EUROPEAN COMMISSION

Complaint – Infringement of EU law

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1. Identity & contact details

	Complainant*	Your representative (*if applicable*)
Title* Mr/Ms/Mrs	Mr	
First name*	Ivica	
Surname*	Todorić	
Organisation:		
Address*	Himper 5	
Town/City *	Zagreb	
Postcode*	10000	
Country*	Croatia	
Telephone		
E-mail		
Language*	English	
Should we send correspondence to you or your representative*:	☒	☐

2. How has EU law been infringed?*

	Authority or body you are complaining about:
Name*	Government of Croatia
Address	Trg Svetog Marka 2
Town/City	Zagreb
Postcode	10000
EU Member State*	Croatia
Telephone	
Mobile	
E-mail	

2.1 Which **national measure(s)** do you think are in breach of EU law and why?*

I. SUMMARY OF THE COMPLAINT

1. In adopting and implementing a special legislation establishing an extraordinary administration procedure (the "**EP**") for the Agrokor Group (known as "**Lex Agrokor**"), the Republic of Croatia has breached several provisions and fundamental principles of EU law:

a. the general principle of legal certainty and legitimate expectations;

b. the general principle of equality and non-discrimination (also enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union);

c. the right to property and the principle of proportionality (Article 17 of the Charter of Fundamental Rights of the European Union, Article 1 of Protocol No.1 to the European Convention of Human Rights in conjunction with Article 6(3) TEU); and

d. the right to a fair trial and to an effective remedy (Article 47 of the Charter of Fundamental Rights of the European Union, Article 6 of the European Convention of Human Rights in conjunction with Article 6(3) TEU).

II. THE BACKGROUND, LEX AGROKOR AND ITS IMPLEMENTATION

A.The Agrokor Group and the political pressure it encountered in early 2017

2. The Agrokor Group is a Croatian vertically integrated farm-to-table supplier of produce. It is the largest privately owned group in Croatia and has almost 60,000 employees. It is composed of Agrokor d.d. ("**Agrokor**"), the Croatian parent company, and its more than 76 subsidiaries incorporated in a dozen of European countries (Hungary, Poland, Spain, Slovenia, The Netherlands, the Czech Republic, Switzerland, Bosnia and Herzegovina, Serbia, Macedonia, and Montenegro).

3. The financial situation of the Agrokor Group became a topic of political statements in the beginning of 2017. The populist climate imposed by the unstable government dependent on support from only few parliamentary votes imposed a framework where Agrokor suddenly was a key political topic. From the perspective of the political actors, Agrokor was a fashionable target for alleged attacks on large business.

4. Furthermore, in a highly geopolitically contested zone, representatives of foreign countries started talking about the Agrokor Group. In February 2017, in a sudden interview, the Russian ambassador in Croatia stated that "We believe that Agrokor will repay the loans to Russian banks" and "If Agrokor demands further loans from Sberbank, this will be considered in the context of financial difficulties the company is currently having."

5. The ambassador further added that Russia currently "does not intend to take over any part of Agrokor." Strikingly, he further stated that "I do not know the president of Agrokor. He must think that it is obsolete to meet the Russian ambassador. In light of this there will be consequences."[1] After this, the representatives of the Russian VTB bank even publicly attacked the management of Agrokor for allegedly falsifying the financial reports, only to, once the damage has been done in the public, revoke this statement and concede it was a mistake.[2]

6. Later in the year, the USA ambassador even reacted to the situation in Agrokor and gave statements that she is "proud" of the role of "American investors" who are part of the "systemic solution" to the Agrokor crisis.[3]

7. The Croatian Government even held a session devoted to the Agrokor Group on 14 March 2017.

8. Furthermore, the public and the investors were fed false information that were leaked to the media, such as the information that Agrokor is in default of VAT payments to the Croatian Government. Later,

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1 This report was widely reported in the media; see for example: http://www.novilist.hr/Vijesti/Hrvatska/Anvar-Azimov-Agrokor-nece-vise-dobivati-ruske-kredite-ne-zanima-nas-ulazak-u-vlasnicku-strukturu-te-tvrtke, accessed at 5 January 2018; https://www.slobodnaevropa.org/a/ruski-ambasador-agrokor-novac-rusija/28302573.html, accessed at 5 January 2018; https://www.24sata.hr/news/azimov-rusija-od-agrokora-ocekuje-vracanje-bankarskih-kredita-511096, accessed at 5 January 2018

2 *See* e.g http://slobodnadalmacija.hr/novosti/biznis/clanak/id/477663/vtb-banka-povukla-rucnu-nas-zamjenik-izvrsnog-direktora-pogresno-se-izrazio-agrokor-nije-falsificirao-izvjesca-nego-je-imao-neregularnosti, accessed at 5 January 2018

3 Interview of the USA ambassador on 17 November 2017, available at https://www.vecernji.hr/vijesti/julieta-valls-noyes-americka-veleposlanica-jedna-zapadna-tvrtka-pokazuje-interes-za-mol-ove-dionice-ine-1208258, accessed at 5 January 2018

it transpired that Agrokor has in fact overpaid tax due to the Croatian authorities – amounting to 16 million EUR.[4]

9. The President of the Croatian Parliament event bragged in the media how he tricked the owner of Agrokor to attend meetings with political actors.[5]

10. Notwithstanding this pressure from the political sphere, the Agrokor Group held a stable financial position, evidenced by a report issued by Moody's on 2 January 2017 which stated that Agrokor Group has adequate liquidity[6] and report issued by Moody's on 24 February 2017 which stated that "Moody's recognises that Agrokor has sufficient liquidity to repay its 2017 and 2018 debt maturities"[7].

11. At the time, few believed that the politically induced pressure, false market information and geopolitical interactions can shake the pillars of the Agrokor Group which was built over a period of almost 40 years and that it will deprive the owners, employees, creditors and all other interested parties from their rights, and bring what is a 21st century example of de facto nationalisation in the middle of European Union.

B. Lex Agrokor

12. On 6 April 2017 the Croatian Parliament adopted the Act on Extraordinary Administration Procedure in Companies of Systemic Importance for the Republic of Croatia (the "Postupak izvanredne uprave u trgovačkim društvima od sistemskog značaja za Republiku Hrvatsku), which, having in mind it was targeted at a single entity – is aptly colloquially referred to as Lex Agrokor.[8]

13. Lex Agrokor has been heavily criticised by opposition and academics as constitutive of a measure contrary to EU law, and has been challenged before the Croatian Constitutional Court. The complainant has submitted a petition to the Constitutional Court for the determination of the constitutionality of Lex Agrokor on 1 December 2017, and the Constitutional Court of Croatia has stated that it is currently assessing the law's compliance with the basic norms of the Croatian legal system.[9] This remains, having in mind the moratorium on all claims, the only potential indirect legal recourse to challenge the law and its effects in Croatia.

