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Uvodnik

Spoštovani.

Prva številka naše revije v letu 2015 prinaša zapise o vprašanjih, ki se nanašajo na aktualne teme javnega sektorja doma in v tujini.

Dva članka govorita o zdravstvu. Istvan Hoffman je prikazal analizo sprememb v madžarskem zdravstvenem sistemu ob odnosu med nacionalno zakonodajo in direktivami EU. Poudaril je možnosti pacientov, da si izberejo zdravstvene storitve tudi izven lastne države, seveda ob predhodni ureditvi nacionalnih pogojev za to. Pristop omogoča direktiva iz leta 2011 in temelji predvsem na omejeni konkurenci zdravstvenih storitev v posameznih državah. Omenjena direktiva, ki so jo v veliki meri izkoristile nekatere članice EU, predvsem Velika Britanija, odpira nacionalna tržišča zdravstvenih storitev in s kakovostjo, ceno in obsegom storitev spodbuja konkurenco. Čeprav se v resnici dogajajo »revolucionarne« spremembe na tem področju, pa je njihov vpliv majhen, saj je delež storitev, ki jih pacienti prejemajo v tujini, še zanemarljiv. Ponudba zdravstvenih storitev v tujini je namreč omejena tudi zato, ker za njihovo širitev ne obstajajo državne spodbude in viri.

Bruno Nikolič je analiziral dopolnilno zdravstveno zavarovanje v Sloveniji, ki je v slovenski zakonodaji opredeljeno kot dejavnost v javnem interesu, kot neločljiv in bistven element sistema socialne varnosti. Zanimivo je razvil tezo, da je slovensko dopolnilno zdravstveno zavarovanje storitev splošnega gospodarskega pomena, ki državam širi meje avtonomnega urejanja področja zdravstvenih storitev, kar ni povsem skladno s konkurenčno zakonodajo EU. Pričakovanja, da se omenjena dajatev v Sloveniji vključi v zdravstveno blagajno in se namenja za pokritje primanjkljaja predvsem regijskih bolnišnic in obeh kliničnih centrov, temeljijo na prepričanju, da je nedopustna ureditev, ki ne namenja vseh zbranih sredstev za financiranje dejavnosti. Slovenija ima ureditev, ki povzroča izgube pri izvajalcih storitev in dobičke pri zavodu za zdravstveno zavarovanje in pri komercialnih zavarovalnicah. Razlogov za nastali položaj je veliko, eden od bistvenih pa je povezan z občutnim zmanjšanjem prispevne stopnje in posledično premajhnih zbranih sredstev za financiranje javnega zdravstva. Ker se istočasno srečujemo z demografskimi spremembami, ki povečujejo povpraševanje, svoje pa je prispevala še kriza in s tem zmanjšala možnosti za višja plačila uporabnikov storitev, je zdravstvena politika pod velikim pritiskom. Nobena od mogočih rešitev ni optimalna: hitre spremembe, ki bi odpravile največje finančne težave, bi bile lahko nedomišljene in ne bi prinesle celovitih sistemskih rešitev. Analiza in predlogi celovitih sprememb, za katere bi potrebovalo ministrstvo še vsaj leto dni, pa bi bile lahko »tempirana bomba«; že se kažejo politični deležniki, ki bi jo radi sprožili v času, ki bi najbolj ustrezal njihovim političnom interesom.

Zdravstvo bi lahko služilo tudi za primer ekonomike javnega sektorja, kjer se izračunavajo oportunitetni stroški proizvodnje blaga in storitev. Čeprav so avtorji Davor Mance, Nenad Vretenar in Jana Katunar svoj prikaz pripravili na osnovi teorije delovanja gospodarstva, pa bi bile njihove ugotovitve uporabne tudi za javni sektor. Javna potrošnja, določena z deležem v BDP, je najbolj kritična predvsem na področjih zdravstva, izobraževanja in sociale, ko se v pogojih finančne krize zateguje pas in išče možnosti optimizacije. Prikazana teorija bi lahko ponudila odgovore na vprašanja o optimizaciji mreže bolnišnic, šol, fakultet in drugih organizacij javnega sektorja. Hkrati pa bi morala upoštevati tudi družbena in politična pričakovanja, ki se največkrat kažejo v nepopustljivosti različnih deležnikov, da se ne bi spremenili ustaljeni običaji in možnosti dostopa do storitev javnega sektorja. Zato se povsod, predvsem pa v Sloveniji, težko pridobi zadostno podporo za kakršnekoli spremembe.

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Determinants of Public Sector Innovation: The Example of Capacity Development in Public Procurement

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ABSTRACT

The Triple-Helix-Model stresses the idea that a successful national system of innovation ought to incorporate the complexity of three social subsystems: private sector economy, governmental system and science. Following the insight that the state and its agencies are important players in any system of innovation, we take a closer look at the innovative action in the public sphere. Therefore, we propose an analytical tool that allows a more detailed explanation of relevant determinants of innovative behaviour: (1) property rights, (2) capabilities, and (3) motivation. In order to show the relevance of these determinants, we tested the plausibility of our theoretical tool against the topic of public procurement of innovation. Five hypotheses were derived and then tested empirically by using a data set about German public procurement practice. Our linear regression model provides evidence for the hypotheses that framework conditions, special training, and motivation of procurement staff play a central role in demand-driven innovation of the public sector.

Keywords: innovation, Triple-Helix approach, public sector economics, capacity building, procurement of innovation

JEL: B52, H 83, O31, P48

1 Introduction

While the connection between innovation, growth and social development is usually examined with relation to private sector enterprises (Audretsch et al. 2006), in recent years the innovation capabilities of other social subsystems have moved into the point of view. Moreover, the public sector and public management capabilities can be seen as an important part of the economic development of regions or countries. As a reference, one can state explicitly

the literature on "varieties of capitalism" (see Hall & Soskice, 2001; Elsner & Hanappi, 2008) as well as studies that use a "National Business Systems" approach (Nelson, 1993; Lundvall, 1999). Insofar, the efficiency of the public sector can be interpreted as an important location factor in a global competitive process as well (e.g. Kristensen & Lilja, 2011). Nevertheless, these recent developments are only partly reflected in the scope of the literature on innovation theory (Greenhalgh & Rogers, 2010; Daskalakis, 2010). In order to do so, we propose in this paper a theoretical model that is applicable to the market sector as well as to the public sector.

The paper is structured as follows: We briefly introduce research on innovation that is based on the Triple-Helix-Model and present our approach to explain innovative behaviour. Following the early work of Röpke (1977), we use three kinds of variables as our determinants of innovative action: property rights, capabilities and motivation. Based on this theoretical background we develop further considerations with regard to the possibilities and problems of innovative action that might (or might not) take place in the sphere of bureaucracy (2). The focus will be on innovation in the public sphere and the field of public procurement has been chosen as a principal example to demonstrate the workability of our analytical tool (3–5). The paper ends with a conclusion (6), showing that the results for the innovation system might be substantial: If the relevant players are not allowed to innovate, public managers do not have the capabilities to innovate, or are not motivated to innovate, then the structural coupling between government and the economic system will not succeed in the long run. As a result, there will be negative consequences for the national system of innovation, e.g. the ability of a society to develop by innovative advances.

2 Innovation Theory and Public Administration

In the economic literature on innovation, one can distinguish at least two different branches of theory: While in industrial economics (or endogenous growth theory) particularly hypotheses about the macroeconomic effects of innovation are picked out as a central theme, the branch of evolutionary economics analyses the endogenous causes of the innovation process (for a broad survey see Fagerberg, Moweira & Nelson, 2006). Consequently, the role as well as typical characteristics of entrepreneurship can be seen as the core of this line of theoretical reasoning (Röpke, 2002; Fagerberg, 2003; Fagerberg, 2006). The latter approach is used here because it seems to be much broader in its applicability, especially with regard to topics like the system of public administration. In our view, one should deal more thoroughly with the possibilities as well as restrictions of innovative behaviour in the non-profit sectors (public management, non-profit organisations) of an economy (Zimmermann et al., 1998). In other words, there is a need to strengthen the innovative capabilities of the state. This thesis has been furthermore stressed by work on the interdisciplinary nature of innovation, e.g. Goto (2000, p. 104):

"The national innovation system essentially consists of three sectors: industry, universities, and the government, with each sector interacting with the others, while at the same time playing its own role". One of the models that can be used to describe the interactions between different societal systems has been labelled "Triple-Helix-Model" (Etzkowitz & Leydesdorff, 2000) which is explicitly based on the complex nature and interactions between the three subsystems economy, science and state.

2.1 The Triple-Helix-Approach and Systems of Innovation

Against this background of innovation theory in the literature, it should be obvious that the national system of innovation is somehow a complex building with one system interacting with the other subsystems (Leydesdorff, 2010, 5ff.). Therefore, the Triple-Helix-Model is used as a metaphor for the fundamental relationships between the three social subsystems economics, science and government. On the one hand, the characteristics of these corresponding networks are defined. On the other hand, the differences regarding the incentive structure and the flexibility of transformation are stressed. The aim is mainly to describe and explain structural developments of a knowledge-based economy. In application to the case of public administration, we find more hierarchical structures of decision, different ways to generate and transfer knowledge as well as other incentive systems to the staff.

In addition, of course, the public sector influences both other subsystems by different means, e.g. legislation and regulation. The model is therefore closely connected to the Systems of Innovation (SI) approach, which can be defined as "all important economic, social, political, organizational, and other factors that influence the development, diffusion, and use of innovations" (Edquist, 1997, p. 14). However, as Edquist (2001, p. 3) in a discussion about SI has already remarked, there has been a weakness of the SI approach since „it lacks a 'theoretical' component about the role of the state. This is an important neglect, since the state and its agencies are obviously important determinants of innovation in any SI".

As a first step, it seems plausible to discuss the role of the state by looking at the mechanisms used to influence the innovation system, e.g. through public innovation policy. In general, innovation policy can be described as all public action that has an impact on technical change or influences other kinds of innovations (Edquist, 2002). On the supply side, this mainly means science&technology policy, e.g. the public provision of basic research as a public good. But innovation policy goes beyond by including elements of research&development, technology and infrastructure policy as well as regional policy and education policy. In consequence, innovation policy can influence innovation just as much from the demand side. In this respect, especially public procurement is of importance. Therefore, the case study that will follow is related to the field of public procurements as an instrument.

Furthermore, Edquist (2001, p. 10f.) suggests that function or determinants of innovation should be given more emphasis, because such work would be an important attempt to raise the theoretical status of the SI approach. Thus, explanatory work should include a specification of the relative importance of determinants as well as the relations between them, which might vary between certain kinds of innovation, e.g. process or product innovation. In short, he expects knowledge progress by integrating „conceptual and theoretical work with empirical studies in an effort to identify determinants". This path of research is followed by Edquist and Zabala-Ihurriagagoitia (2012), who categorize public procurement for innovation along three dimensions: first, the user of the purchased good; second, the character of the procurement process; and third, the cooperative or non-cooperative nature of the process. In accordance to this, our proposed approach can be interpreted as an additional framework that allows to obtain testable statements. And it will be accomplished by an empirical analysis in the field of public procurement as well.

Another way to classify the role of the state has been given by Greenhalgh and Rogers (2010, p. 103f.), who focus on the topic of public action. They assume that the most relevant topics with regard to innovative activities will be intellectual Property Rights (patent law, product permissions), tax policy (enterprise taxation, depreciation possibilities, establishment promotion), competition policy (regulation of monopolies, merger control), public subsidies for scientific research, standardisation, and public procurement. However, since every listed topic above involves different network agents as well as incentive structures, it seems to be necessary to discuss them separately. Yet, this is the third reason why we will concentrate on the field of public procurement in our case study. But initially, we have to describe our conceptual approach for the analysis of the determinants of innovative behaviour.

2.2 Determinants of Innovative Behaviour

Our general explanation of innovative behaviour, either on the individual or organisational level, uses three measurable variables: the structure and incentives of property rights, the degree of individual capabilities and knowledge (competences) and, last but not least, motivational aspects. In the concrete, these determinants of innovative behaviour can be understood as follows:

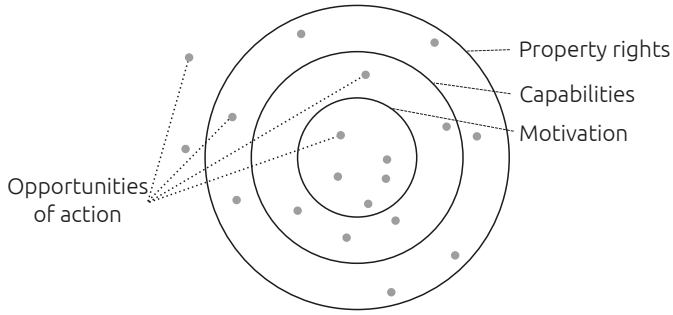
1. *Property rights*: In short, under this heading one can assume all formal and informal rules, which limit the acting of individuals or organisations. They can be further divided up in property rights on the level of the economy, the level of organisation as well as on the level of societies, e.g. cultural values (Röpke, 1983, p. 122ff.). In particular, for the field of public administration it might be of serious concern that innovation in the public sphere is often not very welcome. Instead, there is a "rule

of tradition" that will be altered by new ways of action (Picot & Schneider, 1988, 99ff.). Alternatively, to put this in pure economic terms, the resulting benefits for all parties involved will be changed by innovation, resulting in new distribution patterns of economic resources. In fact, some political interest groups will suffer from innovation externalities, which is one of the reasons why innovative solutions have much higher transaction costs than routine actions. However, it should be noted in this context that there is a controversial discussion about the role of property rights in creating incentives to innovate. To put it in a nutshell, if patent policies foster the diffusion of knowledge and stimulate market entry and competition, then there might be social benefits from stronger incentives to innovate. On the contrary, assigning strong intellectual property rights to early inventors may discourage innovation, e.g. due to litigation risks of later generations of inventors (see Boldrin & Levine, 2013; Moser, 2013). Recently, the growing prominence of patent aggregators called "Intellectual Ventures has sparked heated debates about the economic role played by intermediaries in the patent market and their effects on innovation" (Hagiu & Yoffie, 2013, p. 46).

2. *Capabilities (competences)*: One of the preconditions for discoveries or the implementation of innovation can be seen in the cognitive capabilities of an individual. In abstract terms: "creativity proves to be the outstanding component of the innovation process, since it affects the decision and action logic of the individual strongly" (Brandstätter, 1992, p. 98ff., own translation). With regard to this variable the genetic equipment as well as the level of education and training plays an important role.
3. *Motivation*: Even if innovative action is allowed by property rights and the staff has the required cognitive abilities, then there still might be a last barrier to innovation: Individuals can simply not be motivated enough to leave a "life in routines" for innovative new solutions. We base these considerations on the so-called "achievement motivation theory" developed by McClelland and Heckhausen. Its core hypothesis can be summarized as follows: human beings are mainly motivated by personal achievements; ideally, they choose those tasks where the degree of difficulty is somehow "in the middle range", meaning that the result of action can be attributed to one's own achievements (McClelland & Heckhausen, 1980). Of course, the motivation of individuals can be affected positively or negatively by the usage of either extrinsic or intrinsic incentives.

As is shown by figure 1, all three variables are interconnected to each other and work as filter for innovative behaviour.

Figure 1: Explanation of innovative behaviour



Source: Röpke (1987, p. 233).

Based on this set of variables, one will be able to formulate hypothesis with regard to the consequences of organisational and political reform or to determine the window of opportunity to innovate inside public administration. As an analytical tool, it might help in showing the important consequences for the functioning of the innovation system. If the personnel in public administration is not allowed or not able or not motivated to innovate, then the structural connection to the other sectors (science and economy) will not succeed in the long term. This problem might be eliminated by other actors of the national system of innovation, at least as long as these actors have the necessary opportunities of action at their hand.

Next, we use this theoretical framework to examine whether the political staff or respectively the public administration will have the necessary degree of freedom for innovative behaviour. Therefore, we first take a look at the legal restrictions for innovative policies. Followed by a discussion of the way official staff is likely to act as an "intrapreneur" in his or her organisation. Finally, ways for using the huge amount of "tacit knowledge" incorporated in public administration for the production of public goods will be explained. The strength of our proposed framework can be seen in the fact that we will be able to analyse innovative behaviour on the micro level by means of the public staff as well as on the macro level by property rights set by the national system of innovation. In order to show the workability of our theoretical considerations, we now apply our model to the field of public procurement in Germany.

3 Selection of Case Analysis: Public Procurement

Public procurement has a huge potential for innovative behaviour of public authorities. In 2008[1], Eurostat estimated a total procurement volume for the EU27 of 17.3% of GDP (equivalent to 2.16 billion €), a number showing that the public sector has a significant market power. Regarding single product

1 Own calculations based on Eurostat (2010). The estimations tend to exceed the actual procurement volume, since, for example, spending by the social insurance system is taken into account (Audet, 2002; Weber, 2010).

groups respectively sectors such as ICT, the public demand reaches such a large proportion that further market development can be emanated from this major impetus. Similarly, considerable impetus to public institutions themselves can be emanated from purchasing innovative products and services. Just to give an illustrative example, it can be referenced to the introduction of workflow management software and document management systems, which can deeply interfere in the procedures of the concerned institution (Lorenz et al., 2009, 39f.). With reference to the interaction between impetus to the public institutions through the purchase of innovative solutions on the one hand, and the innovation-promoting effect on the suppliers by a challenging public demand on the other hand, the second aspect is gaining more and more political importance. Therefore, public procurement has been increasingly granted with the suitability as an instrument of innovation-oriented demand policies (Edler et al., 2005; European Commission, 2007a, 2007b; Edquist et al., 2000; Georghiou et. al., 2010). By way of example, one can refer to procurement practices in the UK (Hughes et al., 2011), even on the local level (see Uyarra, 2010), or the initiative of the European commission under Horizon 2020 (European Commission, 2011).

Furthermore, especially in overcoming the so-called "Valley of Death" this kind of demand for novel solutions can play an important role. The Valley of Death is a common term in the entrepreneurship world, relating to the serious challenge of covering the negative cash flow in the early stages of a new venture, before the innovation (service or product) is generating revenue from real customers (see Osawa & Miyazaki, 2006; House of Commons, 2013). Beside this general difficulty of start-ups, Beard et al. (2009) have argued that the Valley of Death occurs especially in the presence of 'non-economic' investments, foremost with regard to government expenditures on basic research. Public Procurement might close the gap between public funded research in early stages and private investment decisions at later stages of the innovation process. The challenging needs of the public sector can directly lead to the development of novel solutions and to the setup of production capacities. At a sufficient expectation of benefit, the public sector can take considerable risks in this context, e.g. maintaining start-up's or specialized suppliers.

The public procurement of innovation can be regarded as an exemplary case for innovation activities in the Triple-Helix-Model: With regard to purchasing, the given relationship between government and economy is expanded by a research and development aspect. All three social sub-systems interact with each other in such projects, whereby science and economy cope with their specific function of production of knowledge or goods and services respectively. Moreover, due to this constellation, there will arise new challenges for public administration. The purchasing of innovation requires actions with a strong innovation orientation, which is often in tension to the legislative framework regulating procurement. Here, innovation orientation

is often accompanied by the innovative handling of procedures (Lorenz et al., 2009, pp. 64–75). Given these interactions, innovative behaviour is understood, in terms of the theoretical approach developed above, as an innovative processing method, as innovation-oriented procurement practice and simply as purchasing innovation.

Thus, the public purchase involves the potential for considerable innovation impetus to public administration, economy and science. Given this vast potential, the inventory of the innovation orientation and the innovation degree of the German federal procurement practice is sobering. Regarding the procurement strategy, promoting innovation plays only a subordinate role and, instead of comprehensive economic criteria, the purchasing price dominates as a key award criterion for public contracts. This makes an awarding of innovative solutions unlikely (Weber, 2009). A fact, that needs to be explained in order to derive ways of its evaluation and overcoming.

4 Hypotheses about Determinants of Public Sector Innovation in Public Purchasing

In order to explain the above stated gap between a potential and an empirical use of public procurement as a tool for demand-driven innovation, we now consider the three variables of innovative behaviour in more detail. In order to do so, we first derive some hypotheses from our analytical tool that will then be tested in the next chapter by using our empirical data set from German public procurement.

4.1 Property Rights

Initially, the function of property rights, defined as an opportunity space for action, seems to be simple: Public authorities can define their requirements and the solution they need to meet their demands without constraints. In principle, the property rights are fully held by public authorities, while enterprises get the chance to adjust their offer to the requirements described in the calls for tenders. However, in reality we can observe constraints on different levels of the procurement process, which hinder public authorities to make use of their rights. In short, two different types of constraining factors can be distinguished: The internal structure of public authorities and external constraints respectively the way public servants deal with these constraints.

First, public authorities cannot be dealt with "as if" there is only one single unique entity. Many different stakeholders in the organisation try to achieve different and partly contradictory goals (Edler et al., 2005, p. 40ff.). The political level and the level of strategic management are two powerful players in this game. If politics and management differ in their aims related to public procurement, different priorities of departments should be taken into account as well. For example, while the department which finances the project might only be interested in a low initial price, the department which has to deal with

the maintenance of the procured product (e.g. a new building) might focus on initially more expensive and probably more innovative solutions to lower costs in the long run. A clear strategic priority and the political will to foster innovation is essential to overcome these conflicting interests. Thus, our first hypothesis with regard to property rights reads as follows:

H1: An explicit strategy and political support enable procurer to strengthen innovation orientation in public procurement.

Second, the most powerful external constraint is the legal framework the purchasing agencies have to deal with. Many public procurers experience that the density of procurement regulation inevitably leads to legal mistakes in nearly any process. This external constraint, which does not influence the objective of the purchasing process directly, produces an error risk, which causes risk-avoiding behaviour of civil servants (Otter et al., 2007, p. 100). In sum, internal structure and external constraints favour a conservative procurement practice. On this organisational and legal background, success is measured by absence of mistakes and not by procuring innovative solutions:

H2: The willingness to take risk is required to make use of instruments of innovation orientation.

4.2 Capabilities, Competences, Capacities

Both, conflicting interests and failure risks signify the need for highly skilled civil servants. Employees who want to purchase innovative solutions have to deal with legal, organisational, and technical risks (European Commission 2010) in a convenient and convincing way. To cope with all these challenges two aspects have be taken into consideration: education and training for the staff and a professionalization of procuring agencies. In many cases procurement is not part of the key competences and functions of public agencies. As a consequence purchasing is executed as side job by civil servants without special training (Lorenz et al. 2009, 57). It can be expected that this absence of special training will have an impact on the innovative behaviour:

H3: Skilled and especially trained procurement staff leads to more innovative behaviour in public procurement.

Another way to cope with the broad range of requirements is the outsourcing of the task to specialised units. Thus:

H4: A centralised structure of procurement with specialised procurement units leads to more innovative behaviour in public procurement.

4.3 Motivation

Despite some hindering framework conditions, many cases of public procurement of innovation procedures can be observed in practice. In many of these cases, highly motivated civil servants guarantee the achievement of these purchasing projects. These employees can be described as intrapreneurs

who drive forward the organisation they are working for. However, these cases cannot conceal the fact that administrative culture in general favours acting in accordance with the law or other organisational routines. Fault tolerance, learning by errors, and giving something new a chance are by no means generic elements of administrative culture (Krone, 2003). In addition, public authorities offer little incentives to foster motivation of their employees. Thus, motivation is expected to be a critical factor for innovative behaviour of public agencies:

H5: Motivation of procurement staff has a strong impact on innovative behaviour in public agencies procurement.

5 Empirical Investigation

Our data allow the empirical testing of the above stated hypotheses for the German Case. The next paragraph will deliver a description of the database as well as the operationalization of the theoretical constructs. Then, the findings of the statistical model are presented, followed by a short discussion of some mayor constraints of the analysis.

5.1 Database and Operationalization of Theoretical Constructs

To get an empirical inside of German procurement agencies we use data from a survey conducted in 2009. The survey was part of the research project "Purchasing State" which was partly funded by the German Federal Ministry of Education and Research (Lorenz et al., 2009). The survey realised 265 responses of all types of German procurement agencies, which corresponds to a response rate of 11.5%. The questionnaire covered a wide range of different aspects with relevance to innovation-orientation. For hypotheses testing six theoretical concepts have to be measured (Table 1).

Table 1: Operationalization of theoretical concepts

Variable	Measurement concept
	Property rights
Innovation-friendly *framework* conditions	Strategic orientation in favour of innovation procurement in contradiction to initial costs and political influence on procurement practises
Encouraged *risk-taking*	Share of new suppliers and share of more sophisticated award criteria than the initial prices
	Capabilities, competences, capacities
Special *training*	Existence of special trainings of procurement staff
Centralised *structure*	Procurement only by centralised units and probably by external service provider
	Motivation
Motivation of procurement staff	Optimistic assessment of purchasing instruments for fostering innovation in public procurement
	Innovative behaviour
Innovation-orientation of procurement practices	Participation of internal knowledge carriers and stakeholders, innovation as aim of negotiations, innovation-friendly procedural aspects, innovation-related aspects in technical specifications, internal and external cooperation, use of various way of market observation

5.2 Statistical Modelling

The distribution of the dependent variable allows the application of linear regression analyses. The independent variables are statistically independent and the statistic of residuals does not show any indication of violating distribution assumptions. The model is printed in Table 2.

Table 2: Linear regression on innovation-orientation

	Coefficient (beta)	
Framework	0.174	*
Risk-taking	0.002	
Training	0.170	*
Structure	0.029	
Motivation	0.340	*
R^2 adjusted	0.206	*
202 valid cases Significance: * 99%		

The model shows medium effect of framework conditions and specialised training on innovation-orientation in public procurement and a strong effect of motivation. All three effects are significant on the 99%-level. Encouraged risk-taking and a centralised structure have no significant effect on the depended variable. The whole model fits with an adjusted R^2 of 0.2 well and is although highly significant.

The statistical model provides empirical evidence for the hypotheses 1, 3 and 5. Framework conditions, special training, and motivation of procurement staff have significant positive impact on innovative behaviour in public procurement. In contrast, we have to reject hypotheses 2 and 4 at this stage of analysis. Neither for risk-taking nor for the organisational structure can we observe a significant impact. Nevertheless, our results of the case study stress the importance of all three determinants of innovative behaviour. Property rights, capabilities, and motivation influence the way public authorities fulfil their duties.

5.3 Constraints

Although the above findings suggest that all three aspects might determine innovative behaviour, attention must also be drawn to some restriction of the empirical model. First, the empirical investigation suffers from those constraints which are typical for a secondary analysis: The survey might probably be biased towards a positive selection of cases. It seems to be plausible that large authorities with a more professionalized procurement structure had answered more likely. In addition, the operationalization of theoretical concepts is limited to the indicators surveyed. This might compromise the validity of the empirical concepts to some extent, e.g. especially the indicator for motivation seems to be critical in this context.

Probably this indicator is just too close to the innovation indicator. Thus, the effect might be overestimated.

Second, the analysis offers only a rough modelling of the theoretical considerations. On the one hand the determinants of innovative behaviour are not logically independent. To some extent property rights are a precondition for the effectiveness of capabilities and motivation. On the other hand the model ends with the explanation of innovative action. Innovative behaviour is one important determinant of innovative output, but it is not the only one. A more complex modelling can help to overcome these constraints. Such a model has to consider interaction effects as well as control variables, like the type of procuring organisation and procured products and services. To model these interaction effects in a second iteration, one has to specify the theoretical considerations in more detail. Additionally a two steps regression analysis can show the effect of innovative behaviour and innovation impact.

6 Conclusion

Public procurement of innovation can be seen as innovative behaviour in two ways. On the one hand, efficient procedures offer significant saving potential and effective targeting of public needs improve quality of purchased solutions. On the other hand public procurement levers innovative behaviour in the private sector. The analytical framework developed here offers an opportunity to get a better understanding of the fact that practices in procuring innovative solution are still subject to different restrictions. The analysis was based on three determinants of innovative behaviour: property rights, competencies, and motivation. In order to show the relevance of our proposed determinants, we tested the plausibility of our theoretical tool against the topic of public procurement of innovation. Therefore, five hypotheses were derived in connection to the process of public procurement and then tested empirically by using a data set from German public procurement practice. Our linear regressions model provides evidence for the hypotheses that framework conditions, special training, and motivation of procurement staff play a central role in demand-driven innovation of the public sector. In contrast to this, our hypotheses about risk-taking as well as organisational structure were rejected. In sum, hindering constraints inside and outside public agencies, a lack of motivating elements in administrative culture, and the antagonism between the low level of public procurement training and the complexity of innovation-oriented procurement practices are important barriers to make procurement an instrument to foster innovation of public authorities as well as of private enterprises.

But the determinants cannot only be used to describe the main problems, they might as well serve as a starting point to overcome these barriers. Likewise, the identified obstacles describe the areas of interest which should be modified to make use of public procurement as a broader policy instrument.

Many initiatives especially on the European level can be observed to facilitate procurement of innovative solution by public agencies. To name a few, the modernisation of European procurement regulation has to be mentioned as well as subsidies for dealing with risks in innovation-oriented procurement procedures. Thus, in medium terms procurement professionals might get the full set of property rights for buying more innovative solutions. In the meanwhile, the awareness of the positive impact of public procurement of innovation on the solution of great societal challenges like climate change and financial crisis is rising. This growing awareness might become an important source for the motivation of procurement professionals. Many additional trends foster public procurement of innovation by additional property rights and by motivating civil servants.

In the area of capabilities, the solution seems to be quite simple. More and better-trained procurement staff might lead to a boost for buying innovative solutions. Keeping budget restrictions in mind, certain functional equivalents might be needed. Empirical evidence can be found that three aspects can significantly contribute to enable civil servants to buy innovative products:

1. Modernisation of purchasing procedures: electronic support for purchasing stuff might help to avoid mistakes. Suitable electronic government solutions are required to implement e-procurement systems (Lorenz et al. 2009, p. 71f.).
2. Open innovation platforms: cooperation between different departments and external actors, especially potential suppliers, are crucial for the success of innovation projects. Electronic platforms can provide a medium for the interaction between relevant partners and can help civil servants to gather required technical and market information (ICLEI et al., 2015).
3. Reference to standards: referencing standards in technical specification allows the usage of codified and accepted knowledge about technical details. Thus, standards offer an affordable and easy way to consider quality aspects (Blind & Weber, 2012).

From our point of view, it is crucial to consider first the options for action in public authority to analyse the impacts on the other subsystems. Innovative action might even lead to a "creative destruction" of the rule of traditions in socio-economic institutions in the sense of Schumpeter (Otter, 2009). Given public budget restrictions, only the recombination of existing resources might cause impulses to innovativeness and growth. In this sense, innovative and innovation-oriented public authorities do not only guarantee the efficiency of their services. Instead, they can contribute to a dynamic innovation policy, which helps to overcome the great challenges. Without additional resources and only by recombining existing assets, significant efficiency growth and impulses for innovation in economy and science can be achieved. Thereby electronic support and use of existing knowledge might facilitate the building

of required capacities. Thus, enabling innovation in public authorities becomes one key factor to respond to the current societal challenges.

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References

Audet, D. (2002). Government Procurement: A Synthesis Report. *OECD Journal on Budgeting 2*(3), 149–194. DOI: 10.1787/budget-v2-art18-en

Audretsch, D. B., Keilbach, M. C., & Lehmann, E. E. (2006). *Entrepreneurship and Economic Growth*. New York.
DOI: 10.1093/acprof:oso/9780195183511.001.0001

Beard, R. T., Ford, G. S., Koutsky, T. M., & Spiwak, L. J. (2009). A Valley of Death in the Innovation Sequence: An Economic Investigation. *Research Evaluation, 18*(5), 343–356. DOI: 10.3152/095820209X481057

Beckenbach, F., & Daskalakis, M. (2010). Invention und Innovation als kreative Problemlösungsprozesse. In M. Moldaschl, & N. Stehr (Eds.), *Wissensökonomie und Innovation* (pp. 259–292). Marburg.

Blind, K., & Weber, M. (2012). Normierte Kreativität? Die Bedeutung von Normen im öffentlichen Einkauf. In D. Hilgers, R. Schauer & Thom, N. (Eds.), *Staat und Verwaltung im Spannungsfeld von New Public Management, Open Government und bürokratischer Restauration* (pp. 585–600). Linz: Tauner.

Boldrin, M., & Levine, D. K. (2013). The Case against Patents. *Journal of Economic Perspectives, 27*(1), 3–22. DOI: 10.1257/jep.27.1.3

Brandstätter, H. (1992). Anthropologisch-psychologische Aspekte einer evolutionären Ökonomik. In: B. Biervert &, M. Held (Eds.), *Evolutorische Ökonomik. Normen, Institutionen, Neuerungen* (pp. 92–109). Frankfurt.

Edler, J. et al. (2005). I*nnovation and Public Procurement. Review of Issues at Stake. Study for the European Commission* (No ENTR/03/24). Final Report. Karlsruhe: Fraunhofer ISI.

Edquist, C. (1997). Systems of Innovation Approaches – their Emergence and Characteristics. In C. Edquist (Ed.). S*ystems of Innovation: Technologies, Institutions and Organizations* (pp. 1–35). London.

Edquist, C. (2001). The Systems of Innovation Approach and Innovation Policy: An Account of the State of the Art. Lead Paper presented at the *DRUID conference, Aalborg, June 12–15, 2001*. Retrieved 28. 1. 2015, from http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.336.4438&rep=rep1&type=pdf

Edquist, C. (2002). Innovation Policy – A Systematic Approach. In B. A. Lundvall & D. Archibugi (Eds.), *The Globalizing Learning Economy* (pp. 219–238). Oxford.
DOI: 10.1093/0199258171.003.0013

Edquist, C., Hommen, L., & Tsipouri, L. (2000). *Public technology procurement and innovation*. Economics of science, technology and innovation, Vol. 16. Dordrecht: Kluwer. DOI: 10.1007/978-1-4615-4611-5

Edquist, C., & Zabala-Iturriagagoitia, J.M. (2012). Public Procurement for Innovation as mission-oriented Innovation Policy. *Research Policy, 41*(10), 1757–1769. DOI: 10.1016/j.respol.2012.04.022

Elsner, W., & Hanappi, H. (Eds.). (2008). V*arieties of Capitalism and New Institutional Deals*. Edward Elgar.

Etzkowitz, H., & Leydesdorff, L. (2000). The Dynamics of Innovation: from National Systems and "Mode 2" to a Triple Helix of university-industry-government relations. *Research Policy, 29*(2), 109–123.
DOI: 10.1016/S0048-7333(99)00055-4

European Commission. (2007a). *Guide on Dealing with Innovative Solutions in Public Procurement. 10 Elements of Good Practice*. PRO INNO Europe paper No 1. Luxembourg: European Communities.

European Commission. (2007b). *Pre-commercial Procurement: Driving Innovation to Ensure Sustainable High Quality Pubic Services in Europe*. Brussels.

European Commission. (2010). *Risk management in the Procurement of innovation. Concepts and empirical evidence in the European Union*. Luxembourg: Publications Office of the European Union.

European Commission (2011). *Commission Staff Working Paper*. Retrieved 3. 2. 2015, from http://ec.europa.eu/research/horizon2020/pdf/proposals/horizon_2020_impact_assessment_report.pdf#view=fit&pagemode=none

Eurostat. (2010). *Government statistics*. Retrieved 19. 6. 2014, from http://epp.eurostat.ec.europa.eu/portal/page/portal/government_finance_statistics/data/database

Fagerberg, J. (2003). Schumpeter and the Revival of Evolutionary Economics: An Appraisal of the Literature. *Journal of Evolutionary Economics, 13*(2), 125–159. DOI: 10.1007/s00191-003-0144-1

Fagerberg, J. (2006). Innovation. A Guide to the Literature. In J. Fagerberg, D. C. Mowery & R. Nelson (Eds.), *Oxford Handbook of Innovation* (pp. 1–26). Oxford. DOI: 10.1093/oxfordhb/9780199286805.001.0001

Georghiou, L., Li, Y., Uyarra, E., & Edler, J. (2010). *Public Procurement for Innovation in Small European Countries*. Retrieved 3. 2. 2025, from http://ec.europa.eu/environment/gpp/pdf/Public%20Procurement%20for%20Innovation%20in%20Small%20European%20Countries.pdf

Goto, A. (2000). Japan's national innovation system: current status and problems. *Oxford Review of Economic Policy, 16*(2), 103–113. DOI: 10.1093/oxrep/16.2.103

Greenhalgh, C., & Rogers, M. (2010). *Innovation, Intellectual Property, and Economic Growth*. Princeton/Oxford.

Hagiu, A., & Yoffie, D. B. (2013). The New Patent Intermediaries: Platforms, Defensive Aggregators, and Super-Aggregators. *Journal of Economic Perspectives, 27*(1), 45–66. DOI: 10.1257/jep.27.1.45

Hall, P. A., & Soskice, D. (Eds.). (2001). *Varieties of Capitalism: the Institutional Foundations of Comparative Advantage*. Oxford.

Heckhausen, H. (1980). *Motivation und Handeln*. Berlin.

House of Commons. (2013). *Bridging the Valley of Death: improving the commercialisation of research*. Retrieved 3. 2. 2015, from http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsctech/348/348.pdf

Hughes, A., Moore, K., & Kataria, N. (2011). *Innovation in the Public Sector: A Pilot Survey for Measuring Innovation across the Public Sector*. NESTA report. Retrieved 3. 2. 2015, from http://www.nesta.org.uk/sites/default/files/innovation_in_public_sector_orgs.pdf

ICLEI, et al. (2015). *Procurement of Innovation Platform*. Retrieved 10. 2. 2015, from http://www.innovation-procurement.org

Krone, H. G. (2003). *Die Bedeutung der Verwaltungskultur. Eine Kulturanalyse zur Wirtschaftsförderungspolitik in der sächsischen öffentlichen Verwaltung*. Osnabrück: Der andere Verlag.

Leydesdorff, L. (2010). T*he Triple Helix, Quadruple Helix, …, and an N-tuple of Helices: Explanatory Models for Analyzing the Knowledge-based Economy?*. Retrieved 19. 6. 2014, from http://arxiv.org/abs/1012.1937

Lorenz, O., et al. (2009). *The 'Purchasing State' as a Driver of Innovation. Development potential and necessities relative to more-innovative procurement in Germany's public procurement sector*. Final report. Berlin: Wegweiser.

Lundvall, B.-A. (1999). National Business Systems and National Systems of Innovation. *International Studies of Management and Organization, 29*(2), 60–77.

Moser, P. (2013). Patents and Innovation: Evidence from Economic History. *Journal of Economic Perspectives, 27*(1), 23–44. DOI: 10.1257/jep.27.1.23

Nelson, R. R. (1993). National Systems of Innovation: A Comparative Analysis. Oxford.

Osawa, Y., & Miyazaki, K. (2006). An Empirical Analysis of the Valley of Death: Large-scale R&D Project Performance in a Japanese Diversified Company. *Asian Journal of Technology Innovation, 14*(2), 93–116. DOI: 10.1080/19761597.2006.9668620

Otter, N. (2009). Schumpeters Diagnose zu Wandel und Krisen im Kapitalismus. *Berliner Debatte Initial, 20*(4), 41–48.

Otter, N., Siegel, T., & Weber, M. (2007). Der Vorrang der Öffentlichen Ausschreibung im Vergabewesen. *Verwaltung und Management, 13*(2), 94–103.

Picot, A., & Schneider, D. (1988). Unternehmerisches Innovationsverhalten, Verfügungsrechte und Transaktionskosten. In D. Budäus, E. Gerum, &, G. Zimmermann (Eds.), *Betriebswirtschaftslehre und Theorie der Verfügungsrechte* (pp. 91–118). Wiesbaden. DOI: 10.1007/978-3-322-83718-9_5

Röpke, J. (1983). Handlungsrechte und wirtschaftliche Entwicklung. In A. Schüller (Ed.), *Property Rights und ökonomische Theorie* (pp. 111–144). München.

Röpke, J. (1987). Möglichkeiten und Grenzen der Steuerung wirtschaftlicher Entwicklung in komplexen Systemen. In M. Borchert, U. Fehl, &, P. Oberender, *Markt und Wettbewerb* (pp. 227–243). Bern und Stuttgart.

Röpke, J. (2002). *Der lernende Unternehmer*. Norderstedt.

Siemon, C. (2009). *Innovationspolitik, Wissenstransfer und der 6. Kondratieff: Knabenmorgenblütenträume in der Krise?* Norderstedt.

Uyarra, E. (2010). *Opportunities for Innovation through Local Government Procurement: A Case Study of Greater Manchester*. NESTA research report. Retrieved 3. 2. 2015, from http://www.nesta.org.uk/sites/default/files/opportunities_for_innovation_through_local_government_procurement.pdf

Weber, M. (2009). *Procurement of innovation in Germany: political goals and empirical findings*. Retrieved 19. 6. 2014, from http://www.oecd.org/dataoecd/50/2/43726963.pdf

Weber, M. (2010). Die Bedeutung der Beschaffung für die öffentliche Wertschöpfung – eine empirische Annäherung. *InfrastrukturRecht, 7*(11), 323–327.

Zimmermann, H., Otter, N., Stahl, D., & Wohltmann, M. (1998). *Innovation jenseits des Marktes – Neuerungsverhalten in Staat, privaten Haushalten und Nonprofit Organisationen und der Einfluss umweltpolitischer Instrumente*. Berlin.

POVZETEK

1.01 Originalni znanstveni članek

Determinante inovacij v javnem sektorju: primer razvoja zmogljivosti v javnih naročilih

Ključne besede: inovacija, model trojne spirale, ekonomika javnega sektorja, razvoj zmogljivosti, javna naročila za inovacije

Glede na spoznanje, da so država in njeni organi v katerem koli inovacijskem sistemu pomembni dejavniki, raziskuje avtor inovativno aktivnost v javni upravi.

Članek na kratko predstavlja raziskave o inovativnosti, ki temeljijo na t. i. modelu trojne spirale (ang. *Triple-Helix Model*) in na nacionalnem sistemu pristopa k inovacijam. Model trojne spirale izhaja iz ideje, da bi uspešen nacionalni inovacijski sistem moral vključevati tri kompleksne družbene podsisteme in sicer: gospodarstvo zasebnega sektorja, državo in znanost. Model trojne spirale se namreč uporablja kot metafora za medsebojne povezave med temi sektorji. Opredeljuje značilnosti pripadajočih mrež, medtem ko na drugi strani poudarja razlike glede strukture spodbud in spremenljivosti. A kot je v razpravi o inovacijski sistemih pripomnil že Edquist (2001, str. 3), se slabost pristopa k inovacijskim sistemom kaže predvsem v pomanjkanju »teoretične« komponente o vlogi države.

