity function of land registers is realized because it immediately makes visible and publicly available the fact that a proposal for the entry of certain content has been received.

Actions that precede sending the proposal and recording it on the land registry court's server greatly affect the time that can be considered proposal's reception. A server is a computer that serves as a data source for other terminals or computers or an organization or institution that provides a server on which a network site is set up.²⁹ This central computer provides files to terminals directly connected to it or is a network server accessed by client devices.³⁰ In this case, the server would be the competent ministry, that is JIS through which the proposal is submitted. The relevant moment that is considered the receipt of a proposal is the registration of the proposal on the server of the Land Registry Court. The procedure takes place through the JIS, as already mentioned, which notaries and lawyers access through their user accounts.

The proposal submission process itself consists of several time-separated actions that, in addition to human action, are also exposed to the action of information technology. Before the entry into force of AALRA/22, when parties were able to submit

²⁵ Art. 3 Paragraph 12 of the Regulation (EU) no. 910/2014 of the European Parliament and the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and repealing Directive 1999/93/EC, *Official Journal*, no. L 257/73 – Regulation (EU) no. 910/2014.

²⁶ Art. 25 of the Regulation (EU) no. 910/2014.

²⁷ Art. 13 of the Ordinance and Art. 108, paragraph 2 LRA/19.

²⁸ Art. 108 of the LRA/19.

²⁹ Struna – Hrvatsko strukovno nazivlje. Poslužitelj. Available at: <http://struna.ihjj.hr/naziv/posluzitelj/48899/> (10. 10. 2024).

³⁰ Struna – Hrvatsko strukovno nazivlje.

motions directly to the court, there was less danger of errors in the receipt of proposals, which led to errors in determining priority order and execution of registration. Each proposal for registration would be received immediately, with an indication of the date and exact time of receipt, and a seal would be immediately entered in the land register. Such errors could lead to a violation of the principles of completeness and truthfulness of land registers. The state is directly responsible for the damage caused by the violation of these principles.

5. ORDER OF PRIORITY AND PRINCIPLE OF PUBLIC FAITH – PUBLIC TRUST

As already stated, the order of priority in the land registry procedure plays a very important role because it is an institute without which the land registry system would lose its purpose and meaning in the legal transaction of real estate. In all regular and special land registry procedures, the decisions that are made take into consideration the priority order of received proposals and executed entries, in order to determine all decisive facts and circumstances related to the proposal's admissibility and registrable rights, which is especially important for legal effects which occur after the registration. The impact of legal effects is determined according to the date and time when the proposal is received, and the order of priority is also determined according to the date and time of receipt. The priority order implies a strict chronological order of submitted proposals. The proposal which has been received first, according to the lead seal, will be registered first.

The order of priority, that is, its role, is directly linked to the principle of trust or public faith in land registers. This principle is two-sided and its constituent parts are: the principle of truthfulness and the principle of completeness of the land register. Both principles are included in the principle of protection of trust or public faith in land registers. The basis for the application of the principle is the provisions of the Act on Ownership and Other Real Properties (AO).³¹ The direct application of the principle of trust is made possible by the provision of Article 7 of the LRA/96, which stipulates that the land register is public.³² This implies that everyone can view the data of the land registry, regardless of whether or not there is a legal interest, that is, that the entered data is not secret, nor that there is a restriction or protection of this data when it comes to their use in legal transactions.

As it can be concluded, the principle of truthfulness is related to the correctness of the owner's information that has been registered, and it contains a rebuttable presumption that all the information is true. The principle of completeness implies that all registrable rights and all facts relating to real estate are entered in the land register, that is, that there is no right or fact if they are not registered. This principle also contains a

³¹ Art. 122, 123 and 124 of the Act on Ownership and Other Real Properties, *Legal Gazette*, no. 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 129/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 143/2012, 152/2014, 81/2015, 94/2017– AO.

³² Art. 7 Paragraph 1 LRA/96, idem Art. 7 Paragraph 1 LRA/19.

rebuttable presumption that what is not registered does not exist, that is, that the actual condition of the real estate is equal to what is registered in the land register. Considering that the order of priority directly affects the order in which the registrations will be carried out, it also directly affects the legal effects that will occur after the registrations are executed. For this reason, the time of receipt of the electronic proposal for registration is extremely important, and the introduction of an intermediary in the proposal submission process can affect not only the order in which the registration will be carried out but also the legal effects that will occur.

Under the provision of Article 122 AO, it can be understood that *bona fides* is prerequisites when the legal action of acquisition of real estate is being made. Such action represents a real contract and it can be concluded that protection is limited to cases of derivative acquisition *inter vivos*.³³ As some author says,³⁴ the scope of protection is limited to the cases of derivate acquisition and this circumstance is particularly strongly articulated under the *Grundbuch* model, where the protection prerequisite is the acquisition of a right based on a legal action.

6. CONCLUSION

Electronic communication in the land registry procedure has brought up certain restrictions in Croatian legal system. Excluding any other form of proposal submission and introducing an intermediary in non-litigation procedure have certain impact on the principle right of an individual to directly addresses the court. In the scope of Article 6 of the Convention, it can be argued whether the right of access to tribunal was being violated. Applicants can no longer submit the proposal directly to the court and if they do so, their proposal will be rejected due to the lack of procedural requirements, i.e., prescribed method and form. According to the previous legal solution, proposals submission in electronic form was also possible through the e-Citizens digital platform, which is no longer the case. *De lege ferenda*, it would be useful to expand the method of proposals submission, in order to enable the parties to directly address the court. In that sense the right of access to tribunal would be respected and excessive formalism would be avoided, if we also take into consideration other legal systems, e.g., Austrian. *De lege lata*, the submission is limited and conditioned by the participation of intermediaries who perform public service. This method of submission can lead to a delay, which directly affects the visibility of the lead seal in the land registry file. The visibility of the lead seal affects the priority order of registration and the legal effects of the registration. The process of submitting a proposal to the mediator and delivering it to the court consists of several actions separated in time, and they are subject to human action, as well as the action of information technology. Such actions may cause a delay in the submission and recording of the receipt on the court server, which ultimately leads to a delay in the registration and legal effects.

³³ Blajer, P. A. 2023. On the principle of public faith of land registers in a comparative context. *European Property Law Journal*, 12(2-3), 2023, pp. 79-125.

³⁴ Blajer, pp. 89 *et seq.*

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