14. During the parliamentary works of the Justice Committee of the Croatian Parliament in particular, it was highlighted, inter alia, that[10]:

a. the emergency procedure followed to adopt the law was inappropriate given its importance and the fact that it affects the freedom of enterprise and the right to property;

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4 This was confirmed during the Extraordinary Administration Proceedings conducted by the Croatian Government; see https://www.nezavisne.com/ekonomija/privreda/Agrokor-ce-traziti-povrat-16-miliona-evra-preplacenog-poreza/446976, accessed at 5 January 2018; as to reports allegedly leaking information on tax debts, see e.g. http://novilist.hr/Vijesti/Hrvatska/Kakva-je-financijska-slika-Agrokora-i-je-li-stvarno-duzan-za-PDV, accessed at 5 January 2018

5 *See* the interview of Mr Božo Petrov, President of Croatian Parliament during the relevant time at https://www.jutarnji.hr/vijesti/hrvatska/bozo-petrov-prvi-put-detaljno-o-troipolsatnom-sastanku-s-todoricem-otkrio-tko-je-sve-bio-na-sastanku-kako-je-vlasnika-agrokora-namamio-u-banske-dvore/6623538/, accessed at 5 January 2018

6 https://www.moodys.com/research/Moodys-downgrades-Agrokor-to-B3-outlook-stable--PR_360263

7 https://www.moodys.com/research/Moodys-changes-outlook-on-Agrokor-to-negative-affirms-B3-rating--PR_362433

8 Members of the Croatian Parliament have during the discussions concerning the law used the phrase Lex Agrokor, and during the parliamentary debates, the topic of the discussion was exclusively the situation in Agrokor (source: phonogram of the debate concerning the final bill of the law; Ninth Session, 3rd seating of the Croatian Parliament from 5 April 2017, published at the official webpage of the Croatian Parliament, http://www.sabor.hr/, accessed at 28 November 2017)

9 The Constitutional Complaint is accessible online through the web blog of the Complainant, Ivica Todoric available at www.ivicatodoric.com

10 Report of the Justice Committee of the Croatian Parliament in relation to the proposed bill, with the final bill annexed, published on the official webpage of the Croatian Parliament; available at http://www.sabor.hr/; accessed on 28 November 2017.

b. the bill did not contain an evaluation of compatibility with the EU acquis, and no communications with the European Commission took place which could be a reason for EU action against Croatia;

c. that the bill is supposed to cover the same legal area already occupied by the Insolvency Act[11] which provides for a pre-insolvency (administration) and insolvency proceedings in Croatia; and that the bill interferes with the basic principles underpinning the Insolvency Act, not least by imposing a moratorium on all proceedings against the debtor and its related entities, thus disproportionately interfering with third party rights;

d. the bill was produced by a drafting group "outside the system of State administration" under the responsibility of the Ministry of Economy (rather than the Ministry of Justice, as it should be the case for such proceedings). The identity of the members of this group was not disclosed (despite a formal request of an oppositional MP under the Croatian Right of Access to Information Act). The media reports however indicate a worrying conflict of interest - the fact that the very Trustee who was appointed by the Croatian Government to administrate the process of Lex Agrokor himself participated in the drafting of the bill[12];

e. that the Trustee is appointed by the Croatian Government, whereas the Court which merely confirms the appointed person (and had no power to withhold such confirmation) has only a nominal role, thus that the Government of Croatia undertakes all responsibility for the procedure under the provisions of the bill and undertakes full liability;

f. that the provision which gives discretion to the Trustee to determine the order of settlement of due obligations is highly dubious and likely unconstitutional. This discretion may cause significant losses to creditors and bring potential lawsuits against Croatia;

15. During the parliamentary works of the Economic Committee of the Croatian Parliament in particular, it was highlighted, inter alia, that:

a. the reaction of the Croatian Government is inappropriate, as it is interfering in the management of Agrokor, which is a private company; and thus the Government is undertaking liability for any subsequent damages;

b. that the 15 month moratorium on all claims against the companies subject to the law is not appropriate;

c. that various creditors have started enforcing their share pledges and seizing the shareholding of the companies, and that by activating the bills of exchange the sureties are under excessive pressure because of the law;

d. that numerous issues remain unclear under the law, and that in order for it to be clear and unambiguous, there needs to be secondary legislation issued.

C. Forced Activation – No Choice for the Company

16. On 7 April 2017, the date of Lex Agrokor's entry into force, faced with political pressure and understanding that the Lex Agrokor was drafted in such a way as to leave them no choice; the Management Board of Agrokor filed for the opening of the extraordinary administration proceedings pursuant to Lex Agrokor before the Zagreb Commercial Court. The court notified the Croatian

11 NN 71/15 and 104/17

12 Statement by the Trustee, Mr Ante Ramljak on 26 October 2017, available at http://www.slobodnadalmacija.hr/novosti/hrvatska/clanak/id/513883/ramljak-pojasnio-klauzulu-i-priznao-sudjelovao-sam-u-izradi-lex-agrokora, accessed at 5 January 2018

Government of this application on the same day. The facts surrounding the pressures put on the Management Board remains an open topic and subject to potential criminal proceedings.

17. The legislator's intent of imposing Lex Agrokor in relation to the Agrokor Group and leaving no choice to the management of Agrokor is clear from the provisions of the law. Contrary to the provisions of the Insolvency Act, and despite the fact that Lex Agrokor nominally allows the option of activation of Lex Agrokor by Agrokor (or the related entities of Agrokor) or the creditors of Agrokor (or the creditors of the related entities), Lex Agrokor practically leaves no choice for the management of Agrokor. This is because, pursuant to Article 48 of Lex Agrokor, even when the management wishes to retain control and enter into pre-insolvency proceedings (such as administration to try to resolve the current issues with liquidity), the court must (and without an ability to refuse the Croatian Government) when the objective conditions of size and "systemic importance" are satisfied put the company within Lex Agrokor and the proceedings therein – thus removing the element of choice from the management. Simply put, Lex Agrokor trumps all other legal mechanism. Once the Lex Agrokor came into force, the Agrokor Group was forced into the extraordinary administration proceedings set out therein.