To je pomembna pomanjkljivost, saj so država in njeni organi več kot očitno pomembne determinante inovacij v katerem koli inovacijskem sistemu. Zato Edquist predlaga, da bi se funkciji oziroma determinantam inovacij prisodilo več poudarka, kar bi pomembno razširilo teoretični pristop k inovacijskem sistemu. Tako bi povezali »konceptualno in teoretično delo z empiričnimi študijami, tako opredelili determinante in povečali znanje.«

V skladu s tem je predlagani pristop mogoče razumeti kot dodaten okvir, ki omogoča pridobitev preverljivih trditev. Na osnovi zgodnjega dela Röpkeja (1977) so kot determinante inovativne dejavnosti uporabljene naslednje tri vrste spremenljivk: lastninske pravice, zmožnosti in motivacija. Na podlagi tega teoretičnega ozadja so bile ugotovljene možnosti in problemi inovativne dejavnosti, ki bi se lahko uresničile ali bi nastali v administraciji. Kot analitično orodje bi slednje lahko pomagalo pri prepoznavanju pomembnih posledic za delovanje inovacijskega sistema. Če zaposlenim v javni upravi ni dovoljeno oziroma ti niso zmožni ali motivirani za inovacije, potem strukturna povezava z drugimi sektorji (znanostjo in gospodarstvom) na dolgi rok ne bo uspešna.

Javna naročila za inovacije je mogoče šteti za vzoren primer inovativnih aktivnosti v modelu trojne spirale. Pri nabavi se razmerje med vlado in gospodarstvom razširja z vidika raziskovanja in razvoja. V takšnih projektih

sodelujejo vsi trije družbeni podsistemi, pri čemer znanost in gospodarstvo opravljata svojo specifično funkcijo proizvodnje znanja ali dobrin in storitev.

Še več, zaradi omenjenega medsebojnega odnosa nastajajo novi izzivi za javno upravo. Nabava inovacij zahteva ukrepe z odločno usmerjenostjo k inovacijam, kar pa pogosto ovira obstoječa zakonodaja, ki ureja javna naročila. Usmerjenost k inovacijam pogosto spremlja tudi inovativno ravnanje s postopki (Lorenz in drugi, 2009, 64–75). Glede na te povezave, se inovativno vedenje razume v smislu zgoraj razvitega teoretičnega pristopa kot inovativna metoda obravnave, kot inovativno usmerjena praksa javnega naročanja in preprosto kot nabavna inovacija.

Zato javna naročila vsebujejo potencial precejšnje inovacijske spodbude tako za javno upravo in gospodarstvo, kot tudi za znanost. Glede na ta velikanski potencial, pregled usmerjenosti v inovacije in stopnja inovativnosti nemške zvezne prakse javnega naročanja precej razočarata. Spodbujanje inovativnosti pri strategiji javnega naročanja ima zgolj podrejeno vlogo, pri čemer je za oddajo javnih naročil, namesto številnih gospodarskih sodil ključna nabavna cena. Prav zaradi tega je sprejem inovativnih rešitev malo verjeten (Weber, 2009).

Da bi pojasnili zgoraj navedeno vrzel med potencialno in dejansko prakso javnega naročanja, kot orodja za inovacije, odvisne od povpraševanja, članek podrobneje obravnava tri spremenljivke inovativnega vedenja. V ta namen najprej izhaja iz hipoteze o pozitivnem vplivu petih dejavnikov iz analitičnega orodja, to so: okvirni pogoji, prevzemanje tveganja, posebno usposabljanje, organizacijska struktura in motivacija.

Z uporabo podatkov iz nemške prakse javnega naročanja lahko preverimo zgoraj navedene hipoteze. Statistični model zagotavlja empirični dokaz za hipoteze, da imajo okvirni pogoji, posebno usposabljanje in motiviranost zaposlenih na področju javnega naročanja precejšen pozitivni vpliv na inovativno vedenje pri javnih naročilih. Prav nasprotno pa pri hipotezah glede tveganja in organizacijske strukture ne moremo opaziti pomembnega vpliva. Vendar rezultati študije primera poudarjajo pomembnost vseh treh determinant inovativnega vedenja. Lastninske pravice (splošni pogoji), zmožnosti (posebno usposabljanje) in motivacija (spodbujanje) vplivajo na način dela javnih organov. Analitični okvir, razvit v tej raziskavi, pa omogoča boljše razumevanje dejstva, da je praksa naročanja inovativnih rešitev še vedno zelo omejena.

Skratka, številne ovire v delovanju in povezovanju organov javnega sektorja, pomanjkanje motivacijskih elementov v upravni kulturi in nasprotje med nizko ravnjo usposabljanja za javna naročila ter kompleksnostjo inovacijsko usmerjene prakse javnega naročanja, preprečujejo, da bi javno naročanje postalo instrument za spodbujanje inovativnosti javnih organov kot tudi zasebnih podjetij. Rezultati inovacijskega sistema bi lahko bili precejšnji: vendar če pomembnim akterjem ni dovoljeno inovirati, javni menedžerji pa niso zmožni ali niso motivirani za inoviranje, potem se vlada in gospodarski sistem pri tej nalogi še dolgo ne bosta uspešno povezala.

DOI: 10.17573/ipar.2015.1.02 *1.01 Izvirni znanstveni članek*

Opredelitev slovenskega dopolnilnega zdravstvenega zavarovanja kot storitev splošnega gospodarskega pomena

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IZVLEČEK

Dopolnilno zdravstveno zavarovanje je v slovenski zakonodaji opredeljeno kot dejavnost v javnem interesu, ki je neločljiv in bistven element sistema socialne varnosti ter kot tak uresničuje identične cilje kot obvezno zdravstveno zavarovanje – finančno varnost prebivalstva pred visokimi zdravstvenimi izdatki ter primeren in pravičen dostop do učinkovite in kakovostne zdravstvene oskrbe. Države članice EU pogosto uvajajo različne regulatorne ukrepe, s katerimi varujejo javni interes na področju gospodarskih dejavnosti. Ti ukrepi so pogosto v nasprotju s pravnim redom EU (pravili o delovanju notranjega trga in konkurenčno zakonodajo), kar je z vidika EU načeloma nedopustno. Cilj članka je opredelitev slovenskega dopolnilnega zdravstvenega zavarovanja kot storitev splošnega gospodarskega pomena, ki državam članicam širi meje avtonomnega urejanja oziroma omogoča sprejem regulatornih ukrepov, ki niso skladni s pravili o delovanju notranjega trga in konkurenčno zakonodajo EU.

Ključne besede: financiranje zdravstvenega varstva, dopolnilno zdravstveno zavarovanje, storitev splošnega gospodarskega pomena, javni interes

JEL: K32

1 Uvod

Zdravstveno zavarovanje je zavarovanje za izgubo, ki nastane zavarovancu v primeru bolezni, poškodbe, poroda ali smrti. Posameznikom, ki so vključeni v sistem zdravstvenega zavarovanja, zagotavlja socialno varnost pred negotovostjo, ki jih lahko doleti ob nastanku zavarovalnega dogodka. Nekatere države uporabljajo zdravstveno zavarovanje na sistematski ravni in prek predplačniških prispevkov financirajo sistem zdravstvenega varstva. V to skupino uvrščamo tudi Slovenijo, kjer se sistem zdravstvenega varstva financira iz dveh virov, to je iz javnih in zasebnih sredstev. Levji delež javnih sredstev,

okoli 75 %, znaša socialno oziroma obvezno zdravstveno zavarovanje.[1] Največji vir zasebnega financiranja pa so prostovoljna zdravstvena zavarovanja (nekaj več kot 50 % zasebnih sredstev), katerih več kot 90 % obsega dopolnilno zdravstveno zavarovanje (ZZZS, 2013, str. 144; SURS, 2013).[2]

Zdravstveno varstvo je temeljni element evropske socialne države. Kljub temu da države članice EU različno urejajo to področje, je skupna značilnost vseh ureditev zasledovanje univerzalnega dostopa, ki temelji na načelu solidarnosti. Države članice z vstopom v EU nanjo prenesejo izvrševanje dela suverenih pravic, kar z drugimi besedami pomeni, da se odrečejo delu svojih pristojnosti in jih v večji ali manjši meri prenesejo na institucije EU. Področje zdravstvenega varstva je na začetku razvoja Evropske gospodarske skupnosti spadalo povsem v pristojnost držav članic. Rimska pogodba, ki je stopila v veljavo leta 1958, ni vidneje posegala na področje zdravstva.[3] Razvoj Evropske gospodarske skupnosti in kasneje EU je skozi čas na številnih področjih dodobra zabrisal meje med pravnim redom držav članic in pravom EU. To se odraža tudi na področju zdravstvenega varstva. Zdravstveno varstvo je postajalo vse pomembnejši interes EU, kar je dobro razvidno iz erozije pristojnosti držav članic na tem področju.[4] Glavno vlogo pri tem imajo reforme ustanovitvenih pogodb, sekundarni pravni viri, razvoj interpretacije temeljnih načel in progresivna vloga Sodišča EU.[5] Tudi pri organiziranju sistema financiranja zdravstvenega varstva, države članice niso povsem avtonomne. Njihova avtonomija je v največji meri odvisna od načina organizacije sistema financiranja in njegove pravne ureditve. Države članice pogosto uvajajo različne regulatorne ukrepe, s katerimi varujejo javni interes na področju financiranja in izvajanja sistema zdravstvenega varstva. Ti ukrepi pogosto prestopijo prag avtonomnosti, ki jim ga dopušča evropska zakonodaja, kar pa je z vidika EU nedopustno.[6]

1 Preostali javni viri so proračunska sredstva države in občin.

2 Preostali zasebni viri so neposredna plačila prebivalstva za zdravstvene storitve (okoli 45 % zasebnih sredstev) ter donacije raznih dobrodelnih ustanov in drugih donatorjev.

3 Zdravstvo in zdravje, predvsem glede njegove zaščite, so omenjali zgolj trije členi: 36, 48(3) in 56(1).

4 Van de Gronden (2013, str. 128) piše o evropeizaciji na področju zagotavljanja in organiziranja socialnih storitev v splošnem interesu. Izraz evropeizacija uporablja tudi Szyszczak (2013, str. 321), s katerim pojasnjuje nastanek mreže uveljavljenih in novih akterjev, ki ustvarjajo koncept socialnih storitev splošnega pomena, ter nove pristojnosti Evropske komisije v obliki nezavezujoče zakonodaje in »mehkega« upravljanja (angl. *soft governance*).

5 Za podrobnejšo razpravo o razvoju vpliva pravnega reda EU na socialne storitve od začetka integracij do Lizbonske pogodbe glej Damjanovic & de Witte (2009).

6 Slovensko dopolnilno zdravstveno zavarovanje se je že znašlo pred Sodiščem EU. Evropska komisija je v tožbi Sloveniji očitala neizpolnitev obveznosti iz člena 8(3) Prve direktive o neživljenjskem zavarovanju ter iz členov 29 in 39 Tretje direktive o neživljenjskem zavarovanju ter tudi iz členov 56 in 63 PDEU (Sodba SEU C-185/11 z dne 26. januarja 2012, odst. 19). Glede očitka v zvezi s kršitvijo člena 8(3) Prve direktive o neživljenjskem zavarovanju ter 29. in 39. člena Tretje direktive o neživljenjskem zavarovanju je Sodišče EU ugotovilo, da Republika Slovenija z nepravilno in nepopolno implementacijo Prve in Tretje direktive o neživljenjskem zavarovanju ni izpolnila obveznosti iz člena 8(3) Prve direktive o neživljenjskem zavarovanju ter iz členov 29 in 39 Tretje direktive o neživljenjskem zavarovanju (Sodba SEU C-185/11 z dne 26. januarja 2012, odst. 27). Očitek v zvezi s kršitvijo členov 56 in 63 PDEU je Sodišče EU zavrglo na podlagi ugotovitev, da v obravnavani zadevi ni koherentnosti med povzetkom očitka, da Republika Slovenija krši člena 56 in 63 PDEU, ter tožbenim predlogom, v okviru katerega Evropska komisija Sloveniji očita nepravilen in nepopoln prenos Prve in Tretje direktive o neživljenjskem zavarovanju (Sodba SEU C-185/11 z dne 26. januarja 2012, odst. 30). Sodišče je tožbeni zahtevek zavrglo kot nedopusten, kar pomeni, da o zadevi ni odločalo meritorno.

Na pravno ureditev zdravstvenega varstva, kamor spada tudi sistem financiranja zdravstvenega varstva, ima v smislu pravnega reda EU izredno velik vpliv koncept *storitve splošnega pomena* (angl. *Service of General Interest – SGI*). Opredelitev posameznih segmentov zdravstvenega varstva v kontekstu storitve splošnega pomena pod določenimi pogoji izključuje domet pravil notranjega trga in konkurenčne zakonodaje EU (*negospodarske storitve splošnega pomena*) oziroma upravičuje regulatorne posege držav članic, ki niso skladni s pravili o delovanju notranjega trga in konkurenčno zakonodajo EU (*storitve splošnega gospodarskega pomena*). Cilj prispevka je opredelitev slovenskega dopolnilnega zdravstvenega zavarovanja kot storitev splošnega gospodarskega pomena, ki državam članicam širi meje avtonomnega urejanja oziroma omogoča sprejem regulatornih ukrepov, ki niso skladni s pravili o delovanju notranjega trga in konkurenčno zakonodajo EU. Takšna opredelitev nacionalnemu zakonodajalcu omogoča sprejem regulatornih ukrepov v javnem interesu, ki krepijo socialno dimenzijo na področju financiranja zdravstvenega varstva.

2 Koncept storitve splošnega pomena

2.1 Storitve splošnega pomena

Storitve splošnega pomena oziroma javne službe, kot jih tudi imenujemo, so pravni koncept, ki zajema vrsto različnih dejavnosti. Mednje uvrščamo obsežne mrežne gospodarske panoge, kot so energetika, telekomunikacije, promet, avdiovizualne in poštne storitve, izobraževanje, oskrbo z vodo, ravnanje z odpadki ter ne nazadnje tudi zdravstvene in socialne storitve. Te storitve imajo pomembno vlogo pri zagotavljanju socialne, ekonomske in ozemeljske kohezije celotne EU ter so bistvene za njen trajnostni razvoj glede višje stopnje zaposlenosti, socialne vključenosti, ekonomske rasti in kakovosti okolja (Evropska komisija, 2007, str. 3). Storitve splošnega pomena lahko nadalje opredelimo kot storitve gospodarske narave – storitve splošnega gospodarskega pomena in kot storitve negospodarske narave – negospodarske storitve splošnega pomena.

2.2 Negospodarske storitve splošnega pomena

Med negospodarske storitve splošnega pomena (negospodarske javne službe) uvrščamo naslednje dejavnosti: davčni sistem, policijo, sodstvo, sisteme socialne varnosti ipd. Za te dejavnosti velja, da spadajo v izključno pristojnost držav članic, kar v smislu pravnega reda EU pomeni, da niso predmet konkurenčne zakonodaje EU in pravil, ki urejajo delovanje notranjega trga (Evropska komisija, 2007, 4; 2. člen Protokola št. 26 o storitvah splošnega pomena, ki je dodan Lizbonski pogodbi (2007/C 306/01)). Obseg dejavnosti, ki so opredeljene kot negospodarske storitve splošnega pomena, se v pravnem

Glede na zapisano lahko Evropska komisija ponovno vloži tožbo zoper Slovenijo in ob ustrezni dopolnitvi tožbenega zahtevka doseže meritorno obravnavo zadeve.

redu EU skozi čas vztrajno krči, kar hkrati zmanjšuje avtonomijo držav članic na tem področju. Pri tem igra poglavitno vlogo Evropska komisija, ki z »mehkim pristopom« (nezavezujočimi pravnimi akti) širi domet evropske zakonodaje (Neergard, 2013, 209).

2.3 Storitve splošnega gospodarskega pomena

Koncept storitve splošnega gospodarskega pomena se nanaša na tržne storitve, za katere države članice zaradi splošnega pomena določijo posebne obveznosti zagotavljanja javnih storitev. Mednje uvrščamo dejavnosti, ki jih zagotavljajo velike mrežne gospodarske panoge (telekomunikacije, poštne storitve, elektrika, plin, promet itd.) in druge storitve splošnega gospodarskega pomena (upravljanje z odpadki, oskrba s pitno vodo, RTV itd.) (Pečarič in Bugarič, 2011, 166). Storitve splošnega gospodarskega pomena obravnavajo domala vsi segmenti pravnega reda EU. Njihovo opredelitev zasledimo v primarni zakonodaji, natančneje v Pogodbi o delovanju Evropske unije (v nadaljevanju PDEU) in Protokolu št. 26 o storitvah splošnega pomena, ki je priložen Lizbonski pogodbi. PDEU v členu 106(2) navaja, da morajo podjetja, pooblaščena za opravljanje storitev splošnega gospodarskega pomena, oziroma podjetja, ki imajo značaj dohodkovnega monopola, ravnati po pravilih o delovanju notranjega trga in konkurenčni zakonodaji EU. Vendar pa ta člen določa tudi izjeme od tega pravila v primeru, če bi uporaba pravil o delovanju notranjega trga in konkurenci pravno ali dejansko ovirala izvajanje nalog, ki so takim podjetjem dodeljene. Ta izjema se uporabi le, kadar ni vpliva na razvoj trgovine v obsegu, ki bi bil v nasprotju z interesi EU (Evropska komisija, 2011, 3. odstavek).

Poleg primarne zakonodaje urejajo storitve splošnega gospodarskega pomena tudi sekundarni pravni viri. Najpomembnejši med njimi je *Direktiva o storitvah na notranjem trgu*.[7] Večina sekundarnih pravnih virov s področja storitev splošnega gospodarskega pomena je odraz liberalizacijske politike EU, ki je potekala po tako imenovanem sektorskem pristopu, v sklopu katerega je Evropska komisija z različnimi sekundarnimi zakonodajnimi akti uredila posebnosti izvajanja posameznih storitev splošnega gospodarskega pomena (področje energetike, telekomunikacij, transporta in drugih, na omrežje vezanih gospodarskih dejavnosti) (Brezovnik, 2008, 40).[8]

7 Direktiva 2006/123/ES Evropskega parlamenta in Sveta z dne 12. decembra 2006 o storitvah na notranjem trgu (Uradni list L 376/37, 27. 12. 2006).

8 Direktiva 96/92/ES Evropskega parlamenta in Sveta z dne 19. 6. 1996 o skupnih pravilih notranjega trga z električno energijo (Uradni list L 027, 30. 1. 1997); Direktiva 97/67/ES Evropskega parlamenta in Sveta z dne 15. decembra 1997 o skupnih pravilih za razvoj notranjega trga poštnih storitev v Skupnosti in za izboljšanje kakovosti storitve (Uradni list L 15, 21. 1. 1998); Direktiva 2002/22/ES Evropskega parlamenta in Sveta z dne 7. marca 2002 o univerzalnih storitvah in pravicah uporabnikov v zvezi z elektronskimi komunikacijskimi omrežji in storitvami (Direktiva o univerzalni storitvi) (Uradni list EU L 108, 24. 4. 2002); Direktiva 97/33/ES Evropskega parlamenta in Sveta z dne 30. junija 1997 o medomrežnem povezovanju v telekomunikacijah glede zagotavljanja univerzalnih storitev in interoperabilnosti z uporabo načel zagotavljanja odprtosti omrežij (Uradni list EU L 199, 26. 7. 1997) itd.

Poleg primarne in sekundarne zakonodaje lahko zasledimo tudi druge oblike zavezujočih in nezavezujočih pravnih aktov, s katerimi institucije in drugi organi EU posegajo na področje storitev splošnega gospodarskega pomena.[9]

Kljub obsežni literaturi, ki obravnava storitve splošnega gospodarskega pomena, in velikemu prizadevanju vseh treh vej oblasti EU za njihovo natančno opredelitev , kar se odraža na številnih aktih s tega področja, še zmeraj ni bila izoblikovana povsem jasna pravna definicija tega koncepta.

2.4 Socialne storitve splošnega pomena

Za področje zdravstvenega varstva je pomemben tudi koncept *socialnih storitev splošnega pomena* (angl. *social service of general interest – SSGI*).[10] Tako primarna kot sekundarna zakonodaja tega pojma ne opredeljujeta. Gre za novejši koncept v družini storitev splošnega pomena, ki ga v zavezujočih pravnih aktih EU ne zasledimo. V politični agendi EU se prvič pojavi v Poročilu Evropske komisije o zasedanju Evropskega sveta v Laeknu – Storitve splošnega pomena iz leta 2001. V pravnem kontekstu pa ga prvič zasledimo v nezavezujočem sporočilu Evropske komisije z naslovom *Izvajanje programa Skupnosti iz Lizbone: Socialne storitve splošnega pomena v Evropski uniji*,[11] ki poleg storitev zdravstvenega varstva v ožjem smislu[12] opredeljuje tudi dve veliki skupini socialnih storitev, kamor uvrščamo obvezna in dopolnilna zdravstvena zavarovanja.[13]

Sporočilo nadalje pojasnjuje, da socialne storitve splošnega pomena v pravu EU ne predstavljajo samostojne pravne kategorije.[14] Socialne storitve splošnega pomena v pravnem smislu uvrščamo, odvisno od njihove narave dejavnosti, med storitve splošnega gospodarskega pomena ali pa med negospodarske storitve splošnega pomena. Samo dejstvo, da je dejavnost označena kot socialna dejavnost, še ne pomeni, da je hkrati ni mogoče označiti kot gospodarsko dejavnost. Socialne storitve splošnega pomena, ki imajo gospodarsko naravo, uvrščamo med storitve splošnega gospodarskega pomena (Evropska komisija, 2010, str. 17). Zanje velja, da mora biti zagotovljena

9 Za ponazoritev navajamo le nekaj primerov: Komisija EU: Zelena knjiga o storitvah splošnega pomena, Bruselj, 21. 5. 2003, COM(2003) 270 končno; Sporočilo Komisije: Bela knjiga o storitvah splošnega pomena, Bruselj, 12. 5. 2004, COM (2004) 374 končno; Resolucija Evropskega parlamenta z dne 5. julija 2011 o prihodnosti socialnih storitev splošnega pomena (2009/2222(INI)); Resolucija Evropskega parlamenta z dne 14. marca 2007 o socialnih storitvah splošnega pomena v Evropski uniji (2006/2134(INI)); Primeri: zadeva C-393/92, Almelo, [1993], zadeva C-320/91, Corbeau, [1993], zadeva C-340/99, TNT Traco, [2001], zadeva C-393/92, Almelo, [1993], zadeva C-475/99, Ambulanz Glöckner, [2001], zadeva C-41/90, Höfner and Elser, [1991], zadeva C-266/96, Corsica Ferries, [1998]…

10 Za razvoj in boljše razumevanje ter razlikovanje vseh konceptov splošnega pomena glej Neergaard (2013).

11 Sporočilo Komisije: Izvajanje programa Skupnosti iz Lizbone: Socialne storitve splošnega pomena v Evropski uniji (COM(2006) 177, z dne 26. 4. 2006).

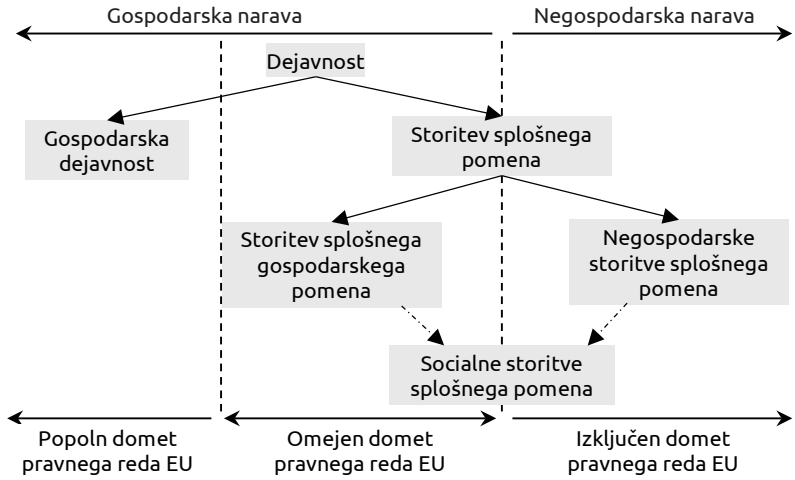
12 Te niso zajete s tem Sporočilom Komisije.

13 Natančneje v prvo skupino: »zakonsko določene in komplementarne oziroma dopolnilne sisteme socialne varnosti v različnih organizacijskih oblikah (vzajemni ali poklicni), ki zajemajo temeljna življenjska tveganja, povezana z zdravjem, starostjo, nesrečami pri delu, brezposelnostjo, upokojitvijo in invalidnostjo«.

14 Tako meni tudi Szyszczak (2013).

skladnost njihovega načina organizacije in delovanja s pravili notranjega trga in konkurenčno zakonodajo EU.[15]

Slika 1: Domet pravnega reda EU



Vir: prirejeno po Hatzopoulos (2011, str.12).

3 Pristojnosti in pogoji opredeljevanja dejavnosti dopolnilnega zdravstvenega zavarovanja kot storitve splošnega gospodarskega pomena

Storitve splošnega gospodarskega pomena se razlikujejo od običajnih gospodarskih storitev, saj država meni, da jih je treba opravljati tudi v primeru nezadostne tržne spodbude. S tem se ne zanika, da je trg v nekaterih primerih najboljši mehanizem zagotavljanja teh storitev, temveč državam zgolj dopušča, da v primeru, če menijo, da so nekatere storitve v splošnem interesu in jih tržne sile ne zmorejo uspešno zadovoljiti, poskrbijo za zagotovitev teh storitev pod posebnimi pogoji v obliki obveznosti zagotavljanja storitve splošnega pomena (Evropska komisije, 2001, točka 14).

Prvi pogoj za opredelitev dejavnosti kot storitve splošnega gospodarskega pomena je, da ima dejavnost gospodarsko naravo. Drugi pogoj za opredelitev zahteva, da se z dejavnostjo zagotavljajo za družbo eksistenčno pomembne storitve (dobrine), zato družba upošteva, da je preskrba s temi storitvami (dobrinami) v javnem interesu in jih podvrže posebnemu pravnemu režimu.

Pri opredeljevanju dejavnosti kot storitve splošnega gospodarskega pomena z vidika evropske zakonodaje je pomembno vprašanje distribucije kompetenc med državami članicami in EU. Države članice imajo pri opredeljevanju

15 Neergardova (2013, str. 207–210) ponazarja razmerje med storitvami splošnega pomena, storitvami splošnega gospodarskega pomena (oziroma negospodarskimi storitvami splošnega pomena) in socialnimi storitvami splošnega pomena s sorodstvenim razmerjem med staro mamo, mamo in vnukinjo.

storitve splošnega gospodarskega pomena široko diskrecijo, kar podpirajo tako primarna in sekundarna zakonodaja EU kot tudi sodna praksa Sodišča EU. V pravnem redu EU ne zasledimo natančne opredelitve pojma storitev splošnega gospodarskega pomena, niti pogojev, ki morajo biti izpolnjeni, da bi se lahko država članica sklicevala na obstoj in varstvo posebnega pravnega režima storitve splošnega gospodarskega pomena.[16] Evropski zakonodaja tudi ne podeljuje EU posebnih pristojnosti glede storitev splošnega gospodarskega pomena. Na podlagi teh argumentov je Sodišče EU v primeru BUPA zavzelo stališče, da je opredelitev dejavnosti kot storitve splošnega gospodarskega pomena v pristojnosti držav članic.[17] Na področju storitev splošnega gospodarskega pomena, ki imajo naravo socialnih oziroma zdravstvenih storitev, je takšno stališče še toliko močnejše, saj imajo države članice na tem področju skoraj izključno pristojnost.[18] Države članice so na podlagi člena 168(7) PDEU odgovorne za opredelitev zdravstvene politike ter organiziranje in zagotavljanje zdravstvenih storitev in zdravstvene oskrbe. Iz tega sledi, da so tudi za opredelitev obveznosti storitve splošnega gospodarskega pomena v tem okviru najprej pristojne države članice. Enako opredelitev pristojnosti na splošni ravni izraža tudi člen 14 PDEU, v skladu s katerim ob upoštevanju položaja, ki ga imajo storitve splošnega gospodarskega pomena v okviru skupnih vrednot in vloge, ki jo imajo pri pospeševanju socialne in teritorialne kohezije v EU, EU in države članice v mejah svojih pristojnosti skrbijo, da takšne službe delujejo na podlagi načel in pogojev, ki jim omogočajo izpolnjevanje njihovih nalog.[19] Sodišče EU je v zadevah FFSA proti Komisiji [C-174/97, 100], Olsen proti Komisiji [T-17/02, 216] in BUPA [T-289/03, 169] zavzelo stališče, da je pristojnost EU pri opredeljevanju storitev splošnega gospodarskega pomena zelo omejena in se nanaša zgolj na iskanje očitnih napak pri presoji držav članic.[20]

Kljub široki diskreciji držav članic morajo biti te pri tem vseeno pazljive, da dejavnost v okoliščinah danega primera izpolnjuje v sodni praksi Sodišča EU opredeljena najnižja merila, skupna vsaki storitvi splošnega gospodarskega pomena. Ta merila od držav članic terjajo, da pri opredeljevanju dokažejo (i) gospodarsko naravo zadevne dejavnosti, (ii) da se dejavnost izvaja

16 Zadeva BUPA [T-289/03, 165].

17 Široko diskrecijsko pravico držav članic pri opredeljevanju je Sodišče EU potrdilo tudi v zadevi FFSA in drugi proti Komisiji [T 106/95, 99]. Takšno stališče zasledimo tudi v Direktivi o storitvah 1(3) in številnih dokumentih Evropske komisije: Sporočilo Komisije o uporabi pravil Evropske unije o državni pomoči za nadomestilo, dodeljeno za opravljanje storitev splošnega gospodarskega pomena, 2012/C 8/02, točka 46; Sporočilo Komisije: Storitve splošnega pomena v Evropi (96/C281/03), OJ C 281/3, sekcija 26; Sporočilo Komisije: Bela knjiga o storitvah splošnega pomena, Bruselj, 12. 5. 2004, COM (2004) 374 končno, str. 5–6; Zelena knjiga o storitvah splošnega pomena, COM(2003) 270, sekcija 30–32, itd.

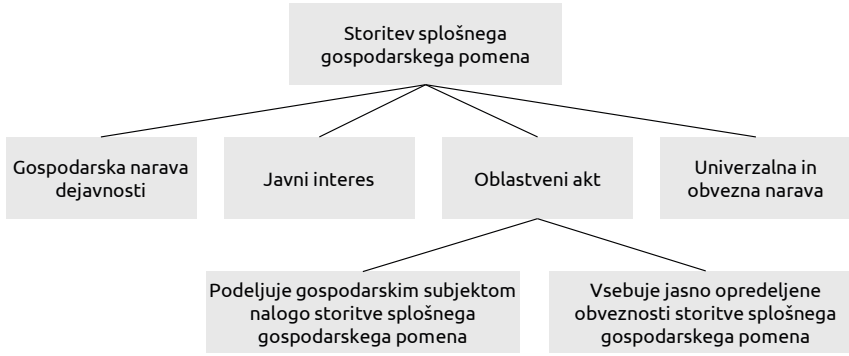
18 Glej člene 2(5), 6, 153 in168(1), (7) PDEU.

19 Zadeva BUPA [T-289/03, 167].

20 Takšno stališče je zavzela tudi Evropska komisija v Sporočilu Komisije o uporabi pravil Evropske unije o državni pomoči za nadomestilo, dodeljeno za opravljanje storitev splošnega gospodarskega pomena, 2012/C 8/02, točka 46.

v javnem interesu,[21] (iii) obstoj oblastvenega akta, s katerim je zadevnemu gospodarskemu subjektu podeljena naloga storitve splošnega gospodarskega pomena (oblastveni akt mora vsebovati jasno opredelitev obveznosti storitve splošnega gospodarskega pomena) ter (iv) univerzalno in obvezno naravo podeljene naloge. Če država tega ne stori, lahko to pomeni očitno napako, ki jo Evropska komisija mora sankcionirati. V nadaljevanju razčlenjujemo merila za opredeljevanje storitve splošnega gospodarskega pomena in v tej luči presojamo slovensko dopolnilno zdravstveno zavarovanje.

Slika 2: Merila za opredelitev dejavnosti kot storitve splošnega gospodarskega pomena



Vir: lasten.

4 Ali slovensko dopolnilno zdravstveno zavarovanje izpolnjuje merila za opredelitev dejavnosti kot storitve splošnega gospodarskega pomena

Če želimo opredeliti slovensko dopolnilno zdravstveno zavarovanje kot storitev splošnega gospodarskega pomena, moramo dokazati, da zavarovanje izpolnjuje merila iz slike 2.

a) Gospodarska narava dejavnosti

Iz ustaljene sodne prakse Sodišča EU izhaja, da ima dejavnost gospodarsko naravo, če izpolnjuje dva kriterija: v okviru te dejavnosti se na trgu ponujajo izdelki ali storitve[22] in finančno tveganje pri opravljanju dejavnosti nosi subjekt, ki to dejavnost opravlja (ponuja na trgu izdelke ali storitve).[23] To ne pomeni,

21 Država ima dolžnost navesti razloge, zaradi katerih meni, da je treba zadevno storitev zaradi njenega posebnega pomena opredeliti kot storitev splošnega gospodarskega pomena in jo tako ločiti od drugih gospodarskih dejavnosti. Glej Zadevo BUPA [T-289/03, 172] in zadevo Merci Convenzionali Porto di Genova [C-179/90, 27].

22 Zadeva Cisal in INAIL [C 218/00, 23].
Nakup dobrin ali storitev na trgu ne opredeljuje (gospodarske) narave te dejavnosti per se. Za namen presoje narave dejavnosti je treba upoštevati tudi poznejšo uporabo kupljenega proizvoda, saj gospodarska ali negospodarska narava poznejše uporabe proizvoda opredeljuje tudi naravo dejavnosti nakupa (FENIN [C-205/03, 26]).

23 Zadeva Wouters C-309/99, 48-49].

da mora subjekt opravljati dejavnost na dobičkonosen način,[24] temveč zadostuje že to, da jo lahko vsaj načeloma izvaja na takšen način (Hatzopoulos, 2011, str. 18–19).[25] Slovenski sistem dopolnilnega zdravstvenega zavarovanja je dejavnost, ki jo izvajajo zdravstvene zavarovalnice po tržnih zakonitostih in s pridobitnim namenom. Dejavnost izpolnjuje oba kriterija, saj zdravstvene zavarovalnice ponujajo dopolnilno zdravstveno zavarovanje na trgu in hkrati nosijo finančno tveganje pri opravljanju te dejavnosti. Glede na oba izpolnjena kriterija lahko nedvomno potrdimo gospodarsko naravo dopolnilnega zdravstvenega zavarovanja.

b) Splošni pomen oziroma javni interes

Za opredelitev dejavnosti kot storitve splošnega gospodarskega pomena je treba dokazati, da je ponudba oziroma opravljanje storitve v splošnem oziroma javnem interesu. Zakonodajalec je v členu 62 Zakona o zdravstvenem varstvu in zdravstvenem zavarovanju (v nadaljevanju ZZVZZ)[26] opredelil, da pomeni dopolnilno zdravstveno zavarovanje javni interes Republike Slovenije, saj skupaj z obveznim zdravstvenim zavarovanjem tvori sistem socialne varnosti. Samo dejstvo, da nacionalni zakonodajalec v splošnem interesu v širšem smislu določi poseben pravni režim izvajanja določene dejavnosti, načeloma ni bistveno za obstoj storitve splošnega gospodarskega pomena.[27] Treba je tudi dejansko dokazati, da je izvajanje dejavnosti v javnem interesu.

Dopolnilno zdravstveno zavarovanje ni le sestavni del sistema socialne varnosti, temveč njegov neločljiv in bistven element ter kot tak uresničuje identične cilje kot obvezno zdravstveno zavarovanje – finančna varnost prebivalstva pred visokimi zdravstvenimi izdatki ter primeren in pravičen dostop do učinkovite in kakovostne zdravstvene oskrbe. Brez vključitve v dopolnilno zdravstveno zavarovanje se zdita finančna varnost pred visokimi zdravstvenimi izdatki ter primeren dostop do učinkovite in kakovostne zdravstvene oskrbe, nedosegljiva ideala. Javni interes dopolnilnega zdravstvenega zavarovanja potrjuje tudi njegova močna socialna funkcija, ki se odraža s pomočjo naslednjih argumentov:

(i) dopolnilno zdravstveno zavarovanje je pomemben in nepogrešljiv vir financiranja sistema zdravstvenega varstva;

(ii) visoka pokritost prebivalstva z dopolnilnim zdravstvenim zavarovanjem;

(iii) namen ustanovitve in narava dopolnilnega zdravstvenega zavarovanja.

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24 Zadeva FFSA [C-244/94, 21].

25 Zadeva SAT Fluggesellschaft mbH v. Eurocontrol [C-364/92, 9]. Za več o razlagi drugega kriterija, ki je izredno široka (ne zahteva se dejanska konkurenca, temveč zadostuje že domnevna konkurenca), glej Sauter W. in Schapel H.: State and Market in EU Law: The Public and Private Spheres of the Internal Market before the EU Courts (Cambridge: CUP, 2009), stran 82.

26 Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju (ZZVZZ), Uradni list RS, št. 9/1992.

27 Glej zadevo BUPA [T-289/03, 178].

i) Dopolnilno zdravstveno zavarovanje kot pomemben in nepogrešljiv vir financiranja zdravstvenega varstva

Zasebna sredstva pri financiranju zdravstvenega varstva so v leta 2011 znašala 841.743.000 evrov, kar znaša 26,3 % vseh izdatkov za zdravstveno varstvo. Sredstva iz prostovoljnih zdravstvenih zavarovanj so v istem letu znašala okoli 422.000.000 evrov, kar je nekaj več kot 50 % vseh zasebnih sredstev (ZZZS, 2013, 144). Levji delež teh sredstev predstavljajo sredstva dopolnilnega zdravstvenega zavarovanja, ki so leta 2010 znašala okoli 400.000.000 evrov, to je krepko čez 90 % vseh sredstev prostovoljnih zdravstvenih zavarovanj (Šik, 2011, str. 41).[28] Tako velik delež prostovoljnih oziroma dopolnilnih zdravstvenih zavarovanj v financiranju zdravstvenega varstva najdemo v EU le še v Franciji. Poleg znatnega deleža sredstev (okoli 13 % vseh izdatkov za zdravstveno varstvo), ki kaže na izredno pomembno vlogo dopolnilnega zdravstvenega zavarovanja v sistemu zdravstvenega varstva, nosi to zavarovanje tudi breme kritja stroškov medicinske inflacije in neučinkovitosti javnega financiranja zdravstvenega varstva.

Na prevalitev bremena medicinske inflacije na dopolnilno zdravstveno zavarovanje kaže dejstvo, da se skupna prispevna stopnja obveznega zdravstvenega zavarovanja ni spremenila vse od leta 2002. Medicinska inflacija je praviloma nad stopnjo splošne inflacije, ki je v obdobju od januarja 2003 do marca 2014 znašala 34,2 %. Na kritje bremena medicinske inflacije nakazuje tudi poslovanje zdravstvenih zavarovalnic, ki izvajajo dopolnilno zdravstveno zavarovanje.[29] Triglav je v obdobju 2007–2014 dvignil premije dopolnilnega zdravstvenega zavarovanja iz 20,61 evra na 29,42 evra, kar pomeni 42,7-odstotno povišanje. Adriatic Slovenica je v obdobju 2006–2014 dvignila premije iz 20,71 evra na 29,38 evra, kar pomeni 41,8-odstotno povišanje.[30] Čeprav v Sloveniji podatki o medicinski inflaciji za to obdobje niso dostopni, se dvigi premij ujemajo oziroma, tako kot je pričakovati, presegajo stopnjo splošne inflacije. Obe zdravstveni zavarovalnici sta po večini opravičevali postopno dvigovanje premij z rastjo stroškov zdravstvenih storitev in spreminjanjem deležev kritja pravic iz obveznega zdravstvenega zavarovanja. Prevalitev stroškov medicinske inflacije povečuje pomen dopolnilnega zdravstvenega zavarovanja in skladno s tem uresničevanje socialnega cilja, saj na ta način država ohranja obstojnost financiranja obveznega zdravstvenega zavarovanja ter dostopnost in kakovost zdravstvenih storitev, ki so del obveznega zdravstvenega zavarovanja.

Gospodarska kriza in recesija, ki je krizi sledila, sta prinesli vidne spremembe na področju financiranja zdravstvenega varstva. Zakonodajalec in Zavod

28 V tem letu so iz naslova dopolnilnega zdravstvenega zavarovanja obračunali skoraj 370.000.000 evrov odhodkov za škodne dogodke. Za več o visokem škodnem količniku dopolnilnega zavarovanja, ki je znašal leta 2006 kar 88 %, glej Milenkovič Kramer (2009).

29 Ne moremo trditi, da je dopolnilno zdravstveno zavarovanje nosilo celotno breme medicinske inflacije, saj sta se na ta račun povečevala tudi luknja v zdravstveni blagajni in obseg sredstev neposrednih plačil uporabnikov zdravstvenih storitev.

30 Splošna inflacija je v obdobju 2006–2014 znašala 20,4 %.

za zdravstveno zavarovanje Slovenije (v nadaljevanju ZZZS) kot nosilec obveznega zdravstvenega zavarovanja sta pri reševanju finančnih težav zdravstvene blagajne posegla po kratkoročni strategiji, ki ne odpravlja strukturnih pomanjkljivosti, temveč zgolj blaži bolezenske znake in hkrati poglablja razsežnost pomanjkljivosti. Varčevalni ukrepi, ki so odraz prezadolženosti države in zdravstvene blagajne, ter prenos finančnega bremena iz javnih virov financiranja na zasebne predstavljajo osrednji del strategije, katere cilj je zagotavljanje finančne vzdržnosti sistema zdravstvenega varstva. Prenos finančnega bremena prezadolžene zdravstvene blagajne na zasebne vire financiranja oziroma v največji meri na dopolnilno zdravstveno zavarovanje je posledica znižanja odstotnega deleža plačil zdravstvenih storitev, ki je krit iz naslova obveznega zdravstvenega zavarovanja (zviševanje doplačil).[31] Na ta način je država kratkoročno prenesla del finančnega bremena in družbene odgovornosti na zdravstvene zavarovalnice, ki pa so s hitrim odzivom in dvigom zavarovalnih premij breme nadalje prevalile na prebivalstvo.[32] Država s povečevanjem odstotnega deleža kritja zdravstvenih storitev iz naslova dopolnilnega zdravstvenega zavarovanja dodatno povečuje njegovo vlogo in pomen v sistemu zdravstvenega varstva.

ii) Visoka pokritost prebivalstva z dopolnilnim zdravstvenim zavarovanjem

Konec leta 2012 je bilo v obvezno zdravstveno zavarovanje vključenih 2.076.273 zavarovanih oseb, od tega 1.536.876 zavarovancev in 539.397 družinskih članov (ZZZS, 2013, str. 18).[33] Dopolnilno zdravstveno zavarovanje je imelo leta 2012 v povprečju sklenjenih 1.431.951 zavarovancev (Gracar, 2014, str. 14). Ker se nekaterim posameznikom ni treba vključiti v dopolnilno zdravstveno zavarovanje, saj imajo doplačila zdravstvenih storitev krita iz drugih naslovov (državnega proračuna,[34] obveznega zdravstvenega zavarovanja[35]), je pokritost z dopolnilnim zdravstvenim

31 Za več o spremembah zakonodaje in ukrepih, ki jih je ZZZS sprejel na podlagi zakonodajnih sprememb; glej ZZZS (2012, str. 20–21).

32 Odličen primer takšne prakse je sprejem Zakona o uravnoteženju javnih financ (ZUJF) (Uradni list RS, št. 40/12). Zaradi zniževanja deleža kritja zdravstvenih storitev iz obveznega zdravstvenega zavarovanja, ki je bilo posledica sprejetja tega zakona, se je mesečna premija s 1. 7. 2012 pri vseh treh zdravstvenih zavarovalnicah dvignila za 15–20 %.

33 Po podatkih SURS je imela Slovenija 1. oktobra 2012 2.058.123 prebivalcev. To potrjuje skoraj popolno pokritost prebivalstva z obveznim zdravstvenim zavarovanjem.

34 Iz tega naslova imajo krita doplačila (24. in 25. ZZVZZ):
- priporniki, ki niso zavarovanci iz drugega naslova, obsojenci na prestajanju kazni zapora in mladoletniškega zapora, mladoletniki na prestajanju vzgojnega ukrepa oddaje v prevzgojni dom, osebe, ki jim je bil izrečen varnostni ukrep obveznega psihiatričnega zdravljenja in varstva v zdravstvenem zavodu ter obveznega zdravljenja odvisnosti od alkohola in drog;
- zavarovanci in po njih zavarovani družinski člani, ki nimajo zagotovljenega plačila zdravstvenih storitev v celoti iz obveznega zdravstvenega zavarovanja, če izpolnjujejo pogoje za pridobitev denarne socialne pomoči, kar ugotavlja center za socialno delo;
- vojni invalidi;
- vojni veterani;
- žrtve vojnega nasilja.

35 Iz tega naslova imajo krita doplačila:
- otroci, učenci in študenti, ki se redno šolajo (posamezniki do dopolnjenega osemnajstega leta starosti oziroma v primeru rednega šolanja do šestindvajsetega leta starosti);
- otroci in mladostniki z motnjami v telesnem in duševnem razvoju;

zavarovanjem ogromna. O tem priča tudi majhna razlika med obveznim in dopolnilnim zdravstvenim zavarovanjem (približno 105.000 oseb). Oktobra 2012 je po podatkih SURS in Ministrstva za delo, družino, socialne zadeve in enake možnosti v Sloveniji prebivalo 363.442 oseb, mlajših od osemnajst let, in 45.734 prejemnikov socialne pomoči. Seštevek mladoletnih oseb in prejemnikov socialne pomoči, ki mu prištejemo zavarovance, ki imajo sklenjeno dopolnilno zavarovanje, znaša več kot 1.800.000 oseb. Če temu prištejemo še dijake in študente, stare med osemnajst in šestindvajset let, ki se redno šolajo,[36] ter druge skupine prebivalstva, ki jim krije doplačila državni proračun, se močno približamo pokritosti z obveznim zdravstvenim zavarovanjem. S tem dokazujemo, da je v dopolnilno zdravstveno zavarovanje vključeno skoraj celotno prebivalstvo Slovenije. Izjemno velika pokritost z dopolnilnim zdravstvenim zavarovanjem je značilna za vse države, ki imajo dopolnilno zdravstveno zavarovanje za doplačila uporabnikov (Francija, Belgija, Luksemburg) (Mossialos & Thomson, 2009, str. 27). Tako velika pokritost dodatno potrjuje pomembno vlogo dopolnilnega zdravstvenega zavarovanja v sistemu socialne varnosti in hkrati dokazuje njegovo močno socialno funkcijo.

iii) Namen ustanovitve in narava dopolnilnega zdravstvenega zavarovanja

Namen ustanovitve in narava dopolnilnega zdravstvenega zavarovanja sta prežeta z močno socialno konotacijo. Sistem financiranja zdravstvenega varstva temelji na obveznem zdravstvenem zavarovanju, ki pa ne krije vseh zdravstvenih storitev, temveč zgolj tiste, ki so določene z zakonom.[37] Tudi delež kritja obveznega zdravstvenega zavarovanja se razlikuje glede na skupino, v katero je razvrščena posamezna storitev. V celotni vrednosti krije le peščico zdravstvenih storitev, pri vseh drugih pa mora razliko do polne vrednosti doplačati zavarovanec neposredno ponudniku storitev. Višina doplačil variira med 10 in 90 % vrednosti zdravstvene storitve. Določena doplačila so zaradi visoke cene zdravstvenih storitev tako visoka, da jih lahko uvrstimo v kategorijo »katastrofalnih« zdravstvenih izdatkov. Po podatkih Vzajemne so zneski nekaterih doplačil v prvi polovici leta 2013 dosegli naslednje vrednosti: najvišje doplačilo za zdravilo iz vmesne liste (90 % vrednosti tega zdravila krije dopolnilno zdravstveno zavarovanje) je znašalo 9.579,11 evrov; povprečno doplačilo za zdraviliško zdravljenje je znašalo 832 evrov, medtem ko je znašalo najdražje kar 4.560 evrov; najvišje enkratno doplačilo za najzahtevnejše bolniške storitve, ki jih je potrebovalo več kot 8.000 zavarovancev (dopolnilno zdravstveno zavarovanje krije 10 % njihove vrednosti), je znašalo 21.560 evrov (Mikeln, 2014).[38] Posledica

- otroci in mladostniki z nezgodno poškodbo glave in okvaro možganov.

36 V študijskem letu 2011/2012 je bilo v Sloveniji v visokošolske študijske programe na univerzah in samostojnih visokošolskih zavodih vpisanih 89.600 študentov (SURS).

37 Glej 23. člen ZZVZZ.

38 Za boljšo predstavo o višini doplačil in finančnem tveganju, ki ga prinašajo, navajamo povprečno mesečno plačo in časovno obdobje, v katerem posameznik za zdravstveno varstvo nameni znesek v višini najvišjega enkratnega doplačila za najzahtevnejše bolniške storitve: posameznik, ki je v delovnem razmerju in prejema povprečno mesečno plačo (povprečna bruto plača je februarja 2014 znašala 1.520,88 evra), bi potreboval dobrih štirinajst let, da

uvedbe doplačil oziroma tako visokih doplačil in velikega finančnega tveganja, ki ga doplačila prinašajo v primeru potrebe po zdravstvenih storitvah, je nastanek trga dopolnilnega zdravstvenega zavarovanja oziroma njegov razcvet. Posamezniki so zaradi izjemno visokih doplačil, z izjemo tistih, ki so nagnjeni k tveganju, prisiljeni skleniti dopolnilno zdravstveno zavarovanje, saj drugače tvegajo nastanek »katastrofalnih« zdravstvenih izdatkov. Iz narave dopolnilnega zdravstvenega zavarovanja in ureditve sistema doplačil izhaja, da dopolnilno zdravstveno zavarovanje nima vloge nadgradnje socialne oziroma zdravstvene varnosti, temveč je njen sestavni in bistveni element. Prav tako težko trdimo, da je vključitev v zavarovanje posledica avtonomne odločitve posameznika, saj višina doplačil skoraj onemogoča posameznikovo svobodno voljo. To potrjuje tudi izjemno visoka pokritost prebivalstva z zavarovanjem.

Glede na močno socialno funkcijo dopolnilnega zdravstvenega zavarovanja ter njegovo vlogo in pomen v sistemu zdravstvenega varstva in socialne varnosti lahko sklepamo, da je izvajanje te dejavnosti v javnem interesu.

c) Oblastveni akt, s katerim je gospodarskim subjektom podeljena naloga storitve splošnega gospodarskega pomena z jasno opredeljenimi obveznostmi te naloge

Podelitev naloge storitve splošnega gospodarskega pomena ne pomeni, da mora gospodarski subjekt nujno pridobiti za njeno izpolnjevanje izključno oziroma posebno pravico. Treba je razlikovati med posebno oziroma izključno pravico, podeljeno gospodarskemu subjektu za izvajanje določene storitve, in nalogo storitve splošnega gospodarskega pomena, ki ji je v okoliščinah posameznega primera lahko pripeta tudi izključna pravica. Izključna pravica služi gospodarskemu subjektu zgolj kot orodje, ki mu omogoča izpolnjevanje naloge storitve splošnega gospodarskega pomena.[39] Za dodelitev naloge splošnega gospodarskega pomena se tako ne zahteva podelitev posebne oziroma izključne pravice, temveč zadostuje že oblastveni akt, s katerim se enemu ali celo vsem gospodarskim subjektom, ki izvajajo določeno storitev, dodeljujejo jasno opredeljene obveznosti.[40] Takšen oblastveni akt predstavlja ZZVZZ, s katerim je bila ustanovljena in opredeljena storitev dopolnilnega zdravstvenega zavarovanja. Gospodarski subjekti morajo izvajati storitve ob spoštovanju posebnih obveznosti, ki so opredeljene v členih 62–62c ZZVZZ (enotno ocenjevanje oziroma enotna premija, odprti pristop in doživljenjsko kritje). Četrta točka prvega odstavka 62.b člena ZZVZZ nadalje opredeljuje predmet oziroma pravice iz dopolnilnega zdravstvenega zavarovanja, ki obsegajo kritje razlike med vrednostjo zdravstvenih storitev v skladu s členom 23 ZZVZZ in deležem te vrednosti, ki ga v skladu z istim členom krije

bi za zdravstveno varstvo (obvezno in dopolnilno zdravstveno zavarovanje – upoštevali smo višino zavarovalne premije Vzajemne, ki je marca 2014 znašala 27,62 evrov) porabil sredstva v višini 21.560 evrov. V tem izračunu je upoštevan samo prispevek obveznega zdravstvenega zavarovanja, ki bremeni neposredno delavca (6,36 % bruto plače). Če pa pri izračunu upoštevamo tudi prispevek delodajalca, bi se časovno obdobje skrajšalo na slabih osem let.

39 Glej zadevo BUPA [T-289/03, 179].

40 Glej zadevi Almelo [C-393/92, 47] in BUPA [T-289/03, 179].

obvezno zdravstveno zavarovanje, oziroma del te razlike, ko se doplačilo nanaša na pravico do zdravil z najvišjo priznano vrednostjo in medicinskih pripomočkov. Zakonodajalec tako ne določa zgolj obveznosti najosnovnejših storitev, ki bi zagotavljale, da bi storitve spoštovale najnižje standarde, temveč v celoti opredeli predmet dopolnilnega zdravstvenega zavarovanja oziroma zavarovalne proizvode, saj dopolnilno zdravstveno zavarovanje po zakonu ne sme vsebovati dodatnih storitev oziroma pravic.[41] Za ta namen lahko zdravstvena zavarovalnica ustanovi dodatno zdravstveno zavarovanje, ki je ločena kategorija prostovoljnih zdravstvenih zavarovanj. Poleg navedenega je zakonodajalec izvajalcem dopolnilnega zdravstvenega zavarovanja v drugi točki člena 62(1) ZZVZZ naložil, da se morajo vključiti v izravnalno shemo dopolnilnega zavarovanja, s katero se med njimi izravnavajo razlike v stroških zdravstvenih storitev, ki izhajajo iz različnih struktur zavarovancev glede na starost in spol.

Sodišče je v zadevi BUPA odločalo o vprašanju, ali lahko štejemo *Health Insurance Acts*, ki podrobno opredeljujejo obveznosti zasebnega zdravstvenega zavarovanja (enotno ocenjevanje, odprti pristop, doživljenjsko kritje in najosnovnejše storitve, ki jih morajo spoštovati vsi izvajalci zasebnega zdravstvenega zavarovanja) kot oblastveni akt, s katerim je gospodarskim subjektom podeljena naloga storitve splošnega gospodarskega pomena z jasno opredeljenimi obveznostmi te naloge. Sodišče je na to vprašanje odgovorilo pritrdilno.[42] Izhajajoč iz primerjave irske ureditve zasebnega zdravstvenega zavarovanja (*Health Insurance Acts*) in slovenske ureditve dopolnilnega zdravstvenega zavarovanja (ZZVZZ) lahko z gotovostjo trdimo, da tudi slovensko dopolnilno zdravstveno zavarovanje izpolnjuje kriterij oblastvenega akta, s katerim je gospodarskim subjektom podeljena naloga storitve splošnega gospodarskega pomena z jasno opredeljenimi obveznostmi te naloge. Ureditvi v obeh državah se namreč v smislu obveznosti, ki jih nalaga proučevana zakonodaja, skoraj povsem ujemata: enotno ocenjevanje, odprti pristop, doživljenjsko kritje in obseg storitev, ki jih morajo spoštovati vsi izvajalci zasebnega zdravstvenega zavarovanja, pri čemer je slovenska ureditev strožja, saj ne določa zgolj najosnovnejših storitev, temveč celoten obseg storitev oziroma pravic dopolnilnega zdravstvenega zavarovanja. Glede na zapisano lahko sklepamo, da je v primeru slovenskega dopolnilnega zdravstvenega zavarovanja podan oblastveni akt (ZZVZZ), s katerim je gospodarskim subjektom podeljena naloga storitve splošnega gospodarskega pomena z jasno opredeljenimi obveznostmi te naloge.

d) Univerzalna in obvezna narava naloge storitve splošnega gospodarskega pomena

Univerzalna narava storitve ne zahteva, da je storitev univerzalna v ožjem pomenu.[43] Dejstvo, da ima od storitve korist le relativno omejena skupina

41 Irska zakonodaja nalaga gospodarskim subjektom, ki izvajajo zasebna zdravstvena zavarovanja, obveznost najosnovnejših storitev.

42 Glej zadevo BUPA [T-289/03, 174–176 in 182].

43 Značilno za obvezno zdravstveno zavarovanje.

uporabnikov, ne postavlja nujno pod vprašaj univerzalne narave naloge te storitve (v našem primeru dopolnilnega zdravstvenega zavarovanja).[44] Univerzalna narava tudi ne zahteva, da je dopolnilno zdravstveno zavarovanje brezplačno, oziroma ga je treba ponujati ne glede na ekonomsko donosnost. Nevključevanje prebivalstva zaradi nezadostnosti finančnih sredstev oziroma finančne nedostopnosti zavarovalnih premij ne spodkopava njegove univerzalne narave. Za to zadostuje, da se storitev ponuja vsem prebivalcem po enotnih in nediskriminatornih cenah ter pod enakimi pogoji in enake kakovosti. Univerzalna narava prav tako ni v nasprotju s svobodnim določanjem višine zavarovalnih premij izvajalcev dopolnilnega zdravstvenega zavarovanja. V Sloveniji določajo višino zavarovalne premije dopolnilnega zdravstvenega zavarovanja zdravstvene zavarovalnice (tržne sile), kar lahko ob pomanjkanju regulacije vodi v visoke premije. Tveganje visokih premij, ki bi presegale finančne zmožnosti določenih skupin prebivalstva, je zaradi obveznosti enotnega ocenjevanja oziroma enotne cene premije ne glede na starost, spol in zdravstveno stanje zavarovancev ter konkurence med zavarovatelji v praksi zelo omejeno.[45] Kljub omejenemu tveganju so cene zavarovalnih premij v zadnjih letih močno porastle.[46] Predstavniki zdravstvenih zavarovalnic opozarjajo, da se cene nevarno približuje psihološko najvišji sprejemljivi vrednosti, ki naj bi znašala okoli 30 evrov. Porast cene zavarovalnih premij pa ni posledica »nedelovanja« tržnih mehanizmov in obveznosti storitve splošnega gospodarskega pomena, temveč državne politike, ki z namenom razbremenitve javnih sredstev prelaga finančno breme na zasebne vire financiranja.

Obvezna narava dopolnilnega zdravstvenega zavarovanja je prav tako bistveni pogoj za obstoj naloge storitve splošnega gospodarskega pomena. Obvezno naravo je treba razumeti tako, da morajo gospodarski subjekti, ki jim je z oblastvenim aktom zaupana naloga storitve splošnega gospodarskega pomena, to storitev načeloma ponujati na trgu ob spoštovanju posebnih obveznosti storitve splošnega gospodarskega pomena. Gospodarskim subjektom, ki izvajajo storitev dopolnilnega zdravstvenega zavarovanja, ni podeljena posebna oziroma izključna pravica, ki bi jim nalagala izvajanje te storitve ne glede na stroške, povezane z njenim izvajanjem. Kljub temu pa ZZVZZ, ki gospodarskim subjektom poverja izvajanje dejavnosti dopolnilnega zdravstvenega zavarovanja, določa dolžnost, da subjekti ponujajo to storitev vsem, ki zanjo zaprosijo. Sodišče EU je v zadevi BUPA zavzelo stališče, da sta obvezna narava storitve in posledično naloga storitve splošnega gospodarskega pomena podani, če mora ponudnik sklepati pogodbe pod določenimi pogoji, ki mu preprečujejo zavrnitev sopogodbenikov.[47] Za izpolnitev pogoja obvezne narave storitve dopolnilnega zdravstvenega zavarovanja zadostuje že obveznost odprtega pristopa, ki je podana v členu 62.b(1) ZZVZZ. Obvezno

44 Takšno stališče je potrdilo Sodišče EU v zadevi BUPA [T-289/03, 187].

45 Tako je odločilo tudi Sodišče EU v zadevi BUPA [T-289/03, 202–203].

46 Z izjemo leta 2014, ko so vse tri zdravstvene zavarovalnice znižale premije: Vzajemna iz 27,76 € na 26,79 €, Triglav iz 28,54 € na 27,51 € in Adriatic Slovenica iz 28,34 € na 27,49 €.

47 Glej zadevo BUPA [T-289/03, 186–190].

naravo storitve dodatno utrjujejo tudi druge obveznosti dopolnilnega zdravstvenega zavarovanja, ki omejujejo diskrecijo zdravstvenih zavarovalnic: obveznost enotnega ocenjevanja, obveznost doživljenjskega kritja in opredelitev pravic iz naslova dopolnilnega zdravstvenega zavarovanja.[48]

Prostovoljna narava dopolnilnega zdravstvenega zavarovanja v smislu, da je vključitev v zavarovanje prepuščena svobodni izbiri zavarovancev, ni v nasprotju z univerzalno in obvezno naravo storitve. Univerzalna in obvezna narava nista pogojeni z obligatorno vključitvijo v dopolnilno zdravstveno zavarovanje.[49] Dodatno dejstvo, ki govori v prid univerzalni in obvezni naravi dopolnilnega zdravstvenega zavarovanja, je tudi visoka pokritost prebivalstva z zavarovanjem. V zavarovanje je vključenih neposredno prek pogodbenega razmerja z zavarovateljem okoli 70 % prebivalstva, če pa k temu prištejemo še prebivalstvo, ki ima kritje dopolnilnega zdravstvenega zavarovanja iz drugega, z zakonom določenega naslova, se delež močno približa pokritosti obveznega zdravstvenega zavarovanja.

Sodišče EU je v zadevi BUPA v kontekstu univerzalne in obvezne narave storitve presojalo tudi začetno čakalno dobo za vključitev v zavarovanje, ki je sestavni del slovenske ureditve dopolnilnega zdravstvenega zavarovanja (peta točka 62.b(1) člena ZZVZZ). Pri tem je zavzelo stališče, da so čakalne dobe za vključitev v dopolnilno zdravstveno zavarovanje bistveni element prostovoljnih zdravstvenih zavarovanj, ki temeljijo na obveznosti odprtega pristopa in enotnega ocenjevanja. Kljub temu da so čakalne dobe omejitev pri sklepanju zavarovanj, je to primerno sredstvo za usklajevanje dostopnosti in univerzalnosti storitve dopolnilnega zdravstvenega zavarovanja, saj onemogoča izkoriščanje medgeneracijske solidarnosti na način zlorab osebam, ki z vključitvijo v zavarovanje odlašajo, dokler nimajo precejšnje potrebe po zdravstvenih storitvah.[50]

Glede na stališče Sodišča EU v zadevi BUPA, kjer je odločilo, da je v primeru irskega zasebnega zdravstvenega zavarovanja podana univerzalna in obvezna narava naloge storitve splošnega gospodarskega pomena,[51] ter analize slovenske ureditve dopolnilnega zdravstvenega zavarovanja lahko sklepamo, da je tudi v primeru slovenskega dopolnilnega zdravstvenega zavarovanja podana univerzalna in obvezna narava naloge storitve splošnega gospodarskega pomena.

5 Zaključek

Iz presoje slovenskega dopolnilnega zdravstvenega zavarovanja v luči meril za opredelitev dejavnosti kot storitve splošnega gospodarskega pomena, ki jih je izoblikovalo Sodišče EU, izhaja, da dopolnilno zdravstveno zavarovanje

48 Glej zadevo BUPA [T-289/03, 191–192].
49 Glej zadevo BUPA [T-289/03, 190–195] in pripadajočo sodno prakso.
50 Glej zadevo BUPA [T-289/03, 195–200].
51 Glej zadevo BUPA [T-289/03, 205–207].

izpolnjuje vsa zahtevana merila. Dopolnilno zdravstveno zavarovanje ima gospodarsko naravo dejavnosti in se izvaja v javnem interesu kot nepogrešljiv del sistema zdravstvenega varstva (socialne varnosti). Analiza nadalje potrjuje tako podanost oblastvenega akta, s katerim je gospodarskim subjektom podeljena naloga storitve splošnega gospodarskega pomena z jasno opredeljenimi obveznostmi (ZZVZZ), kot tudi obvezno in univerzalno naravo dopolnilnega zdravstvenega zavarovanja. Glede na zapisano lahko zaključimo, da je slovensko dopolnilno zdravstveno zavarovanje storitev splošnega gospodarskega pomena, za katero velja omejen domet pravnega reda EU (pravil notranjega trga in konkurenčne zakonodaje). Takšna opredelitev pa ne upravičuje vsakršnih državnih regulatornih posegov v to dejavnost (npr. neposredno ali posredno dodeljevanje državnih sredstev subjektom, ki opravljajo storitve splošnega gospodarskega pomena – nadomestila za izvajanje javne storitve, različne obveznosti dopolnilnega zdravstvenega zavarovanja, pravila, ki zagotavljajo solventnost izvajalcev zdravstvenega zavarovanja itd.) temveč zgolj omogoča možnost za njihovo upravičevanje, ki je naslednji korak na poti presoje skladnosti pravne ureditve slovenskega dopolnilnega zdravstvenega zavarovanja s pravnim redom EU.

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Viri in literatura

Adriatic Slovenica d.d. (2012). Splošni pogoji dopolnilnega zdravstvenega zavarovanja.

Brezovnik, B. (2008). *Izvajanje javnih služb in javno-zasebno partnerstvo*. Maribor: Založba Lex localis.

Damjanovic, D., & de Witte, B. (2009). Welfare values and welfare integration under the Lisbon Treaty. V: U. Neergaard, L. Roseberry & R. Nielsen (ur.), I*ntegrating welfare functions into EU law: From Rome to Lisbon* (str. 53–94). Copenhagen: DJØF Publishing.

Evropska komisija. (2001). *Sporočilo Komisije, Storitve splošnega interesa v Evropi* (2001/C 17/04, z dne 19. 1. 2001).

Evropska komisija. (2007). Sporočilo Komisije Evropskemu parlamentu, Svetu, Evropskemu ekonomsko-socialnemu odboru in Odboru regij – Spremni dokument k Sporočilu: »Enotni trg za Evropo 21. stoletja« – Storitve splošnega interesa, vključno s socialnimi storitvami splošnega interesa: nova evropska zaveza, Bruselj, z dne 20. 11. 2007.

Evropska komisija. (2010). *Priročnik za uporabo pravil Evropske unije o državnih pomočeh, javnih naročilih in notranjem trgu pri storitvah splošnega gospodarskega pomena, zlasti storitvah splošnega pomena na področju socialne varnosti* (SEC(2010) 1545, z dne 7. 12. 2010).

Evropska komisija. (2011). *Sklep Komisije o uporabi člena 106(2) Pogodbe o delovanju Evropske unije za državno pomoč v obliki nadomestila za javne storitve, dodeljenega nekaterim podjetjem, pooblaščenim za opravljanje storitev splošnega gospodarskega pomena* (2012/21/EU, z dne 20. decembra 2011).

Gracar, I. (2014). Spremembe financiranja sistema zdravstvenega varstva RS, predlog z dne 24. 2. 2014.

Hatzopoulos, V. (2011). *The concept of 'economic activity' in the EU Treaty: from ideological dead-ends to workable judicial concepts*. Research papers in Law 06/2011. College of Europe, Department of European Legal Studies.

Mikeln, A. (2014). Pomen zasebnih sredstev za dolgoročno stabilnost zdravstvenega sistema. Prispevek na posvetu *Zdravstvena polemika: Kakšna bo cena vašega zdravja v prihodnje*. Ljubljana.

Milenkovič Kramer, A. (2009). *Private health insurance in Slovenia: a study for the European Commmission*.

Mossialos, E., & Thomson, S. (2009). *Private health insurance in the European Union. Final report prepared for the European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities*. LSE Health and Social Care, London School of Economics and Political Science.

Neergaard, U. (2013). The Concept of SSGI and Asymmetries Between Free Movement and Competition Law. V: U. Neergaard, E. Szyszczak, J. W. van de Gronden & M. Krajewski (ur.), *Social services of general interest in the EU – Legal issues of services of general interest* (str. 205–245). The Hague: TMC Asser Press. DOI: 10.1007/978-90-6704-876-7_9

Pečarič, M., & Bugarič, B. (2001). *Javne službe*. Ljubljana: Fakulteta za upravo.

Szyszczak, E. (2013). Soft Law and Safe Havens. V: U. Neergaard, E. Szyszczak, J. W. van de Gronden & M. Krajewski (ur.), *Social services of general interest in the EU – Legal issues of services of general interest* (str. 317–345). The Hague: TMC Asser Press. DOI: 10.1007/978-90-6704-876-7_13

SURS – Statistični urad RS. (2013). *Izdatki za zdravstveno varstvo po namenih in virih financiranja, Slovenija, 2003–2012*.

Šik, A. (2011). Obratovalni stroški dopolnilnega zdravstvenega zavarovanja. V *Dopolnilno zdravstveno zavarovanje in zdravstvena reforma*. Ljubljana: Slovensko zavarovalno združenje.

van de Gronden, J. W. (2013). Free Movement of Services and the Right of Establishment. Does EU Internal Market Law Transform the provision of SSGI?. V: U. Neergaard, E. Szyszczak, J. W. van de Gronden & M. Krajewski (ur.), *Social services of general interest in the EU – Legal issues of services of general interest* (str. 123–160). The Hague: TMC Asser Press. DOI: 10.1007/978-90-6704-876-7_6

ZZZS – Zavod za zdravstveno zavarovanje Slovenije. (2012). *Poslovno poročilo za leto 2011*. Ljubljana: Zavod za zdravstveno zavarovanje Slovenije.

ZZZS – Zavod za zdravstveno zavarovanje Slovenije. (2013). *Poslovno poročilo za leto 2012*. Ljubljana: Zavod za zdravstveno zavarovanje Slovenije.

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Slovenian Complementary Health Insurance as a Service of General Economic Interest

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ABSTRACT

Slovenian legislation defines complementary health insurance as an activity of the public interest, which represents an inseparable and essential element of healthcare system and as such pursues objectives identical to those of compulsory health insurance – financial security of population against high healthcare expenses and appropriate and fair access to efficient and quality healthcare. EU Member States often introduce different regulatory measures to safeguard the public interest in the field of economic activities. These measures often contravene the Union acquis (the rules on the functioning of the internal market and competition law), which is in principle unacceptable. This article aims to define Slovenian complementary health insurance as a service of general economic interest, which opens up new prospects for the Member States' adoption of the regulatory measures that are not compliant with the rules on the functioning of the internal market and EU competition law.

Keywords: *financing of healthcare, complementary health insurance, service of general economic interest (SGEI), public interest*

JEL: K32

1 Introduction

Health insurance is insurance against financial loss which is incurred by illness, body injury and birth or death of the insured person. Individuals with health insurance are provided with social security against uncertainty that may befall them if an insured event occurs. Some countries organize health insurance at a systemic - national level and finance their healthcare system through pre-paid Health insurance contributions. Such a system can be found in Slovenia, where healthcare system is financed by two sources, that is public and private funds. The lion's share, around 75% of these funds, represents social or compulsory health insurance.[1] The largest source of private financing represents voluntary health insurance (a little above 50% of private funds),

1 The remaining public sources are budgetary resources of the state and the municipalities.

of which complementary health insurance represents more than 90% (ZZZS, 2013, 144; SURS, 2013).[2]

Healthcare is a fundamental component of European welfare state. Although EU Member States regulate this area differently, all regulations have a common feature of pursuing the universal access to healthcare, which is based on the principle of solidarity. When Member States join the EU, they confer the exercising of a part of their sovereign rights to the EU. In other words, they renounce a part of their competences and pass them, to a greater or lesser extent, on the EU institutions. In the early period of the development of the European Economic Community, the field of healthcare fell within the exclusive competence of the Member States. The Treaty of Rome, which entered into force in 1958, did not visibly affect the field of healthcare.[3] Development of the European Economic Community and later the EU has, over time, thoroughly blurred the lines between national legal systems of Member States and EU law. This is reflected in the area of healthcare as well. EU's interest in healthcare has been on the increase, which is evident from the erosion of Member States' competence in this field.[4] The leading role in this have the reforms of the Founding Treaties, secondary legislation, the development of interpretation of fundamental principles and progressive role of the Court of Justice of the European Union.[5] Member States also do not have complete autonomy in organizing the healthcare financing system. Their autonomy mainly depends on the organizational structure of financing system and on its legal regime. Member States often introduce different regulatory measures in order to protect the public interest regarding financing of healthcare system and provisions of medical services. These measures often cross the autonomy threshold admissible by EU law, which classifies as an infringement of Union acquis.[6]

2 The remaining private sources are direct payments for health services made by individuals (around 44% of private funds) and donations of various charities and other donors.

3 Healthcare and health, especially in terms of its protection, were mentioned only by three Articles: 36, 48(3) and 56(1).

4 Van de Gronden (2013, p. 128) writes about Europeanisation in the field of providing and organizing social services of general interest. The term Europeanisation is also used by Szyszczak (2013, p. 321) in order to explain the emergence of new networks of established, and new players, creating the concept of social services of general interest and the emergence of the Commission with a new governance competence and capacity in the form of soft law and soft governance processes.

5 For detailed discussion on the development of EU law influence on social services from the beginning of integration until the Lisbon Treaty see Damjanovic & de Witte B. (2009).

6 Slovenian complementary health insurance has already been a subject of infringement proceedings before the Court of Justice of the European Union. In its action against the Republic of Slovenia, the European Commission accused it of Infringement of Article 8(3) of First Council Directive 73/239/EEC (First non-life insurance Directive) and of Articles 29 and 39 of Council Directive 92/49/EEC (Third non-life insurance Directive) – Infringement of Articles 56 and 63 of TFEU (Judgement of the CJEU case C-185/11 of 26 January 2012, Par. 19). With regard to the infringement of Article 8(3) of First non-life insurance Directive and Articles 29 and 39 of Third non-life insurance Directive, the Court of Justice of the European Union ruled that, by incorrect and incomplete transposition of First and Third non-life insurance Directive into national law, the Republic of Slovenia has failed to fulfil its obligations under Article 8(3) of First non-life insurance Directive and Articles 29 and 39 od Third non-life insurance Directive (Judgement of the CJEU case C-185/11 of 26 January 2012, Par. 27). With regard to the infringement of Articles 56 and 63 of TFEU, the Court of Justice of the European Union

Legal regulation of healthcare, including the healthcare financing system, is, within the meaning of the Union acquis, substantially influenced by the concept of *Service of General Interest – SGI*. Definition of individual segments of healthcare in the context of service of general interest under certain conditions excludes the scope of the internal market rules and EU competition law (non-economic services of general interest) or justifies the Member States' regulatory measures that do not comply with the rules on the functioning of the internal market and EU competition law (services of general economic interest). This article aims to define Slovenian complementary health insurance as a service of general economic interest, which opens up new prospects for the Member States' autonomous regulation and allows the adoption of the regulatory measures that are not compliant with the rules on the functioning of the internal market and EU competition law. Such definition enables national legislature to adopt regulatory measures in the public interest, which reinforce the social dimension of healthcare financing.

2 The Concept of Service of General Interest

2.1 Services of General Interest

Services of general interest, also known as *public services*, are legal concept covering a series of different activities. These include large network industries, such as energy industry, telecommunications, traffic, audio-visual and postal services, education, water supply, waste management and, last but not least, healthcare and social services. These services are essential for the daily life of citizens and enterprises, and reflect Europe's model of society. They play a major role in ensuring social, economic and territorial cohesion throughout the Union and are vital for the sustainable development of the EU in terms of higher levels of employment, social inclusion, economic growth and environmental quality (European Commission, 2007, p. 3). Services of general economic interest can be further defined as services of an economic nature – services of general economic interest and services of a non-economic nature – non-economic services of general interest.

2.2 Non-Economic Services of General Interest

Non-economic services of general interest (non-economic public services) include the following activities: tax system, the police, the judiciary, social security systems etc. Member States have exclusive competence over these

dismissed the action. Its decision is based on the finding that there is no coherency between the summary of allegations claiming that the Republic of Slovenia violates Articles 56 and 63 of TEFU and the statement of claim in the context of which the European Commission accuses Slovenia of incorrect and incomplete transposing of First and Third non-life insurance Directive (Judgement of the ECJ case C-185/11 of 26 January 2012, Par. 30). The Court of Justice of the European Union rejected the complaint as inadmissible, meaning that it did not decide on the merits of the case. This means that the European Commission can once again bring an action against Slovenia and with appropriate supplement of the complaint achieve hearing on the merits of the case.

activities, which are not, within the meaning of the Union acquis, subject to EU competition law and the rules governing the functioning of the internal market (European Commission, 2007, 4; Article 2 of the Protocol No. 26 on services of general economic interest, annexed to the Lisbon Treaty (2007/C 306/01)). Over time, the scope of activities defined as non-economic services of general interest has been constantly diminishing and thus simultaneously reducing Member States' autonomy in this field. European Commission plays a key role in this, as its "soft law" approach (non-binding legal acts) broadens the scope of European legislation (Neergaard, 2013, p. 209).

2.3 Services of General Economic Interest

The concept of services of general economic interest refers to market services for which the Member States, for general interest reasons, determine special obligations for providing public services. These include activities provided by large network industries (telecommunications, postal services, electricity, gas, traffic etc.) and other services of general economic interest (waste management, drinking water supply, radio and television broadcasting service etc.) (Pečarič & Bugarič, 2011, p. 166). Services of general economic interest are considered in nearly every segment of the Union acquis. Their definition is to be found in primary legislation, specifically in the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU) and Protocol No. 26 on services of general interest, annexed to the Treaty of Lisbon. Article 106(2) of the Treaty states that undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of these rules does not obstruct, in law or in fact, the performance of the tasks entrusted. This should however not affect the development of trade to such an extent as would be contrary to the interests of the Union (European Commission, 2011, Par. 3).

Beside primary legislation, services of general economic interest are regulated also by secondary legislation. The most important of them is *Directive on Services in the internal market*.[7] The majority of secondary legal sources concerning the field of services of general economic interest is the reflection of the liberalisation policy of the EU, which was implemented by a so-called sectoral approach. It enabled the European Commission to regulate the specifications of individual services of general economic interest (the fields of energy industry, telecommunications, traffic and other network–bound economic activities) by means of various secondary legislative acts (Brezovnik, 2008, p. 40).[8]

7 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OG L 376/37, 27 December 2006).

8 Directive 96/92/EC of the European Parliament and of the Council of 19 June 1996 concerning common rules for the internal market in electricity (OG L 027, 30 January 1997); Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OG L 15, 21 January 1998); Directive 2002/22/EC of the

In addition to primary and secondary law, the institutions and other EU bodies influence services of general economic interest also through other forms of binding and non-binding legal acts.[9]

Despite the extensive literature concerning services of general economic interest and considerable efforts for their exact definition by all three EU branches of government, which is reflected in numerous acts from this field, a clear-cut legal definition of this concept has yet to be determined.

2.4 Social Services of General Interest

Another important concept in the field of healthcare is the concept of *social services of general interest – SSGI*.[10] This term is not defined by neither primary nor secondary law. It is the latest concept in the group of services of general interest which cannot be found in binding European legislation. The political agenda first mentions it in the European Commission's report on the European Council session in Laeken – Services of General Interest from 2001. In legal context it is first found in a non-binding Commission communication titled *Implementing the Community Lisbon programme: Social Services of General Interest in the European Union*,[11] which in addition to health services in narrower sense[12] defines two main categories of social services (included compulsory and complementary health insurances).[13]

This Communication further states that social services of general interest do not constitute a legally distinct category within EU law.[14] Social services of general interest in legal terms qualify as, depending on the nature of their activity, services of general economic interest or non-economic services of general interest. The mere fact that the activity is considered a social activity does not mean that it cannot be simultaneously considered as an economic

European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) (EU Official Journal L 108 of 24 April 2002); Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (EU Official Journal L 199 of 26 July 1997) etc.

9 To illustrate, here are a few examples: Commission Green Paper on Services of General Interest, Brussels, 21 May 2003, COM(2003) 270 final; Communication from the Commission: White Paper on Services of General Interest, Brussels, 12 May 2004, COM(2004) 374 final; European Parliament Resolution of 5 July 2011 on the future of social services of general interest (2009/2222(INI)); European Parliament Resolution of 14 March 2007 on social services of general interest in the European Union (2006/2134(INI)); Examples: case C-393/92, Almelo, [1993], case C-320/91, Corbeau, [1993], case C-340/99, TNT Traco, [2001], case C-393/92, Almelo, [1993], case C-475/99, Ambulanz Glöckner, [2001], case C-41/90, Höfner and Elser, [1991], case C-266/96, Corsica Ferries, [1998]…

10 For detailed development and better understanding and differentiation of all concepts of general interest see Neergaard (2013).

11 Communication of the Commission: Implementing the Community Lisbon programme: Social Services of General Interest in the European Union (COM(2006) 177 of 26 April 2006).

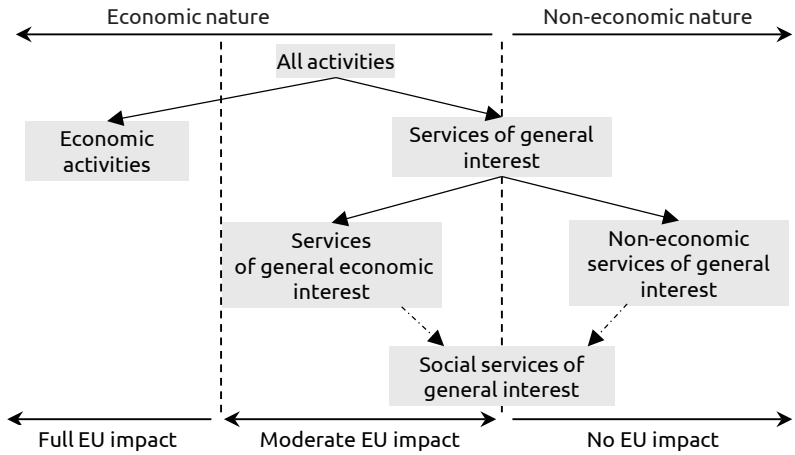
12 They are not covered by this Communication.

13 More precisely in the first category: "statutory and complementary social security schemes, organised in various ways (mutual or occupational organisations), covering the main risks of life, such as those linked to health, ageing, occupational accidents, unemployment, retirement and disability".

14 This view is shared by Szyszczak (2013).

activity. Social services of general interest, which have an economic nature, are classified as services of general economic interest (European Commission, 2010, p. 17). They have to assure the compatibility of their organisational arrangements with rules on the internal market and EU competition law.[15]

Figure 1: The scope of EU law



Source: adapted from Hatzopoulos (2011, p.12).

3 Competences and Criteria for Defining the Activity of Complementary Health Insurance as a Service of General Economic Interest

Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. This is not to deny that in many cases the market will be the best mechanism for providing such services. However, if the public authorities consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations (European Commission, 2001, point 14).

The first condition for defining an activity as a service of general economic interest is its economic nature. The second condition requires that the activity provides services (goods) that are of existential importance for the society, which therefore considers that provision of these services (goods) is of general interest and subjects them to a special legal regime.

15 Neergaard (2013, pp. 207–210) illustrates the relations between services of general interest, services of general economic interest (or non-economic services of general interest) and social services of general interest with family ties between grandmother, mother and granddaughter.

When defining an activity as a service of general economic interest within the meaning of European legislation, an important question should be considered, namely that of distribution of competences between Member States and the EU. When defining a service of general economic interest, Member States have a wide discretion, which is supported by both, primary and secondary EU law, as well as the Court of justice of the European Union case-law. Nowhere in the Union acquis a specific definition of the term services of general economic interest can be found, nor the conditions that need to be fulfilled so that a Member State could refer to the existence and protection of a special legal regime of service of general economic interest.[16] Beside the absence of the definition, EU law does not grant any special powers to the EU regarding the services of general economic interest. Thus in the case BUPA the Court of justice of the European Union took a position that defining an activity as a service of general economic interest falls under Member States' competence.[17] This refers even more for services of general economic interest which have the nature of social or healthcare services, as Member States have almost exclusive competence in this area.[18] Pursuant to Article 168(7) of TFEU, Member States are responsible for defining health policy and organizing and providing health services and healthcare. In this context, the determination of obligations of a service of general economic interest is firstly a matter of the Member States. The same definition of competences on a general level can be found in Article 14 of TFEU which provides that, given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the EU and the Member States, each within their respective powers and within the scope of application of the Treaty, are to take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.[19] In cases *FFSA vs. Commission* [C-174/97, 100], *Olsen vs. Commission* [T-17/02, 216] and *BUPA* [T-289/03, 169] the Court of justice of the European Union has taken the standpoint that its competence in defining services of general economic interest is limited to checking whether the Member State has made a manifest error when defining the service as an service of general economic interest.[20]

16 Case BUPA [T-289/03, 165].

17 Member States' wide margin of discretion in defining the activities was confirmed also by the Court of Justice of the European Union in the case of *FFSA and others vs. Commission* [T 106/95, 99]. This standpoint may also be found in the Services Directive 1(3) and numerous European Commission documents: Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02, Point 46; Communication from the Commission: Services of General Interest in Europe (96/C281/03) OJ C 281/3, section 26; Communication from the Commission: White Paper on Services of General Interest, Brussels, 12 May 2004, COM(2004) 374 final, pp. 5–6; Green Paper on Services of General Interest, COM(2003) 270, section 30–32, etc.