18. On 10 April 2017, the Government appointed Mr Ante Ramljak as Trustee and the Court ordered the start of the EP over the Agrokor Group and confirmed the appointment of Mr. Ramljak. Pursuant to Article 24 of Lex Agrokor, and having in mind the merely nominal role of the court (which will be elaborated further below), the court had no choice but to activate the proceedings under Lex Agrokor. As a result, the Trustee took over the functions of the Agrokor Group's corporate bodies, including its daily management, and the moratorium on the initiation and conduct of any litigation, enforcement, administrative or securing proceedings against Agrokor d.d. and its subsidiaries started on the same day.

19. The extraordinary proceeding over the Agrokor Group was therefore opened and effective within 17 days from the first public announcement that a bill in response to it's alleged cash-flow problems was proposed.

D.The Extraordinary Administration Proceedings

20. Lex Agrokor introduces a new procedure into Croatian insolvency law known as the "extraordinary administration proceeding" or "EP", available to private companies of "systemic importance for Croatia".

21. The EP provides for the appointment of a special administrator (the "**Trustee**"), who exercises decisive control over the Agrokor Group as from the start of the procedure and for its entire duration.

22. The Trustee must undoubtedly be considered as a State body, both de jure and de facto, in particular since:

a. he is appointed and can be dismissed only by the Croatian Government, without any powers from the Croatian Courts to change or interfere with this appointment. Thus, the Trustee's post is entirely dependent on the will of the executive government[13];

b. he is required to report to the Croatian Government every month on the status of the proceedings;

c. the Trustee is the only person allowed to petition the conversion of the EP into normal bankruptcy proceeding, but only after having been granted an approval of the Ministry of Economy to that end;

d. the Trustee is economically dependent to the Croatian Government as his salary and reward is determined by the Minister for Economy[14];

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13 *See* Articles 11(1) and 15(1) of Lex Agrokor

14 *See* Articles 20(1) and 20(2) of Lex Agrokor

e. the Trustee's actions and decisions are regularly opined upon by the so-called Advisory Body – which is appointed by the Ministry of Economy. This is one more element of control by the Croatian Government imposed on the Trustee[15];

f. the Trustee, at his own admission, was involved in the drafting of Lex Agrokor by the Ministry of Economy[16].

g. the "deputies" of the Trustee are also entirely appointed by the Croatian Government and they assist the Trustee in discharging his duties;

h. he worked as "Special adviser to Deputy Prime Minister for Economy" from 2011 to 2014;

23. In the regular pre-liquidation (administration) proceedings under the Insolvency Act, the key organs are the court and the administrator, but with the company subject to the proceedings retaining its management. The business of the relevant company is still being run by its management and the shareholders retain their control over the management. The role of the administrator is to oversee the conduct of business – especially the financial elements.

24. In the regular liquidation proceedings under the Insolvency Act, the key organs of governance are the court, the liquidator, the Creditor's Assembly and the Creditor's Board. The highest-ranked organ is the Creditor's Assembly, where all the creditors are represented and where the liquidator also sits. The Creditor's Assembly has the widest authorities – forming the Board, appointing the liquidator, and determining all relevant issues during the insolvency. From this regular structure, and one recognized Europe-wide, there is transparency in the conduct of the proceedings, fair distribution of rights, equal treatment of creditors, and strong protections by the court.

25. Thus, in both the pre-liquidation (administration) and liquidation proceedings in Croatia – the court retains a key oversight role – and these proceedings are both classified as court proceedings.

26. Lex Agrokor is properly understood as a pre-liquidation proceeding (administration) the purpose of which is to protect the long-term viability of the going concern of systemic importance to the Republic of Croatia, as it is expressly defined by the law.[17]

27. However, contrary to European standards of insolvency laws:

a. Lex Agrokor dispenses with the Creditor's Assembly and the Creditor's Board and in turn provides what is the so called Creditor's Committee;

b. the Creditor's Committee is a form which completely diminishes the rights of the creditors compared to the democratic Creditor's Assembly provided by the general Insolvency Act. The creditors under Lex Agrokor do not have any real powers in relation to key decisions made in relation to Agrokor. They have no powers to propose decisions, vote for the same or ask the proposer to account to them and explain the reasons why certain decisions are propose. Put otherwise, they have no powers to control the process. The Creditors' Committee has merely the right to be notified about the economic status of the procedure (while certain information is only provided to the Croatian Government) and to participate to the preparation and the approval of the settlement. As opposed to what is provided for in modern insolvency proceedings, its approval is required in strictly limited cases (such as the payment of business, as opposed to financial, pre-petition debts, and the raising of new finance enjoying super priority status in order to pay pre-petition debts);

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15 *See* Articles 16-17 of Lex Agrokor

16 Statement by the Trustee, Mr Ante Ramljak on 26 October 2017, available at http://www.slobodnadalmacija.hr/novosti/hrvatska/clanak/id/513883/ramljak-pojasnio-klauzulu-i-priznao-sudjelovao-sam-u-izradi-lex-agrokora, accessed at 5 January 2018

17 *See* Article 1(1), Article 2 and Article 4 of Lex Agrokor

c. the method of choosing the Creditor's Committee is not fully specified in the law. There are no conditions set, but only generic explanations that it should consist of 9 members and that those should be determined by "classes". The law further, does not explain how these classes are to be determined – by provides wide discretion to the Trustee;

d. the Trustee is given the power to classify the creditors and to decide which creditor belongs to which class. Even at this stage it is evident how the Trustee as agent for the Government has a substantial impact on the formation of the CC. What effectively can occur is that one minor class of creditors can be put in a position to have the same number of representatives as a large class of creditors whose claims are ten times greater. As each representative has one vote – the Trustee can in this way completely diminish the rights of creditors with substantial claims as against the debtor and prioritize others, thus completely removing the principle of democratic representation of creditors present in the Croatian Insolvency Act and in all the European insolvency laws;

e. it is evident that such a small body like the CC cannot effectively represent the creditors. This in turn hurts Agrokor d.d. as the mismanagement of the company by the Government is subject to no control. This in turn reveals the nature of Lex Agrokor to be a de facto nationalization rather than any administration procedure which is in accordance with European law;

f. once the creditors are classified into classes, Lex Agrokor is silent and unclear on how the creditors are to agree on the representatives of the class; how the representatives are to be elected and how do they derive their authority;

g. further and even more showing the executive's hold on the management of Agrokor and how Lex Agrokor radically differs from European norms, the Trustee has been given a power to organize a private committee of his own choosing to act as an apparent check on his power. This unconstitutional solution has produced what is called the Interim Creditors' Committee ("**ICC**"), which is composed of creditors' representatives appointed by the Trustee. The ICC acts with the powers of the (permanent) Creditors' Committee until the election of that committee;

h. strikingly, the vagueness of the provisions concerning the Creditor's Committee has so far produced an anticipated result – that no Creditor's Committee has been elected as at the date of this Complaint; making the entire EP so far go through the Trustee's ICC.

i. finally, the Trustee holds the subsidiary power to appoint even the members of the Creditor's Committee, if the creditor's fail to appoint their representatives within 90 days from the date when the tables of creditor's claims are confirmed by the Trustee.[18] Noting the ambiguity and practical inoperability of the provisions concerning the appointment of representatives of creditors, this provisions again exposes the unfettered discretion of the Trustee and the influence of the executive government on the entire process, which is unacceptable.