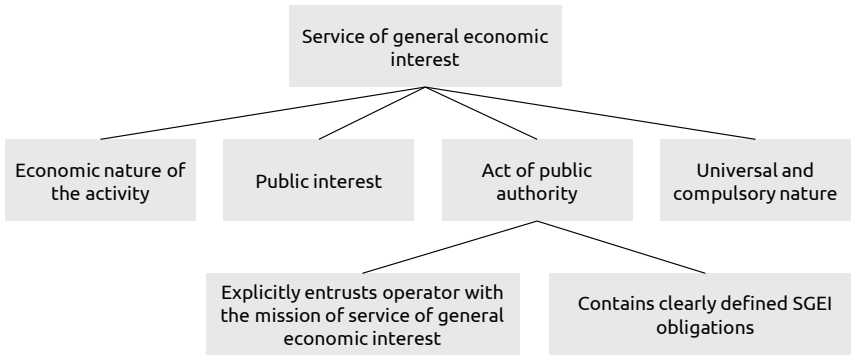
18 See Articles 2(5), 6, 153 and 168(1), (7) TFEU.

19 Case BUPA [T-289/03, 167].

20 Such standpoint was also taken by the European Commission in Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, 2012/C 8/02, point 46.

Despite the fact that Member States have wide discretion, they need to be vigilant and ensure that the activity in circumstances of a given case fulfils the lowest criteria determined by the case-law of the Court of justice of the European Union, which are common to all services of general economic interest. When Member States wish to define an activity as service of general economic interest, they need to demonstrate: (i) economic nature of the activity, (ii) activity is carried out in the public interest[21] , (iii) the existence of the act of public authority which explicitly entrusts operator with the mission of service of general economic interest (act of public authority must contain a clear definition of SGEI obligations) and (iv) universal and compulsory nature of the entrusted mission. If the state fails do so, this may present a manifest error that has to be sanctioned by the European Commission. Further on we analyse the criteria for defining a service of general economic interest and in this perspective assess Slovenian complementary health insurance.

Figure 2: Criteria for defining an activity as service of general economic interest



Source: author's.

4 Does Slovenian Complementary Health Insurance Meet the Criteria for the Definition of the Activity as a Service of General Economic Interest?

In order to define Slovenian complementary health insurance as a service of general economic interest, one has to demonstrate that the activity meets the criteria presented in Figure 2.

a) Economic nature of the activity

The Court of Justice of the European Union defines the nature of activity as economic, if it meets two criteria: first, the activity offers goods and

21 The state is obliged to set out the reasons why it considers that the service in question should be, due to its particular significance, defined as a service of general economic interest and thus separated from other economic activities. See Case BUPA [T-289/03, 172] and Case Merci Convenzionali Porto di Genova [C-179/90, 27].

services on the market[22], and second, financial risk in performing the activity is borne by the subject that carries out the activity (offers goods or services on the market).[23] This is not to say that the subject is obliged to carry out the activity in a profitable manner,[24] but the fact that it can be carried out in such manner, at least on principle, suffices (Hatzopoulos, 2011, pp. 18–19).[25] Slovenian complementary health insurance system is an activity carried out by health insurance companies on commercial principles and for the purposes of profit. This activity meets both criteria as health insurance companies offer complementary health insurance on market and at the same time bear financial risk in performing this activity. By both criteria being met, we can undoubtedly confirm that complementary health insurance is of economic nature.

b) General or public interest

In order to define the activity as a service of general economic interest, it has to be demonstrated that offering or carrying out the service is in the general or public interest. In Article 62 of Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju (hereinafter ZZVZZ)[26] the legislator defined that complementary health insurance represents the public interest of the Republic of Slovenia as it, together with compulsory health insurance, forms a social security system. The mere fact that national legislator in the general interest and within the broader sense defines a special legal regime for carrying out a certain activity, is in principle not imperative for the existence of service of general economic interest.[27] It needs to be demonstrated in fact that carrying out of the activity is in the public interest.

Complementary health insurance is inseparable and essential element of social security system and it, as such, pursues identical objectives as compulsory health insurance does – financial security of the population against high healthcare expenses and appropriate and fair access to efficient and quality medical services. Without complementary health insurance, financial security against high healthcare expense and appropriate access to efficient and quality medical services seem an unattainable ideal. Public interest

22 Case Cisal and INAIL [C 218/00, 23].
Purchase of goods or services on the market does not define the (economic) nature of this activity per se. For the purpose of determination of the activity, account should be taken of the subsequent use of the purchased goods as the nature of the purchasing activity is determined also according to the economic or non-economic nature of subsequent use (FENIN [C-205/03, 26]).

23 Case Wouters [C-309/99, 48-49].

24 Case FFSA [C-244/94, 21].

25 Case SAT Fluggesellschaft mbH vs. Eurocontrol [C-364/92, 9]. For more information on interpretation of the second criterion, which is very extensive (actual competition is not required as alleged competition is sufficient in itself) see Sauter W. and Schapel H.: State and Market in EU Law: The Public and Private Spheres of the Internal Market before the EU Courts (Cambridge: CUP, 2009), p. 82.

26 Zakon o zdravstvenem varstvu in zdravstvenem zavarovanju (Health Care and Health Insurance Act) (ZZVZZ), Official Gazette of the RS, no. 9/1992.

27 See case BUPA [T-289/03, 178].

of complementary health insurance is affirmed also by its strong social function, which is reflected through the following arguments:

(i) complementary health insurance is an important and indispensable source of financing of healthcare system;

(ii) high level of complementary health insurance population coverage;

(iii) purpose of creation and nature of complementary health insurance.

i) **Complementary health insurance as an important and indispensable source of financing of healthcare system**

In 2011, private resources in financing of healthcare system amounted to €841.743.000, representing 26.3% of total healthcare expenditure. In the same year, resources from voluntary health insurances amounted to €422.000.000, representing a little over 50% of all private resources (ZZZS 2013, 144). The lion's share of these resources represent resources from complementary health insurance, which in 2010 accounted for about €400.000.000, representing well beyond 90% of all resources from voluntary health insurances (Šik, 2011, p. 41).[28] Within the EU, such a large share of voluntary or complementary health insurances in financing of healthcare can be found only in France. Alongside considerable share of funds (around 13% of all healthcare expenditure), which indicates an exceptionally important role of complementary health insurance in the healthcare system, this insurance also bears the burden of covering expenses of medical inflation and inefficacy of public financing of healthcare.

The fact that the total contribution rate of compulsory health insurance has not changed since 2002 shows that the cost of medical inflation has been passed on to complementary health insurance. Medical inflation rate is normally above the percentage point of general inflation. In the period between January 2003 and March 2014 the general inflation was 34.2%. Management decisions of insurance undertakings which provide complementary health insurance additionally point to the compensation of medical inflation.[29] Between 2007 and 2014, Zavarovalnica Triglav raised the complementary health insurance premium from €20.61 to €29.42, which represents an increase of 42.7%. Between 2006 and 2014 Adriatic Slovenica raised premiums from €20.71 to €29.38, representing an increase of 41.8%.[30] Although in Slovenia data on medical inflation are not available for this period, the raises in premiums are consistent and, as is to be expected, exceed the general inflation rate. Both health insurance companies justified the gradual raising of premiums mainly by increasing

28 In the same year complementary health insurance covered loss events amounting to almost €370.000.000. For more information on high claims percentage of complementary health insurance, which in 2006 amounted around 88%, see Milenkovič Kramer, 2009.

29 We cannot claim that complementary health insurance bore the entire burden of medical inflation, as the latter caused also negative profits of health insurance fund and increase of out-of-pocket payments of health service users.

30 General inflation between 2006 and 2014 was 20.4%.

health services costs and changing the coverage ratio of compulsory health insurance benefits. Absorbing the costs of medical inflation is increasing the importance of complementary health insurance and, in line with this, achieving the social objective – it helps to maintain viability of compulsory health insurance financing as well as efficiency and quality of medical services which are covered by compulsory health insurance.

Economic crisis and recession that followed brought visible changes to the field of healthcare financing. The legislator and Zavod za zdravstveno zavarovanje Slovenije (*Health Insurance Institute of Slovenia*; hereinafter ZZZS) – provider of compulsory health insurance have reached for a short-term strategy in order to solve financial problems of health insurance fund, which does not eliminate structural deficiencies but only mitigates the pathological problems and simultaneously deepens the scope of the deficiencies. Austerity measures, which reflect over-indebtedness of the country and health insurance fund alongside with passing the financial burden from public sources of financing to private ones both represent the central part of the strategy, the objective of which is ensuring financial sustainability of the healthcare system. Passing on the financial burden of over-indebted health insurance fund onto the private financing sources, mainly onto the complementary health insurance, is a consequence of increasing statutory user charges for benefits covered by compulsory health insurance.[31] In doing so the state in the short term passed on financial burden and social responsibility on health insurance companies, which by a quick increase of insurance premiums passed them on the population.[32] By increasing statutory user charges covered by complementary health insurance, the state additionally amplifies its role and significance in healthcare system.

ii) High level of complementary health insurance population coverage

At the end of 2012, 2,076,273 insured persons were provided with compulsory health insurance, 1,536,876 of which were insured persons and 539,397 their dependent family members (ZZZS, 2013, p. 18).[33] In 2012, complementary health insurance was on average taken out by 1,431,951 insured persons (Gracar, 2014, p. 14). Because some individuals do not need to obtain a complementary health insurance as they have statutory user charges for benefits covered by compulsory health insurance covered by other sources

31 For additional information on changes in legislation and measures taken by ZZZS on the basis of the legislative reforms see ZZZS (2012, pp. 20–21).

32 An excellent example of such practice is adoption of a Fiscal Balance Act (ZUJF) (OG RS, No. 40/12). Because of the reduction of percentage share of benefits covered by compulsory health insurance, which was a consequence of the adoption of the above mentioned Act, a monthly premium of all three insurance companies were increased on 1 July 2012 by 15–20%.

33 According to Statistical Office of Republic of Slovenia (SURS), on 1 October 2012 Slovenia had a total population of 2,058,123. This confirms almost complete compulsory health insurance population coverage.

(state budget,[34] compulsory health insurance[35]), the complementary health insurance coverage is very large. A good evidence of this is also the small difference between compulsory and complementary health insurance (approximately 105,000 persons). According to SURS and Ministry of Labour, Family, Social Affairs and Equal Opportunities in October 2012 Slovenia had 363,442 inhabitants under the age of 18 and 45,734 recipients of social assistance. The sum of minors, social assistance recipients and persons with complementary insurance amounts to more than 1,800,000 persons. If we add pupils and students in regular education between the ages of 18 and 26[36] and other sectors of the population which have statutory user charges covered by the state budget, we come fairly close to compulsory health insurance coverage. Thus we substantiate the claim that complementary health insurance covers almost all population of Slovenia. Extremely high complementary health insurance coverage is characteristic for all states in which users can take out complementary health insurance for statutory user charges (France, Belgium, Luxembourg) (Mossialos & Thomson, 2009, p. 27). Very large coverage additionally confirms its important role in the social security system and at the same time demonstrates its strong social function.

iii) Purpose of creation and nature of complementary health insurance

Purpose of creation and nature of complementary health insurance have a strong social connotation. Healthcare financing system is based on compulsory health insurance, which does not cover all medical services.[37] The compulsory health insurance coverage ratio also differs according to the group of services to which individual service belongs. Only a handful of medical services are fully covered, for all other services the insured person has to go directly to the service provider. Statutory user charge rate varies between 10 and 90% of medical service value. Due to the high prices of medical services, some statutory user charges may be so high that can be classified as "catastrophic" health expenditure. According to *Vzajemna*, amounts of some statutory user charge in the first half of 2013 reached the following values: the highest

34 This title covers the statutory user charges for (Articles 24 and 25 of ZZVZZ):
- pre-trial prisoners not insured under other title, convicts serving a prison sentence and juvenile detention, minors awarded into a re-education facility, persons with imposed security measures of compulsory psychiatric treatment and care in a health establishment and compulsory treatment of alcoholism and drug addiction;
- insured persons and covered family members who do not have full compulsory health insurance coverage for payment of medical services if they fulfil the conditions for granting financial social assistance, which is determined by Social Work Centre;
- war disabled;
- war veterans;
- victims of war violence.

35 This title covers the surcharge for:
- children, pupils and students in regular education (until the individual reaches the age of 18 or in case of regular education the age of 26);
- children and adolescents with physical and mental health disabilities;
- children and adolescents with accident-related head injury and brain injury.

36 In academic year 2011/2012 in Slovenia there were 89,600 students enrolled in higher education study programmes at universities and independent higher education institutions (SURS).

37 For covered medical services see Article 23 of ZZVZZ.

statutory user charge for the medicine from the intermediate list (90% of this medicine's value is covered by statutory user charge) was €9,579.11; average statutory user charge for treatment at a health resort was €832 while the most expensive amounted to €4,560; the highest single statutory user charge for most demanding medical services, needed by more than 8,000 insured persons (complementary statutory user charge covers 10% of their value), was €21.560 (Mikeln, 2014).[38] Introduction of high statutory user charge and large financial risk that they bring in cases of healthcare needs, resulted in the creation of complementary health insurance market and its flourishing. Due to extremely high statutory user charge the individuals, except for those more susceptible to health risk, are compelled to take out complementary health insurance, as they otherwise run the risk of "catastrophic" health expenditure. The nature of complementary health insurance and regulation of statutory user charge make clear that complementary health insurance does not have a role of upgrading social and health security but it represents integral and key element of Slovenian social security system. It is also difficult to claim that taking out complementary health insurance is a consequence of autonomous individual's decision, as the height of statutory user charge renders individual's free will almost impossible. This is also supported by high level of insurance coverage of the population.

Given a strong social function of complementary health insurance, its role and importance in the healthcare and social security system, one can conclude that performance of this activity is in the public interest.

c) Act of public authority that explicitly entrusts operator with the mission of service of general economic interest and clearly defines service of general economic interest obligations

Recognition of service of general economic interest mission does not necessarily presume that the operator entrusted with that mission will be given an exclusive or special right to carry it out. There is a distinction between a special or exclusive right conferred on an operator and the service of general economic interest mission which, where appropriate, is attached to that right. The grant of a special or exclusive right to an operator is merely the instrument, possibly justified, which allows that operator to perform service of general economic interest mission.[39] Assigning the mission of general economic interest thus does not demand granting a special or exclusive

38 For illustration of the height of statutory user charges and financial risk they bring along, we present an example of an average monthly salary and time period in which an individual dedicates the amount of the highest single statutory user charges for most demanding medical services to healthcare: employed individual who receives an average monthly salary (in February 2014 average gross salary was €1,520.88), would need a little more than 14 years to spent €21,560 on healthcare (compulsory and complementary health insurance contributions – we considered Vzajemna's insurance premium value, which in March 2014 totalled €27.62). This calculation takes into account only the contribution of compulsory health insurance, which is charged to the employee directly (6.36% of gross salary). If the calculation considers also the employer's contribution, the time period would be reduced to a little less than 8 years.

39 See case BUPA [T-289/03, 179].

right because an act of public authority, which clearly defines obligations to one or even all operators who perform certain service, suffices.[40] ZZVZZ represents such an act of public authority. It created and defined a service of complementary health insurance. Economic operators have to perform services while respecting the special obligations laid down in the Articles 62–62c ZZZVZ (community rating, open enrolment and lifetime cover). Article 62.b, Par. 1, Point 4 of ZZVZZ further defines the subject and health care benefits covered by complementary health insurance which is difference between the value of health services in accordance with Article 23 of ZZVZZ and the share of these value covered by compulsory health insurance under the same Article, or a part of this difference, when statutory user charges refer to the right to medications with the highest recognised efficacy and medicinal devices. Legislator does not define only obligations for minimum benefits ensured that the products proposed would respect certain minimum quality standards, but defines the subject of complementary health insurance and its benefits entirely, as complementary health insurance by the law may not include additional services or benefits.[41] For this purpose a health insurance company may create a supplementary health insurance which represents a separate category of voluntary insurances. Furthermore, Point 2 of Article 62(1) of ZZVZZ obliges the complementary health insurance providers to participate in the equalization scheme for complementary health insurance, which distributes fairly some of the differences that arise in insurers' costs due to the differences in age and gender of the insured persons.

In case BUPA the Court of Justice of European Union was deciding whether Health Insurance Acts, which specify obligations of a private health insurance (community rating, open enrolment, lifetime cover and minimum benefits), could be considered as an act of public authority that explicitly entrusts operator with the mission of service of general economic interest with clearly defined obligations. The answer of the Court was affirmative.[42] Drawing on the basis of the comparison between the Irish regulation of private health insurance (Health Insurance Acts) and Slovenian regulation of complementary health insurance (ZZVZZ) we may conclude that Slovenian complementary health insurance also meets required criterion. Regulation of both countries, within the meaning of obligations imposed by Irish Health Insurance Acts and Slovenian ZZZV, coincide almost entirely: community rating, open enrolment, lifetime cover and level of benefits received by insured people, where the Slovenian regulation is even stricter, because it does not define only minimum level of benefits, but a complete extent of benefits provided by complementary health insurance. In view of the above, it can be concluded that in case of Slovenian complementary health insurance an act of public

40 See cases Almelo [C-393/92, 47] and BUPA [T-289/03, 179–182].

41 Irish legislation imposes on the operators who provide private health insurance the obligation of minimum benefits.

42 See case BUPA [T-289/03, 174–176 and 182].

authority – ZZVZZ which explicitly entrusts operator with the mission of service of general economic interest with clearly defined obligations is presented.

d) Universal and compulsory nature of the service of general interest mission

Universal nature of the service does not demand that the service is universal in narrow meaning.[43] The fact that only relatively limited group of users benefits from the service does not necessarily call into question the universal nature of the service's mission (in our case complementary health insurance).[44] The universal nature also does not require that complementary health insurance is free of charge and it has to be offered irrespective of economic profitability. Population's not covered by this service due to the insufficiency of financial means does not undermine its universal nature. It suffices that the service is offered to the entire population at an affordable price and on similar quality conditions.[45] Likewise, universal nature does not oppose free fixing of the amount of insurance premiums. Insurance premiums are in Slovenia determined by the health insurance companies (market forces), which might lead to high premiums and diminished accessibility of health care. Due to the obligations of community rating, and competition between the providers of complementary health insurance, the risk of high premiums is very limited.[46] Despite the limited risk, the prices of premiums have increased sharply during the last years in Slovenia.[47] The representatives of health insurance companies point out that the prices are dangerously approaching the psychologically highest acceptable amount of €30. However, the increase of insurance premiums is not a consequence of "non-functioning" market mechanisms or even service of general economic interest obligations, but of the state policy which aims to relieve public sources of funding by passing financial burden of financing health care to private sources (complementary health insurance).

Compulsory nature of complementary health insurance is a prerequisite for the existence of a mission of service of general economic interest as well. That compulsory nature must be understood as meaning that the operators entrusted with the service of general economic interest mission by an act of a public authority are, in principle, required to offer the service in question on the market in compliance with the service of general economic interest obligations which govern the supply of that service. Operators who perform service of complementary health insurance in Slovenia are not entitled to any special or exclusive right which would impose performing of this service irrespective of the costs of performing it. Nevertheless, the ZZVZZ, which explicitly entrusts the operators with the mission of service of general

43 Characteristic for compulsory health insurance.

44 The Court of Justice of the European Union confirmed this view in case BUPA [T-289/03, 187].

45 See case BUPA [T-289/03, 206].

46 See case BUPA [T-289/03, 202–203].

47 With the exception of 2014 when all three health insurance companies lowered their premiums: *Vzajemna* from €27.76 to €26.79, *Triglav* from €28.54 to €27.51 and *Adriatic Slovenica* from €28.34 to €27.49.

economic interest, also establishes the subject's obligation to offer the service to everyone upon their request. In case BUPA the Court of Justice of the European Union took a position that compulsory nature of the service and subsequently the mission of service of general economic interest exist, if the service-provider is obliged to contract, on consistent conditions, without being able to reject the other contracting party.[48] To confirm the condition of compulsory nature of service of general economic interest, the obligation of open enrolment given in Article 62.b(1) of ZZVZZ suffices. Compulsory nature of the service is additionally supported by other complementary health insurance obligations which limit the discretion of health insurance companies: community rating, lifetime cover and level of benefits provided by complementary health insurance.[49]

Voluntary nature of complementary health insurance, in the meaning that the decision for taking out insurance is left to the insurer's freedom of choice, is not contrary to the universal and compulsory nature of the service.[50] Furthermore, in favour of universal and compulsory nature of complementary health insurance implies also high insurance coverage of the population. Around 70% of the population takes out the insurance directly through contractual relation with one of the insurers. Adding the rest of population which has complementary health insurance covered by other statutory source, the percentage share is almost the same as the share of compulsory health insurance coverage.

In case BUPA the Court of Justice of the European Union was also evaluating, in the context of universal and compulsory nature of the service, the initial waiting period after which the insurance enters into force, which is an integral part of the Slovenian complementary health insurance regulation (Article 62.b(1), Point 5 of ZZVZZ). The Court took the view that the waiting periods present an essential element of voluntary health insurance based on the obligation of community rating and open enrolment. Despite the fact that waiting periods impose a restriction on taking out insurance, they are essential and lawful measures designed to prevent abuse consisting in obtaining purely temporary cover in order to obtain treatment rapidly without having contributed beforehand, by paying premiums.[51]

On the basis of Court of Justice of the European Union, which in the case of an Irish private health insurance (case BUPA) decided that the universal and compulsory natures of the mission of service of general economic interest exists[52], and on the basis of comparative analysis of Slovenian complementary health insurance regulation it can be concluded that in the latter case universal

48 See case BUPA [T-289/03, 186–190].
49 See case BUPA [T-289/03, 191–192].
50 See case BUPA [T-289/03, 190–195] and related case law.
51 See case BUPA [T-289/03, 195–200].
52 See case BUPA [T-289/03, 205–207].

and compulsory natures of the mission of service of general economic interest exist as well.

5 Conclusion

In light of criteria for defining an activity as a service of general economic interest, laid down by the Court of Justice of the European Union, the assessment of Slovenian complementary health insurance demonstrates compliance with all criteria required. Complementary health insurance has an economic nature and is performed in the public interest as an indispensable part of healthcare system (social security). Further analysis confirms both, existence of the act of public authority which explicitly entrusts operator with the mission of service of general economic interest whose obligations are clearly defined (ZZVZZ) and compulsory and universal nature of complementary health insurance. It can be concluded that Slovenian complementary health insurance is a service of general economic interest which falls under a limited scope of the Union acquis (rules on internal market and competition law). This definition does not justify any regulatory state intervention regarding this activity (e.g. direct or indirect allocation of state resources to subjects providing services of general economic interest – compensation for public services, different obligations of complementary health insurance, rules providing solvency of health insurance providers etc.) but only provides an opportunity for their justification, which is the next step in the assessment of compatibility between statutory rules of Slovenian complementary health insurance and the EU acquis.

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References

Adriatic Slovenica d.d. (2012). Splošni pogoji dopolnilnega zdravstvenega zavarovanja.

Brezovnik, B. (2008). *Izvajanje javnih služb in javno-zasebno partnerstvo*. Maribor: Založba Lex localis.

Damjanovic, D., & de Witte, B. (2009). Welfare values and welfare integration under the Lisbon Treaty. In U. Neergaard, L. Roseberry & R. Nielsen (Eds.), I*ntegrating welfare functions into EU law: From Rome to Lisbon* (pp. 53–94). Copenhagen: DJØF Publishing.

European Commission. (2001). *Communication from the Commission — Services of general interest in Europe* (2001/C 17/04, of 19. 1. 2001).

European Commission. (2007). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the RegionsAccompanying the Communication on "A single market for 21st century Europe" Services of general interest, including social services of general interest: a new European commitment, of 20. 11. 2007.

European Commission. (2010). *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest* (SEC(2010) 1545, of 7. 12. 2010).

European Commission. (2011). *Commission Decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest* (2012/21/EU, of 20. December 2011).

Gracar, I. (2014). Spremembe financiranja sistema zdravstvenega varstva RS, predlog z dne 24. 2. 2014.

Hatzopoulos, V. (2011). *The concept of 'economic activity' in the EU Treaty: from ideological dead-ends to workable judicial concepts*. Research papers in Law 06/2011. College of Europe, Department of European Legal Studies.

Mikeln, A. (2014). Pomen zasebnih sredstev za dolgoročno stabilnost zdravstvenega sistema. Prispevek na posvetu *Zdravstvena polemika: Kakšna bo cena vašega zdravja v prihodnje*. Ljubljana.

Milenkovič Kramer, A. (2009). *Private health insurance in Slovenia: a study for the European Commmission*.

Mossialos, E., & Thomson, S. (2009). *Private health insurance in the European Union. Final report prepared for the European Commission, Directorate General for Employment, Social Affairs and Equal Opportunities*. LSE Health and Social Care, London School of Economics and Political Science.

Neergaard, U. (2013). The Concept of SSGI and Asymmetries Between Free Movement and Competition Law. In U. Neergaard, E. Szyszczak, J. W. van de Gronden & M. Krajewski (Eds.), *Social services of general interest in the EU – Legal issues of services of general interest* (pp. 205–245). The Hague: TMC Asser Press. DOI: 10.1007/978-90-6704-876-7_9

Pečarič, M., & Bugarič, B. (2001). *Javne službe*. Ljubljana: Fakulteta za upravo.

Szyszczak, E. (2013). Soft Law and Safe Havens. In U. Neergaard, E. Szyszczak, J. W. van de Gronden & M. Krajewski (Eds.), *Social services of general interest in the EU – Legal issues of services of general interest* (pp. 317–345). The Hague: TMC Asser Press. DOI: 10.1007/978-90-6704-876-7_13

SURS – Statistični urad RS. (2013). *Izdatki za zdravstveno varstvo po namenih in virih financiranja, Slovenija, 2003–2012*.

Šik, A. (2011). Obratovalni stroški dopolnilnega zdravstvenega zavarovanja. V: *Dopolnilno zdravstveno zavarovanje in zdravstvena reforma*. Ljubljana: Slovensko zavarovalno združenje.

van de Gronden, J. W. (2013). Free Movement of Services and the Right of Establishment. Does EU Internal Market Law Transform the provision of SSGI?. In U. Neergaard, E. Szyszczak, J. W. van de Gronden & M. Krajewski (Eds.), *Social services of general interest in the EU – Legal issues of services of general interest* (pp. 123–160). The Hague: TMC Asser Press. DOI: 10.1007/978-90-6704-876-7_6

ZZZS – Zavod za zdravstveno zavarovanje Slovenije. (2012). *Poslovno poročilo za leto 2011*. Ljubljana: Zavod za zdravstveno zavarovanje Slovenije.

ZZZS – Zavod za zdravstveno zavarovanje Slovenije. (2013). *Poslovno poročilo za leto 2012*. Ljubljana: Zavod za zdravstveno zavarovanje Slovenije.

DOI: 10.17573/ipar.2015.1.04 *1.01 Izvirni znanstveni članek*

Analiza nabora, pomena, obsega in pogostosti vložitve razlogov za zahtevo sodnega varstva

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IZVLEČEK

Pravica do pravnega sredstva je ena temeljnih pravic, ki mora biti zagotovljena vsakemu udeležencu v postopku (kazenskem, upravnem, pravdnem …), v katerem se odloča o njegovih pravicah, dolžnostih ali pravnih koristih. Na področju prekrškovnega prava v hitrem prekrškovnem postopku je zakonodajalec to pravno sredstvo poimenoval zahteva za sodno varstvo. Njena učinkovitost zagotavljanja pravne varnosti kršiteljev je neraziskana, zato je bila opravljena poglobljena empirična, historična in normativna raziskava izpodbojnih razlogov za njeno vložitev, zlasti njihovega nabora, pomena, obsega in pogostosti njihove vložitve. Ugotovil sem, da se nabor izpodbojnih razlogov za vložitev zahteve sodnega varstva širi s spremembami Zakona o prekrških. Največ zahtev je vloženih zaradi izpodbojnega razloga zmotne in nepopolne ugotovitve dejanskega stanja. To pomeni, da se prekrškovnemu organu v tem delu hitrega prekrškovnega postopka očita največ nepravilnosti. Z rezultati empirične raziskave z modelom izpodbijanja prekrškovnih odločitev policije je bil predstavljen potek raziskovanja, uporabljene metode in izhodišča za model pravnega varstva zoper odločitve policije po Zakonu o prekrških *de lege ferenda*.

Ključne besede: pravno sredstvo, zahteva za sodno varstvo, hitri prekrškovni postopek, razlogi za vložitev zahteve za sodno varstvo

JEL: K14, K23, K42

1 Uvod

Javno pravo in njegov tradicionalni model sta imela kar nekaj pomanjkljivosti, ki so pripeljale do zagovora zasnove javnega prava človekovih pravic in temeljnih svoboščin. Da javni organi ne bi zlorabljali oblasti, so se začeli uvajati standardi zakonitosti (Craig, 2003, str. 31).

V Republiki Sloveniji je zakonska ureditev na področju prekrškovnega prava prestala prvo resnejšo ustavno-sodno presojo skladnosti z Ustavo Republike Slovenije (v nadaljevanju URS). Ustavno sodišče je v odločbi, št. U-I-56/06-31,

zapisalo, da sta pri obravnavanju prekrškov v okviru enotnega upravno-kaznovalnega postopka zagotovljeni pravici do sodnega varstva (23. člen URS[1]) in do pravnega sredstva (25. člen URS[2]), saj se z odločanjem o zahtevi sodnega varstva (v nadaljevanju ZSV) zagotavljata sodno varstvo in hkrati instančna kontrola odločbe prekrškovnega organa (Perpar et al., 2009, str. 216–217). Podobno je Evropsko sodišče za človekove pravice (v nadaljevanju ESČP) v odločbi Suhadolc proti Sloveniji, št. 57655/08 ugotovilo, da je bila pritožnikova zadeva obravnavana po hitrem postopku iz Zakona o prekrških (v nadaljevanju ZP-1), kar pomeni, da lahko globo in kazenske točke naložijo tudi upravni organi, medtem ko je sodno varstvo zagotovljeno s pritožbo na sodišča. To pomeni, da ima vsakdo možnost, da zoper posamični akt (plačilni nalog, odločba o prekršku in sklep) prekrškovnega organa vloži ZSV. Če je ta ocenjena kot neutemeljena, se posreduje na okrajno sodišče v sodno presojo. S tem je zagotovljena pravica do poštenega sojenja v skladu s 6. členom Evropske konvencije za človekove pravice (v nadaljevanju EKČP).

Na področju prekrškovnega[3] prava je v hitrem prekrškovnem postopku (v nadaljevanju hitri postopek)[4] določen nabor razlogov, zaradi katerih je mogoče vložiti ZSV (62. člen ZP-1).

Zakaj se ZSV daje tak pomen, je mogoče pripisati dejstvu, da odločanje o ZSV odraža tudi uspešnost kateregakoli prekrškovnega organa.[5] Ob tem je potrebno poudariti, da je ZSV kot pravno sredstvo tudi način povratne informacije o učinkovitosti pravnega reda v praksi in ni le orodje pravnega varstva.[6]

Namen tega članka je predstavitev analize odprtih procesnih vprašanj o širitvi nabora in o pomenu izpodbojnih razlogov za vložitev ZSV s spremembami ZP-1 in s tem posledično o zagotavljanju večje pravne varnosti storilcev. Na podlagi kvantitativne, deskriptivne metode ter metode indukcije – dedukcije in vzorčenja predstavljam izhodišča za model pravnega varstva zoper

1 Vsakemu posamezniku je treba zagotavljati, da o obtožbah, podanih zoper njih in tudi o njihovih pravicah ter dolžnostih, brez nepotrebnih odlašanj, odločajo nepristranska, neodvisna in z zakonom ustanovljena sodišča. Torej ustavna določba pomeni veljavo varstva človekovih pravic tudi v prekrškovnem postopku, kar zagotavlja posebni status in delo sodišča (Gajzer, 2007, str. 157).

2 Pravica do pritožbe je temeljna pravica posameznika, ki izhaja iz načela zakonitosti (2. člen URS) in načela enakega varstva pravic (22. člen URS) ter je značilna za pravno državo. Vsakomur je dana možnost, da izpodbija izdane posamične akte vseh organov državne in lokalnih oblasti ter nosilcev javnih pooblastil (Šturm in dr., 2002, str. 274-275).

3 Osnovni namen prekrškovnega prava je varstvo pravnih vrednot, glavni cilj pa je sožitje, red in mir v skupnosti (Kečanović, 2010, str. 1).

4 Zakonodajalec je z ZP-1 ustvaril hitri postopek, ki si ga je na prvi stopnji zamislil kot upravni (prekrškovni) postopek, ki teče pred različnimi, predvsem upravnimi (prekrškovnimi) organi. V nadaljevanju tega postopka je z ZSV predvidel in uredil sodno kontrolo odločitev prekrškovnih organov (Fišer, 2006, str. 49).

5 Transparentnost, administrativne (upravne) pravice, odprti procesi odločanja ali izboljšanje odnosov med državljani in državno oblastjo so tiste oblike, na podlagi katerih se presojajo praktični standardi dobre uprave (Nehl, 1999, str. 17).

6 Tudi pravna varnost in načelo poštenega (»*fair*«) obravnavanja v postopkih pred sodišči in drugimi državnimi organi sodita med temeljne elemente pravne države (Maunz & Dürig, 1991).

odločitve Policije o ZP-1 *de lege ferenda*. Skozi analize in študije preverjam, ali se nabor razlogov za vložitev ZSV dejansko širi z noveliranjem ZP-1 in ali se trend pogostosti njihove vložitve spreminja med izbranimi vzorci v časovnih obdobjih po policijskih postajah.

2 Analiza širitve nabora izpodbojnih razlogov za vložitev zahteve sodnega varstva

Ob uveljavitvi ZP-1 je imel 62. člen samo štiri sklope razlogov, ki jih je lahko upravičenec posamezno ali vse uveljavljal v ZSV. Takratni 62. člen ZP-1 se je glasil: »Odločbo prekrškovnega organa je mogoče izpodbijati z ZSV:

- če je bila z odločbo prekršena materialna določba tega zakona ali predpis, ki določa prekršek;
- če je bila storjena kršitev določb postopka, ker ni odločil pristojni organ, ker storilcu ni bila dana možnost, da se izjavi o prekršku, ker je pri odločanju ali vodenju postopka sodelovala oseba, ki bi po zakonu morala biti izločena ali je bila izločena, ker so bile kršene določbe o uporabi jezika v postopku, ker izrek odločbe ni razumljiv ali je sam s seboj v nasprotju ali ker odločba nima vseh predpisanih sestavin;
- zaradi zmotne in nepopolne ugotovitve dejanskega stanja, pri čemer se smejo v ZSV navajati nova dejstva in predlagati novi dokazi le, če vlagatelj ZSV izkaže za verjetno, da jih brez svoje krivde ni mogel uveljaviti v hitrem postopku;
- zaradi izrečenih sankcij, odvzema premoženjske koristi in stroškov postopka in odločitve o premoženjskopravnem zahtevku.«

Takšna ureditev, glede na opredelitev postopka v zvezi z ZSV, kot je bil določen v ZP-1 v 65. členu, ni omogočala preizkusa vložene ZSV po uradni dolžnosti (po 159. členu v zvezi s tretjim odstavkom 59. člena ZP-1), temveč je bil ta preizkus omejen izključno le na razloge, uveljavljene v ZSV (npr.: katero koli bistveno kršitev določb postopka ali materialnega zakona). V tem pogledu je zanimiva tudi odločitev Vrhovnega sodišča, ki je v obrazložitvi sodbe, št. IV Ips 41/2006, med drugim tudi navedlo, da sodišče »… oceni navedbe ZSV in se opredeli do tega, ali so v ZSV podane uveljavljene kršitve ali ne …«. Torej ni navedlo, da sodišče opravi poleg navedene ocene tudi uradni preizkus odločbe glede nekaterih kršitev, zaradi katerih se lahko vloži ZSV. Enako je veljalo tudi za prekrškovni organ, ki je preizkusil le tiste kršitve, ki jih je uveljavljal upravičenec. Pri tem ni smel popraviti svoje napake, v kolikor je ugotovil kršitev, na katero se upravičenec ni skliceval.

Praksa okrajnih sodišč je bila v tem pogledu zelo neenotna, kar ni pripomoglo k pravni varnosti državljanov in zagotavljanju njihove enakosti pred zakonom (Pruša, 2007, str. 201). Vse to je kazalo na velike anomalije na področju obravnave ZSV. Šele novela ZP-1E je vse postavila na svoje mesto. Z njo se je dodal novi četrti razlog 62. člena ZP-1, ki se glasi:

- »če se odločba opira na dokaz, na katerega se po določbah tega zakona ne more opirati, ali ki je bil pridobljen s kršitvijo z ustavo določenih človekovih pravic in temeljnih svoboščin.«

Do takrat četrti razlog je postal peti razlog 62. člena ZP-1. Od takrat 62. člen ZP-1 ni bil več spremenjen oziroma dopolnjen.

Najpomembnejša novost, ki jo je prinesla omenjena novela, je bila uveljavitev 62. a člena ZP-1, ki je bil v nadaljevanju še dvakrat dopolnjen oziroma spremenjen, in sicer z novelama ZP-1F in ZP-1G. Prvi odstavek 62. a člena ZP-1 je uvedel kršitve, na katere je treba paziti po uradni dolžnosti – *ex offo*, kar pomeni, da jih je treba upoštevati ne glede na to, ali jih upravičenec v ZSV uveljavlja ali ne. S tem je bolj jasno določena dolžnost oziroma obveznost tako prekrškovnega organa kot tudi sodišča pri vsebinskem preizkusu ZSV.

Sedaj se po vseh spremembah prvi odstavek 62. a člena ZP-1 glasi: »V postopku o ZSV se mora vselej po uradni dolžnosti preizkusiti:

- ali je odločil stvarno pristojni organ (spremenjena z novelo ZP-1G),
- ali je podana kršitev materialnih določb tega zakona ali predpisa, ki določa prekršek (dodana z novelo ZP-1F in nato spremenjena z novelo ZP-1G),
- ali je pregon zastaral (dodana z novelo ZP-1F),
- ali je storilcu bila dana možnost, da se izjavi o prekršku,
- ali je izrek odločbe razumljiv in
- ali se odločba opira na dokaz, na katerega se po določbah tega zakona ne more opirati, ali je bil pridobljen s kršitvijo z ustavo določenih človekovih pravic in temeljnih svoboščin«.

Iz navedenega je torej razvidno, da se nabor izpodbojnih razlogov za vložitev ZSV širi s spremembami ZP-1 in se na tak način zagotavlja večja pravna varnost storilcev. To pomeni, da je sedaj z vsemi opisanimi spremembami tudi v hitrem postopku dejansko zagotovljeno učinkovito pravno sredstvo in pravica do poštenega postopka.[7]

7 Avtor članka je v svojem magistrskem delu z naslovom *Analiza izpodbijanja odločitev Policije v hitrem prekrškovnem postopku* v empiričnem delu analiziral tudi delež zavrnjenih ZSV pred sodiščem in ugotovil, da je ta delež od 2006 do 2011 padel za približno 18 % (leta 2006 je bil ta delež največji – 78,16 %, 2011 pa najmanjši – 60,72 %). To pomeni, da se je upravičencem do ZSV dejansko izboljšal položaj, saj imajo s sedanjo ureditvijo ZP-1 na razpolago več razlogov za njeno vložitev (62. člen ZP-1). Določene razloge, ali je prišlo do posamezne kršitve, sta sedaj dolžna preizkusiti tako prekrškovni organ kot sodišče po uradni dolžnosti, ne glede na to ali jih je upravičenec uveljavil (62. a člen ZP-1).

3 Raziskava pomena izpodbojnih razlogov za vložitev zahteve sodnega varstva z analizo primerov iz sodne prakse

3.1 Kršitev materialnih določb Zakona o prekrških ali predpis, ki določa prekršek

Kršitev materialnih določb je podana tako v primeru, ko je prekrškovni organ napačno ali zmotno uporabil zakon ali drug predpis, kot tudi, če ga sploh ni uporabil. Materialno-pravne določbe so razložene v prvem delu ZP-1 (splošni del materialnega prava), ki zajema temeljne določbe: določbe o prekršku ter odgovornost zanj, določbe o sankcijah, odvzemu premoženjske koristi, pridobljene s prekrškom, vzgojnih ukrepih in sankcijah za mladoletnike ter splošne določbe o zastaranju. Posebni del materialno-pravnih določb pa je določen v zakonih, uredbah vlade ali odlokih samoupravne lokalne skupnosti, ki določena ravnanja ali opustitve določajo kot prekršek, določajo znake prepovedanega ravnanja ter za ta dejanja predpišejo oziroma določajo sankcije (Orel, 2008, str. 28–29).

Vrhovno sodišče je v sodbi, št. IV Ips 41/2013, navedlo: »Vrhovni državni tožilec utemeljeno uveljavlja tudi materialno kršitev določb zakona po 4. točki 156. člena ZP-1, saj je sodišče glede prekrška, ki je predmet plačilnega naloga, uporabilo predpis, ki ga ne bi smelo, s tem ko v izreku svoje sodbe ni spremenilo pravne opredelitve prekrška voznika. Prav ima tudi, ko navaja, da bi moralo sodišče po uradni dolžnosti ugotoviti kršitev materialnih določb ZP-1, in sicer drugega odstavka 57. člena ZP-1, saj plačilni nalog ni vseboval pravne opredelitve prekrška voznika, v izreku spremeniti pravno opredelitev prekrška voznika, svojo odločitev pa tudi ustrezno pojasniti. Prekršek voznika je opredeljen v drugem odstavku 125. člena ZPCP-2.« Ob poplavi vseh zakonov in drugih predpisov, ki opredeljujejo različne prekrške (prometna zakonodaja, prekrški s področja javnega reda in miru, orožje, prepovedana droga …), se lahko kaj hitro pripeti, da se uporabi napačni predpis ali pa se znotraj njega kršitelju očita prekršek po napačni določbi. Težave povzroča predvsem pravna opredelitev prekrška fizični osebi v odnosu do odgovorne osebe. Torej, kdaj fizična oseba nastopa tudi v vlogi odgovorne in po kateri določbi se jo potem sankcionira (po določbi za fizično ali za odgovorno osebo).[8] Težavo povzročajo tudi določbe, ki poleg svoje dispozicije vsebujejo tudi opredelitve drugih prekrškov. Tako so, npr. v določbi 20. člena Zakona o varstvu javnega reda in miru (ZJRM-1)[9] zajete pravne opredelitve 6., 7., 12., 13. ali 15. člena ZJRM-1. Dogaja se namreč, da se kršitelju poleg globe za prekršek po 20. členu ZJRM-1, izreče tudi globa, npr. po 7. členu ZJRM-1 (nedostojno vedenje na javnem kraju). Takšno ravnanje prekrškovnega organa pomeni kršitev ustavne pravice, saj se kršitelja dvakrat kaznuje za isto dejanje (31. člen Ustave). Globo

8 Podrobneje v sodbah Vrhovnega sodišča št. IV Ips 75/2013 z 29. 8. 2013, IV Ips 85/2013 z 29. 8. 2013 in IV Ips 113/2013 z 21. 11. 2013.

9 Če so dejanja iz 6., 7., 12., 13. in 15. člena tega zakona storjena z namenom vzbujanja narodnostne, rasne, spolne, etnične, verske, politične nestrpnosti ali nestrpnosti glede spolne usmerjenosti, se storilec kaznuje z globo najmanj 200.000 tolarjev (834,58 evrov).

se mu sme izreči le za prekršek po 20. členu ZJRM-1, če je mogoče potrditi, da je bil storjen z elementi nestrpnosti. Kljub temu, da so lahko kršene celo ustavne pravice, ima prekrškovni organ možnost, da jih odpravi, seveda, če jih sam odkrije[10] ali če je nanje opozorjen[11]. Cilj vsakega prekrškovnega organa je, da je njegovo ravnanje, odločanje, vodenje postopkov zakonito in pravilno.

3.2 Kršitev določb postopka

Za kršitev določb postopka gre, če:

- je odločil nepristojni organ,
- je bila kršena pravica storilca do izjave,
- je pri odločanju ali vodenju postopka sodelovala oseba, ki bi po zakonu morala biti izločena ali je bila izločena,
- so bile kršene določbe o uporabi jezika v postopku,
- je izrek odločbe nerazumljiv ali je sam s seboj v nasprotju,
- odločba nima vseh predpisanih sestavin.

V postopku z ZSV je treba presojati vprašanje, ali je odločil pristojni organ. Prekrškovnih organov je zelo veliko in prav lahko se zgodi, da bodo prestopali meje svojih delovnih področij, zlasti če razmejitve pristojnosti niso povsem jasne. Procesni predpisi po navadi zahtevajo zelo strogo spoštovanje stvarne pristojnosti, pri krajevni pristojnosti pa so, zlasti če ni ugovora v tej smeri in če je postopek že prišel do napredujoče faze v postopku, manj strogi. Ugoditev ZSV po uradni dolžnosti, ker je odločil (le) krajevno nepristojni organ, bi se zdela pretirana (Fišer et al., 2009, str. 379).

Vrhovno sodišče je s sodbo, št. IV Ips 58/2007, odločilo, da je treba pred odločitvijo o ZSV zoper plačilni nalog storilca seznaniti s ključnimi obremenilnimi dejstvi in mu omogočiti, da se o njih izjavi, ne glede na to, da postopkovne določbe ZP-1 tega izrecno ne zahtevajo. Podobno je ESČP v sodbi *Šild proti Sloveniji*, št 59284/08, tudi navedlo: »Čeprav 6. člen EKČP ne določa posebnih oblik vročanja dokumentov (glej *Bogonos proti Rusiji*, št. 68798/01, 5. februar 2004, splošno načelo pravičnega odločanja sodišča, ki vključuje temeljno pravico kontradiktornosti postopka, zahteva, da ima vsakdo, ki je obdolžen kaznivega dejanja, v skladu s točko a tretjega odstavka 6. člena EKČP pravico biti seznanjen z bistvom in vzroki obtožbe, ki ga bremeni. Pravica dostopa do sodišča v skladu s prvim odstavkom 6. člena poleg tega vključuje upravičenost do prejemanja ustreznih obvestil o upravnih in sodnih odločbah (glej, med drugim, splošno *Hennings proti Nemčiji*, 16. december 1992, serija A št. 251-A, in *Sukhorubchenko proti Rusiji*, št. 69315/01, 53. in 54. odstavek, 10. februar 2005), kar je še posebej pomembno v zadevah, kjer se pritožba zahteva v za to določenem časovnem obdobju.«

10 Sanacija je mogoča po pravnomočnosti z vložitvijo izrednega pravnega sredstva – Odprava ali sprememba odločbe o prekršku na predlog prekrškovnega organa (v nadaljevanju OSOPPO).

11 Z ZSV ali predlogom za OSOPPO.

Novela ZP-1E je določila še vedno veljavne pogoje za pridobitev izjave kršitelja pred izdajo odločbe o prekršku in vsebino, s katero mora biti kršitelj seznanjen (drugi in tretji odstavek 55. člena ZP-1). Tako kot že doslej je določeno, da se kršitelju, ki se na kraju ugotovitve prekrška ne more izjaviti o prekršku, pošlje pred izdajo odločbe pisno obvestilo s poukom in z možnostjo izjave. Enako velja, če prekrškovni organ takoj ob ugotovitvi ali obravnavanju konkretne zadeve kršitelja ni mogel obvestiti o vsebini očitka in njegovih pravicah, s čimer se mu da možnost za »pripravo obrambe«. Izrecno je določeno, da se odločba o prekršku ne more opirati na izjavo kršitelja, če ni bil v skladu z ZP-1 poučen o svojih pravicah v postopku (drugi odstavek 55. člena ZP-1). Glede na kaznovalno naravo prekrškovnega postopka je treba varstvo pravic kršitelja zagotavljati tudi pri izdaji plačilnega naloga. Pooblaščena uradna oseba (v nadaljevanju PUO), ki kršitelju plačilni nalog izda in vroči na kraju prekrška, ga je o storjenem prekršku dolžna seznaniti takoj ob vročitvi, kar zaznamuje na plačilnem nalogu (prvi odstavek 57. člena ZP-1) (Orel, 2008, str. 30). Če plačilnega naloga kršitelju ni mogoče vročiti na kraju prekrška, mu je treba pred njegovo izdajo in vročitvijo omogočiti, da se osebno izjavi o prekršku po določbah 55. člena ZP-1, plačilni nalog pa mora vsebovati tudi kratek opis prekrška in povzetek kršiteljeve izjave (drugi odstavek 57. člena ZP-1). S tem se kršitelju zagotavlja pravica do ZSV, saj lahko le tako, če je z ugotovitvami PUO seznanjen, v njej vsebinsko izpodbija ugotovitve prekrškovnega organa. Kršitelj se lahko z vsebino pridobljenih dokazov seznani tudi s pregledom spisa pri prekrškovnem organu (82. člen ZUP v zvezi s prvim odstavkom 58. člena ZP-1).

V primeru, da je pri odločanju ali vodenju postopka sodelovala oseba, ki bi po zakonu morala biti izločena ali je bila izločena, se kršitev nanaša na vse osebe, ki so sodelovale pri vodenju postopka in pri odločanju. Teh je lahko več, zato je doseg te kršitve precej širok. To je sicer razumljivo pri izločitvenih, manj pa pri izključitvenih razlogih.

Glede na posebnosti nekaterih hitrih postopkov se ocenjuje, da se določbe o zagotavljanju uporabe svojega jezika v hitrem postopku pogosto kršijo, posledice pa podcenjujejo. Tudi pravica do uporabe maternega jezika je sestavina pravice do poštenega postopka. Kaj na primer pomaga kršitelju pravica do izjave, če ne razume, za kaj v postopku gre, kaj se mu očita in kaj je podlaga za očitek, za nameček pa svojih misli ne more izraziti v jeziku, ki ga obvlada (Fišer et al., 2009, str. 380).

Razumljivost izreka odločbe ne pomeni le njegove jasne vsebine, temveč mora opis zajeti vse okoliščine, ki konkretizirajo abstraktni dejanski stan prekrška. Abstraktni opis dejanja zadošča le takrat, ko po naravi stvari konkretizacija ni smiselna, sicer pa mora izrek zajeti tudi konkretizacijo dejanskega stanu. Bistveno je, da so konkretne okoliščine tako opisane, da je mogoč preizkus, ki mora odgovoriti na vprašanje: »Ali so s konkretnimi okoliščinami, opisanimi v izreku, uresničeni vsi abstraktni zakonski znaki prekrška?« Posebej velja poudariti pomembnost navedbe kraja in časa storitve prekrška ter odločilnih

dejstev, saj odsotnost teh v opisu dejanja pomeni nerazumljivost izreka odločbe o prekršku (nepravilna oziroma pomanjkljiva navedba kraja in časa ter odločilnih dejstev pa je vprašanje, ki se nanaša na dejansko stanje prekrška) (Orel, 2008, str. 30–31).

Vrhovno sodišče je s sodbo, št. IV Ips 71/2007, odločilo, da nenatančnost policista, ki je prekršeno določbo ZVCP-1 deloma vpisal v napačno od šestih za to predvidenih rubrik na obrazcu plačilnega naloga, zaradi česar je iz zapisanega izhajalo, da gre za prekršek po 4. točki petega odstavka 115. člena ZVCP-1, ki ne obstaja, ni takšna pomota, da bi bil »izrek« plačilnega naloga nerazumljiv. Glede vsebine očitka v postopku ni bilo nejasnosti, kar izhaja tudi iz dejstva, da je storilec v ZSV izrecno zapisal, da »mu je policist izrekel globo zaradi kršitve četrtega odstavka 115. člena ZVCP-1 in ne storitve prekrška po petem odstavku istega člena«. Napake so nekaj vsakdanjega v poslovanju prekrškovnega organa. Vse napake, razen tistih, ki so ugotovljene v izreku posamičnega akta, se po njihovih ugotovitvah (po opozorilu storilca, lastna zaznava) popravijo s sklepom o popravi pomot. V kolikor prekrškovni organ zazna napako v izreku posamičnega akta, jo lahko sanira šele po pravnomočnosti z vložitvijo izrednega pravnega sredstva – odprava ali sprememba odločbe o prekršku na predloga prekrškovnega organa (v nadaljevanju OSOPPO). Če pa je nanjo opozorjen s pravnim sredstvom (ZSV), svojo prvotno odločitev najprej odpravi in nato sprejme pravilno odločitev (izda nov posamični akt, ustavi postopek, poda obdolžilni predlog ali predlog drugemu prekrškovnemu organu).

Sestavine pisne odločbe o prekršku sicer določa 56. člen ZP-1, vendar kljub temu ne bo vedno preprosto ugotoviti, ali odločba vsebuje vse, kar bi morala, ali ne, niti ali so pri tem mišljene samo formalne sestavine odločbe (uvod, izrek, obrazložitev in morebiti še pravni pouk ter identifikacijske oznake), ali pa gre za vse tisto, kar bi te sestavine morale zajemati po vsebini. Če bi šlo za slednje, bi bil to izjemno širok razlog za vložitev ZSV in verjetno ne bi bilo veliko odločb prekrškovnih organov, ki bi zdržale kolikor toliko strogo preverjanje. Med sestavinami odločbe bo vendarle treba upoštevati zlasti tiste, ki po eni strani določajo kršitelja, po drugi strani pa ravnanje, ki ima znake prekrška (Fišer et al., 2009, str. 380–381).

3.3 Zmotna in nepopolna ugotovitev dejanskega stanja

Tretji razlog, zaradi katerega se lahko vloži ZSV, se veže le na odločilna dejstva. To so tista dejstva (materialno-pravno in procesno-pravno relevantna dejstva), na katerih neposredno temelji uporaba zakona (materialnega in procesnega). Ta odločilna dejstva pomenijo dejansko stanje prekrška.[12] O zmotno ugotovljenem dejanskem stanju govorimo, če iz ugotovljenih

12 Tudi v primerih, ko PUO osebno zaznajo prekrške, je smiselno in dopustno uveljavljanje zmotne in nepopolne ugotovitve dejanskega stanja kot razloga za vložitev ZSV in tudi, da domnevni storilec z njo lahko uspe. Izhajati moramo iz dejstva, da so tudi PUO prekrškovnih organov samo ljudje, ki so zmotljivi, in priznati dejstvo, da tehnične naprave in sredstva ne delujejo vedno brezhibno. Ni pa mogoče izključiti niti primerov, ko PUO zlorabljajo svoj položaj (Jakulin, 2007, str. 55).

okoliščin, ki jih ima prekrškovni organ za dokazane, ne izhajajo ugotovitve, na podlagi katerih bi lahko ugotovili obstoj prekrška, ali kadar je prekrškovni organ izvedene dokaze nepravilno presodil. Presodil jih je drugače, kot bi po logičnem sklepanju izhajalo iz rezultatov izvedenih dokazov. O nepopolno ugotovljenem dejanskem stanju govorimo, če prekrškovni organ ni upošteval pomembnih okoliščin ali če je opustil njihovo ugotavljanje. V prekrškovnem postopku velja omejitev uveljavljanja novih dejstev in predlaganja novih dokazov. Na to omejitev mora kršitelja opozoriti že prekrškovni organ, preden izda odločbo o prekršku ali plačilni nalog (drugi odstavek 55. člena ZP-1). Njen namen je preprečiti nepotrebno zavlačevanje postopka v vseh fazah hitrega postopka, kar je sicer še vedno zelo pogost namen kršiteljev v hitrem postopku (Orel, 2008, str. 31).

Višje sodišče v Celju je v svoji odločitvi, št. VSC sklep Prp 241/2013, odločilo: »Ugotavljanje okoliščin, zaradi katerih šteje prekršek za prekršek neznatnega pomena, kot je to določeno v 6. a členu ZP-1, sodi v okvir ugotavljanja dejanskega stanja. Če jih sodišče prve stopnje ugotovi in oceni, pritožnik (prekrškovni organ) pa se s takšno ugotovitvijo sodišča ne strinja in podaja lastno oceno drugače ugotovljenih in ocenjenih okoliščin, gre za vprašanje pravilne ugotovitve dejanskega stanja.« Šele ko prekrškovni organ ugotovi dejansko stanje storjenega prekrška, lahko verodostojno sprejme svojo določitev, ali je zbral dovolj dejstev in dokazov, da je določena oseba storila prekršek, ali pa iz zbranih dejstev, dokazov in okoliščin izhaja, da je bil prekršek storjen v takih okoliščinah, ki ga delajo posebej lahkega in škodljiva posledica ni oziroma ne bo nastala. Najslabše je, če okrajno sodišče ob preizkusu ZSV ugotovi, da je bilo dejansko stanje nepopolno ali zmotno ugotovljeno, kar ima lahko za posledico, da njegovo odločitev spremeni in na koncu postopek celo ustavi. Takšen izid lahko pripiše le svojemu pomanjkljivemu vodenju hitrega postopka, saj je več kot očitno, da ni ravnal v skladu z ZP-1 in sodno prakso. Ob tem je zlasti pomembno, da pri sprejemanju svojih odločitev upošteva tudi stališča domnevnega kršitelja in da obrazloži, zakaj njegovih predlaganih dokazov ni izvedel oziroma jih je izvedel le v manjši meri (zagotavljanje ustavne pravice do izvajanja dokazov v njegovo korist – tretja alineja 29. člena URS). S tako vodenim hitrim postopkom se lahko upravičencem onemogoči oziroma omeji vložitev ZSV.

3.4 Opiranje na dokaz, na katerega se po določbah Zakona o prekrških ne more opirati ali ki je bil pridobljen s kršitvijo z ustavo določenih človekovih pravic in temeljnih svoboščin

Za kako hudo kršitev gre, je mogoče razbrati iz rednega sodnega postopka, v katerem se ta kršitev šteje za absolutno bistveno kršitev določb postopka (6. točka prvega odstavka 155. člena ZP-1). To pomeni, da je treba dokazati le njen obstoj in ne tudi, da je kršitev imela vpliv na zakonitost odločbe.

Navedena določba ima svojo sorodnico v kršitvi kazenskega postopka (8. točka prvega odstavka 371. člena ZKP). Seveda med ZP-1 in ZKP

ni mogoče postaviti enačaja. Sporna ni situacija, ko se sodbe/odločbe opirajo na dokaze, ki so bili pridobljeni s kršenjem ustavno določenih človekovih pravic in temeljnih svoboščin oziroma na dokaze, za katere je v zakonu določeno, da se sodbe/odločbe na njih ne bi smele opirati. Tu je treba le slediti tem normam, ki prepovedujejo uporabo takšnih dokazov (npr. četrti odstavek 110. člena ZP-1 ali drugi odstavek 18. člena ZKP). Čeprav ZP-1 za razliko od ZKP izrecno ne določa, da se dokazi, ki so bili pridobljeni na podlagi nedovoljenih dokazov (doktrina sadežev zastrupljenega drevesa), ne bi smeli uporabljati, ni utemeljenega razloga za njuno razlikovanje. Bistvena razlika glede potencialnih kršitev, ko je dokaz pridobljen s kršenjem ustavno zagotovljenih človekovih pravic in temeljnih svoboščin (od nezakonite pridobitve materialnega dokaza do pridobitve personalnega dokaza), je v njihovih varovalkah. V predhodnih postopkih predlagatelja so bistveno ohlapnejše kot v predkazenskem postopku. Predvsem od prvostopenjskega sodnika, v nadaljevanju pa tudi v morebitnem pritožbenem postopku, se pričakuje pozornost in reakcije na te kršitve. Kljub temu v ZP-1 ni določbe o ekskluzijskem pravilu, po katerem bi bilo treba nedovoljeni dokaz izločiti in bi se moral sodnik, ki je prišel z njim v stik, izločiti (psihološka okužba). Tudi z uporabo takšnih dokazov je mogoče zagotoviti pravico do poštenega sojenja v tej fazi kaznovalnega prava (Fišer et al., 2009, str. 691-695).

Pri ureditvi hitrega postopka ta razlog ni določen kot ena izmed mogočih kršitev določb postopka, ampak je opredeljen kot samostojen razlog, zaradi katerega se lahko vloži ZSV (4. alineja prvega odstavka 62. člena ZP-1). ZP-1 izrecno določa, da se odločba prekrškovnega organa ne sme opirati na izjavo kršitelja, ki ni bil poučen o svojih pravicah iz drugega odstavka 55. člena ZP-1. Prav tako se ne sme opirati na dokaz, če pouk o pravicah ni vpisan v zapisnik ali uradni zaznamek oziroma v obvestilo kršitelju, da se izjavi o dejstvih oziroma okoliščinah prekrška. Odločba se prav tako ne sme opirati na izjavo kršitelja, ki je bil pridržan, ker je bil zaloten pri prekršku pod vplivom alkohola ali drugih psihoaktivnih snovi in ni bil poučen o pravicah (tretji odstavek 109. člena in tretji odstavek 110. člena ZP-1 ter 24. člen ZPrCP) (Orel, 2008, str. 31-33).

Višje sodišče v Ljubljani je v sodbi, št. VSL PRp 571/2009, med drugim navedlo: »Sodišče prve stopnje je oprlo svojo odločitev na obdolženkino izpovedbo na zaslišanju, kjer je povedala, da je policistu v razgovoru zaradi zmedenosti res priznala, da je v kritičnem času vozila očetovo vozilo, in na izpovedbo policista, ki je njeno izpovedbo potrdil. Iz izpodbijane sodbe in podatkov v spisu ne izhaja, da bi policist obdolženko v postopku zbiranja obvestil o storilcu prekrška pred razgovorom poučil o ustavni pravici, da ni dolžna izpovedati zoper sebe ali svoje bližnje ali priznati krivdo. Sodba sodišča prve stopnje se tako opira na nedovoljen dokaz.«

Tudi Vrhovno sodišče je v sodbi, št. IV Ips 117/2008, podobno odločilo: »Uradni zaznamek o izjavi osumljenca, ki jo je dal Policiji na kraju storitve prekrška, preden je bil poučen o svoji ustavni pravici do molka oziroma do privilegija zoper samoobtožbo, ne more biti dokaz v procesnem smislu, na katerega bi

se smela opreti sodba o prekršku, saj v smislu 6. točke prvega odstavka 155. člena ZP-1 predstavlja nedovoljen dokaz.«

Predstavljeni sodbi opisujeta različna primera, ko se je sodba oprla na nedovoljen dokaz. Ravno ustavna pravica, ki določa privilegij do samoobtožbe oziroma do molka, je prva v vrsti, ki lahko z njenim kršenjem pomeni zbiranje nedovoljenih dokazov. Če kršitelj ali priča pred zbiranjem obvestil oziroma zaslišanjem nista poučena o tej pravici, so tako njuna izjava kot dokazi, ki so bili pridobljeni na podlagi teh izjav, nedovoljeni in se odločba nanje ne sme opirati. Temu se v hitrem postopku daje premajhen pomen, saj se pravico še vedno prepogosto krši. Gre zlasti za pogovore o storjenih prekrških, ko pred njihovim pričetkom kršitelji ali priče niso opozorjene na privilegij do samoobtožbe oziroma do obtožbe svojcev in do molka.

3.5 Izrečene sankcije, odvzem premoženjske koristi in stroški postopka ter odločitev o premoženjskopravnem zahtevku

Prekrškovni organi praviloma izrekajo globe v višini najnižje predpisane, razen če imajo pooblastilo, da izrekajo globo v razponu. V primeru neupoštevanja predpisane višine globe lahko kršitelj v ZSV uveljavlja peti razlog – okoliščine, ki jih prekrškovni organ pri izbiri in odmeri sankcije oziroma pri odločitvi o ukrepu ni upošteval, pa bi jih moral upoštevati, oziroma ni upošteval pravilno. Prekrškovni organi imajo po vloženi ZSV ne glede na vrsto odločitve (peti odstavek 63. člena ZP-1) omejeno možnost drugačnega izrekanja sankcij. V okviru pooblastil se lahko odločijo za izrek opomina, če za to obstajajo utemeljeni razlogi (21. člen ZP-1), lahko pa hitri postopek zoper kršitelja po odpravi svoje odločitve ustavijo (136. člen v zvezi z drugim odstavkom 58. člena ZP-1). Sicer pa morajo (praviloma) zadevo posredovati v odločanje sodišču. Prekrškovni organi namreč nimajo pooblastila, da bi lahko predpisano sankcijo omilili, torej da bi odmerili globo pod mejo, ki je predpisana za ta prekršek. Omilitveno pooblastilo uporablja le sodišče (šesti odstavek 26. člena ZP-1).

Vrhovno sodišče je v sodbi, št. IV Ips 28/2014, tudi navedlo: »Z novelo ZP-1G je odgovornost pravnih oseb, samostojnih podjetnikov posameznikov in posameznikov, ki samostojno opravljajo dejavnost, v primeru stečaja ali prenehanja urejena v 14. b členu ZP-1. Pri tem je treba poudariti, da pojem prenehanja ne zajema samo prenehanja s stečajem, temveč tudi druge mogoče oblike prenehanja pravnih oseb, npr. prostovoljno in prisilno likvidacijo, izbris iz sodnega registra brez likvidacije, združitev, delitev, prenos premoženja, spremembo pravno organizacijske oblike ipd. (Jenull & Selinšek, 2011, str. 53–54). Po tej določbi se pravno osebo, ki pred izdajo odločbe oziroma sodbe o prekršku preneha obstajati, spozna za odgovorno za prekršek, sankcije za prekršek in odvzem premoženjske koristi pa se izrečejo subjektu, ki je njen pravni naslednik, če je vodstveni ali nadzorni organ ali nosilec tega subjekta vedel za storjeni prekršek. Če tega ni vedel, se pravnemu nasledniku lahko izreče le odvzem predmetov in odvzem premoženjske koristi.« Ob tem je treba opozoriti, da hitri postopek ni dovoljen, ko se odloča o premoženjskopravnem

zahtevku. To pomeni, da o njem vedno odloča okrajno sodišče v posebnem postopku. V primeru, da za odvzem premoženjske koristi ni določen pogoj odvzema ali je ta fakultativen, o njenem odvzemu prav tako odloča okrajno sodišče. V nasprotnem primeru, ko je določen obligatorni pogoj, je za odločitev o njenem odvzemu pristojen prekrškovni organ. Za odmero stroškov postopka (npr. sodno takso) ali poplačilo (npr. nagrado odvetniku) je vedno pristojen prekrškovni organ (od 143. do 146. člena ZP-1).

4 Študija pogostosti vložitve razlogov za zahteve sodnega varstva

Glavni cilj študije je ugotoviti pogostost uveljavitve posameznega razloga v ZSV. Za samo študijo sem se odločil, ker takšna raziskava še ni bila opravljena in ker lahko pokaže, glede na očitke upravičencev, kateri razlog naj bi prekrškovni organi najpogosteje kršili pri sprejemanju svojih odločitev. Te ugotovitve lahko prekrškovnemu organu pomagajo pri nadaljnjem delovanju, saj na ta način ugotavlja, kako lahko še izboljša svoje delovanje in poskuša s tem doseči, da bodo upravičenci čim manjkrat uveljavljali kršitev posameznega razloga.

Preden sem se lahko lotil samih študij in analiz, sem moral sam zbrati podatke, ker niti Policija niti Ministrstvo za pravosodje ne vodita evidence pogostosti uveljavitve posameznega razloga. Torej če sem želel opraviti primarno študijo, sem se moral sam odločiti, kje bom podatke zbral. Po pridobljenem dovoljenju sem v okviru Policijske uprave Ljubljana[13] obiskal mestni policijski postaji (Center, Moste) in območni policijski postaji (Kočevje, Ribnica). Na vsaki postaji sem vsebinsko pregledoval ZSV, ki so bile vložene zoper posamične akte (odločbe o prekršku, plačilne naloge, sklepe), in na ta način ugotovil razloge za njihovo vložitev. Zajete so bile vse ZSV ne glede na tip ugotovljenega prekrška (cestni promet, javni red in mir, orožje, droga …). Ugotovljene razloge sem beležil na prej pripravljenem obrazcu, tako da sem za mestne postaje iz celotne populacije zbral naključni vzorec 150 enot, za območne postaje pa so podatkovni nizi različni, saj sem pregledal vse njihove posamične akte.[14] Za mestne postaje to ne bi bilo mogoče, saj se število vloženih ZSV v posameznem letu približa številu 1000 ali celo več. Pri zbiranju vzorca na teh postajah nisem bil pozoren, v katerem mesecu posameznega leta je bila ZSV vložena, ali je bila vložena zoper plačilni nalog, odločbo o prekršku oziroma sklep, ali je bila vložena zoper prekrške s področja prometne zakonodaje, javnega reda in miru, orožja, prepovedane droge, tujske problematike …, ampak sem v arhivskih prostorih naključno prebiral registratorje, v katerih je spravljena arhivska dokumentacija. Na kraju samem sem se sproti odločal, kateri registrator bom pregledal. Vsaka policijska postaja ima svoj način vodenja

13 Te policijske postaje sem izbral glede na primerljivi obseg delovnega področja.

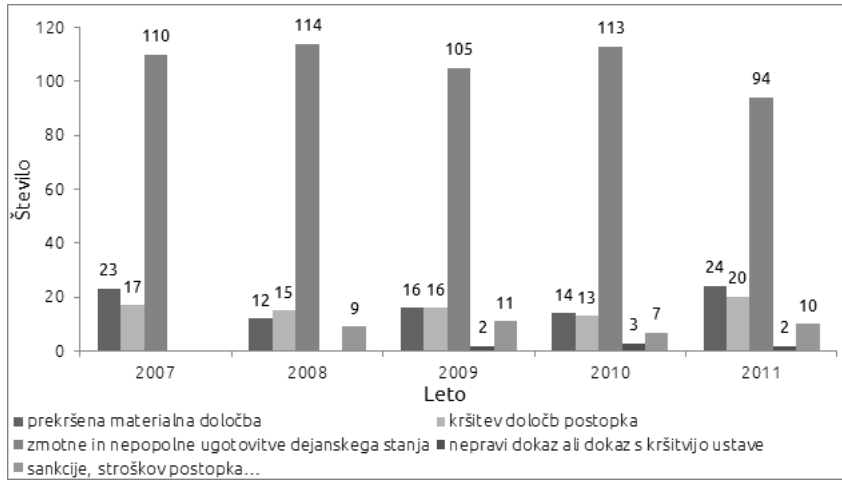
14 Zbrani podatkovni nizi vloženih ZSV zoper posamične akte, po policijskih postajah, v izbranem časovnem obdobju so razvidni iz grafikonov. Nad vsakim stolpcem v določenem letu je navedeno število vloženih ZSV po posameznem izpodbojnem razlogu. Npr. iz Grafikona 1 je razvidno, da je bilo v letu 2007 vloženih 110 ZSV zaradi zmotne in nepopolne ugotovitve dejanskega stanja in da zaradi nedovoljenega dokaza ni bila vložena nobena ZSV.

arhivske dokumentacije[15], zato izbira po nekem sistemu ne bi bila mogoča. Ko sem zbral vzorec 150 enot za posamezno leto, sem na enak način nadaljeval z zbiranjem vzorca v drugem letu.[16] V študiji je zajeto obdobje 2007 do 2011. Iz tako zbranih podatkov sem najprej opravil študijo za vsako posamezno policijsko postajo, v zaključku pa sem rezultate med seboj primerjal in povzel skupne ugotovitve.

4.1 Policijska postaja Ljubljana Center

Na Policijski postaji Ljubljana Center (v nadaljevanju PP Center) sem iz populacije vseh posamičnih aktov z vloženo ZSV naključno izbral vzorec 150 enot za vsako posamezno leto (2007 do 2011).

Grafikon 1: Študija vloženih ZSV po številu posameznega razloga za obdobje 2007–2011 na PP Center



Vir: ZSV, vložene zoper posamične akte prekrškovnega organa PP Center

Iz Grafikona 1 je razvidno, da je *zmotna in nepopolna ugotovitev dejanskega stanja* najpogostejši razlog, ki ga upravičenci uveljavljajo v ZSV. V obdobju 2007–2010 je zastopan nekje med 70 % in 76 % vseh ZSV. Le v letu 2011 je opazen majhen padec, saj je v primerjavi s prejšnjimi časovnimi obdobji, uveljavljen le v 62 % vseh ZSV. Na drugem mestu po pogostosti uveljavitve v ZSV je skoraj v vseh časovnih obdobjih razlog *prekršena materialna določba*. Le v letu 2008 je pred njim razlog *kršitev določb postopka*, v letu 2009, pa sta z njim izenačena. V odstotkih predstavlja razlog *prekršena materialna določba* najmanj v letu 2008, saj je uveljavljen le v 8 % vseh ZSV, največ pa v letu 2011,

15 Arhivi se vodijo na način, da se odločbe o prekršku in plačilni nalogi, zoper katere je bila vložena ZSV, vodijo posebej, drugje se vodijo skupaj, spet drugje med preostalo arhivsko dokumentacijo. Vmes se je tudi spremenil način evidentiranja dokumentov, saj je policija pričela uporabljati novo programsko opremo. To so glavni razlogi, da izbira ni bila mogoča po nekem sistemu.

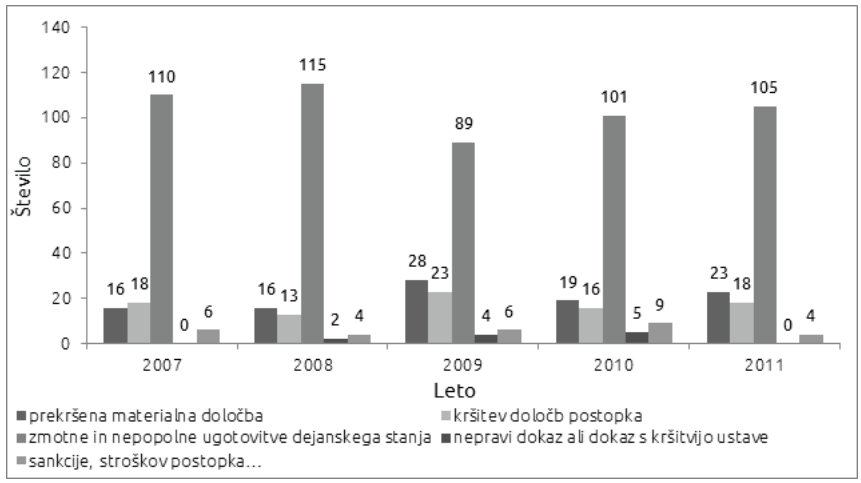
16 Ob tem se bo lahko marsikomu zastavilo vprašanje, ali je vzorec 150 enot reprezentativen glede na njegovo naključno izbiro. Odgovor bo predstavljen v poglavju 4.5 Primerjava rezultatov.

ko je uveljavljen v 16 % vseh ZSV. V celotnem obdobju 2007–2011 je na tretjem mestu razlog *kršitev določb postopka*. V letu 2008, ko je na drugem mestu, pred razlogom *prekršena materialna določba*, zastopa 10 % vseh ZSV. V letu 2009, ko sta s tem razlogom izenačena, je tako kot razlog *prekršena materialna določba* v 10,7 % vseh ZSV. Leti 2008 in 2009 ne predstavljata njegovega minimuma oziroma maksimuma, kajti v letu 2010 je bil uveljavljen le v 8,7 % vseh ZSV (minimum), v letu 2011 pa je bil uveljavljen v 13,3 % vseh ZSV (maksimum). Razlog *sankcije, stroški postopka …*, ki zaseda četrto mesto, v letu 2007 ni uveljavljen v nobeni ZSV. Za preostala časovna obdobja so ga upravičenci uveljavljali tako, da je najmanjkrat uveljavljen v letu 2010, le v 4,7 % vseh ZSV, največkrat pa v letu 2009, v 7,3 % vseh ZSV. Tudi za razlog *nedovoljeni dokaz*, ki zaseda zadnje, peto mesto, velja, da v letu 2007 in 2008 ni uveljavljen v nobeni ZSV. V preostalih časovnih obdobjih pa je uveljavljen le v 1,3 % (2009, 2011) oziroma 2 % (2010) vseh ZSV.

4.2 Policijska postaja Ljubljana Moste

Na Policijski postaji Ljubljana Moste (v nadaljevanju PP Moste) sem iz vzorca vseh posamičnih aktov z vloženo ZSV naključno izbral podatkovni niz 150 enot za vsako posamezno leto (2007–2011).

Grafikon 2: Študija vloženih ZSV po številu posameznega razloga za obdobje 2007–2011 na PP Moste



Vir: ZSV, vložene zoper posamične akte prekrškovnega organa PP Moste

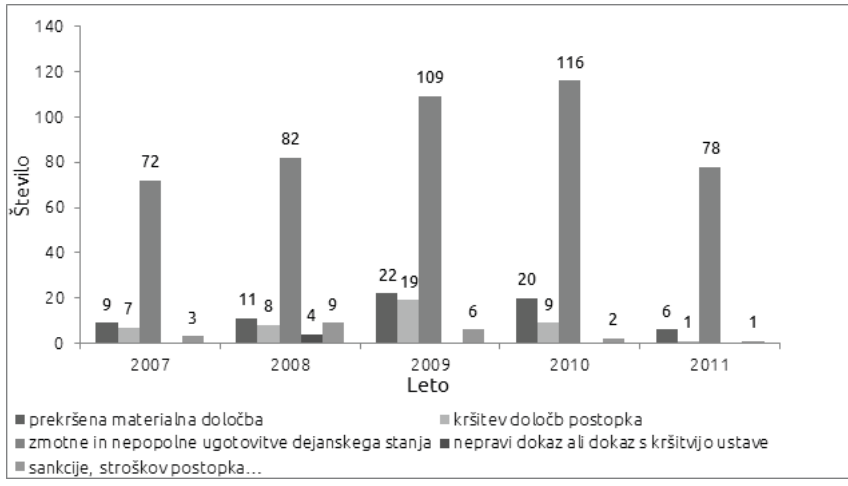
Iz Grafikona 2 je razvidno, da je *zmotna in nepopolna ugotovitev dejanskega stanja* najpogostejši razlog, ki ga upravičenci uveljavljajo v ZSV. V letu 2009 je uveljavljen le v 59 % vseh ZSV, medtem ko je v drugih časovnih obdobjih uveljavljen pogosteje, in sicer med 67 % in skoraj 77 % vseh ZSV. Na drugem mestu po pogostosti uveljavitve je skoraj za vsa obravnavana časovna obdobja razlog *prekršena materialna določba*. Le leta 2007 je pred njim razlog *kršitev določb postopka*. V odstotkih je najmanj zastopan v letih 2007 in 2008, saj je

uveljavljen le v 10,7 %, največ pa v letu 2009, saj je uveljavljen v 18,7 % vseh ZSV. Na tretjem mestu, v skoraj vseh časovnih obdobjih, razen v letu 2007, ko je na drugem mestu, je razlog *kršitev določb postopka*. V tem letu in v letu 2011 zastopa 12 % vseh ZSV. To je srednja vrednost, saj je najmanjkrat uveljavljen v letu 2008, le v 8,7 % vseh ZSV, največkrat pa v letu 2009, v 15,3 % vseh ZSV. Za razlog *sankcije, stroški postopka* …, ki zaseda četrto mesto, predstavljata minimum leti 2008 in 2011, ko je uveljavljen le v 2,7 % vseh ZSV, medtem ko je njegov maksimum v letu 2010, saj je uveljavljen v 6 % vseh ZSV. Za razlog *nedovoljeni dokaz*, ki zaseda zadnje, peto mesto, pa velja, da v letih 2007 in 2011 ni uveljavljen v nobeni ZSV. V časovnem obdobju 2008–2010 je uveljavljen med 1,3 % in 3,3 % vseh ZSV.

4.3 Policijska postaja Kočevje

Glede na to, da je Policijska postaja Kočevje (v nadaljevanju PP Kočevje) prejela dosti manj ZSV kot mestne policijske postaje, sem lahko pregledal vse njene posamične akte, zoper katere je bila vložena. Tako sem tukaj dobil različne podatkovne nize za vsako posamezno leto (2007-2011).

Grafikon 3: Študija vloženih ZSV po številu posameznega razloga za obdobje 2007–2011 na PP Kočevje



Vir: ZSV, vložene zoper posamične akte prekrškovnega organa PP Kočevje

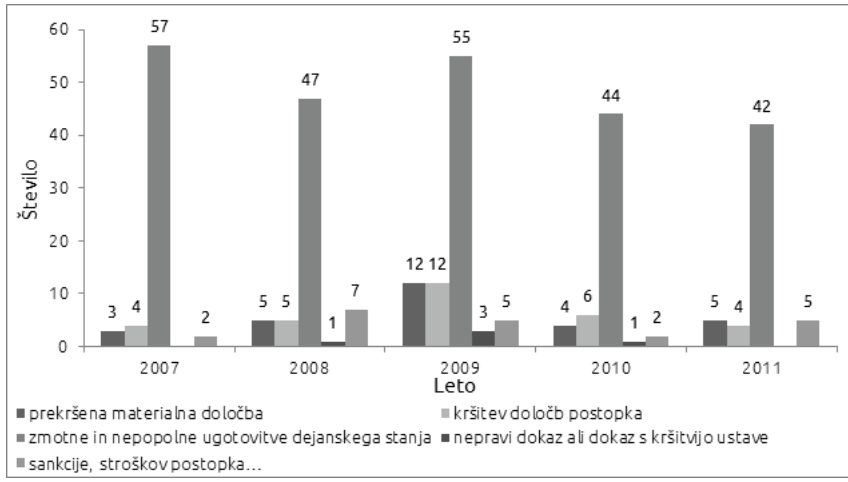
Grafikon 3 prikazuje, da je *zmotna in nepopolna ugotovitev dejanskega stanja* najpogostejši razlog, ki ga upravičenci uveljavljajo v ZSV. V obdobju 2007-2010 znaša nekje med 70 % in 79 % vseh ZSV. Le v letu 2011 predstavlja veliko odstopanje, saj je bil uveljavljen v skoraj 91 % vseh ZSV. Na drugem mestu po pogostosti uveljavitve je razlog *prekršena materialna določba*. V odstotkih je zastopan najmanj v letu 2011, saj je uveljavljen le v 7 % vseh ZSV, največ pa v letu 2009, ko je uveljavljen v 14,1 % vseh ZSV. Tretje mesto zaseda razlog *kršitev določb postopka*. Njegov minimum je v letu 2011, saj je uveljavljen le v 1,2 % vseh ZSV, maksimum pa v letu 2009, ko je uveljavljen v 12,2 % vseh

ZSV. Razlog *sankcije, stroški postopka …*, ki zaseda četrto mesto, je najmanjkrat uveljavljen v letu 2011, le v 1,2 % vseh ZSV, največkrat pa v letu 2008, v skoraj 8 % vseh ZSV. Za razlog *nedovoljeni dokaz*, ki zaseda zadnje peto mesto, velja, da je uveljavljen le v letu 2008, kar je 3,5 % vseh ZSV.

4.4 Policijska postaja Ribnica

Glede na to, da je tudi Policijska postaja Ribnica (v nadaljevanju PP Ribnica) prejela dosti manj ZSV kot mestne policijske postaje, sem lahko pregledal vse njene posamične akte, zoper katere je bila vložena. Tako sem tudi tukaj dobil različne vzorce enot za vsako posamezno leto (2007–2011).

Grafikon 4: Študija vloženih ZSV po številu posameznega razloga za obdobje 2007–2011 na PP Ribnica



Vir: ZSV, vložene zoper posamične akte prekrškovnega organa PP Ribnica

Grafikon 4 prav tako prikazuje, da je *zmotna in nepopolna ugotovitev dejanskega stanja* najpogostejši razlog, ki ga upravičenci uveljavljajo v ZSV. Leto 2007 in 2009 odstopata od preostalega časovnega obdobja, v katerem je uveljavljen med 72 % in 77 % vseh ZSV. Leto 2007 predstavlja njegov maksimum, saj je uveljavljen v kar 86 % vseh ZSV, leto 2009 pa njegov minimum, saj je uveljavljen le v 63 % vseh ZSV. Na drugem mestu po pogostosti uveljavitve je skoraj za vsa obravnavana časovna obdobja razlog *kršitev določb postopka*. Le leta 2011 je pred njim razlog *prekršena materialna določba*, v letu 2008 in 2009 pa sta izenačena. V odstotkih je razlog *kršitev določb postopka* zastopan najmanj v letu 2007, saj je uveljavljen le v 6 % vseh ZSV, največ pa v letu 2009, ko je uveljavljen v 13,8 % vseh ZSV. V vseh časovnih obdobij je na tretjem mestu razlog *prekršena materialna določba*. V letu 2011, ko je na drugem mestu, pred razlogom *kršitev določb postopka*, zastopa skoraj 9 % vseh ZSV. V letih 2008 in 2009, ko sta s tem razlogom izenačena, je uveljavljen v 7,7 % oziroma 13,8 % vseh ZSV. Leto 2009 tako predstavlja njegov maksimum, medtem ko njegov minimum predstavlja leto 2007, ko je uveljavljen le v 4,5 % vseh ZSV. Razlog

sankcije, stroški postopka …, ki zaseda četrto mesto, je najmanjkrat uveljavljen v letu 2007, le v 3 % vseh ZSV, največkrat pa v letu 2008, v skoraj 11 % vseh ZSV. Za razlog *nedovoljeni dokaz*, ki zaseda zadnje, peto mesto, pa velja, da je uveljavljen le v časovnem obdobju 2008–2010, torej med 1,5 % in 3,4 % vseh ZSV.