28. The ICC held its first meeting on 13 April 2017. The Trustee decided to appoint five representatives of five different classes of creditors: three Croatian companies for the "minor suppliers", "substantial suppliers" and "secured creditors", Sberbank Russia for the "unsecured creditors" and Knighthead Capital Management for the "bond holders".

29. The start of the EP entails the ban on commencement of – and stay of any pending – proceedings against the companies of the Agrokor Group, which include litigation, enforcement and provisional measures as well as out-of-court claim settlement procedures. This moratorium, previously unheard of in Croatian insolvency proceedings, gives unfettered power to the Trustee to reorganise the Agrokor Group and negotiate a settlement with its creditors, which will be binding over all the Group's creditors provided it "has been voted for by most of all creditors and if in each class [determined by the Trustee] the sum of

18 *See* Article 30(8) of Lex Agrokor

claims of creditors who voted for the mutual settlement is greater than the sum of claims of creditors who voted against", or approved by creditors representing 2/3 of the total claims.

30. Lex Agrokor extends to 76 subsidiaries and affiliated companies, of Agrokor d.d., irrespective of separate corporate entities (and individual satisfaction of insolvency or pre-insolvency grounds), and despite the non-existence of any financial thresholds for the triggering of the insolvency proceedings, Lex Agrokor forcefully puts these companies within the EP. The Trustee is granted even more powers over those companies (he is not required to obtain the ICC's approval on the payment of pre-proceeding debts), and can impose a single, group-wide settlement on the creditors and companies of the Agrokor group.

31. Several of these elements – in particular the state-interventionist purpose of Lex Agrokor and the State's influence over the procedure, the deprivation of property rights, and the fact that Agrokor's creditors do not receive an equal and equitable treatment in the procedure, due to discretionary decisions of the Trustee (without the proper oversight of the court) and the fact that the EP extends to affiliates and subsidiaries of Agrokor d.d. which do not meet the insolvency conditions – entailed Bosnian, Slovenian, Serbian and Montenegrin Courts to refuse to recognise the EP as a foreign insolvency proceeding.

1. Raising of new finance and payment of pre-petition claims

32. On 13 April 2017, citing alleged reasons of ensuring the Agrokor Group's liquidity, the Trustee, acting on behalf of Agrokor, signed a loan agreement with four banks (Zagrebačka banka d.d., Privredna banka Zagreb d.d., Erste&Staiermerkische bank d.d. and Raiffeisenbank Austria d.d.), for a total amount of € 80m. The loan has since been repaid in full from the proceeds of the loan concluded on 8 June 2017.

33. On 8 June 2017, the Trustee signed a new loan agreement, the so called "Super Senior Facility" with various investors for a total amount of € 1.06bn. The loan has a super-priority status and allows for the refinancing of debt incurred prior to the start of the EP. Such old debt would be "rolled-up" to the super-priority status, in the equivalent amount provided by the investor. Thus:

a. 50% of its amount is to be used, not to meet immediate cashflow requirements, but instead for repaying or refinancing a substantial proportion of the pre-petition debts of financial creditors who were willing and able to participate to the new financial agreement, applying a 1:1 ratio between new money and refinanced debt (the "roll-up" element)**;** while

b. the remaining 50% is to be used to pay debts of suppliers that arose prior to the start of the EP and to provide liquidity. As part of this process which has already started, the Trustee indicated that €150m would be allocated to three pools of suppliers, being micro suppliers, historic suppliers prepared to supply future goods on industry standard terms and a discretionary fund for other (unspecified) trade suppliers.

34. The Trustee has concluded these agreements whilst the Creditor's Committee is not yet appointed and when all actions are assisted by the Trustee-appointed ICC.

35. First, such super senior facilities are problematic and sensitive for various reasons. The nature and timing of the loan can have different financial conditions attached to it, and a serious impact on the financial condition of the debtor. Having in mind the existence of the EP, the creditors are likely to ask for burdensome interest rates, and oversized collaterals. Thus, the relevant organs must balance the benefit of such a loan with the damage it causes to the debtor and the creditors. With this in mind, the Insolvency Act necessitates that two thirds of all creditors (determined by size of claim) must consent to such arrangements. Contrary to this, Lex Agrokor provides complete autonomy to the Trustee in negotiating such a loan – and, as it occurred, the Trustee entered into a 1 billion EUR facility with an added roll-up element; with only the consent of the ICC, which was formed by the very same Trustee. Having in mind the moratorium imposed on all lawsuits against the debtor; there is no way to challenge this loan.

36. Further, subject to the consent of the Creditor's Committee, or the ICC, the Trustee can also decide to repay existing pre-petition debts during the EP, when he decides that this is required to reduce

"systemic risk", the continuation of a going concern, preservation of assets, or if the debts arise from the operational elements of the business. Again, this wide power allows the Trustee to even pay out such debts to the members of the ICC, and in this way prioritize creditors during the EP. Such powers are contrary to the principle of equal treatment of creditors and it further hurts the purpose of Lex Agrokor – which is to maintain the debtor as a going concern.

2.2 Which is the **EU law** in question?

III. THE INFRINGEMENT OF EU LAW BY LEX AGROKOR AND ITS IMPLEMENTING MEASURES

37. The relevant EU law provisions and fundamental principles breached, as indicated above, are:

a. the general principle of legal certainty and legitimate expectations;

b. the general principle of equality and non-discrimination (also enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union);

c. the right to property and the principle of proportionality (Article 17 of the Charter of Fundamental Rights of the European Union, Article 1 of Protocol No.1 to the European Convention of Human Rights in conjunction with Article 6(3) TEU); and

d. the right to a fair trial and to an effective remedy (Article 47 of the Charter of Fundamental Rights of the European Union, Article 6 of the European Convention of Human Rights in conjunction with Article 6(3) TEU).

A. Principle of legal certainty and legitimate expectations

1. <u>Applicable principles</u>

38. The principle of affording protection to legal certainty and legitimate expectations has been recognised by the European Court of Justice from the very outset of its practise as a sub-principle of the rule of law. At its core, it enshrines a prohibition against sudden change of the legal framework and constitutes that those subject to the law must know the content of the law so as to be able to plan their action accordingly.