4.5 Primerjava rezultatov

Posamezne študije kažejo na to, da ni bistvene razlike med mestnimi in območnimi policijskimi postajami, saj so, ne glede na različne vzorce zbranih enot, rezultati približno enaki. Torej tako območje kot podatkovni nizi niso dejavniki, ki bi vplivali na rezultate opravljenih študij. Seveda so določena odstopanja od povprečja na posameznih policijskih postajah v posameznih časovnih obdobjih, kar tudi bistveno ne vpliva na končne rezultate opravljenih študij,[17] tako da je mogoče iz njih povzeti naslednje:

1. Na vseh policijskih postajah je na prvem mestu razlog *zmotna in nepopolna ugotovitev dejanskega stanja*, pri čemer se smejo v ZSV navajati nova dejstva in predlagati novi dokazi le, če vlagatelj ZSV izkaže za verjetno, da jih brez svoje krivde ni mogel uveljaviti v hitrem postopku. Uveljavljen je v razponu od 59,3 % (PP Moste v letu 2009) do 90,7 % (PP Kočevje v letu 2011) vseh ZSV.
2. Drugo mesto zaseda razlog *prekršene materialne določbe ZP-1 ali predpis, ki določa prekršek*. Izjema je le PP Ribnica, ker je njena analiza pokazala, da drugo mesto zaseda razlog *kršitev določb postopka*. Ob tem je treba povedati, da sta si navedena razloga dokaj blizu po pogostosti uveljavitve, saj sta v nekaterih časovnih obdobjih celo izenačena, vendar pa je razlog *prekršene materialne določbe* na preostalih policijskih postajah večkrat na drugem mestu kot razlog *kršitev določb postopka*, kar dokazuje tudi njuno povprečje pogostosti uveljavitve. Tako je drugo uvrščeni razlog uveljavljen v razponu od 4,5 % (PP Ribnica v letu 2007) do 18,7 % (PP Moste v letu 2009) vseh ZSV.
3. Na tretjem mestu je razlog *kršitev določb postopka*, ker ni odločil pristojni organ, ker storilcu ni bila dana možnost, da se izjavi o prekršku, ker je pri odločanju ali vodenju postopka sodelovala oseba, ki bi po zakonu morala biti izločena ali je bila izločena, ker so bile kršene določbe o uporabi jezika v postopku, ker izrek odločbe ni razumljiv ali je sam s seboj v nasprotju ali ker odločba nima vseh predpisanih sestavin. Izjema je znova PP Ribnica, tako da pri njej tretje mesto zaseda razlog *prekršene materialne določbe*. Tretje uvrščeni razlog je torej uveljavljen v razponu od 1,2 % (PP Kočevje v letu 2011) do 15,3 % (PP Moste v letu 2009) vseh ZSV.

17 Pri območnih policijskih postajah je bila analizirana celotna populacija, kar pomeni, da je dobljeni vzorec reprezentativen. Glede na to, da so rezultati opravljenih študij med mestnimi in območnimi policijskimi postajami primerljivi in podobni, menim, da je naključno izbrani vzorec 150 enot med celotno populacijo na mestnih postajah tudi reprezentativen. Na podlagi te ugotovitve se lahko predpostavi, da bi bil tudi na novo naključno izbrani vzorec 150 enot reprezentativen.

4. Četrto mesto zaseda razlog *izrečene sankcije, odvzem premoženjske koristi, stroški postopka in odločitev o premoženjskopravnem zahtevku*. Uveljavljen je v razponu od 1,2% (PP Kočevje v letu 2011) do 10,8 % (PP Ribnica v letu 2008). Izjema je le leto 2007, ko na PP Center ni bil uveljavljen v nobeni ZSV.
5. Na zadnjem, petem mestu je tako pristal razlog *opiranje na dokaz, na katerega se po določbah ZP-1 ne more opirati, ali ki je bil pridobljen s kršitvijo z ustavo določenih človekovih pravic in temeljnih svoboščin*. Na vsaki policijski postaji sta najmanj dve časovni obdobji, ko ni uveljavljen v nobeni ZSV. Med vsemi uveljavitvami pa je njegov maksimum največ 3,5 % (PP Kočevje v letu 2008).

Preučene izjeme kaj dosti ne vplivajo na končne rezultate opravljene študije, tako da lahko postavim trditev, da je tako dobljena lestvica pogostosti uveljavitev razlogov v ZSV, ne glede na območje in vzorce zbranih enot, prisotna v skoraj vseh prekrškovnih organih. Le pri razlogu *prekršena materialna določba* in *kršitev določb postopka* bi lahko bile izjeme, npr. PP Ribnica.

5 Sklepna ugotovitev

Z analizo sem dokazal, da se je s spremembami ZP-1 dejansko širil nabor izpodbojnih razlogov in se je uredila norma, po kateri je dolžnost prekrškovnega organa in sodišča, da po uradni dolžnosti preizkusita določene izpodbojne razloge, ne glede na to, ali so uveljavljeni v sami ZSV ali ne.

Ker noveli ZP-1H in ZP-1I nista prinesli nobenih sprememb ali dopolnitev na področju pravnega varstva v hitrem postopku, lahko ugotovim, da je prekrškovna reforma, kar se tiče ZSV, prišla do tiste točke, ko je s tako urejenima 62. (nabor razlogov) in 62. a členom ZP-1 (preizkus po uradni dolžnosti) postala res učinkovito pravno sredstvo. Sedaj dejansko v celoti združuje tako elemente pravice do pravnega sredstva kot tudi pravice do sodnega varstva. To sta eni izmed temeljnih pravic, določenih tako v EKČP kot URS. Sedaj pokriva tako rekoč vse kršitve, do katerih lahko pride med vodenjem hitrega postopka.

Ugotovitve analize so namenjene tako upravičencem do ZSV kot prekrškovnim organom. Upravičenci lahko sedaj vložijo ZSV zaradi katerekoli nepravilnosti, ki jo je po njihovem mnenju storil prekrškovni organ med vodenjem hitrega postopka. V preteklosti je manjkal razlog »nedovoljeni dokaz« (4. alineja prvega odstavka 62. člena ZP-1). Drugi razlogi so v tem času doživeli le majhne popravke oziroma dopolnitve. Upravičencem je sedaj zagotovljeno nekakšno dvojno varovalo. Nekatere izpodbojne razloge sta sedaj dolžna prekrškovni organ in sodišče preizkusiti po uradni dolžnosti ne glede na to, ali so uveljavljeni v ZSV. V preteklosti ta dolžnost ni bila urejena, kar je pomenilo le preizkus tistih razlogov, ki so bili uveljavljeni v ZSV. Upravičenci imajo sedaj s tako urejeno ZSV dosti več možnosti, da z njo uspejo, predvsem pred sodiščem.

Ker je ZSV sedaj učinkovito pravno sredstvo, je ravnanje prekrškovnega organa še toliko bolj pod drobnogledom. Upravičencem je sedaj na voljo več izpodbojnih razlogov, zaradi katerih lahko vložijo ZSV, če menijo, da je bila med vodenjem hitrega postopka storjena kakšna nepravilnost. V študiji sem predstavil lestvico, iz katere je razvidna pogostost vložitve posameznega izpodbojnega razloga. Na podlagi preučitve izbranih vzorcev sem ugotovil, da se pogostost njihove uveljavitve kaj dosti ne spreminja v izbranih časovnih obdobjih po policijskih postajah. To pomeni, da so tudi vzorci 150 enot, ki so bili naključno izbrani med celotno populacijo na mestnih policijskih postajah, reprezentativni in je takšne rezultate mogoče pričakovati tudi na drugih policijskih postajah, v kolikor bi se študija razširila nanje. Informacija, kateri izmed razlogov je najpogosteje uveljavljen, prekrškovnemu organu omogoča spoznanje, v katerem delu hitrega postopka se mu očita največ nepravilnosti. Na ta način lahko že sedaj sprejme določene ukrepe za njihovo odpravo, kar v nadaljevanju pomeni večjo zakonitost njegovega ravnanja, postopanja in odločanja ter posledično s tem onemogočanje upravičencem do njihove uveljavitve. Ni presenetljivo, da je ravno razlog zmotne in nepopolne ugotovitve dejanskega stanja daleč pred vsemi najpogosteje uveljavljen v ZSV. To je mogoče pripisati dejstvu, da imamo na eni strani ugotovljeno dejansko stanje, ki ga zagovarja prekrškovni organ, na drugi strani pa dejansko stanje, ki ga zagovarja domnevni kršitelj. V primeru, da se pri odločitvi ne upošteva kršiteljevega stališča in se tega tudi ne obrazloži, to predstavlja izhodišče za večino vloženih ZSV zaradi omenjenega razloga. Tudi policijski prekrškovni organ se v svojih odločitvah pogosto ne izreče do navedb kršitelja ali pa so te zelo skope. Po tako vodenem hitrem postopku je povsem logično, da storilec, ki se mu očita prekršek, dobi občutek, da je bil postopek voden enostransko, medtem ko njegove navedbe niso bile oziroma so bile upoštevane le v manjši meri. To vse kaže na očitno kršitev pravice do poštenega sojenja (6. člen EKČP in 22., 23. in 25. člen URS).

Da bi se izognili tem kršitvam, se mora prekrškovni organ zavedati pomembnosti navedenega in v tem delu hitrega postopka zagotoviti še dodatno pozornost in izvesti določene ukrepe za izboljšanje stanja na tem področju. Sam predlagam sledeče:

- Kontradiktornost – je eden od elementov pravice do poštenega postopka. Na podlagi lastnih izkušenj lahko potrdim, da se policijski prekrškovni organ šele v zadnjem letu zaveda, kako pomembno je tudi v hitrem postopku zagotavljati kontradiktornost. Šele, ko je kršitelj seznanjen z vsemi zbranimi dejstvi, okoliščinami, dokazi in izjavami prič, lahko zavzame stališče o pravnih in dejanskih aspektih storjenega prekrška. Tudi če prekrškovni organ zbere nova, dodatna dejstva in dokaze, je dolžan o njih ponovno obvestiti kršitelja. Če kršitelj zavzame svoje stališče do storjenega prekrška, je prekrškovni organ seznanjen z njegovim dejanskim stanom. Šele s tako vodenim hitrim postopkom je mogoče sprejeti verodostojno, pravilno, zakonito odločitev, ki upošteva tako stališča kršitelja kot prekrškovnega organa.

- Samokritičnost – vodenje hitrih postopkov na silo. V primeru, če obstaja dvom, da je nekdo storil prekršek ali da so podane okoliščine, ki izključujejo pregon za prekršek, mora biti prekrškovni organ dovolj samokritičen do svojega poslovanja in v teh primerih presoditi, ali so izpolnjeni pogoji, da bi se lahko nekomu očital prekršek in se mu za to izdal tudi ustrezen posamični akt (plačilni nalog, odločba o prekršku).
- Usposabljanje – zaradi nenehnega spreminjanja ZP-1, učinkovite ZSV, sodne prakse je potrebno stalno usposabljanje vseh, ki se ukvarjajo s hitrim postopkom, kajti šele z usposobljenim kadrom je mogoče pričakovati, da bo očitkov glede nepravilnosti med vodenjem hitrega postopka manj. Mogoče bi bilo potrebno uzakoniti vsakoletno obvezno usposabljanje prekrškovnih organov (predvsem tistih s šesto stopnjo izobrazbe), na katerem bi se predstavile novosti, pogoste nepravilnosti… ali pa še bolj rigorozno pravilo, po katerem bi bilo treba, npr. na vsake tri leta opraviti preizkus za vodenje hitrega postopka. Sedaj marsikdo ni dovolj usposobljen za vodenje hitrega postopka, kot se trenutno zahteva. Narediti bi bilo treba tudi selekcijo in dejansko omogočiti vodenje hitrega postopka le tistim, ki bi se skozi preizkuse izkazali, da so sposobni vodenja na takšnem nivoju. Pridobljena šesta ali višja stopnja izobrazbe še ne pomeni garancije, da je človek iz pravega testa za tako zahtevno vodenje hitrega postopka.
- Upoštevanje odločbi Ustavnega sodišča, št. Up-34/93 in Up-13/94, ki med drugim v odnosu do hitrega postopka navajata, da prekrškovni organ glede na načelo proste presoje dokazov ter načelo materialne resnice sam odloča o tem, katere dokaze bo izvedel in kako bo presojal njihovo verodostojnost. Ob tem pa ni dolžan izvesti vsakega dokaza, ki ga predlaga obramba. Njegova dolžnost je le obrazložiti, zakaj predlaganega dokaza ni izvedel. Na ta način bo kršitelju prekrška zagotovljena tudi ustavna pravica do izvajanja dokazov v njegovo korist (tretja alineja 29. člena URS).

Seveda bi bilo iluzorno pričakovati, da upravičenci ne bi več vlagali ZSV zaradi zmotne in nepopolne ugotovitve dejanskega stanja, vendar menim, da bi se dalo z zgoraj opisanimi predlogi zmanjšati njegovo pogostost vložitve.

ZP-1 v prvem odstavku 55. člena določa, da prekrškovni organ po uradni dolžnosti brez odlašanja, hitro in enostavno ugotovi tista dejstva in zbere tiste dokaze, ki so potrebni za odločitev o prekršku. Ob tem se zastavlja vprašanje, ali ima takšna ureditev sploh še kakšen smisel glede na to, da so postali prekrškovni postopki in s tem posledično tudi ugotavljanje dejanskega stanja prej kompleksni in dolgotrajni kot pa hitri in enostavni. Sam predlagam preureditev navedene določbe, saj bi bilo potrebno opredeliti, kaj so dejstva in njihovo delitev na odločila in druga pomembna dejstva, kaj so dokazi in njihov nabor, kaj je materialna resnica in pomen njenega iskanja v različnih fazah postopka, kaj so pravna in dejanska vprašanja, kaj so dokazni standard in njegove stopnje (npr. v kazenskem postopku ima dokazni standard šest

stopenj), kaj je dokazna prepoved, kaj je instrukcijska maksima. To je le nekaj postulatov, ki bi prekrškovni organ vodili med različnimi fazami hitrega postopka. Njihov pomen bi prišel do izraza predvsem pri ugotavljanju dejanskega stanja, saj bi se ob njihovem upoštevanju lahko ugotovila njegova popolnost ali vsaj njen približek. Skratka v ZP-1 bi moralo biti opredeljeno, kaj vse zajema ugotavljanje dejanskega stanja.

Rezultati študije o pogostosti uveljavitve posameznega razloga v ZSV nakazujejo potrebo po nadaljnjem raziskovanju, saj so bila z raziskavo preverjana samo nekatera področja. Vsekakor bi bilo smiselno nadaljnje raziskovanje ugotovitve dejanske uspešnosti upravičencev glede na uveljavitev posameznega razloga v vloženi ZSV. Po tako opravljeni študiji bi bilo mogoče ugotoviti, koliko od teh ZSV je bilo glede na posamezni uveljavljeni razlog neutemeljenih, koliko odločitev prekrškovnega organa je bilo spremenjenih oziroma ustavljenih. Po tako opravljeni študiji bi dobili informacijo o dejanski uspešnosti upravičencev pri izpodbijanju posamičnega akta (plačilnega naloga, odločbe, sklepa) z ZSV glede na uveljavljeni razlog.

Tine Jurič *ima opravljen magisterij (magister upravnih ved). Kot pomočnik komandirja je zaposlen na Policijski postaji za izravnalne ukrepe Ljubljana. Njegovo delovno področje so predvsem raziskovanje in odkrivanje prekrškov in kaznivih dejanj. Objavil je več strokovnih člankov. Članek »Analiza nabora, pomena, obsega in pogostosti vložitve razlogov za zahtevo sodnega varstva« je njegov prvi znanstveni članek. Za svoje delo je bil večkrat pohvaljen, za vse dotedanje dosežke je prejel priznanje »Bronasti ščit Policije«. Sedaj nadaljuje doktorski študij na Fakulteti za državne in evropske študije. Njegovo področje raziskovanja je prekrškovno pravo.*

Viri in literatura

Literatura

Craig, P. (2003). *Administrative Law*. London: Sweet and Maxwell.

Fišer, Z. (2006). Sodnik v postopku o prekršku. V: *1. dnevi prekrškovnega prava* (str. 49–57). Ljubljana: GV založba.

Gajzer, M. (2007). Varstvo človekovih pravic v postopkih pred sodišči. V: *2. dnevi prekrškovnega prava* (str. 156–162). Ljubljana: GV založba.

Jakulin, V.(2007). Dejansko stanje pri plačilnem nalogu. V: *2. dnevi prekrškovnega prava*. Ljubljana: GV založba.

Jenull, H. (ur.), Čas, P., Filipčič, K., Fišer, Z., Maček Guštin, Š., Orel, N., Perpar, M., & Selinšek, L. (2009). *Zakon o prekrških s komentarjem*. Ljubljana: GV založba.

Jenull, H., & Selinšek, L. (2011). *Uvodna pojasnila k ZP-1 z novelama ZP-1F in ZP-1G*. Ljubljana: GV Založba.

Kečanović, B. (2010). Pet let reforme prekrškovnega prava. *Pravna praksa, 29*(25), str. 1.

Kovač, P. (2012). Pomen in raba pravnega sredstva odprave in spremembe odločbe na predlog prekrškovnega organa. *Pravosodni bilten, 33*(1), 87–99.

Maunz, T., & Dürig, G., (1991). *Grundgesetz Kommentar*. München: C. H. Beck.

Nehl, H. P. (1999). *Principles of Administrative Procedure in EC Law*. Oxford: University of Oxford.

Orel, N. (2008). Razlogi za vložitev zahteve za sodno varstvo. V: *3. dnevi prekrškovnega prava* (str. 28–34). Ljubljana: GV založba.

Šturm, L. (ur.), Arhar, F., Blaha, M., Bučar, F., Čebulj, J., Deisinger, M., Dular, J., Friedl, J., Graselli, A., Jadek Pensa, D., Jaklič, K., Jambrek, P., Jerovšek, A., Klemenčič, G., Končina Peternel, M., Kresal, B., Mavčič, A. M., Mozetič, M., Novak, M., Orehar Ivanc, M., Pemuš Grošelj, B., Pirnat, R., Plaušta jner, K., Ribarič, M., Rijavec, V., Sladič, J., Sovdat, J., Steinman, T., Šorli, M., Testen, F., Toplak, L., Trampuž, M., Trpin, G., Virant, G., Vlaj, S., Zakrajšek, F., Zalar, B., & Zupančič, M. B. (2002). *Komentar Ustave Republike Slovenije*. Ljubljana: Fakulteta za podiplomske državne in evropske študije.

Šturm, L. (ur.), Avbelj, M., Bardutzky, S., Bele, I., Blaha, M., Cerar, M., Čebulj, J., Deisinger, M., Galič, A., Grad, F., Ivanc, B., Jaklič, K., Jakulin, V., Jambrek, P., Jerovšek, T., Kaučič, I., Končina Peternel, M., Kovač, P., Klemenčič, G., Kresal, B., Letnar Černič, J., Mavčič, A., Nerad, S., Orehar Ivanc, M., Pavlin, P., Pirnat, R., Pogorelec, J., Prepeluh, U., Farmany, P., Sovdat, J., Šorli, M., Testen, F., Umek, U., Vlaj, S., Zagradišnik, R., Zobec, J., & Zupančič, K. (2011). *Komentar Ustave Republike Slovenije: dopolnitev – A*. Ljubljana: Fakulteta za podiplomske državne in evropske študije.

Viri

(1994). Evropska konvencija o človekovih pravicah (EKČP). Ur. list RS, št. 33/94, MP, št. 7/94).

(1991). Ustava Republike Slovenije. Ur. list RS, št. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06.

(1994). Zakon o kazenskem postopku (ZKP). Ur. list RS, št. 63/94 (70/94 popr.), 25/96 Odl.US: U-I-18/93, 39/96 Odl.US: U-I-33/95-12, 5/98 Odl.US: U-I-25/95, 49/98-ZPol (66/98 popr.), 72/98, 6/99, 42/00 Odl.US: U I 282/99, 66/00, 111/01, 32/02 Odl.US: U-I-92/96-27, 3/03 Odl.US: U-I-204/99-22, 21/03 Odl. US: U-I-190/00-11, 44/03 Odl.US: U-I-149/99-15, 56/03, 92/03 Odl.US: U-I-319/00-21, 114/03 Odl.US: U-I-426/02, Up-546/01-21, 116/03-UPB1, 43/04, 68/04 Odl.US: U-I-296/02, 83/04 Odl.US: Up-729/03, U-I-187/04, 96/04-UPB2, 101/05, 8/06-UPB3, 14/07, 32/07-UPB4, 102/07-ZSKZDČEU, 21/08 Odl.US: U-I-96/06-13, 23/08-ZBPP-B, 65/08 Odl.US: U-I-328/04-22, 68/08, 89/08 Odl. US: U-I-25/07-43, 77/09, 88/09 Odl.US: Up-3871/07-26, U-I-80/09-26, 109/09 Odl.US: U-I-46/08-20, 29/10 Odl.US: U-I-50/09-18, Up-260/09-17, 58/11-ZDT-1, 91/11, 32/12-UPB8, 47/13.

(1999). Zakon o splošnem upravnem postopku (ZUP). Ur. list RS, št. 80/99, 70/00, 52/02, 73/04, 22/05-UPB1, 119/05, 24/06-UPB2, 105/06-ZUS-1, 126/07, 65/08, 47/09 Odl.US: U-I-54/06-32 (48/09 popr.), 8/10.

(2003). Zakon o prekrških (ZP-1). Ur. list RS, št. 7/2003, št. 86/2004, 7/2005 Skl. US: U-I-19/05-5, 23/2005-UPB1, 34/2005 Odl.US: U-I-19/05-11, 44/2005, 55/2005-UPB2, 40/2006 (51/2006 popr.), 70/2006-UPB3, 115/2006, 139/2006 Odl.US: U-I-69/06-16, 3/2007-UPB4, 29/2007 Odl.US: U-I-56/06-31, 58/2007 Odl.US: U-I-34/05-9, 16/2008 Odl.US: U-I-414/06-7, 17/2008 (21/2008 popr.), 76/2008-ZIKS-1C, 108/2009, 109/2009 Odl.US: U-I-56/08-15, 45/2010-ZIntPK, 9/2011, 10/2011 Odl.US: Up-319/10-14, U-I-63/10-7, 26/2011 Odl.US: Up-456/10-22, U-I-89/10-16, 29/2011-UPB8, 43/2011 Odl. US: U-I-166/10-8, 21/2013, 111/2013.

(2006). Zakon o varstvu javnega reda in miru (ZJRM-1). Ur. List RS, št. 70/2006.

(2010). Zakon o pravilih cestnega prometa (ZPrCP). Ur. list RS, št. 109/2010, 57/2012.

Sodba ESČP, Suhadolc proti Sloveniji, 17.5.2011, vloga št. 57655/08.

Sodba ESČP, Šild proti Sloveniji, 17. 9. 2013, vloga št. 59284/08.

Odločbi Ustavnega sodišča RS, št. Up-34/93 in Up-13/94, 8. 6. 1995.

Odločba Ustavnega sodišča RS, št. U-I-56/06-31, 15. 3. 2007.

Odločba Ustavnega sodišča RS, št. Up-1293/10, 21. 6. 2012.

Sodba Vrhovnega sodišča RS, št. IV Ips 41/2006, 16. 2. 2007.

Sodba Vrhovnega sodišča RS, št. IV Ips 58/2007, 28. 2. 2008.

Sodba Vrhovnega sodišča RS, št. IV Ips 71/2007, 16. 9. 2008.

Sodba Vrhovnega sodišča RS, št. IV Ips 117/2008, 24. 2. 2009.

Sodba Vrhovnega sodišča RS, št. IV Ips 41/2013, 25. 4. 2013.

Sodba Vrhovnega sodišča RS, št. IV Ips 28/2014, 20. 5. 2014.

Sodba Višjega sodišča v Ljubljani, št. VSL PRp 571/2009, 24. 3. 2009.

Sklep Višjega sodišča v Celju, št. VSC Prp 241/2013, 17. 1. 2014.

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Analysis of the Set, Meaning, Range and Frequency of Lodging the Reasons for Judicial Protection Request

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ABSTRACT

The right to a legal remedy is one of the fundamental rights, which must be provided to every party involved in the proceedings (criminal, administrative, civil) which decide on the party's rights, obligations or legal benefits. In the field of misdemeanour law with regard to the fast track misdemeanour proceedings, the legislature refers to this remedy as the request for judicial protection. Its effectiveness at the level of the set of reasons and their frequency at lodging the request, with the aim of providing the best possible legal protection of offenders, is unexplored, and so an in-depth empirical, historical and normative research of the challenge against its lodging has been made, in particular of the range, meaning, scope and the frequency of the filing of the reasons challenging the lodging. The research established that the range of the challenging grounds for filing a request for judicial protection extends with the amendments to the Minor Offences Act and in this way provides a greater legal protection for offenders, and that most of them are filed due to a challenge on the grounds of erroneous and incomplete factual findings. This suggests that in this part of the fast track misdemeanour proceedings, most irregularities by misdemeanours authority are claimed. The results of empirical research utilizing the model of challenging the Police decisions regarding misdemeanours present the conduct of research, the methods used, as well as the baseline for a model of judicial protection against the decisions of the Police regarding the Minor Offences Act *de lege ferenda*.

Keywords: *legal means, judicial protection request, fast track misdemeanour proceedings, reasons for requesting judicial protection*

JEL: K14, K23, K42

1 Introduction

Public law and its traditional model have had several shortcomings which have led to the conception of public law being defended on the grounds of human rights and fundamental freedoms. However, to prevent public bodies

from abusing their authority, standards of legality have been introduced (Craig, 2003, p. 31).

In the Republic of Slovenia the legislation in the field of misdemeanours law has undergone the first serious constitutional and judicial review of compliance with the Constitution of the Republic of Slovenia (hereinafter CRS). The Constitutional Court in its decision no. U-I-56/06-31 stated that when dealing with misdemeanours within a single administrative and penal procedure, the rights to judicial protection (Article 23 of the CRS[1]) and to a legal remedy (Article 25 of the CRS[2]) are guaranteed, since the decision on the judicial protection request (hereinafter JPR) provides judicial protection and at the same an appellate supervision of the decision of the body deciding on misdemeanour (Perpar et al., 2009, pp. 216–217). Similarly, the European Court of Human Rights in the decision Suhadolc against Slovenia, no. 57655/08, found that the applicant's case was dealt under a fast track procedure defined in the Minor Offences Act (hereinafter MOA-1), which means that a fine and penalty points may be imposed by regulatory authorities as well, while judicial protection is ensured by the appeal to the Court. This means that everyone has the opportunity to act against a single individual act (payment order, decision on the offence and the conclusion) of a misdemeanour authority by lodging a JPR and, if the latter is deemed unfounded, it shall be forwarded to the District Court in case assessment. In this way the right to a fair trial in accordance with Article 6 of the European Convention on Human Rights (hereinafter ECHR) is ensured.

In the field of misdemeanour law[3] a set of reasons due to which a JPR may be lodged (Article 62 of MOA-1) is determined regarding the fast track misdemeanour proceedings (hereinafter fast track procedure)[4] as well.

The reason why the JPR is given such importance can be attributed to the fact that the decision on it reflects the success of the body deciding on misdemeanors.[5] It is also necessary to emphasize that, as a legal remedy, JPR

1 Each individual must be ensured that the allegations made against them and about their rights and obligations are, without undue delay, decided by impartial, independent and lawfully established courts. So the constitutional provision provides an effective protection of human rights also in misdemeanours proceedings, which establishes a special status and work of the Court (Gajzer, 2007, p. 157).

2 The right to appeal is a fundamental right of an individual, which derives from the principle of legality (Article 2 of the CRS) and the principle of equal protection of rights (Article 22 of the CRS), and is characteristical of the rule of law. Everyone is given the opportunity to contest the issued individual acts of all bodies of state and local authority, as well as the public bodies entrusted with authorities (Šturm et al., 2002, pp. 274–275).

3 The primary purpose of misdemeanour law is the protection of legal values, while the main goal is harmony, peace and order within the community (Kečanović, 2010, p. 1).

4 With MAO-1 the legislature created a fast track procedure, which was conceived as an administrative (misdemeanour) procedure at the first instance, pending before various, mainly administrative (misdemeanour) authorities. In continuation of this process, together with JPR it anticipated and regulated the judicial control over the decisions by offence authorities (Fišer, 2006, p. 49).

5 Transparency, administrative rights, open decision-making procedures, or improvement of the relations between citizens and state power are those forms which enable us to assess the practical standards of good governance (Nehl, 1999, p .17).

is also some kind of a feedback on the effectiveness of the acquis in practice, and not just a tool of legal protection.[6]

The purpose of the paper is to present an analysis of the open procedural issues on the expansion of the set of reasons and on the importance of challenge for lodging a JPR in connection with the Amendments to MOA-1, and consequently, on providing greater legal protection of the offenders. Based on quantitative and descriptive methods and the induction-deduction method as well as sampling, I present the starting points for the model of legal protection against the decisions of the Police on the MOA-1 *de lege ferenda*. Through analysis and study I examine whether the set of reasons for filing the JPR is actually expanding along with the MOA-1 amendments, and whether the trend of the frequency of lodging JPR varies between the chosen samples in different periods at different police stations.

2 Analysis of the Expansion of the Set of Reasons for Challenge When Lodging Judicial Protection Request

Upon entry into force of MOA-1, the Article 62 had only four sets of reasons which the beneficiary may invoke individually or all together in JPR. Then the Article 62 of MOA-1 reads as follows: "The decision by a misdemeanour body may be challenged by the JPR:

- if the decision violates the substantive provision of this Act or the regulation which defines the offence;
- if there has been a violation of the procedural provisions because the decision has not been made by the competent body, because the offender was not presented with an opportunity to be heard about the offence, because a person who under the law should be excluded or was excluded had been involved in the decision making or conduct of the procedure, because the provisions on the use of language in the proceedings have been violated, because the order of the decision is not clear or is contradictory within itself, or because the decision does not contain all the prescribed items;
- due to erroneous and incomplete factual findings, where new facts may be stated and new evidence proposed in the JPR only if the JPR applicant proves as probable that, without the fault on his or her part, the applicant could not include them in the fast-track procedure;
- due to the sanctions imposed, asset recovery and costs of the proceedings and the decision of a property claim."

Such an arrangement, according to the definition of the procedure in respect to the JPR as set out in Article 65 of the MOA-1 did not allow the examination of the lodged JPR ex-officio (according to Article 159 in relation to the

6 Legal certainty and the principle of fair treatment in proceedings before courts and other state bodies are also among the fundamental elements of the rule of law (Maunz & Dürig, 1991).

third paragraph of Article 59 of MOA-1), rather the examination was limited solely to the reasons established in the JPR (e.g. any fundamental defect of procedure or substantive law). Interesting in this respect is the decision of the Supreme Court, which in the reasoning of the judgement, no. IV Ips 41/2006, *inter alia*, stated, that the court "shall assess the JPR claims and comment on whether the JPR provided established violations or not", and therefore did not indicate that the court shall, in addition to the foregoing assessment, conduct an official examination of a decision in respect to certain violations which may constitute the grounds for lodging JPR. The same is true for the misdemeanours body which tested only those violations claimed by the beneficiary. In doing so, however, the body was not enabled to correct its mistakes in the cases when it found a violation of a right which the beneficiary did not invoke.

The practice of district courts was very heterogeneous in this respect, which did not contribute to legal protection of citizens and the provision of their equality before the law (Prus, 2007, p. 201). All this reflected large anomalies in the processing of JPR, but only the Act Amendment MOA-1E somehow put everything into place. It added a new fourth reason of Article 62 of MOA-1, which reads as follows:

- "if the decision is based on a piece of evidence on which, according to the provisions of this Act, it cannot be based, or which was obtained in violation of the human rights and fundamental freedoms defined by the Constitution."

The previous fourth reason became the fifth reason of Article 62 of MOA-1. From then on, Article 62 of MOA -1 has not been amended or supplemented.

The most important change brought by the said Amendment was the implementation of Article 62. a of MOA-1, which was later supplemented or amended twice, namely by Act Amendments MOA-1F and MOA-1G. The first paragraph of Article 62. a of MOA-1 introduced violations which should be examined ex officio, which means that they must be considered irrespectively of whether the beneficiary claims them in the JPR or not. This defined more clearly the duty or obligation by both, the misdemeanours body as well as the court, in substantive examination of JPR.

Now, after all the changes, the first paragraph of Article 62.a of MOA-1 reads: "When processing a JPR, the following shall be always examined *ex-officio*:

- whether the decision has been made by the competent body (changed by the Act Amendment MOA-1G)
- whether there is a violation of substantive provisions of this Act or Regulations which define the offence (added in Act Amendment MOA-1F and later modified by the Act Amendment MOA-1G)
- whether the prosecution is time-barred (added by Act Amendment MOA-1F)

- whether the offender was given the opportunity to make a statement about the offence,
- whether the order of the decision is intelligible and
- whether a decision is based on a piece of evidence on which it cannot be based according to the provisions of this Act, or which was obtained by violating human rights and fundamental freedoms set out in the Constitution".

From the above it follows that the set of reasons for challenging the decision and which serve as a basis for lodging a JPR, expands with the amendments to MOA-1, and in this way provides a greater legal certainty to the perpetrators. This means that now, with all the amendments described, also the fast track procedure actually provides an effective legal remedy and ensures the right to a fair trial.[7]

3 Investigation of the Meaning of the Reasons for Challenge When Lodging a Judicial Protection Request with Analysis of the Cases from Case Law

3.1 Violation of Substantive Provisions of the Minor Offences Act or the Regulation That Defines the Offence

Violation of substantive provisions is specified as the case when the misdemeanour authority wrongly or incorrectly applies a legal act or other regulation, as well as the case when none was used. Substantive legal provisions are comprised in the first part of MOA-1 (the general part of substantive law), which covers the basic provisions: the provisions on offence and the responsibility for it, the provisions on penalties, recovery of criminal assets, educational measures and sanctions for juveniles, and general provisions setting forth time limits. The special part of substantive legal provisions is set out in the acts, governmental regulations or decrees governing local communities, which define certain acts or omissions as an offence, determine the signs of prohibited conduct, and prescribe or determine sanctions for such acts (Orel, 2008, pp. 28–29).

The Supreme Court, in its judgement, no. IV Ips 41/2013, also stated: "The Chief State Prosecutor reasonably exercises also the material breach of the provisions of the law under item 4 of Article 156 of MOA-1, since in respect to the offence which is the subject of a payment order, the Court applied a rule

7 In the empirical part of his master thesis entitled Analysis of Challenging Police Decisions in Fast Track Misdemeanour Proceedings, the author of the article analysed also the proportion of the JPR rejected before the court, and found that from 2006 to 2011 the proportion fell by about 18% (in 2006, this proportion was the highest – 78.16%, while in 2011 it was the lowest – 60.72%). This means that the position of the JPR beneficiaries has actually improved, since under the current regime of MOA-1 more reasons are available for lodging the request (Article 62 of MOA-1). The misdemeanours body as well as the court are now obliged to examine certain reasons, whether there was a violation or not, irrespectively of whether the beneficiary has listed the reasons in the request (Article 62 of MOA-1).

which it should not have applied by failing to change the legal definition of the driver's offence in the operative part of its judgement. It is also right when stating that the court had an ex-office obligation to establish the violation of the substantive provisions of MOA-1, namely, the second paragraph of Article 57 of MOA-1, since the payment order contained no legal definition of the driver's offence, and to change the legal definition of the offence of the driver in the operative part of its judgement, as well as adequately clarify its decision. The offence of the driver is defined in the second paragraph of Article 125 of RTA-2." In the flood of laws and other regulations, which define the various offences (traffic legislation, offences in the field of public order and peace, weapons, illegal drugs…) it can easily occur that an incorrect regulation is applied, or that the violator is accused of an offence under the wrong provision of that regulation. The problems are caused primarily by the legal definition of the offence to the natural person in relation to the person responsible. That is – when a natural person also acts in the role of the responsible person, and under which provision is then this person sanctioned (under the provision for natural or responsible person)[8]. The problem is also caused by the provisions which, in addition to their disposition, also contain definitions of other offences. Thus, for example, the provision of Article 20 of the Act on Criminal Offences against Public Order and Peace (APOP-1)[9] covers the legal definitions of the Articles 6, 7, 12, 13 or 15 of the APOP-1. Sometimes it happens that, in addition to the fine for an offence under Article 20 of APOP-1, a violator is also punished with a fine pursuant to Article 7 of APOP-1 (indecent behaviour in a public place). Such conduct of a misdemeanour body constitutes a violation of constitutional rights since the offender is punished twice for the same offence (Article 31 of the Constitution). The fine may be imposed only for an offence under Article 20 of APOP-1, if it is possible to confirm that it was performed with elements of intolerance. Despite the fact that even constitutional rights may be violated, the misdemeanour authority has the possibility to eliminate them, of course, if it notices them by itself[10] or if the violation is brought to its attention[11]. The aim of any misdemeanours body is that its behaviour, decision making and procedure management are lawful and proper.

8 In more detail in the judgments of the Supreme Court no. IV Ips 75/2013 dated 29. 8. 2013, IV Ips 85/2013 dated 29. 8. 2013 and IV Ips 113/2013 dated 21. 11. 2013.

9 If the offences referred to in Articles 6, 7, 12, 13 and 15 of this Act have been committed to incite ethnic, racial, sexual, ethnic, religious, political intolerance or intolerance of sexual orientation, the perpetrator shall be punished by a fine of at least SIT 200.000 (EUR 834.58).

10 Rehabilitation is possible after finality by lodging an extraordinary legal remedy – elimination or amendment of the decision on the offence following a proposal by the misdemeanours authority (hereinafter referred to EADPMA).

11 With JPR or with a proposal for EADPMA.

3.2 Violation of the Provisions of the Procedure

It is considered to be a violation of the provisions of the procedure if:

- decision has been made by an incompetent authority,
- the offender's right to be heard has been infringed,
- a person who under the law should have been excluded, or was excluded from it, has been involved in the decision making or the conduct of the procedure,
- the provisions on the use of language in the proceedings have been violated,
- the operative part of the decision is incomprehensible or contradictory within itself,
- the decision does not contain all the prescribed elements.

In the JPR process it must be assessed whether the decision has been made by a competent authority. Misdemeanour bodies are very numerous and it may occur that they cross the boundaries of their areas of work, especially, if the delimitation of competences is not entirely clear. The procedural regulations usually require very strict compliance with substantive jurisdiction, while regarding territorial jurisdiction they are less strict, especially if there is no objection in this direction and if the procedure has already reached progressive stages in the process. Granting a JPR *ex officio* due to the fact that a decision was made by a territorially incompetent body or bodies would seem excessive (Fišer et al., 2009, p. 379).

The Supreme Court in its judgement, no. IV Ips 58/2007, decided, that before deciding on a JPR against a payment order, the offender needs to be informed of the key incriminating facts and must be allowed to be heard on the subject, regardless of the fact that the procedural provisions of the MOA-1 do not explicitly require it. Similarly, the European Court of Human Rights in its judgement *Šild vs. Slovenia*, no. 59284/08, also stated: "Although Article 6 of the ECHR does not provide for specific forms of service of documents (see *Bogonos vs. Russia*, (dec.) no. 68798/01, 5 February 2004), the general concept of fair trial, encompassing the fundamental right that the proceedings should be adversarial, requires that anyone who is charged with an offence, has the right, under Article 6 § 3 (a) of the ECHR, to be informed of the nature and cause of the accusation against him. The right of access to court under Article 6 § 1 furthermore entails the entitlement to receive adequate notification of administrative and judicial decisions (see, *inter alia*, generally *Hennings vs. Germany*, 16 December 1992, Series A no. 251-A, and *Sukhorubchenko vs. Russia*, no. 69315/01, §§ 53–54, 10 February 2005), which is of particular importance in cases where an appeal may be sought within a specified time-limit." The Act Amendment MOA-1E set out the still existing conditions for obtaining the offender's statement before the decision on the offence and the content which must be made known to the offender (Article

55 §§ 2–3 of MOA-1). Thus, as has been previously determined, the offender who at the site of detection of an offence cannot provide a statement about the offence, must be, before issuing a decision, sent a written notice with the instruction and be provided with the possibility to be heard. The same applies if immediately upon finding or dealing with the concrete matter the misdemeanour authority could not inform the offender of the nature of the complaint and his or her rights in order to give the offender an opportunity to "prepare a defence." It is expressly provided that a decision on the offence cannot rely on the statement of the offender, if he or she was not informed in accordance with MOA-1 of his or her rights in the proceedings (Article 55 § 2 of MOA-1). Given the punitive nature of misdemeanour proceedings, the rights of the offender should be protected also when issuing the payment order. An authorized officer (hereinafter AO) who issues the payment order to the offender and serves it on the spot, is obliged to inform the offender about committing the offence immediately upon delivery, which is characterized by the payment order (first paragraph of Article 57 of MOA-1) (Orel, 2008, p. 30). If a payment order cannot be served to the offender at the location of the offence, it is necessary that prior to its issuance and service the offender has the possibility to make a personal statement about the offence under the provisions of Article 55 of MOA-1, while the payment order must also include a brief description of the offence and a summary of the offender statement (Article 57 § 2 of MOA-1). This ensures the offender's right to JPR, because only if the offender is informed about the findings by the AO, the offender can challenge the substantive findings of the misdemeanour authority. An offender may also learn about the nature of the obtained evidence by reviewing the file at the offence authority (Article 82 of the APA in relation to Article 58 § 1 of MOA-1).

The infringement due to the fact that a person has been involved in the decision making or the conduct of the procedure who under the law should have been excluded, or was excluded from it, does not only apply to the individual AO of a misdemeanour authority, but to all persons who have been involved in managing the procedure and decision-making. These may be several, so the scope of this infringement is quite large. Which is understandable for the exemptive reasons, but rather less for the exclusionary ones.

Considering the specifics of some of the fast track procedures, it is estimated that the provisions providing for the use of the offender's language in the fast track procedure are often breached, and their consequences underestimated. The right to use one's own language is a component of the right to a fair trial. For example, of what use is the offender's right to be heard, if the offender does not understand the proceedings, of what is he or she accused and what is the basis for the complaint, while in addition the offender is also unable to express his or her thoughts in a language which he or she masters (Fišer et al., 2009, p. 380).

Intelligibility of the decision does not only relate to its clear content, but also provides that the description includes all specific circumstances that concretize the material scope of the offence. Abstract description of the act is sufficient only when the nature of matter renders concretization unsound, but otherwise the operative part must also include the concretization of the material scope. It is essential that the specific circumstances are described in such a way that an examination is possible which must answer the question: "Do the specific circumstances described in the operative part realize all the abstract legal signs of the offence?" The importance of indicating the place and time of the offence and the relevant facts must be particularly emphasized, since the absence of these in the description of the act constitutes unintelligibility of the decision on the offence (incorrect or defective indication of the place and time and decisive facts is a question relating to the factual state of the offence) (Orel, 2008, p. 30–31).