39. Generally speaking, the adoption of any provision should be foreseeable and give the time needed for the necessary amendment due to changes to the law. The lack of an appropriate transitional period infringes the principles of legal certainty and the protection of legitimate expectations[19]. A party subject to law that commences its activities under a known legal framework, and that, to that end, makes investments, should not see its interests considerably affected by the changes in law before the date announced, all the more so if that change takes place suddenly and unforeseeably, without leaving it enough time to adapt to the new legal situation.

40. This principle must be respected by the EU institutions, and by Member States (i) in the exercise of the powers conferred on them by EU law[20] and (ii) where they adopt measures which constitute a restriction to the free movement of capital[21].

2. <u>Application to Lex Agrokor and its implementing measures</u>

19 Case C 98/14 [2015].

20 Case C 381/97 Belgocodex [1998] ECR I 8153, paragraph 26; Case C-376/02 'Goed Wonen' [2005] ECR I-3445, paragraph 32; and Case C 271/06 Netto Supermarkt [2008] ECR I 771, paragraph 18.

21 ECJ, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, C-222/86, 15 October 1987, para. 22. Although legal certainty is a general principle of law, only in respect of free movement of capital is the requirement so clearly and repeatedly stated by the Court. See C. Barnard, *The Substantive Law of the EU: the Four Freedoms*, Oxford, OUP, 2010, p. 586.

41. Contrary to these principles, Lex Agrokor is a law legislated for one purpose, applicable to one company, with norms substantially different to those established under Croatian and European insolvency laws.

42. First, the law is inherently uncertain. It does not provide, as recognized in the parliamentary committees' works, sufficiently clear provisions which determined the consequences of the EP and the way the EP will be conducted.

43. Second, the law in Articles 37 and 8 points to the equivalent application of provision of the Insolvency Act relevant to liquidation in so far as the law is silent or lacks sufficient detail. Why, the liquidation provision and not the administration provisions are invoked in the Lex is unclear, as Lex Agrokor is recognized as a pre-bankruptcy law. The Justice Minister has clearly stated that "the purpose of the law is not liquidation".[22] Indeed, the Government's representatives, during the parliamentary discussion have stated that "when it comes to the debtor [Agrokor], the matter at hand is in fact a pre-liquidation [administration] procedure"[23]

44. The purposes of these two procedures (pre-liquidation vs liquidation) is radically different. The basic purpose of the liquidation is to fairly repay the creditors from the liquidated assets of the debtor.[24] However, Lex Agrokor's stated purpose is to protect the long-term viability of the going concern of systemic importance to the Republic of Croatia, as it is expressly defined by the law.[25]

45. Therefore, such conflict between the apparent purpose of Lex Agrokor and its indirect inclusion of bankruptcy provisions which sits uneasily with other provisions of Lex Agrokor shows that the subject of this complaint is a poorly drafted instruments, that defies both the legitimate expectations of market participants and provides a legally uncertain and arbitrary platform. This arbitrariness is exacerbated when one considers the wide discretion provided to the Trustee and the completely diminished role of the court.

46. Some examples of the lack of legal certainty in the law are the following:

a. it is unclear whether the Trustee is himself liable for any damage caused to the debtor. The law is simply unclear on this point. Furthermore while the law cross-refers to the obligations that a liquidator has (such as the Trustee's obligation to have and maintain adequate insurance), the Commercial Court in Zagreb itself confirmed the ambiguous and imprecise nature of these provisions when it confirmed the current Trustee (as it could refuse the appointment by the Government) without such Trustee having the requisite insurance;

b. the law provides a generic phrase that the court is exclusively competent to oversee the work of the Trustee[26], yet the law is silent as to how the court does this; and it fails to provide any provisions which empower the court to actually take any action. On the contrary; it gifts the Trustee with an unlimited discretion. A striking example of this is the fact that the Trustee concluded the Roll-Up arrangement described above, and in this agreement of 1 billion EUR, he included a provision whereby an event of default has occurred if the Croatian Government removes the current Trustee (Mr Ante Ramljak) from his post. Simply put, the 1 billion EUR obligation becomes due if the Croatian Government exercises its power granted by the law. The court, in the concrete situation couldn't even consider the appropriateness of these provisions;

c. Article 18 of the law provides the framework for the classification of creditors in different groups. Yet, the law remains silent on the criteria for such classification. Thus, it is unclear how

22 Report of the Justice Committee of the Croatian Parliament in relation to the Lex Agrokor bill, with the final draft of the bill attached, published on the official webpage of the Croatian Parliament http://www.sabor.hr/ , accessed on 28 November 2017

23 Report of the Economic Committee of the Croatian Parliament in relation to the Lex Agrokor bill, with the final draft of the bill attached, published on the official webpage of the Croatian Parliament http://www.sabor.hr/ , accessed on 28 November 2017

24 *See* Article 2(2) and Article 2(3) of the Insolvency Act

25 *See* Article 1(1), Article 2 and Article 4 of Lex Agrokor

26 *See* Article 14 of Lex Agrokor

the classification of the creditors occurs. One further issue with these provisions is the fact that Lex Agokor does not state whether the creditors' majority is to be decided on the basis of the show of hands vote or by reference to the value of the claim against the debtor. This in turn prevents the creditors from choosing their representatives to sit on the Creditor's Committee, and thus leaves the doors open for the current status quo to remain – that the entire process of the EP is being conducted with the ICC (elected by the Trustee).

d. Article 41 which imposes a moratorium on all claims related to the Agrokor Group is vague and potential so wide that the Commercial Court in Zagreb issued an opinion (contrary to EU law) which ordered the Competition Commission to stay all proceedings against the group for investigation of anti-competitive concentrations;

B. Principles of equality and non-discrimination

1.Applicable principles

47. The principles of equality and non-discrimination were recognised as general principles of EU law by the European Court of Justice [27], and are now enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union.

48. A violation of these provisions is established when other persons in an analogous or relevantly similar situation enjoy preferential treatment, and when there is no reasonable or objective justification for this distinction. This question may be seen as comprising the following elements:

a. was different treatment given to the substantive rights at issue between the applicant on the one hand and other persons put forward for comparison (the chosen comparator) on the other?

b. Were the chosen comparators in an analogous or relevantly similar situation to the situation of the applicant?

c. Does the difference of treatment have a legitimate aim? Is it necessary and proportionate? States enjoy a broad margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.

2. Application to Lex Argokor and its implementing measures

49. The regime of Lex Agrokor discriminates against different creditors and unfavorably favors Trustee's discretionary preferred creditors compared with the normal pre-insolvency and insolvency regime and further discriminates the creditors of the companies subject to Lex Agrokor against creditors of other companies while being "in a relevantly similar situation". This in turn produces a negative impact to all interested parties – the shareholders (of the holding company and all subsidiaries), employees and others.

50. Lex Agrokor also discriminates against the shareholders of the holding company Agrokor d.d. and shareholders of the related entities which are worse-off than shareholders who are allowed to retain control and voting rights in administration proceedings pursuant to the Inolvency Act. Therefore, because under Lex Agrokor, the Agorkor Group is forced to enter the EP, the shareholders of Agrokor d.d. are completely deprived from the rights that shareholders of other companies in a similar situation enjoy. First, the formal conditions in Lex Agrokor were framed in such a way as to be only satisfied at the time by the Agrokor Group. Simply put, the law was tailored for one company group and imposes a legal framework only for that group; discriminating it against all other in the legal system. However, contrary to the political propaganda which suggested that the Agrokor Group has such a key impact on the Croatian economy as a whole, the very governor of the Croatian National Bank stated that his estimate is

27 ECJ, Joined Cases 117/76 and 16/77 *Ruckdeschel*, 19 October 1977.

that the alleged crisis in Agrokor "has a very mild effect of the GDP"[28]. Secondly, Lex Agrokor deprives the companies and their shareholders, from the mechanism of protection that are available to all other shareholders of companies in Croatia. Thus:

a. contrary to the pre-liquidation (administration) regime otherwise applicable in Croatia, the management and the shareholders lose control over the subject of the EP, and the entire management and voting powers are transferred to the Trustee;

b. the shareholders lose all ownership rights stemming from their shareholdings; they are deprived from controlling the actions of the Trustee;

c. the Trustee acts in a completely discretionary fashion, with no substantive control by the courts manages the Agrokor Group – he only needs ask for permission to dispose of certain assets which are valued 3,5 million kuna or more;

d. the Court is only nominally present as a factor in Lex Agrokor; it has no powers to: i) prevent any acts of the Trustee during the EP; ii) cannot on its own initiative discharge the Trustee from his duties;

e. in the standard and established pre-insolvency proceedings in Croatia, the shareholders retain full control over the company and seek to align their interests with the creditors (see e.g. Articles 67, 73, 24 of the Insolvency Act)

51. Furthermore, having in mind that Lex Agrokor forces the related entities into the EP, the shareholders of the related entities are completely deprived of their rights and discriminated against other shareholders who hold shares in companies which do not satisfy the threshold conditions for the administration proceedings. This is because, as clarified above, Lex Agrokor does not require the existence of financial difficulties in the related entities, in order to push them within the EP.

52. Unjustified differences of treatment also exist amongst Agrokor's creditors in a relevantly similar situation, as it is clear from the following examples:

a. Lex Agrokor allows for the payment of unsecured creditors' debts incurred prior to the decision of opening of the extraordinary administration proceedings (and it happened in practice), while other unsecured creditors cannot benefit from this measure;

b. the composition of the creditors' classes and the appointment of the creditors' representatives by the Trustee has given certain creditors a disproportionately important representation at the ICC;

c. the Super Senior Facility has advantaged the financial creditors which participated to the new financial agreement of EUR 1.06 billion – of which 50% was used for repaying or refinancing a substantial proportion of their pre-petition debts (which enjoy super priority relative to existing debt) – vis-à-vis financial creditors which did not. While one can understand that new loans benefit from a super priority status, the proceeds of such loans must not be used to repay or refinance pre-petition debts that had no reason to enjoy any priority status. Through the Super Priority, the Trustee has accepted in a discriminatory way that some creditors turn their ordinary claims into claims enjoying a super priority status. Furthermore, the Facility provides a windfall to speculative investors and investment funds which have acquired Agrokor Groups' bonds at discounted rates while getting 100 cents on the Euro payout from the Super Senior Facility's Roll-Up mechanism;

53. Lex Agrokor and its implementing measures also disregard the overall interest of the companies being a going concern and providing a fair treatment to all interested creditors and are aimed at achieving

28 Source: http://www.poslovni.hr/hrvatska/spreman-sam-svjedociti-o-agrokoru-a-ako-mi-ukinusupervizorsku-tajnu-bit-ce-vrlo-zanimljivo-333445, accessed on 28 November 2017

political goals of appearing to prefer domestic suppliers of the Agrokor Group. In fact, while the short-term political goals may be achieved, long term, the domestic suppliers will tied in to the faith of the companies of the Agrokor Group which are being hurt by such ad hoc payments. Lex Agrokor allows for the payment of pre-proceeding debts of "operating businesses" (i.e. suppliers, as opposed to financial institutions) if it is necessary to "reduce systemic risk" (Article 40 of Lex Agrokor). Suppliers are companies which the Trustee in its discretion decides are deserving of these discretionary payments. Having in mind that the Trustee is a Government-appointed person, the payment of such moneys may purely used for political propaganda under the preface of protectionism of preferred companies, while wholly disregarding the overall interest of the Agrokor Group and also discriminating against the whole creditor base of the Agrokor Group and their *pari passu* interests.

54. The Trustee has announced that €150m will be paid to three pools of suppliers, being micro suppliers, historic suppliers prepared to supply future goods on industry standard terms and a discretionary fund for other (unspecified) trade suppliers.

55. This demonstrates that, in line with its propagandist aim, Lex Agrokor has been designed – and implemented – in view of propagating political aims, rather than pursuing economic sense in the interests of the companies and their creditors.

C.Right to a fair trial and to an effective remedy

1.Applicable principles

56. Both the European Convention on Human Rights (Article 6) and the Charter of Fundamental Rights of the European Union (Article 47) provide for the right to an effective remedy and to a fair trial. The European Court of Justice has also recognised this principle as a general principle of Union law[29]. Under these provisions, everyone has the right to have any claim relating to his "civil rights and obligations" brought before a court or tribunal[30].

57. The "right to a court" and the right of access to court may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired[31]. In addition, a limitation will not be compatible if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved[32].

58. In the context of insolvency proceedings, the European Court of Justice has ruled that:

> a. "the right of creditors or their representatives to participate in accordance with the equality of arms principle is of particular importance. Though the specific detailed rules concerning the right to be heard may vary according to the urgency for a ruling to be given, **any restriction on the exercise of that right must be duly justified and surrounded by procedural guarantees ensuring that persons concerned by such proceedings actually have the opportunity to challenge the measures adopted in urgency**"[33].