In the judgement no. IV Ips 71/2007 the Supreme Court ruled out that the imprecision of a police officer who partly entered the violated provision of the RTSA-1 in the wrong part of the six sections provided for this purpose on the form of a payment order, due to which the record suggested that the offence is pursuant to Article 115 § 5 Item 4 of RTSA-1, which does not exist, is not a mistake which would render the "operative part" of the payment order unintelligible. Regarding the nature of the complaint, there was no lack of clarity in the procedure, which is also established by the fact that the perpetrator explicitly wrote in the JPR that "the police officer fined him for the breach of Article 115 § 4 of RTSA-1 and not for the offence under the § 5 of the same Article". Mistakes are commonplace in the operation of offence authorities. All mistakes, except for those that have been found in the operative part of an individual act, are corrected upon their finding (upon perpetrator's advice, one's own notice) by an order on mistake correction. If the misdemeanour authority detects a mistake in the operative part of an individual act, it can be repaired only after finality by filing an extraordinary remedy EADPMA. However, if the mistake is brought to the authority's attention by legal means (JPR), it shall first abolish its original decision and then take the right decision (issue a new individual act, stop the proceedings, make a suspensory proposal or suggest other misdemeanour authority).

The components of a written decision on the offence are otherwise provided by Article 56 of MOA-1, but nevertheless, it will not be always easy to determine whether a decision contains everything that it should, or not, or whether this applies only to the formal elements of decision (Introduction, Operative Part, Explanation and possibly even Legal Instruction and identification tags), or whether it entails everything that the components should include by nature. In the latter case, that would constitute an extremely broad reason for filing JPR and probably there are not a lot of misdemeanour authorities' decisions that would withstand a somewhat strict examination. Among the components of decision it is necessary, however, to prioritize and take

into account in particular those which on the one hand determine the offender, while on the other they define the action that is characterized as the offence (Fišer et al., 2009, pp. 380–381).

3.3 False and Incomplete Factual Findings

The third reason constituting the grounds for lodging a JPR relates only to the decisive facts. These are the facts (substantive and procedural legal relevant facts), which present the direct foundation for the application of the law (substantive and procedural). The key facts represent the factual state of the offence.[12] We consider the determination of factual state to be erroneous if, from the circumstances identified by the misdemeanour authority as proven, we cannot derive conclusions on the grounds of which the existence of an offence could be determined, or when the misdemeanour body has wrongly assessed the evidence, deciding about it differently than it should from the derivative evidence by a logical conclusion. However, determination of factual state is regarded as incomplete if the misdemeanours authority has not considered relevant circumstances, or if it has abandoned their determination. The offence proceedings are subject to the limitation of new facts and proposal of new evidence. This limitation must be brought to the offender's attention already by the misdemeanours authority, before taking a decision on the offence or issuing a payment order (Article 55 § 2 of MOA-1). Its purpose is to avoid unnecessary delay in the proceedings at all stages of the fast track procedure, which is still a very common aim of the offenders undergoing such procedure (Orel, 2008, pp. 31).

Higher Court of Celje in its decision no. VSC decision Prp 241/2013, ruled: "The determination of the circumstances which shall deem an offense as a minor offence, as defined in Article 6 of MOA-1, falls within the framework of establishing the factual state. If the court of first instance finds and assesses them, but the complainant (misdemeanours body) disagrees with the determination of the court and offers its own assessment of differently determined and assessed circumstances, this is an issue of the correct assessment of the factual state." Only when the misdemeanours authority establishes the factual state of the offence committed, it can credibly determine, whether it has collected enough facts and evidence that a person has committed an offence, or the collected facts, evidence and circumstances show that the offence was committed in such circumstances which render it particularly minor, and no adverse consequences have or will have ensued. The worst thing for a misdemeanours authority is if the district court upon examining the JPR establishes that the factual state was determined in an incomplete or incorrect way, which may have the effect that the authority's

12 Even in the cases where AOs personally notice offences, it is reasonable and permissible to use the reason of erroneous and incomplete findings of the factual state for lodging the JPR, as well as the alleged offender succeeding with it. We must proceed from the fact that the AOs working at offence bodies are only people, who are fallible, and acknowledge the fact that the technical devices and resources do not always perform impeccably. However, it is not possible to exclude even the cases where the AOs abuse their position (Jakulin, 2007, p. 55).

decision is changed, and in the end, may even stop the whole procedure. The authority can attribute such an outcome only to its own shortcomings in conducting the fast track procedure, since it is more than obvious that it did not comply with the MOA-1 and case law. It is particularly important that when making its decisions, the authority takes into account the views of the alleged offender and explains why it did not introduce the evidence proposed by the offender, or why did it consider it to a smaller extent (ensuring the constitutional right to present evidence to the offender's favour – the third indent of Article 29 of CRS). A fast track procedure conducted in this way can prevent or restrict the beneficiary to lodge a JPR.

3.4 Relying on a Piece of Evidence on Which a Decision Cannot Rely According to the Provisions of Minor Offences Act, or Which Was Obtained by Violating Human Rights and Fundamental Freedoms Set out in the Constitution

It is possible to infer the severity of violation from the fact that a breach of this reason in the appeal proceedings under the ordinary course of judicial proceedings is deemed to be an absolute breach of the essential procedural provisions (Item 6 of Article 155 § 1 of MOA-1). This means that only its existence needs to be proved, and not also that its infringement impacted the legality of the decision.

The stated provision is similar also to the violation of criminal procedure (Item 8 of Article 371 § 1 of CPA). Of course, the infringement of reason between the MOA-1 provision and the CPA provision cannot be deemed equal. The situation is not controversial when the rule/decision is based on the evidence obtained in violation of constitutional human rights and fundamental freedoms, or on the evidence for which the law provides that a rule/decision must not be based on. Here, one should only follow the norms that prohibit the use of such evidence (e.g. Article 110 § 4 of MOA-1, or Article 18 § 2 of CPA). Although MOA-1, unlike CPA, does not expressly provide that the evidence obtained on the basis of illicit evidence (fruit of the poisonous tree doctrine) should not be used, there is no valid reason for their differentiation.

The main difference with regard to potential violations when the evidence is obtained in violation of the constitutionally provided human rights and fundamental freedoms (from illegal acquisition of material evidence to obtaining personal evidence), can be found in their safety measures. In earlier proceedings of the applicant they are significantly looser than in pre-trial proceedings. Paying attention and responding to these violations is expected from the first instance judge in particular, and later also during the eventual appeal. Despite this, the MOA-1 contains no provision on the rule of exclusion, under which it would be necessary to exclude an inadmissible evidence, as well as the judge who came into contact with it (psychological contamination). Even with the use of such evidence it is possible to ensure the right to a fair trial at this stage of criminal law (Fišer et al., 2009, pp. 691–695).

In the regulation of fast track procedure this argument is not specified as one of the possible violations of procedural provisions, but is rather defined as a separate reason for which a JPR may be lodged (fourth indent of Article 62 § 1 of MOA-1). MOA-1 specifically provides that the decision of the misdemeanour authority should not rely on the statement of the offender who was not informed of his rights under Article 55 § 2 of MOA-1. It also should not rely on the evidence if the instruction on the rights has not been entered in the minutes or in the official notes, or in the notice to the offender, in order that the offender makes a statement regarding the facts and the circumstances of the offence. In addition, the decision should not rely on the statement of the offender who was detained because he or she was caught committing an offence under the influence of alcohol or other psychoactive substances, and was not informed about the rights (Article 109 § 3 and Article 110 § 3 of MOA-1 and Article 24 of Act of Rules in Road transport) (Orel, 2008, pp. 31–33).

Higher Court of Ljubljana in its judgement, no. VSL PRp 571/2009, inter alia, stated: "The first instance court based its decision on the offender's testimony at the hearing, where she stated that in an interview by a police officer she had indeed confessed to him due to her confusion that she had driven her father's vehicle during the critical period, and on the testimony by the police officer, who confirmed her testimony. From the judgement under appeal and the information in the file it cannot be inferred that a police officer would, prior to the interview, inform the accused party in the process of collecting information about the offender about her constitutional right to not incriminate herself, or her family, or to confess guilt. The judgement of the first instance court thus relies on illicit evidence." The Supreme Court, in its judgement, no. IV Ips 117/2008, also concluded similarly: "The official notice about the suspect's statement which was given to the Police at the site of the offence, before the suspect was informed of his constitutional right to remain silent or of his privilege against self-incrimination, cannot be used as evidence in a procedural sense, on which the judgement about the offence could rely, since it presents illicit evidence according to Item 6 of Article 155 § 1 of MOA-1." The featured rulings describe different situations when the judgement relied on inadmissible evidence. Precisely the constitutional right, which determines the privilege of not incriminating oneself or to remain silent, is the first in a series of rights the infringement of which constitutes the collection of illicit evidence. If an offender or a witness are not informed of this right prior to the collection of information or their hearing, their statements, as evidence obtained on the basis of these statements, are rendered illicit and the decision shall not be based on them. This is given too little importance in the fast track procedures, since it is still too often violated. This refers primarily to discussions about the committed offences, when, prior to their initiation, witnesses or offenders had not been alerted to the privilege of self-incrimination or incrimination of their relatives, and the right to remain silent.

3.5 The Sanctions Imposed, Asset Recovery and Costs of the Proceedings and the Decision of a Property Claim

As a rule, the misdemeanours authorities impose fines in the amount of the prescribed minimum, unless they have the power to impose fines within a range. In this case, the offender is able to claim a fifth reason in the JPR – the circumstances which the misdemeanours authority did not consider even if it should have considered them, or which the authority did not properly consider in the selection and assessment of the sanction. After the JPR has been submitted, irrespective of the type of decision (Article 63 § 5 of MOA-1), the misdemeanours authorities have a limited possibility of a different imposition of sanctions. Pursuant to the powers, they may opt for a reprimand if there exist reasonable grounds (Article 21 of MOA-1), but they can also stop the fast track procedure against the offender after abolishing their decision (Article 136 in relation to Article 58 § 2 of MOA-1). Otherwise, they must (generally) refer the matter to the court. The misdemeanours bodies do not have the authority to mitigate the prescribed sanction, that is to impose a fine below the limit prescribed for this offence. The mitigation power is reserved for court only (Article 26 § 6 of MOA-1).

In its judgment no. IV Ips 28/2014, the Supreme Court also stated: "With the act amendment MOA-1G, the responsibility of legal persons, sole proprietors individuals and individuals who independently perform an activity, in the event of bankruptcy or closure is regulated by Article 14. b of MOA-1. It should be noted that the concept of termination does not only entail the termination with bankruptcy, but also other possible forms of termination of legal persons, for example, voluntary and compulsory liquidation, deletion from the register without liquidation, merger, division, transfer of assets, change of legal form, etc. (Jenull and Selinšek 2011, p. 53–54). According to this provision, the legal entity which ceases to exist before being issued a decision or judgement regarding an offence is recognized as responsible for the offence, and the penalties for the offence and assets recovery are imposed on the entity that is its legal successor, if the managerial or supervisory authority or the business operator had known of the offence committed. If he or she did not know of it, only confiscation and assets recovery may be imposed upon the successor." It has to be noted that fast track procedure is not permitted when deciding on a property claim. This means that the decision about it is always taken at a district court in special proceedings. In the case, when asset recovery is not specifically conditioned, or the condition is optional, a district court also decides about the seizure. Otherwise, when a certain obligate requirement is provided, the decision on assets recovery falls under the authority of a competent misdemeanours body. As for the costs of the procedure, their assessment (e.g. court fee) or payment (e.g. as an award to an attorney) always falls under the authority of a competent misdemeanours body (from Article 143 to 146 of MOA-1).

4 Study of the Frequency of Lodging Reasons for Judicial Protection Request

The main objective of the study is to determine the frequency of implementation of each reason in JPRs. Such a survey hasn`t been conducted yet and it may show, in relation to the complaints of beneficiaries, which reason misdemeanours authorities supposedly most frequently violate in making their decisions. The findings may assist a misdemeanours authority in its subsequent operation, because in this way it learns where it can still improve its performance and by doing so diminish the number of beneficiaries claiming infringement of an individual reason.

Before I could tackle the studies and analyses themselves, I had to collect data by myself, since neither Police nor the Ministry of Justice keep records regarding the frequency of application of individual reason. Thus, if I wanted to do a primary study, I had to decide by myself where I would collect the data. After obtaining the authorisation, I visited two urban police stations (Center, Moste) and two district police stations (Kočevje, Ribnica), which fall under the Ljubljana Police Directorate[13]. At each station, I reviewed the content of the JPRs which were filed against individual acts (decisions on the offence, payment orders, orders), and thus found the reasons for their lodging. The study included all JPRs, irrespective of the type of the established offence (road traffic, public order and peace, weapons, illegal drugs…). I recorded the found reasons on the form prepared beforehand, and for the urban stations, I collected a random sample of 150 units out of the entire population, while the datasets for regional stations were different, since I reviewed all of their individual acts.[14] This was not possible at urban stations, since the number of the filed JPRs in a given year was close to 1000 or even more. When collecting samples at these stations, I was not paying attention to the month of each year in which the JPR was lodged, and whether it was lodged against a payment order, a misdemeanours decision or an order, whether it was lodged against offences in the field of traffic law, public order and peace, weapons, illegal drugs, alien citizen problems… rather, when I was in the archives, I randomly selected and read the binders which stored archival documentation (I decided on site which binders I would take and review the archival documentation). Because each police station has its own way of keeping archival documentation,[15] choosing documents by following a certain

13 I chose these police stations with the regard to the comparable volume of their work area.

14 The collected data sets of the lodged JPRs against individual acts, by police station, within the selected time-frame, are shown in the graphs. The number of JPRs filed by individual reason for challenging the decision is indicated above each column in a given year. E.g., the Graph 1 shows that in 2007 there were 110 JPRs lodged due to erroneous and incomplete findings of fact, and that no JPR was lodged due to inadmissible evidence.

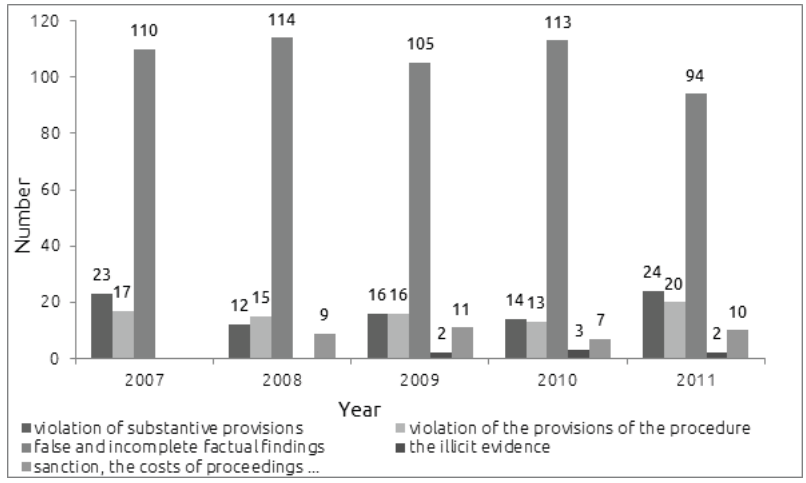
15 The archives are managed in a way which enables that the decisions on offence and payment orders against which a JPR was lodged are managed separately, while in some places they are managed together, or in others they are kept with the rest of archival documents for which a JPR has not been lodged. In the meantime, document filing and recording system has also changed, because Police started using a new software. These are the main reasons that a systematic choice was not possible.

system was not possible. When I gathered a sample of 150 units for each year, I continued collecting samples in the same way for the next year.[16] The study covered the period 2007–2011. From the data collected, I initially conducted a study for each separate police station, and in the conclusion, I compared the results between the stations and summarized the common findings.

4.1 Police Station Center Ljubljana

For the Police Station Ljubljana Center (hereinafter PS Center), I randomly selected a sample of 150 units for each individual year (2007–2011) from the population of all individual acts where a JPR has been filed.

Graph 1: Study of the filed JPRs by the number of the individual reason for the period 2007–2011 at PS Center



Source: JPRs filed against individual acts of the misdemeanours authority PS Center

The Graph 1 shows that the reason of 'false and incomplete factual findings' is most frequently exercised by the beneficiaries in their JPRs. Its representation during the period 2007–2010 is somewhere between 70% and 76% with regard to all JPRs. A small decline is noticeable only in 2011, when it is established – if compared to previous periods – in only 62% of all JPRs. Regarding its frequency of exercise in JPRs, the reason of 'violation of substantive provisions' is placed second during almost all time periods. Only in 2008, the reason of 'violation of the provisions of the procedure' takes over, but they become equally frequent in 2009. The reason of 'violation of substantive provisions' reaches its lowest percentage in 2008, because it is established only in 8% of all JPRs, and is highest in 2011, when it is established in 16% of all JPRs. When regarding all time periods in a comprehensive manner, the third most frequent reason is the 'violation of the provisions

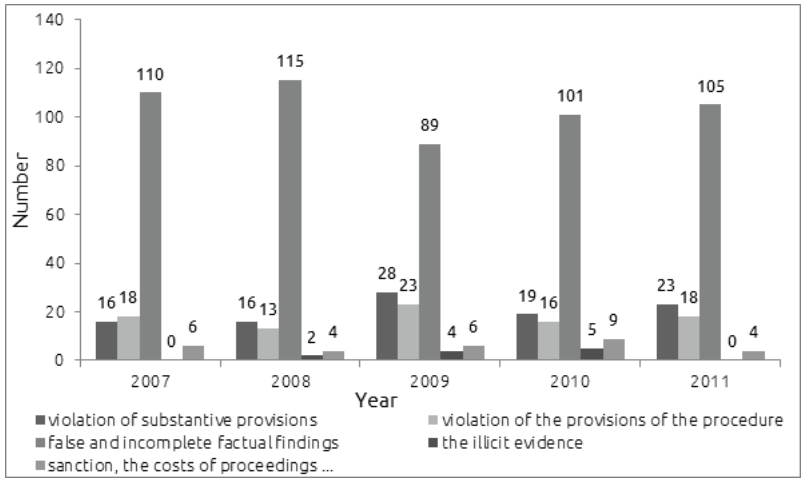
16 In this context, many people will be raising the question whether the sample of 150 units is representative considering their random selection. The answer will be presented in Section 4.5 Comparison of Results.

of the procedure'. In 2008, when it ranked second, before the reason of 'violation of substantive provisions', it represented 10% of all JPRs. In 2009, when the two reasons were even, they were both exercised in 10.7% of all JPRs. The years 2008 and 2009 do not represent its minimum or maximum, because in 2010 it was exercised in only 8.7% of all JPRs (minimum), while in 2011 it was exercised in 13.3% of all JPRs (maximum). The reason of 'sanction, the costs of proceedings…', which occupies the fourth place, was not exercised in any JPR in 2007. In other periods of time, the beneficiaries exercised it the least in 2010 – in only 4.7% of all JPRs, and most often in 2009 – in 7.3% of all JPRs. Also, the reason of 'the illicit evidence', which occupies the last, fifth place, was not exercised in any of the JPRs in the years 2007 and 2008. In the remaining time frames it is established only in 1.3% (2009, 2011) or 2% (2010) of all JPRs.

4.2 Police Station Ljubljana Moste

For the Police Station Ljubljana Moste (hereinafter PS Moste), I randomly selected a dataset of 150 units for each individual year (2007–2011) from the sample of all individual acts where a JPR has been filed.

Graph 2: Study of the filed JPRs by the number of the individual reason for the period 2007–2011 at PS Moste



Source: JPRs filed against individual acts of the misdemeanours authority PS Moste

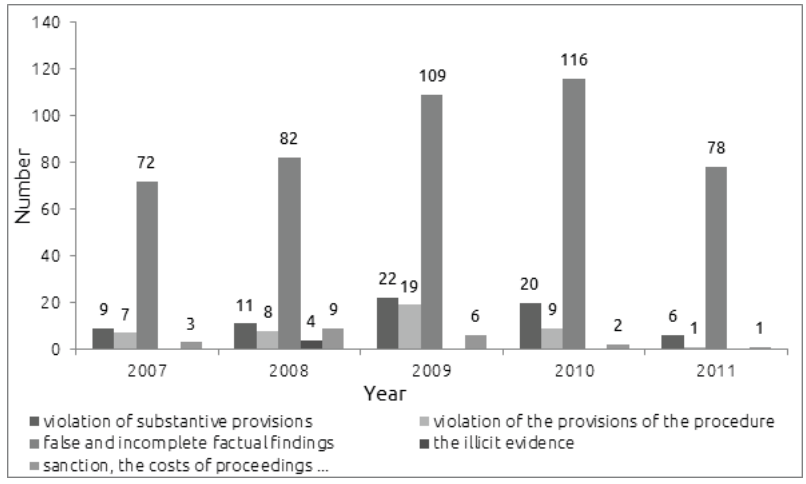
The Graph 2 shows that the reason of 'false and incomplete factual findings' is most frequently exercised by the beneficiaries in their JPRs. In 2009, it is established only in 59% of all JPRs, while in the remaining periods of time it is established in many more JPRs, namely, in between 67% and almost 77% of all JPRs. By its frequency of being claimed, the reason of 'violation of substantive provisions' ranks second in almost all the studied periods, except for 2007, when the reason of 'violation of the provisions of the procedure' is more frequent. The reason reaches its lowest percentage in the years 2007

and 2008, because it is established only in 10.7% of all JPRs, and its highest in 2009, when it is established in 18.7% of all JPRs. In the third place, in almost all periods of time, except in 2007, when it was ranked second, is the reason of the 'violation of the provisions of the procedure'. In that year, and in 2011, it represented 12% of all JPRs. This is a medium value, since the reason is least established in 2008, in only 8.7% of all JPRs, and most often in the year 2009, in 15.3% of all JPRs. Regarding the reason of 'sanction, the costs of proceedings…', which occupies the fourth place, its minimum was reached in 2008 and 2011, when it was established only in 2.7% of all JPRs, while its maximum occurred in 2010, when it was established in 6% of all JPRs.The reason of 'illicit evidence', which occupies the last, fifth place, however, was not claimed between the years 2007 and 2011 in any JPR. In the time period 2008–2010, it is established in between 1.3% and 3.3% of all JPRs.

4.3 Police Station Kočevje

Given the fact that the Police Station Kočevje (hereinafter referred to as PS Kočevje) had received much fewer JPRs than the urban police stations, I was able to examine all of its individual acts against which a JPR was filed. That is how I got different datasets for each year (2007–2011) here.

Graph 3: Study of the filed JPRs by the number of the individual reason for the period 2007–2011 at PS Kočevje



Source: JPRs filed against individual acts of the misdemeanours authority PS Kočevje

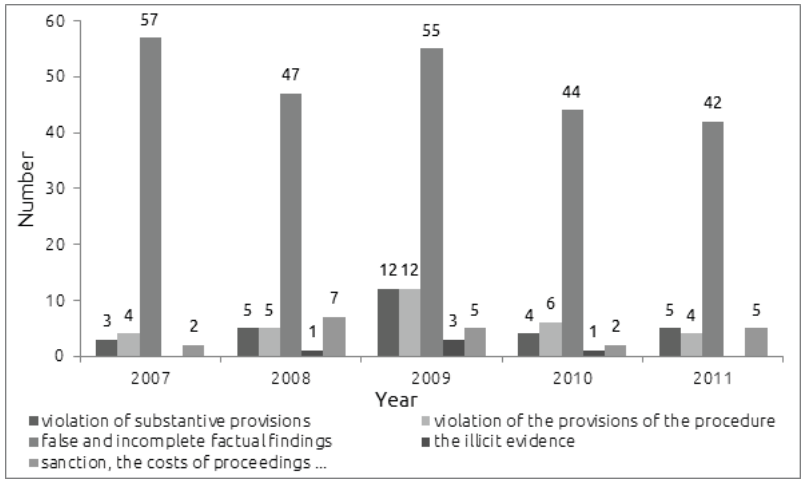
The Graph 3 shows that the reason of 'false and incomplete factual findings' is most frequently exercised by the beneficiaries in their JPRs. In the period 2007–2010 it represents somewhere between 70% and 79% of all JPRs. Only in the year 2011 there is a significant deviation, since the reason was claimed in almost 91% of all JPRs. By its frequency of being claimed, the reason of 'violation of substantive provisions' ranks second. The reason reaches its lowest percentage in 2011, because it is established only in 7% of all JPRs,

and its highest in 2009, when it is established in 14.1% of all JPRs. The third place is occupied by the reason of 'violation of the provisions of the procedure'. Its minimum occurred in 2011, when it was exercised only in 1.2% of all JPRs, and its maximum in 2009, when it was exercised in 12.2% of all JPRs. The reason of 'sanction, the costs of proceedings…', which occupies the fourth place, is the least established in 2011, contributing to only 1.2% of all JPRs, and most established in 2008, in almost 8% of all JPRs. The reason of 'illicit evidence', which occupies the last, fifth place, however, was claimed only in the year 2008, which represents 3.5% of all JPRs.

4.4 Police Station Ribnica

Given the fact that the Police Station Ribnica (hereinafter referred to as PS Ribnica) had received much fewer JPRs than the urban police stations, I was able to examine all of its individual acts against which a JPR was filed. That is how I got different datasets for each year (2007–2011) here as well.

Graph 4: Study of the filed JPRs by the number of the individual reason for the period 2007–2011 at PS Ribnica



Source: JPRs filed against individual acts of the misdemeanours authority PS Ribnica

The Graph 4 also shows that the reason of 'false and incomplete factual findings' is most frequently exercised by the beneficiaries in their JPRs. The years 2007 and 2009 differ from the rest of the time periods in which it is established in between 72% and 77% of all JPRs. 2007 represents its maximum, as it was exercised in 86% of all JPRs, while 2009 is marked by its minimum, since it was established only in 63% of all JPRs. By its frequency of being claimed, the reason of 'violation of the provisions of the procedure' ranks second in almost all the studied periods. Only in 2011, the reason of 'violation of substantive provisions' takes over, but they become equally frequent in 2008 and 2009. The reason of 'violation of the provisions of the procedure' reaches its lowest percentage in 2007, because it is established

only in 6% of all JPRs, and its highest in 2009, when it is established in 13.8% of all JPRs. When regarding all time periods in a comprehensive manner, the third most frequent reason is the 'violation of substantive provisions'. In 2011, when it ranked second, before the reason of 'violation of the provisions of the procedure', it represented nearly 9% of all JPRs. In 2008 and 2009, when it tied with this reason, the latter is established in 7.7%, or in 13.8% of all JPRs. The year 2009 thus represents its maximum, while its minimum is represented by the year 2007, when it was claimed only in 4.5% of all JPRs. The reason of 'sanction, the costs of proceedings…', which occupies the fourth place, is the least established in 2007, contributing to only 3% of all JPRs, and most established in 2008, in almost 11% of all JPRs. The reason of 'illicit evidence', which occupies the last, fifth place, however, was claimed only in the period 2008–2010, which represents between 1.5% and 3.4% of all JPRs.

4.5 Comparison of Results

Individual studies indicate that there are no essential differences between the urban and regional police stations, because, irrespective of the various collected samples of units, the results are approximately the same. Hence, neither the site nor the datasets are factors which could affect the results of the study. Of course there are certain deviations from the mean at individual police stations in different time periods, which also significantly affects the final results of the conducted studies,[17] so the following can be induced from these:

1. At all police stations, the first place is taken by the reason of 'false and incomplete determination of factual state', where new facts and new evidence may be proposed in the JPR only if the JPR applicant proves as likely that, without fault on his or her part, he or she could not submit them in the fast track procedure. It is claimed in the range from 59.3% (PS Moste in 2009) to 90.7% (PS Kočevje in 2011) with regard to all JPRs.
2. The second place is occupied by the reason of the 'violations of substantive provisions of MOA-1, or the regulation defining the offence'. The only exception is the PS Ribnica, because its analysis has shown that there the second place is occupied by the reason of the 'violation of the provisions of the procedure'. Here it should be noted that the stated reasons are quite close to one another regarding the frequency of enforcement, since they are even equally common in some periods, but overall, the reason of the 'violation of the substantive provisions' at other police stations appears in second position more frequently than the reason of 'the violation of the provisions

17 In the case of local police stations total population was analysed, which means that the resulting sample is representative. Given that the results of the conducted studies at urban and regional police stations are comparable and similar, I believe that a randomly selected sample of 150 units out of the entire population in urban stations is also representative. On the basis of these findings it can be assumed that also a new randomly selected sample of 150 units would be representative.

of the procedure', as evidenced by their average frequency of enforcement. Thus, the runner-up reason is claimed in the range of 4.5% (PS Ribnica in 2007) to 18.7% (PS Moste in 2009) with regard to all JPRs.

3. The third place is filled by the reason of the 'violation of the provisions of the procedure' because a decision was not made by a competent authority, because the offender was not given an opportunity to be heard about the offence, because a person who under the law should have been excluded, or had been excluded from it, was involved in the decision making or the conduct of the procedure, because the provisions on the use of language in the procedure were infringed, because the operative part of the decision is not clear or is contradictory within itself, or because the decision does not contain all the required components. The exception is again the PS Ribnica, where the reason ranking third is the 'violation of the substantive provision'. The third reason is thus established in the range from 1.2% (PS Kočevje in 2011) to 15.3% (PS Moste in 2009) with regard to all JPRs.
4. The fourth place goes to the reason of 'imposed sanction, asset recovery and procedural costs as well as the decision on a property claim'. It is established within a range of 1.2% (PS Kočevje in 2011) to 10.8% (PS Ribnica in 2008). The only exception was the year 2007, when this reason was not claimed in any of the JPRs filed at the PS Center.
5. On the last, fifth place landed the reason of 'relying on a piece of evidence on which the procedure cannot rely as provisioned by the MOA-1, or which was obtained by violating human rights and fundamental freedoms set out in the Constitution'. At every police station there are at least two time frames when the reason is not claimed in any of the JPRs. Among all claims of this reason, its maximum reaches up to 3.5% (PS Kočevje in 2008).

The examined exceptions do not significantly affect the final results of the conducted study, and so I can state that the thus obtained frequency scale of the application of reasons in JPRs is present in almost all misdemeanours bodies, irrespective of their location and the sample of the collected units. Only the reasons of 'violating the substantive provision' and of 'violating the provisions of the procedure' may constitute exceptions, as has been studied in the case of PS Ribnica.

5 Conclusion

The analysis has shown that the amendments to the MOA-1 have actually expanded the range of grounds for challenging the decision and that a norm has been regulated, according to which it is the duty of the misdemeanours authority and the court to examine certain actionable grounds *ex officio*, irrespective of whether they are established in a JPR itself, or not.

Since the Act Amendments MOA-1H and MOA-1I did not bring any changes or additions in the field of judicial protection in a fast track procedure, I can establish that in terms of JPR, the misdemeanours reform has reached the point where the Article 62 (scope of reasons) and Article 62.a of MOA-1 (examination *ex officio*) are regulated in a way which establishes it as a truly effective legal remedy. Now it actually fully integrates both, the elements of the right to a remedy, as well as the right to judicial protection. These are among the fundamental rights provided for by both, the ECHR and the CRS. It now covers almost all infringements that may occur during the conduct of the fast track proceedings.

The findings of the analysis are intended for the beneficiaries of JPR as well as for the misdemeanours authorities. Beneficiaries can now lodge a JPR on the grounds of any irregularity which has been, according to their belief, committed by the misdemeanours authority in the conduct of the fast track procedure. In the past, the illicit evidence was missing among the reasons (fourth indent of Article 62 § 1 of MOA-1). During this time, other reasons experienced only small corrections and additions. Beneficiaries are now ensured with a some kind of a double safety measure. Some actionable grounds are now by obligation examined by misdemeanours authority and court *ex officio*, irrespective of whether they have been established with a JPR. In the past, this obligation was not regulated, which meant that they only examined those reasons which have been applied in a JPR. With JPR regulated in this way, the beneficiaries are now much more likely to succeed with it, especially before the court, in comparison with its regulation in the past.

Since JPR is an effective remedy now, the conduct of a misdemeanours authority is now even more closely monitored. Beneficiaries have now more actionable grounds available, which enable them to lodge a JPR, if they believe that any irregularity has been committed during the conduct of a fast track procedure. In the study I presented a scale showing the frequency of filing a challenge on the grounds of an individual reason. On the basis of the examination of the selected samples I have found that the frequency of their application does not change much within the selected time frames at police stations. This suggests that the samples of 150 units, which were randomly selected from the entire population at urban police stations, are representative, and that such results can be anticipated at other police stations as well, in the event that the study expands and includes them. The information which of the reasons is most often established enables the misdemeanours authority to realize in which part of its fast track procedure most irregularities are claimed. In this way, the authority can already in the present undertake certain measures to avoid these irregularities, which means a greater legality of its conduct, handling and decision-making in the future, and consequently, the prevention of beneficiaries claiming these reasons. It is not surprising, that precisely the reason of inaccurate and incomplete

findings of factual state, among all others, is far the most commonly claimed reason in JPR. This can be attributed to the fact that on the one hand we have the established factual state advocated by the misdemeanours authority, while on the other hand there is a factual state advocated for by the alleged offender. When the decision does not take into account the offender's point of view and it also does not explain it, this constitutes the baseline point for most of the filed JPR claiming the mentioned reason. Even the Police misdemeanours authority in their decisions often do not declare the statements of the offender, or the latter are very limited. Considering this kind of conducting a fast track proceedings, it is quite logical that the offender, who is accused of an offence, feels that the procedure was conducted unilaterally, since his statements were not considered, or were taken into account only to a lesser extent. This all points to an apparent violation of the right to a fair trial (Article 6 of ECHR and Articles 22, 23 and 25 of CRS).

To avoid such violations, the misdemeanours authority must be aware of the importance of the above, and in this part of the fast track procedure pay additional attention and undertake certain measures to improve the situation in this area. I suggest the following:

- Adversarial procedure – is one of the elements of the right to a fair trial. Based on my own experience, I can state that only in the last year has the Police misdemeanours authority become aware of the importance of ensuring adversary in fast track proceedings. Only when the offender has learned of all the collected facts, circumstances, evidence and witnesses statements, may he or she take a position on the legal and factual aspects of the offence committed. Even if the misdemeanours body collects new, additional facts and evidence, it is required of the body to again notify the offender. If the offender takes a stand regarding the offence committed, then the misdemeanours authority is familiarized with his or her actual material scope. Only a fast track procedure conducted in this way allows us to adopt an authentic, correct, legal decision which takes into account the positions of both, the offender and the misdemeanours authority.
- Self-criticism – forcefully conducting a fast-track procedure. In case there is any doubt that someone may not have committed an offence, or that there exist circumstances which preclude prosecution for the offence, the misdemeanours authority must be sufficiently self-critical about its operation and determine in these cases, whether the conditions are met to accuse someone of an offence and also issue the appropriate individual act (payment order, the decision on the offence).
- Training – due to the constantly changing nature of MOA-1, effective JPR, and case law, a continuous training of all those involved in the fast track proceedings is required, because only qualified staff can be expected to lower the number of complaints regarding the irregularities in the conduct of fast track procedure. Maybe it would be

necessary to enact an annual mandatory training for officers working in misdemeanours bodies (especially for those with bachelor or master degrees, since they are more susceptible to the complexity of the fast track procedure); the training would present new amendments, common irregularities or maybe even a more rigorous rule would be needed, requiring, for example to pass a test on the conduct of a fast track procedure every three years. In current situation many officers are inadequate to conduct a fast track procedure at the level which is currently required. Also, a selection should be implemented to actually ensure that only those conduct fast track procedures who have proven through the tests that they are adequate to conduct these proceedings on such a level. If someone has obtained a bachelors degree or higher, it does not necessarily guarantee that this person is suitable for such a demanding task of managing fast track proceedings.

- Taking into account the decisions of the Constitutional Court, no. Up-34/93 and Up-13/94, which, *inter alia*, in relation to the fast track procedure state that the misdemeanours body, according to the principle of free evaluation of evidence and the principle of material truth, shall alone decide on which evidence will be taken into consideration and how it will assess their credibility. At the same time, it is not obliged to take all the evidence proposed by the defence. Its duty is only to explain why the proposed evidence was not accepted. In this way, the offender will be also provided the constitutional right to present evidence in his or her favour (third indent of Article 29 of CRS).

Of course, it would be illusory to expect that the beneficiaries would no longer lodge JPRs due to erroneous and incomplete findings of fact, but I believe that by applying the above proposals, it would be possible to reduce the frequency of lodging.

The MOA-1 in Article 55 § 1 provides that the misdemeanours authority ex officio and without delay quickly and simply determines those facts and gathers the evidence which are necessary to make a decision on the offence. This raises the question whether such an arrangement still makes any sense, given the fact that misdemeanours proceedings, and consequently the determination of factual state, have become complex and time-consuming rather than quick and simple. I suggest an amendment of that provision, since it would be necessary to determine what the facts are, as well as divide them into decisive and other relevant facts, which are the pieces of evidence and what is their scope, what is material truth and the importance of searching for it at different stages of the proceedings, what are the legal and actual questions, what is the standard of proof and its degrees (e.g. in criminal proceedings the standard of proof consists of six levels), what is the evidence ban, what is the instructing maxim. These are only a few postulates which shall lead a misdemeanours authority through the various stages of the fast track procedure. Their importance would come to the fore especially in determining

the factual state, since taking them into account would allow us to determine its completeness or at least its approximation. In short, the MOA-1 should define what is entailed in the determination of the factual state.

The results of the study on the frequency of claiming an individual reason when lodging JPR indicate a need for further research, since the survey examined certain areas only. It would be certainly useful to further explore the findings of the actual success of beneficiaries regarding their claims of individual reasons when filing a JPR. After the completion of such study, it would be possible to determine how many of these JPRs, with regard to the individual claimed reason, were unfounded, and how many decisions by a misdemeanours body have been modified or ceased. This kind of study would provide us with the information about the actual success of the beneficiaries when challenging a singular act (payment order, decision, conclusion) by lodging a JPR in relation to a claimed reason.

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References

Literature

Craig, P. (2003). *Administrative Law*. London: Sweet and Maxwell.

Fišer, Z. (2006). Sodnik v postopku o prekršku. In *1. dnevi prekrškovnega prava* (pp. 49–57). Ljubljana: GV založba.

Gajzer, M. (2007). Varstvo človekovih pravic v postopkih pred sodišči. In *2. dnevi prekrškovnega prava* (str. 156–162). Ljubljana: GV založba.

Jakulin, V.(2007). Dejansko stanje pri plačilnem nalogu. In *2. dnevi prekrškovnega prava*. Ljubljana: GV založba.

Jenull, H. (ur.), Čas, P., Filipčič, K., Fišer, Z., Maček Guštin, Š., Orel, N., Perpar, M., & Selinšek, L. (2009). *Zakon o prekrških s komentarjem*. Ljubljana: GV založba.

Jenull, H., & Selinšek, L. (2011). *Uvodna pojasnila k ZP-1 z novelama ZP-1F in ZP-1G*. Ljubljana: GV Založba.

Kečanović, B. (2010). Pet let reforme prekrškovnega prava. *Pravna praksa, 29*(25), p. 1.

Kovač, P. (2012). Pomen in raba pravnega sredstva odprave in spremembe odločbe na predlog prekrškovnega organa. *Pravosodni bilten, 33*(1), 87–99.

Maunz, T., & Dürig, G., (1991). *Grundgesetz Kommentar*. München: C. H. Beck.

Nehl, H. P. (1999). *Principles of Administrative Procedure in EC Law*. Oxford: University of Oxford.

Orel, N. (2008). Razlogi za vložitev zahteve za sodno varstvo. In *3. dnevi prekrškovnega prava* (pp. 28–34). Ljubljana: GV založba.

Šturm, L. (ur.), Arhar, F., Blaha, M., Bučar, F., Čebulj, J., Deisinger, M., Dular, J., Friedl, J., Graselli, A., Jadek Pensa, D., Jaklič, K., Jambrek, P., Jerovšek, A., Klemenčič, G., Končina Peternel, M., Kresal, B., Mavčič, A. M., Mozetič, M., Novak, M., Orehar Ivanc, M., Pemuš Grošelj, B., Pirnat, R., Plauštajner, K., Ribarič, M., Rijavec, V., Sladič, J., Sovdat, J., Steinman, T., Šorli, M., Testen, F., Toplak, L., Trampuž, M., Trpin, G., Virant, G., Vlaj, S., Zakrajšek, F., Zalar, B., & Zupančič, M. B. (2002). *Komentar Ustave Republike Slovenije*. Ljubljana: Fakulteta za podiplomske državne in evropske študije.

Šturm, L. (ur.), Avbelj, M., Bardutzky, S., Bele, I., Blaha, M., Cerar, M., Čebulj, J., Deisinger, M., Galič, A., Grad, F., Ivanc, B., Jaklič, K., Jakulin, V., Jambrek, P., Jerovšek, T., Kaučič, I., Končina Peternel, M., Kovač, P., Klemenčič, G., Kresal, B., Letnar Černič, J., Mavčič, A., Nerad, S., Orehar Ivanc, M., Pavlin, P., Pirnat, R., Pogorelec, J., Prepeluh, U., Farmany, P., Sovdat, J., Šorli, M., Testen, F., Umek, U., Vlaj, S., Zagradišnik, R., Zobec, J., & Zupančič, K. (2011). *Komentar Ustave Republike Slovenije: dopolnitev – A*. Ljubljana: Fakulteta za podiplomske državne in evropske študije.

Sources

(1994). Evropska konvencija o človekovih pravicah (EKČP). Ur. list RS, št. 33/94, MP, št. 7/94).

(1991). Ustava Republike Slovenije. Ur. list RS, št. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06.

(1994). Zakon o kazenskem postopku (ZKP). Ur. list RS, št. 63/94 (70/94 popr.), 25/96 Odl.US: U-I-18/93, 39/96 Odl.US: U-I-33/95-12, 5/98 Odl.US: U-I-25/95, 49/98-ZPol (66/98 popr.), 72/98, 6/99, 42/00 Odl.US: U I 282/99, 66/00, 111/01, 32/02 Odl.US: U-I-92/96-27, 3/03 Odl.US: U-I-204/99-22, 21/03 Odl. US: U-I-190/00-11, 44/03 Odl.US: U-I-149/99-15, 56/03, 92/03 Odl.US: U-I-319/00-21, 114/03 Odl.US: U-I-426/02, Up-546/01-21, 116/03-UPB1, 43/04, 68/04 Odl.US: U-I-296/02, 83/04 Odl.US: Up-729/03, U-I-187/04, 96/04-UPB2, 101/05, 8/06-UPB3, 14/07, 32/07-UPB4, 102/07-ZSKZDČEU, 21/08 Odl.US: U-I-96/06-13, 23/08-ZBPP-B, 65/08 Odl.US: U-I-328/04-22, 68/08, 89/08 Odl. US: U-I-25/07-43, 77/09, 88/09 Odl.US: Up-3871/07-26, U-I-80/09-26, 109/09 Odl.US: U-I-46/08-20, 29/10 Odl.US: U-I-50/09-18, Up-260/09-17, 58/11-ZDT-1, 91/11, 32/12-UPB8, 47/13.