2. Recognition proceedings

59. The Trustee has initiated proceedings in several foreign jurisdictions in order to have Lex Agrokor recognised as insolvency proceedings and, in turn, to impede the enforcement of the claims of the Argokor Group's creditors' in these jurisdictions. Except for the High Court of England and Wales,

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29 ECJ, Case C-341/04, *Eurofood*, 2 May 2006, para. 65.
30 ECtHR, *Golder v. the United Kingdom*, 21 February 1975, para. 36.
31 ECtHR, *Philis v. Greece (no. 1)*, 27 August 1991, para. 59.
32 ECtHR, *Lupeni Greek Catholic Parish and Others v. Romania*, 29 November 2016, para. 89.
33 ECJ, Case C-341/04, *Eurofood*, 2 May 2006, para. 66.

foreign Courts have dismissed the Trustee's applications and refused to recognise Lex Agrokor. These are courts in Slovenia, Serbia, Bosnia & Herzegovina and Montenegro.

60. The main grounds for their decisions were the state interventionist aim of Lex Agrokor, the State's influence over the procedure, the disproportionate deprivation of property rights, and the fact that the EP extends to related entities of Agrokor d.d. which do not meet the insolvency conditions.

3. Application to Lex Agrokor and its implementing measures

61. The pre-liquidaiton and liquidation proceedings pursuant to the Insolvency Act are court proceedings where the court has significant powers and acts as control mechanism for the conduct of the proceedings. The most important check on the process is the power of the court to remove the administrator or liquidator. The court also retains residual powers over all questions not expressly reserved to other organs.[34]

62. Contrary to this, Lex Agrokor reserves a merely technical role for the court – making it nominally present during the EP but removing any substantive powers. One of the reasons is that Lex Agrokor in Article 10 clearly states that all actions and all relevant decisions in relation to the EP are within the exclusive jurisdiction of the Trustee. This, coupled with a provision that the court has powers not otherwise reserved for other organs in the EP, means that the court occupies a niche in the EP that is neither substantive nor relevant, but merely nominal.

63. In practice, this means that:

a. the court has no relevance in choosing and appointing the Trustee;

b. the court has no relevance in choosing and appointing the members of the Creditor's Committee;

c. the court has no relevance in relation to the decisions made by the Trustee (all relevant decisions in the EP), and the court cannot quash a decision or action of the Trustee;

d. The court is not concerned with any payments made to the creditors;

e. The court has no relevance in relation to the remuneration paid to the Trustee;

f. The court, in a paradoxical example whereby the Trustee is fired from his post by the Government, cannot do anything even if the Government again proposes the same person to be the Trustee.

64. In the administration and liquidation proceedings set out in the Insolvency Act, it is the court which conducts the proceedings, controls the business of the debtor company and takes care about goals imposed by the law. The purpose of these safeguards is to ensure a lawful procedure by an independent and impartial organ.

65. These mentioned powers are the essence why the Insolvency Act's procedures are properly described as "court proceedings". Lex Agrokor completely deprives the interested parties from the court's protections; it fails to provide a procedure which enjoys a court protection whilst depriving the shareholders, creditors and others from substantive rights; thus amounting to a measure contrary to basic tenets of the rule of law. It deprives the interested parties from an access to court, a fair hearing which will determine their rights and deprives the interested parties from an effective remedy.

66. In addition to removing the element of judicial control, Lex Agrokor grants further discretion and powers to the Trustee and the executive by dispensing with the Creditor's Assembly. Whereas the liquidator appointed pursuant to the Insolvency Act essentially executes the decision made by the

34 *See* Article 22 and Article 76 of the Insolvency Act

Creditor's Assembly where all creditors are democratically represented, the Trustee has no such limitations. Only a few decisions by the Trustee are subject to consent granted by the Creditor's Committee, or more worryingly by the ICC (which is elected and appointed by the Trustee). For the reasons mentioned above, neither the ICC nor the Creditor's Committee (once formed) can be a proper check on the Trustee's power.

67. In line with its spirit of nationalization, it is the executive and its agents that control the process of Lex Agrokor whilst at the same time not having the accountability to a court of law.

68. The Insolvency Act also contains a moratorium concerning the debts that were incurred before the initiation of the insolvency proceedings. However, it permits the continuation of all other proceedings and starting new ones that are not affected by the insolvency proceedings under the Act (like proceedings for determination of certain facts).

69. Contrary to this, Lex Agrokor indiscriminately bans all proceedings – civil, enforcement, insurance, administrative, determination of facts – against the debtor and the related entities. In practice this means that the Trustee's acts are subject to no control by the judiciary. Shareholders, creditors and third parties affected by the EP are prevent from protecting <u>any</u> of their rights. So, for example they cannot:

a. request preliminary measures;

b. rely on avoidance proceedings;

c. challenge the settlement agreement; and

d. access the Croatian Supreme Court (although such recourse would be available under the Bankruptcy Act);

70. The only way for their rights to be protected is if the Trustee, in his discretion, decides to do so.

71. Finally, and in relation to one of the most important decisions in the EP; Lex Agrokor does not specify a right to an appeal to the court's confirmation decision regarding the settlement. This is problematic, as other provisions in the Lex do deal with the rights to an appeal for other decisions. This implies one of two things: a) either this amounts to a clear deprivation of an access to a court and another interference with basic rights protected by the EU legal acquis; or b) in so far as a right to an appeal is implied from the provisions of the Insolvency Act, this further shows the lack of legal certainty in Lex Agrokor, and that, as drafted it is an instrument which does not satisfy the threshold conditions required by EU law.

D. *Right to property and principle of proportionality*

1.<u>Applicable principles</u>

72. Article 6(3) TFUE provides that fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States constitute general principles of EU law.

73. The right to property is one of the fundamental principles of the EU's legal order[35]. In Hauer, the European Court of Justice stated that:

> "the right to property is guaranteed in the community legal order in accordance with the ideas common to the constitutions of the member states, which are also reflected in the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms".

35 ECJ, Case No. C-44/79 *Hauer*, para. 17-18.

74. The protection of the right to property is also enshrined in Article 17 of the Charter of Fundamental Rights of the European Union, pursuant to which:

> "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest".

75. Consequently, the exercise of property rights may only be restricted provided that the restrictions correspond to the objectives of public interest pursued by the European Union and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the right thus guaranteed[36].

76. The European Court of Human Rights has observed that an infringement of Article 1 of Protocol No. 1 may arise from various circumstances, such as:

a. **the adoption of debt-adjustment legislation by the Contracting State**: the ECHR has acknowledged that, whilst bankruptcy rules may provide for the irrevocable extinction or reduction of claims, this "could in some circumstances result in the placing of an excessive burden on a creditor"[37]. The ECHR indicated that this might, for example, be the case if the burden of the bankruptcy were to be borne by one single creditor[38];

b. **the insolvency liquidator's actions**: the ECHR has ruled that a State can be held directly responsible for the wrongful acts of an insolvency liquidator where the State's involvement in the insolvency procedure is sufficiently material[39]. The relevant circumstances of the case must be assessed, including how the liquidator is appointed, his/her operational and institutional independence, the State's powers to give him/her instructions, etc.

c. **the lack of procedural guarantees**: even where the State cannot be held responsible for a liquidator's behaviour, the Court considers that it must "at least set up a minimum legislative framework including a proper forum allowing persons who find themselves in a position such as the applicant's to assert their rights effectively and have them enforced"[40]

2. <u>Application to Lex Argokor and its implementing measures</u>

77. The legal regime of Lex Agrokor unduly and disproportionately restricts the shareholder's property rights. In addition, Lex Agrokor unduly and disproportionally restricts the creditor's property rights.

78. The effect of Lex Agrokor is not only to interfere with the holding company (Agrokor d.d.) but all related entities where the holding company has at least 25% of shareholding. However, this application is regardless of the status or financial condition of these related entities. The nominal relationship is sufficient to push them within the EP[41].

79. By directly interfering with all the companies in the group, without any criteria as to financial condition, the EP forcefully imposes the business risk of the holding entity to all the related entities. In this way, Lex Agrokor unduly and disproportionately interferes with their legitimate expectations that the company where they have invested

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36 *See*: Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 21; *Kadi*, paragraph 355; *Bank Melli Iran v Council*, paragraphs 89, 113 and 114; and *Al-Aqsa v Council*, paragraph 121.

37 ECHR, *Bäck v Finland*, 20 July 2004, para. 63.

38 ECHR, *Bäck v Finland*, 20 July 2004, para. 69.

39 ECHR, *Kotov v Russia* [GC], 3 April 2012.

40 ECHR, *Kotov v Russia* [GC], 3 April 2012, para. 117.

41 *See* Article 5 of Lex Agrokor

their capital can only be subject to the regular Croatian pre-liquidation (administration) or liquidation proceedings.

80. Furthermore, Lex Agrokor displaces the basic norm of the civil law in Croatia – which is that the company is liable for its debts and guarantees this liability with all its assets; but not with the assets of other subsidiaries. The subsidiaries are liable to their own creditors; not to the creditors of the "systemically important company".

81. Furthermore, Lex Agrokor deprives the company owners of their property by unjustifiably wide powers of the Trustee and by failing to provide sufficient protections and procedural safeguards. As indicated above, while the standard administration proceedings retain the ownership rights of all shareholders of the Agrokor Group, Lex Agrokor effectively expropriates their interest without due process and without an effective legal remedy to challenge any of the actions of the Trustee.

82. Finally, on the basis of the above, it is clear that the discriminatory treatment of non-preferred creditor deprives such creditors of their property, again without due process, and sufficient protections. One further striking example of this interference is the treatment of secured creditors. Lex Agrokor prevents the secured creditors' election to enforce the debt via the security which they hold. Contrary to accepted principles of insolvency law, the secured creditors must now be part of the final settlement – and this opens the possibility that they will be outvoted by representatives of creditors which in the same group, hold mortgages with second, third or fourth priority. This in turn means that these secured creditors are treated less favorably than other secured creditors not subject to Lex Agrokor and are deprived of a property right in the secured assets, without due compensation or protection from the court,

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As such, Lex Agrokor and its implementing measures are a modern day example of de facto unlawful nationalization and is in its entirety, for reasons stated above, incompatible with the EU legal acquis.

2.3 Describe the problem, providing facts and reasons for your complaint* (max. 7000 characters):

Please see above under 2.1. and 2.2.

2.4 Does the Member State concerned receive (or could it receive in future) EU funding relating to the subject of your complaint?

○ Yes, please specify below ○ No ⊗ I don't know

2.5 Does your complaint relate to a breach of the EU Charter of Fundamental Rights?
The Commission can only investigate such cases if the breach is due to national implementation of EU law.

⊗ Yes, please specify below ○ No ○ I don't know

As indicated above, the measure is in breach of:

- the general principle of equality and non-discrimination (Articles 20 and 21 of the Charter of Fundamental Rights of the European Union);
- the right to property and the principle of proportionality (Article 17 of the Charter of Fundamental Rights of the European Union)
- the right to a fair trial and to an effective remedy (Article 47 of the Charter of Fundamental Rights of the European Union)

3. Previous action taken to solve the problem*

Have you already taken any action in the Member State in question to solve the problem?*

IF YES, was it: ○ Administrative ⊗ Legal ?

3.1 Please describe: (a) the body/authority/court that was involved and the type of decision that resulted; (b) any other action you are aware of.

The only indirect remedy available is the petition to the Constitutional Court of Croatia. I have thus filed a petition to the Constitutional Court of Croatia on 1 December 2017 concerning the compliance of Lex Agrokor with the Croatian Constitution.

However, this remedy is an indirect remedy as the measure above-specified prevents me from bringing an action in the Croatian courts.

3.2 Was your complaint settled by the body/authority/court or is it still pending? If pending, when can a decision be expected?*

The decision concerning the petition is pending, with such decisions usually taking more than two years.

IF NOT please specify below as appropriate

○ Another case on the same issue is pending before a national or EU Court
○ No remedy is available for the problem
○ A remedy exists, but is too costly
○ Time limit for action has expired
○ No legal standing (not legally entitled to bring an action before the Court) please indicate why:

○ No legal aid/no lawyer
○ I do not know which remedies are available for the problem
○ Other – specify

4. If you have already contacted any of the EU institutions dealing with problems of this type, please give the reference for your file/correspondence:

○ Petition to the European Parliament – Ref:.....
○ European Commission – Ref:.....
○ European Ombudsman – Ref:.....
○ Other – name the institution or body you contacted and the reference for your complaint (e.g. SOLVIT, FIN-Net, European Consumer Centres)

5. List any supporting documents/evidence which you could – if requested – send to the Commission.

⚠ Don't enclose any documents at this stage.

Please see the above referenced footnotes which relate to documents and evidence which could be sent to the Commission.

6. Personal data*

Do you authorise the Commission to disclose your identity in its contacts with the authorities you are lodging a complaint against?

⊗ Yes ○ No

 *In some cases, disclosing your identity may make it easier for us to deal with your complaint.*