(1999). Zakon o splošnem upravnem postopku (ZUP). Ur. list RS, št. 80/99, 70/00, 52/02, 73/04, 22/05-UPB1, 119/05, 24/06-UPB2, 105/06-ZUS-1, 126/07, 65/08, 47/09 Odl.US: U-I-54/06-32 (48/09 popr.), 8/10.

(2003). Zakon o prekrških (ZP-1). Ur. list RS, št. 7/2003, št. 86/2004, 7/2005 Skl. US: U-I-19/05-5, 23/2005-UPB1, 34/2005 Odl.US: U-I-19/05-11, 44/2005, 55/2005-UPB2, 40/2006 (51/2006 popr.), 70/2006-UPB3, 115/2006, 139/2006 Odl.US: U-I-69/06-16, 3/2007-UPB4, 29/2007 Odl.US: U-I-56/06-31, 58/2007 Odl.US: U-I-34/05-9, 16/2008 Odl.US: U-I-414/06-7, 17/2008 (21/2008 popr.), 76/2008-ZIKS-1C, 108/2009, 109/2009 Odl.US: U-I-56/08-15, 45/2010-ZIntPK, 9/2011, 10/2011 Odl.US: Up-319/10-14, U-I-63/10-7, 26/2011 Odl.US: Up-456/10-22, U-I-89/10-16, 29/2011-UPB8, 43/2011 Odl. US: U-I-166/10-8, 21/2013, 111/2013.

(2006). Zakon o varstvu javnega reda in miru (ZJRM-1). Ur. List RS, št. 70/2006.

(2010). Zakon o pravilih cestnega prometa (ZPrCP). Ur. list RS, št. 109/2010, 57/2012.

Sodba ESČP, Suhadolc proti Sloveniji, 17.5.2011, vloga št. 57655/08.

Sodba ESČP, Šild proti Sloveniji, 17. 9. 2013, vloga št. 59284/08.

Odločbi Ustavnega sodišča RS, št. Up-34/93 in Up-13/94, 8. 6. 1995.

Odločba Ustavnega sodišča RS, št. U-I-56/06-31, 15. 3. 2007.

Odločba Ustavnega sodišča RS, št. Up-1293/10, 21. 6. 2012.

Sodba Vrhovnega sodišča RS, št. IV Ips 41/2006, 16. 2. 2007.

Sodba Vrhovnega sodišča RS, št. IV Ips 58/2007, 28. 2. 2008.

Sodba Vrhovnega sodišča RS, št. IV Ips 71/2007, 16. 9. 2008.

Sodba Vrhovnega sodišča RS, št. IV Ips 117/2008, 24. 2. 2009.

Sodba Vrhovnega sodišča RS, št. IV Ips 41/2013, 25. 4. 2013.

Sodba Vrhovnega sodišča RS, št. IV Ips 28/2014, 20. 5. 2014.

Sodba Višjega sodišča v Ljubljani, št. VSL PRp 571/2009, 24. 3. 2009.

Sklep Višjega sodišča v Celju, št. VSC Prp 241/2013, 17. 1. 2014.

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Opportunity Cost Classification of Goods and Markets[1]

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ABSTRACT

Sixty years ago, Samuelson's "Pure Theory of Public Expenditure" expounded the classification of goods, and Bain's "Economies of Scale, Concentration and the Condition of Entry in Twenty Manufacturing Industries" expounded the structure-conduct-performance paradigm. To the present day, rivalry in- and excludability from consumption classify goods, and subadditivity and irreversibility in production classify market structure. Opportunity costs of production in the form of prospective sunk costs incentivise investment and production, and the sunk costs themselves induce subadditivities, specialization and convexity of the marginal rate of technical substitution. Opportunity costs in consumption are determined by the marginal costs of replacement. In light of the recent Nobel price award to Jean Tirole, we revisit some of the forgotten discussions and clarify some of the terminology under a more economic framework of opportunity costs.

Keywords: *classification of goods and markets, opportunity costs, prospective sunk costs*

JEL: D47, D52, H41

1 Introduction

Sixty years ago, Samuelson's (1954) formalisation of Musgrave's (1939) theory gave a seminal distinction between public consumption goods and private consumption goods that never set a universal rule for public expenditures,

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as initially intended. Table 1 shows the Samuelson's (1954) subtractability in consumption criterion also known as rivalry in consumption, depletability, scarcity, or summarily: opportunity cost in consumption (Buchanan, 2008).

Table 1: The classification of goods according to the consumption subtraction criterion

The consumption of a good by one consumer leads to a subtraction of consumption of some other consumer	The consumption of a good by one consumer leads to no subtraction of consumption of any other consumer
Private consumption goods	Collective consumption goods

Source: Samuelson (1954).

Musgrave (1959) added a second dimension: excludability. The importance of excludability and property rights was stressed by Coase (1960), Olson (1965), and Ostrom (2003) as the criteria merged into the standard textbook combination shown in table 2.

Table 2: Rivalry and excludability criteria

		Excludability from consumption	
		Excludable	Non Excludable
Subtractability from consumption	Subtractable	Pure private goods	Common goods
	Non subtractable	Club goods	Pure public goods

Source: Ostrom (1996).

Buchanan (1965, 2008) analysed club goods, and Ostrom (1977, 1996, 2003) common goods and common pool resources. The excludability criterion is of institutional (legal and political) and technical (feasibility and efficiency) nature, so there is no unique and consistent economic representation. Samuelson's goal of finding an overarching classification of goods that would legitimise governmental provision of public goods has not been achieved. So, the classification neither explains nor legitimises governmental role in the provision of goods: governments mostly provide private consumption goods, and collective consumption goods are mostly provided by the private market as they are more efficiently produced in a competitive market based system (Wisniewski, 2013). Even in the field of market structures, empirical research does not conform to the theory and market concentration allows no deduction about competitiveness (Demsetz, 1968). Following the groundwork by Bain (1954) and Demsetz (1968), Baumol's et al. (1982) Theory of contestable markets and endogenous cost structures entered the textbooks as shown in table 3.

This approach to goods and market structure classification uses exclusively economic terms, and as we shall see, is fully commensurable with the previous classification of goods.

Table 3: Market classification according to irreversibility and jointness in production

		Irreversibilities in production ("sunk costs")	
		Large "sunk costs"	Negligible "sunk costs"
Cost subadditivities in production ("economies of scale / scope")	Large	Natural monopoly	Disciplined monopoly
	Negligible	Market with imperfections	Normal market

Source: Baumol et al. 1982.

2 Interdependence of Economics and Institutions

Formally, institutions are laws, rules, regulations, and other formal or informal social norms of behaviour (the substantive definition). Functionally, institutions create and structure incentives for desirable behaviour (North, 1990). The rivalry and excludability criteria actually show the interdependence of economic realities about the scarcity of a resource and institutional possibilities of mitigating that scarcity by allowing for an allocation mechanism. The role of the economic institutional mechanism design is to provide for the most suitable allocation mechanism (Hurwicz, 1960, 1973; Hurwicz & Reiter, 2006) being the one mechanism with the highest informational efficiency (Hayek, 1945) communicating the dispersed information about desires and resourcefulness of individuals in society. Institutional mechanisms give incentives for the production of goods, their allocation, and for the market structures to form just as Bain (1954) has supposed. Economic reality, i.e. scarcity determines market structure. Market structure determines the game-theoretical conduct of players, and this determines their performance. An endogenously deductive process of causation is explained in detail as follows.

The connection between goods and markets is normally unclear, as the classification belongs to different subjects: public finance and industrial organisation as shown in table 4.

Table 4: Institutional and economic classification criteria

		Property rights existence and market pricing possibility	
		Positive price, $P_x > 0$	Zero price, $P_x = 0$
Subtractability, rivalry, and depletability in consumption: marginal costs of replacement.	$MC_x > 0$	Pure private goods $MC_x > 0, P_x > 0$	Common goods $MC_x > 0, P_x = 0$
	$MC_x = 0$	Club goods $MC_x = 0, P_x > 0$	Pure public goods $MC_x = P_x = 0$

Source: Author's own representation.

The horizontal axis, the excludability criterion is a component of property rights. Property rights are themselves institutional public goods, as a well-defined, enforceable, transferable and exclusive property rights system is a necessary state of the world for an effective market allocation to take place

(Demsetz, 1967, 2008, 2011). There are two basic types of organisation systems for the purpose of allocation decision-making: centralised systems based on top-down allocation rules (lotteries, majoritarian voting systems, common-law evolutionary rules, committees, and dictatorships), and a decentralised market allocation system based on voluntary trade and cooperation including homesteading for piously non owned resources. Centralised allocation rules cannot achieve maximisation of welfare as allocation is imposed on individuals (Sen, 1977, p. 53), although there are many occasions where such decision-making rules are necessary, for example in case of disputes. But even a centralised economy needs property rights. The Tirole's (2006) socialist enterprise model needs a capitalist manager with sunk-cost collateral to mitigate moral-hazard.

The Robbinsian (1932) "What? How? For whom?" is impossible without property rights even in the case of centrally planned economies, as property rights confer necessary information and incentives. Primarily, property rights make allocation by prices according to the principle of scarcity possible. A full set of well-defined, enforceable, transferable, and exclusive property rights is indispensable for the decentralised market allocation of goods. Unpriced goods without property rights or other forms of exclusion are available free of charge ($P_x = 0$), and anybody can free ride on them. Users rush to convert the free resources into possession and ownership: a race that Hardin (1968) described as tragedy of the commons. As Ostrom (2003) has shown, the tragedy of the commons does not need to occur if users of the common resource are able to design and institutionalize a mechanism of control. Efficient and sustainable production needs a set of rules and incentives. For Demsetz (1967, 2011), property rights primarily guide incentives for greater internalisation of externalities. An externality is a property of competitive social relationships that remains external to the market economy because of its high cost of internalisation. For Demsetz (1967, 2011) therefore, externalities are economically efficient. The same holds for information asymmetries that are too costly to internalise. Any production may also be seen as a combination of institutionally permissible or unconstrained human action. What shall be constrained, is a question of ethics and what is efficient to constrain, is decided by transaction costs and technical feasibility. Unethical behaviour with lower costs than internalisation policies is efficient, and property rights drive transaction costs down to the point of efficient internalisation.

Accumulation of capital (in any form) is the single most important determinant of economic development. One particular aspect of capital is of particular interest: the sunk investment. An investment is sunk if it is specialized to the point that it has no substitution alternative, thus having no opportunity cost of production, and an endless value of risk or uncertainty in case of failure. Before being sunk, the potential investment has an opportunity cost of capital equal to the value of the real option of the investment and the level

of risk or uncertainty equal to the prospective sunk cost. Sunk costs thus create specialization, cost irreversibilities and cost subadditivities that are major barriers to entry according to Baumol et al. (1982) but also increase the risks as specialization comes at the price of decreasing substitutability of productive resources and decreasing opportunity costs of production. So, without effective property rights, there is no incentive for risk-taking, investment, specialization, and efficient production with cost subadditivities. Prospective sunk investments increase opportunity costs of production and real option values. Opportunity cost of production is a two sided coin: on one side there is a possibility of market protection of incumbents against potential entrants and on the other side, there is possibility of higher risk as investment is sunk. Present anti-trust policies seem to be concerned only with the former problem of market centralisation, and less with the latter problem of entrepreneurship and risk. So, the anti-trust policies have to weigh between following rules: the less supplementary the resources (the lower the opportunity costs of production), the more convex the production possibility frontier (to the origin), and higher the cost subadditivities, i.e. higher the economies of scale and scope, and higher the efficiency in production, but also, higher the sunk costs, i.e. the risks for the investor.

Thus, the characteristics of resources, production functions and goods, endogenously define the characteristics of markets that furthermore influence strategy and performance, as in a standard Harvard "Structure-Conduct-Performance" model (Bain, 1954), and "Contestable Markets" theory (Baumol, 1982; Baumol et al., 1982). The opportunity costs of production reflect risk and reward possibilities. Types of goods do ultimately determine types of markets and there are two types of goods producing inefficient results: club goods and common goods.

3 Opportunity Cost Based Classification of Goods

Alternative ends, tastes and preferences are subjective and exogenous to theoretical economic analysis. They are the opportunity costs of consumption. Opportunity cost is an important concept in economics as it expresses the basic relationship between scarcity and choice (Buchanan, 2008). Scarcity according to Cairncross (1944) and Samuelson (1954) has an exclusively social, demand oriented context in the sense of rivalry, or competition for resources. Demsetz's (1964, p. 20) perspective on scarcity is the production side: the marginal cost of replacement. Table 5 shows the same four types of goods, this time presented according to their opportunity costs of production and opportunity costs in consumption.

Table 5: Interdependence of economics and institutions

		The institutional framework	
		Efficient	Inefficient
Economic facts	Resource or good is scarce	Positive opportunity costs of production and positive opportunity costs in consumption.	No opportunity costs of production and positive opportunity costs in consumption.
	Resource or good is not scarce	Positive opportunity costs of production and no opportunity costs in consumption.	No opportunity costs of production and no opportunity costs in consumption.

Source: Author's own representation.

The opportunity cost of production is the basic economic incentive of production and important decision-making factor in the allocation of resources. It incorporates risks and rewards of sunk costs in a single measure: the investment real option. It is the part of an investment that is irreversible, the highest possible amount to be lost, and simultaneously a barrier to entry for competitors, once the investment option is exercised, guaranteeing monopoly rents.

The opportunity cost in consumption determines the allocative efficiency of existing goods and gives the optimal pricing to clear the market. Club goods and common goods therefore show some allocation problems. Club goods are made artificially scarce by the institutions of the society. Common goods lack necessary institutions for efficient allocation. Samuelson's (1954) collective consumption goods have zero marginal costs (MC_x) of consumption for any good x_n subscript n denoting possible consumption quantities Q_n ($n = 1, 2, 3, \ldots, N$) for all potential consumption quantities across the entire production / consumption spectrum:

$$\forall x_n \in X; \quad MC\left(\sum_{n=1}^{N} x_n\right) = 0; \quad n \in \mathbb{N} \tag{1}$$

The replacement cost function is boundless with respect to demanded quantity n:

$$\forall x_n \in X; \quad TC(x_1) = TC(x_{1+n}); \quad |x_n| \to \infty; \quad n \in \mathbb{N} \tag{2}$$

The production/consumption schedule is independent of the total production/consumption quantity. In case of Samuelson's (1954) collective consumption goods, the production function consists entirely of sunk costs: a constant. In this case, the cost function is extremely subadditive. The marginal cost of the production/consumption schedule does not decrease monotonically with the quantity: the costs are nil from the very first production unit.

The marginal production/consumption costs, for private consumption goods are instead positive:

$$\forall x_n \in X; \quad MC\left(\sum_{n=1}^{N} x_n\right) > 0; \quad n \in \mathbb{N} \tag{3}$$

It implies that the production/consumption function is bounded in respect to some final quantity of produced goods M:

$$\forall x_n \in X; \quad TC(x_1) < TC(x_{1+n}); \quad |x_n| \leq M; \quad n \in \mathbb{N}, M \in \mathbb{N} \tag{4}$$

As Baumol (1972) pointed out, the production possibility frontier when using a positive externality (or emitting a negative externality) may present a non-convex shape. The allocative efficiency depends on the cross-section of opportunity costs in consumption and prices, and is satisfied when $P_x = C_x$. So, for private consumption goods $P_x = MC_x > 0$, and for collective consumption goods $P_x = MC_x = 0$. Table 6 depicts the previous statements more clearly.

Table 6: Opportunity costs in consumption and opportunity cost of production

		Opportunity cost of production given by institutional incentive mechanisms	
		Pricing is possible	Pricing is impossible
Opportunity costs in consumption given by the economic reality	Quantity dependent (bounded) functions	Pure private goods $MC > 0$, P > 0	Common goods $MC > 0$, $P = 0$
	Quantity independent (unbounded) functions	Club goods $MC = 0$, $P > 0$	Pure public goods $MC = P = 0$

Source: Author's own representation.

Sunk costs induce economies of scale, i.e. subadditive production cost functions (Weitzman, 1983). Zero marginal costs in consumption imply superadditive consumption functions: no subtraction from further consumption, i.e. no opportunity costs in consumption. It is the goal of the economic optimization problem to produce at least cost. Goods with no rivalry in consumption and without any costs of replacement are produced with zero marginal costs, i.e. without opportunity costs in consumption. Which is very often equalised with monopoly power (does anybody still remember the Microsoft lawsuit case?). To say that a firm is guilty of monopoly power because its average cost curve is falling is to say that it is guilty of being efficient. A successful market structure depends not so much on allocative (static) as on productive (dynamic) efficiency. In an allocatively efficient industry, companies equalise marginal cost and price. Companies with large sunk investments and no marginal costs of replacement cannot possibly charge zero price.

It is not the physical states of the world which one cannot influence that one shall be guilty of, but only his actions and coercions and/or abuses of power to coerce.

There are some goods that are usually wrongly classified: cinemas and air flights are fine examples. They are wrongly put into the category of non-rival goods, as, there is no opportunity cost of usage for the next customer as long as there are empty seats. This view disregards the non-monotonicity and boundaries of production functions. These instead are lumpy goods, meaning their production function is not monotone, and they are ultimately subtractable at the end of every supply unit that consists of many consumption units, subtractable in lumps. Normally, these goods are also composite of two or more other goods. For example cinemas. No two seats in a cinema are equal, and ultimately a composite service is sold: the movie projection, which is non rivalrous up to the last seat, but a single seat in the projection room is rivalrous (and with positive marginal costs in consumption). When at least one part of the composite service is subtractable, the entire composite service is subtractable, because adding a superadditive consumption function to a non-superadditive consumption function yields a non-superadditive consumption function, i.e. a private consumption good. So, where is the big problem within the classification of goods? Let us think of an example. Angelina Jolie may make a movie only once, which is a sunk cost, but the movie may be viewed an unlimited number of times, in a quantitatively unbounded consumption function. So, the problem is the production scarcity of Angelina Jolie movies. But once they are produced, they are not rival or subtractable in consumption. Angelina Jolie is a natural monopolistic provider of Angelina Jolie movies. The question her fans are interested in is not how to punish her for the monopoly position, but how to incentivize her to produce more movies. This is also the main point of Demsetz (1964, 1966, 1967, 1968, 2008, 2011), that has been missed by the market regulators in the past.

The most common definition of monopoly translates into a market structure with just one supplier. This is a neo-classic substantive definition. A functional definition is concentrated on monopoly power: a market structure with the producer having market power to control either prices or quantities. According to Baumol (1982) a monopoly is an uncontestable market position. It is a functional definition that includes not only what is seen, but tries also to include what is not seen: the possibility to contest the market power of the incumbent producer. So, even if the monopolist has market power to control prices or quantities, he won't abuse his power if his position can be contested by a sudden entrant, which could be detrimental for his profits.

4 Opportunity Cost Based Classification of Markets

Table 3 (Market classification according to the irreversibility and jointness in production criteria) has according to Weitzman (1983) a serious flaw. Weitzman postulated that in a timeless production function and without sunk costs no fixed costs are possible and subsequently no cost subadditivities may exist. Table 7 shows the implications of the critique.

Table 7: Market structure according to jointness and irreversibility in production

		Irreversibility in production ("sunk costs")	
		Large "sunk costs"	Neglectable "sunk costs"
Jointness in production ("Economies of scale / scope")	Large $FC > 0,\ AC' < 0,\ MC < AC$	Natural monopoly	IMPOSSIBLE!
	Negligible $FC = 0,\ AC' \geq 0,\ MC \approx AC$	IMPOSSIBLE!	Normal market

Source: Authors' own representation.

The Weitzman (1983) critique implies two impossible results shown in the table 7. The subadditivity in production implies sinking average costs and positive sunk costs. According to this view, only two opposite market structures are possible: normal market and natural monopoly. Natural monopoly is a direct consequence of the sunk cost. But the sunk cost is a double sided coin: it is simultaneously a source of opportunity and a source of risk. This has significant implications for the anti-trust policies as they take into account only the opportunities but not the risks. Table 8 draws on that conclusion and shows a modified representation with prospective sunk costs as a maximum value at risk for an investment and representing the opportunity costs of production, and the marginal cost of replacement representing the opportunity cost in consumption.

Table 8: Opportunity costs of production and opportunity costs in consumption

		Opportunity costs of production	
		Positive prospective sunk costs = positive real option values	No prospective sunk costs = non positive option values
Opportunity costs in consumption	Positive MC in consumption	Private and lumpy goods $MC_x \approx P_x;\ P_x > 0;\ PSC > 0$	Common goods $MC_x > P_x;\ P_x = 0;\ PSC = 0$
	No MC in consumption	Monopoly goods $MC_x = 0;\ P_x > 0;\ PSC > 0$	Non economic goods $MC_x = P_x = PSC = 0$

Source: Authors' own representation.

Any categorisation of goods has to start from the basic economic question of scarcity, i.e. the opportunity costs in consumption and the effects of institutions on allocating the consumption of these scarce resources. Any consumption of products that are not readily found in nature, however circular an economy may be, needs incentives for their production. Rival goods are ultimately finite in consumption. Rival goods are economic goods. Scarcity is a temporary local shortage of a good. The scarce good has to be produced. Without the right incentives, there is low probability of its spontaneous and efficient production. Government production is no guarantee of efficient production as government officials cannot know even what goods

should be produced. And even if they could by some miracle have that information, the government has no inherent incentives to produce the good efficiently. So, we mostly count on a well-defined system of property rights to produce the needed incentives for dynamic efficiency. Private property rights are institutions that induce the development of intellectual and other property rights, saving, production, commerce and consumption. In a capitalist society, the pure public good has the substantive form of an idea, work of literature, music, art, etc. A form of intellectual property, recognized by the patent and copyright laws, firstly comes to life as an intermediary form of a club good. The necessary research and development costs are sunk in form of money, time, and effort as the real option of investment is exercised. Once successfully produced, its marginal cost of production is negligible, enabling the producer to earn monopoly profits. It may be argued that a government subsidy amounting to the cost of research and development may provide a more efficient solution, but then the question of who decides what goods are to be invented, researched and developed, stays largely unanswered. To achieve dynamic efficiency, one must sacrifice static efficiency. So, club goods are dynamically efficient but statically inefficient. To achieve both, one needs to have an optimal duration of copyrights and patents to provide for production incentives without excessive monopolistic profits for the producers. Various goods have different costs of research and development but not necessarily different patent expiration durations which leaves the market with many institutionally supplied monopolies. When the patent ultimately does expire, the good becomes a generic, public domain, pure public good.

The problem of the tragedy of the commons arises with common goods and common pool resources when the non-renewable and ultimately depletable (scarce) resource is depleted at a rate higher than its rate of renewal. The opportunity cost between present and future consumption of a non-renewable common pool resource is the interest rate (the time preference rate). The rate of depletion of a common pool resource is equal to this rate. The difference between the rate of depletion and the rate of renewal can be seen as the goods' true marginal cost. In the case of common goods, the price is nil or under the marginal cost. To assure for dynamic efficiency, the good should be priced according to its marginal cost. Normally, this goes via privatisation. There are many nuances of property rights, and according to Ostrom et al. (1996), there is mostly no need to fully privatize a good to achieve desired efficiencies. Without some institutional mechanism of allocation, explicit or implicit pricing is impossible, and the depletion of common goods is almost guaranteed. The most effective allocation mechanism is the price. Price is simultaneously information and incentive (Hayek, 1945; Demsetz, 1964, 2011). A system of prices in a market economy fulfils several roles at once: allocation between consumption and production, and gives information on risks, marginal costs and marginal benefits.

Table 9: Possibility and desirability of pricing

		Opportunity costs of production (dynamic allocation)	
		Positive	Non existent
Opportunity costs in consumption (static allocation)	Scarce goods	Pricing feasible and desirable for dynamic and static purposes.	Pricing not feasible but desirable. Through the process of "propriation" some aspects of it may be privatized.
	Non-scarce goods	Pricing feasible and desirable to repay for the "sunk costs". In the long run, the good becomes a public good.	Pricing neither feasible nor desirable. Goods neither locally nor temporarily scarce, depletable nor subtractable.

Source: Author's own representation.

5 Conclusion

There aren't enough resources around, regardless of production efforts. As long as there are desires, and incentives to produce, the impact of scarcity on human lives is less dramatic. Scarcity is the main topic of economics. The goods are either scarce in production (there is a shortage thereof) or they are scarce in consumption (they are rival, depletable, subtractable).

To make the common goods dynamically more efficient we need an effective system of property rights that will cover this grey area. To make the club goods statically more efficient, we need to terminate their exclusive property rights just in time to still induce further investment, research, and development without causing static inefficiencies.

By examining their substantive characteristics, all goods fall into one of the four categories. The presented classification has several benefits: it avoids the accounting terms of fixed and variable costs that are prone to misclassification, it uses simple economic terminology, and it can easily be formally stated and graphically represented by using marginal rates of transformation in production possibility frontiers. The terms scarcity in production and scarcity in consumption fit perfectly the concept of analysis based on opportunity costs of production and opportunity costs in consumption.

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References

Alchian, A. A., & Demsetz, H. (1972). Production, information costs, and economic organization. *American Economic Review, 62*(Dec.), 777–795.

Bain, J. S. (1954). Economies of Scale, Concentration and the Condition of Entry in Twenty Manufacturing Industries. *American Economic Review, 44*(1), 15–39.

Baumol, W. J. (1964). External Economies and Second-Order Optimality Conditions. *American Economic Review, 54*(4), 358–372.

Baumol, W. J., & Bradford, D. (1972). Detrimental Externalities and Non-Convexity of the Production Set. *Economica, New Series, 39*(154), 160–176. DOI: 10.2307/2552639

Baumol, W. J. (1982). Contestable Markets: An Uprising in the Theory of Industry Structure. *American Economic Review, 72*(1), 1–15.

Baumol, W. J., Panzar, J. C., & Willig, R. D. (1982). *Contestable Markets and the Theory of Industry Structure*. New York: Harcourt Brace Jovanovich, Inc.

Buchanan, J. M. (1965). An Economic Theory of Clubs. *Economica, New Series, 32*(125), 1–14. DOI: 10.2307/2552442

Buchanan, J. M. (2008). *Opportunity cost*. In S. N. Durlauf & L. E. Blume (Eds.), The New Palgrave Dictionary of Economics (2nd ed.). Palgrave Macmillan. DOI: 10.1057/9780230226203.1222

Cairncross, A. (1944). *Introduction to Economics*. London: Butterworth.

Coase, R. H. (1937). The Nature of the Firm. *Economica, New Series, 4*(16), 386–405. DOI: 10.1111/j.1468-0335.1937.tb00002.x

Coase, R. H. (1946). The Marginal Cost Controversy. *Economica, New Series, 13*(51), 169–182. DOI: 10.2307/2549764

Coase, R. H. (1960). The Problem of Social Cost. *Journal of Law and Economics, 3*(Oct.), 1–44. DOI: 10.1086/466560

Coase, R. H. (1974). The Lighthouse in Economics. *Journal of Law and Economics, 17*(2), 357–376. DOI: 10.1086/466796

Demsetz, H. (1964). The Exchange and Enforcement of Property Rights. *Journal of Law and Economics, 7*(Oct.), 11–26. DOI: 10.1086/466596

Demsetz, H. (1966). Some Aspects of Property Rights. *Journal of Law and Economics, 9*(Oct.), 61–70. DOI: 10.1086/466619

Demsetz, H. (1967). Toward a Theory of Property Rights. *American Economic Review, 57*(2), *Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association*, 347–359.

Demsetz, H. (1968). Why Regulate Utilities? *Journal of Law and Economics, 11*(1), 55–65. DOI: 10.1086/466643

Demsetz, H. (1973). Industry Structure, Market Rivalry, and Public Policy. *Journal of Law and Economics, 16*(1), 1–9. DOI: 10.1086/466752

Demsetz, H. (1982). Barriers to Entry. *American Economic Review, 72*(1), 47–57.

Demsetz, H. (2008). *From Economic Man to Economic System*. Cambridge, UK: Cambridge University Press. DOI: 10.1017/CBO9780511510656

Demsetz, H. (2011). The Problem of Social Cost: What Problem? A Critique of the Reasoning of A.C. Pigou and R.H. Coase. *Review of Law and Economics, 7*(1), 1–13. DOI: 10.2202/1555-5879.1502

Hardin, G. (1968). The Tragedy of the Commons. *Science, 162*(3859), 1243–1248. DOI: 10.1126/science.162.3859.1243

Hayek, F. A. (1945). The Use of Knowledge in Society. *American Economic Review, 35*(4), 519–530.

Houthakker, H. (1956). Economics and Biology: Specialization and Speciation. *Kyklos, 9*(2), 181–189. DOI: 10.1111/j.1467-6435.1956.tb02717.x

Hurwicz, L. (1960). Optimality and Informational Efficiency in Resource Allocation Processes. In K. J. Arrow, S. Karlin & P. Suppes (Eds.), *Mathematical Methods in the Social Sciences*. Stanford, CA: Stanford University Press.

Hurwicz, L. (1973). The design of mechanisms for resource allocations. *American Economic Review, 63*(2), 1–30.

Hurwicz, L., & Reiter, S. (2006). *Designing Economic Mechanisms*. Cambridge, UK: Cambridge University Press. DOI: 10.1017/CBO9780511754258

Musgrave, R. A. (1939). Voluntary Exchange Theory of Public Economy. *Quarterly Journal of Economics, 53*(2), 213–237. DOI: 10.2307/1882886

Musgrave, R. A. (1959). *The Theory of Public Finance*. New York: McGraw-Hill.

North, D. (1990). *Institutions, Institutional Change and Economic Performance*. Cambridge, UK: Cambridge University Press. DOI: 10.1017/CBO9780511808678

Olson, M. (1965). *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, MA: Harvard University Press.

Ostrom, E., & Schlager, E. (1996). The Formation of Property Rights. In S. Hanna, C. Folke & K.-G. Mäler (Eds.), *Rights to Nature* (pp. 127–156). Island Press.

Ostrom, E. (2003). How Types of Goods and Property Rights Jointly Affect Collective Action. Journal of Theoretical Politics, 15(3), 239–270. DOI: 10.1177/0951692803015003002

Ostrom, V., & Ostrom, E. (1977). A Theory for Institutional Analysis of Common Pool Problems. In G. Hardin & J. Baden (Eds.), *Managing the Commons* (pp. 157–172). San Francisco, CA: WH Freeman.

Robbins, L. (1932). *An Essay on the Nature & Significance of Economic Science*. London: Macmillan and Co., Ltd.

Samuelson, P. A. (1954). The Pure Theory of Public Expenditure. *Review of Economics and Statistics, 36*(4), 387–389. DOI: 10.2307/1925895

Sen, A. (1977). Social Choice Theory: A Re-Examination. *Econometrica, 45*(1), 53–89. DOI: 10.2307/1913287

Stigler, G. J. (1942). *The Theory of Competitive Price*. New York: Macmillan.

Stigler, G. J. (1951). The Division of Labor is Limited by the Extent of the Market. *Journal of Political Economy, 59*(3), 185–193. DOI: 10.1086/257075

Tirole, J. (2006). *Theory of Corporate Finance*. Princeton University Press.

Weitzman, M. (1983). Contestable Markets: An Uprising in the Theory of Industry Structure: Comment. *Review of Economics and Statistics, 73*(3), 486–487.

Wiśniewski, J. B. (2013). Non-Excludability, Externalities, and Entrepreneurship – An Overview of the Austrian Theory of Common Goods. Journal of Prices & Markets, 1(1), 58–69. Available at SSRN: http://ssrn.com/abstract=2394889

POVZETEK

1.02 Pregledni znanstveni članek

Klasifikacija oportunitetnih stroškov, dobrin in trgov[1]

Ključne besede: klasifikacija dobrin in trgov, oportunitetni stroški, potencialni nepovratni stroški

V luči nedavne Nobelove nagrade Jeanu Tiroleu so se avtorji članka odločili ponovno preučiti dve pomembni teoriji iz leta 1954 o klasifikaciji dobrin in trgov (ki sta osnova vsem univerzitetnim ekonomskim študijam) in tudi o vladnem zagotavljanju javnih dobrin, o vladnih protimonopolnih politikah in o politikah tržne koncentracije.

Teoriji sta Samuelsonova teorija (1954) o klasifikaciji dobrin v dobrine zasebne in skupne potrošnje ter Bainova teorija (1954) o endogenih tržnih strukturah. Obe teoriji se poučujeta ločeno tako v makroekonomiji, kot tudi v mikroekonomiji, čeprav imata enako teoretično ozadje, ki se ga pogosto zanemarja.

Dobrine se klasificirajo po merilih tekmovalnosti in izključenost iz potrošnje, tržne strukture pa po subaditivnosti in ireverzibilnosti v proizvodnji, to je po oportunitetnih stroških proizvodnje in oportunitetnih stroški v potrošnji. Oportunitetni stroški proizvodnje v obliki potencialnih nepovratnih stroškov spodbujajo investicije in proizvodnjo. Potencialni nepovratni stroški imajo vlogo neizkoriščene realne možnosti za investicije. Če se ta možnost izkoristi, postanejo potencialni nepovratni stroški nepovratni, sprožijo uvajanje subaditivnosti, specializacijo in konveksnost mejne stopnje tehnične substitucije. To je osnova Baumolove (1982) sporne tržne teorije, ki temelji na Bainovi (1954) teoriji endogenih tržnih struktur in kasnejše harvardske paradigme struktura-ravnanje-učinkovitost (SCP).

Paradigma SCP je osnova sodobne teorije o industrijski organizaciji in vladnih protimonopolnih politikah ter politikah tržne koncentracije. Z uporabo Demsetzovih (1968) argumentov se oportunitetni stroški v potrošnji določajo z mejnimi stroški substitucije in se končajo z argumentom, da so za njihovo dobavo, namesto vladne proizvodnje, potrebne institucije in mehanizmi za spodbujanje proizvodnje. Pred šestdesetimi leti se je razprava končala brez odkritja vseobsegajoče klasifikacije dobrin, ki bi upravičila vladno zagotavljanje javnih dobrin, medtem ko sedanje protimonopolne politike in politike o koncentraciji še vedno niso usklajene.

1 Predstavljeno delo je podprla Univerza v Reki v okviru projektov številka 13.02.1.3.11 in 13.02.1.2.09.

Klasifikacija Samuelson-Musgrave-Buchanan-Ostrom ne razloži niti ne upravičuje vladne vloge pri zagotavljanju dobrin. Vlada večinoma zagotavlja zasebno potrošnjo dobrin, saj so dobrine, ki jih dobavlja, bodisi pokvarljive oziroma minljive ali konkurenčne v potrošnji. Skupno potrošnjo dobrin večinoma zagotavlja zasebni trg, saj so bolj učinkovito proizvedene v sistemu, ki temelji na konkurenčnem trgu z močnimi spodbudami za proizvodnjo - v okolju subaditivnosti stroškov in superaditivnosti dobička. Na področju tržnih struktur, empirična raziskava ne ustreza teoriji in tržna koncentracija ne omogoča sklepanja o konkurenčnosti. Članek v devetih razpredelnicah predlaga novo klasifikacijo, ki močno črpa iz omenjenih teorij, jih pojasnjuje in dopušča uvedbo institucionalne/ekonomske dihotomije. Predstavljena klasifikacija ima več prednosti: izogiba se računovodskim izrazom o fiksnih in variabilnih stroških, ki se jih pogosto napačno razvršča, uporablja enostavno ekonomsko terminologijo, mogoče jo je enostavno formalno navajati in z mejnimi ravnmi transformacije v proizvodnji možnih meja tudi grafično predstavljati.

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National Interest and European Law in the Legislation and Juridical Practice on Health Care Services – In the Light of the Reforms of the Hungarian Health Care System[1]

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ABSTRACT

The priority of the national interest in the field of the health care policy is secured by the rules of the TFEU, the Charter of Fundamental Rights of the European Union and by the secondary law as well. Although several market-type and pro-competitive solutions have appeared, they can have only limited influence on the national systems. The main reasons of the limited influence of the EU regulations are the primary responsibilities of the Member States, the widely applicable public health exceptions, and the limited application of the EU competition rules. Although the national legislation is the determinative, the EU regulations on the free movement of persons and services could be applied in the field of the health care services. This principle was recognized by the landmark decisions of the Court of Justice (ECJ). The Directive 2011/24/EU is based on these principles and a limited competition has evolved. Because the competition is limited and the creation of a single European health care area has just begun, the "silent revolution" of the public service provision has a minor importance. The practice of the ECJ has been focused on the use of the cross-border services and the Member States have had a broad margin for the organisation and management of this public service. The role of the European legislation on the competition is limited in this field as well. Therefore the strong centralization of the Hungarian health system from 2011 to 2013 may be in harmony with the EU legislation, although the competition at the national level is not promoted by the reformed Hungarian rules on health care.

Keywords: *health care, harmonization, impact of the EU on national health policies, national health policies, Hungary*

JEL: I18

1 This study is based on investigations of the Research Group of the Hungarian Academy of Science and the University of Debrecen (MTA-DE) on Regulations of Local Public Services (2012–2016).

1 Introduction

The significance of the health care services has been increasing during the last decades in the modern European countries. This growing importance has several demographical, social and economic reasons.

The social care, the health care and the social benefits, the social partnership and dialogue and several rules on the world of the labour belong to the European social policy (Clasen, 2007, pp. 603–604). The rules on the health care services are part of it as well.

The article 151 of the Treaty on the Functioning of the European Union (hereinafter TFEU) states that the social policy belongs primarily to the responsibilities of the Member States. The article 168 of the TFEU has a similar regulation: in the field of Public Health the main responsibilities of the Member States are highlighted by the Article 168 of the TFEU: the Union action shall complement the national policies in this field (Clasen, 2007, p. 612).

The health care is considered as services by the guideline decisions[2] of the European Court of Justice, therefore the legislation and juridical practice on the free movement of services has an important role in the field of health care. If we would like to examine the role of the national interest in the field of the health care it is important to note that these services can be interpreted as services of general interest after the article 14 of TFEU. The "essential role and the wide discretion of the national, regional and the local authorities" is confirmed by the Protocol No. 26 (of the TFEU) on Services of General Interest. The approach of these policies defined by the TFEU is consistent with the rules of the Protocol No. 26 (de Vries, 2011, p. 312). If the health care involves the movement of goods as well then the rules of TFEU on the free movement of the goods shall be applied.[3] The free movement of labour is promoted by the free access to health services (Nistor, 2011, pp. 36–38).[4]

Although the main responsibilities of the Member States are recognised by the TFEU, several Union competencies are secured by the regulations on the "four freedoms". These competencies are strongly limited by restrictions justified on grounds of the protection of health and human life thus practically the national interest in public health can be a justified ground of the restrictions of these freedoms. This regulation also suggests that the competition law of the EU shall be applied in the field of health care (de Vries, 2011, p. 295) but there are special circumstances.

2 See for example the case C-159/90 T*he Society for the Unborn Children Ltd. vs. Stephen Grogan and others*, [1991], ECR I-4685.

3 See for example the case C-120/95 *Decker vs. Caisse de maladie des employés privés* [1998] ECR I-1831.

4 See for example the case C-158/96 *Raymond Kohll vs. Union des caisses maladie* [1998] ECR I-1931.

The health care services are strongly influenced by the national interest, however the European Union has significant responsibilities. Therefore I would like to examine the role of the national interest in an inside-out manner, to investigate the role of the European integration, practically limiting the national interest.

To examine the limits of the national interest the review of several national policies is required. This review is limited to the changes of the Hungarian health care and the interaction of the Hungarian national legislation based on the national interest and the European legislation as well. Hungary is a good example, because different stages and approaches can be reviewed. Our analysis is based on the review of the European and Hungarian legislation and juridical practice. The analysis of the funding and the economic impacts of the legislation are just additional. Therefore the EU legislation and juridical practice will be reviewed and the impact of the different fields of the EU rules and acquis on the Hungarian legislation will be analysed by this article. The significance of the cross-border health service will be presented by statistical surveys on the funding and literature reports and analysis on this topic.

2 The Impact of the Public Health and Social Legislation of the European Union on the National Policies on Health Care

The priority of the national interest is shown by the late institutionalisation of the public health policy of the European integration (Clasen, 2011, pp. 410–411; Fazekas & Koncz, 2013, p. 31). As mentioned above the main responsibilities of the Member States of the European Union remain unchanged. Although the national policies have the greatest importance, these European policies have been evolving and the EU legislation has been changing in the last decades, as well.

2.1 Frameworks of the Fundamental Rights

In the last decades – in addition to the evolving social dimension – the fundamental rights approach of the formerly economic integration has emerged. This approach appeared primarily in the case law of the European Court of Justice (Kaczorowska, 2013, p. 217–218). Several rules on the founding treaties of the European integration were applied with a fundamental law approach by the ECJ. The ECJ took into account the rules of the European Convention on Human Rights mainly when the founding treaties were interpreted. The fundamental rights legislation of the EU was based on this practice of the ECJ (Craig & de Burca, 2003, p. 69).

The health care services are regulated by several rules of the Charter of Fundamental Rights of the European Union, which has the same legal value as the European Union treaties following the entry into force of the Lisbon Treaty in 2009.

The fundamental rights approach has a direct influence on the national health care systems. Although the national interest is recognised by the article 35 of the Charter, this rule states that everyone has the right to access the preventive health care and the right to benefit from medical treatment (Waltermann, 2001, pp. 49–50). The principles of the access to services are not regulated by the Charter, thus the different national health care systems can be prevailed. Therefore the importance of the health care systems within the welfare systems is different, the significance of which can be compared by the share of the health care expenditures. This is shown by the following table.

Table 1: The share of health care spending within the welfare expenditures in the Member States of the European Union from 2000 to 2011 (in %)

Countries or group of countries	2000	2005	2009	2011
EU-27	-	28,92	29,49	29,39
Euro zone (EU-17, except Latvia)	28,34	28,99	29,73	29,59
Belgium	27,61	28,74	28,45	28,78
Bulgaria	-	29,03	24,19	25,99
Czech Republic	33,63	35,26	32,33	31,92
Denmark	20,19	20,72	21,94	20,97
Germany	29,68	28,78	32,33	33,28
Estonia	32,10	31,94	28,36	27,96
Ireland	39,36	39,20	39,03	45,04
Greece	25,84	27,79	29,13	25,86
Spain	29,86	31,37	29,28	27,38
France	28,75	29,85	28,88	28,52
Italy	24,40	26,66	26,62	24,86
Cyprus	27,46	25,25	24,39	22,69
Latvia	17,66	27,47	23,49	21,29
Lithuania	29,81	30,17	26,54	27,75
Luxembourg	25,42	25,66	25,42	25,42
Hungary	27,90	29,89	23,81	27,76
Malta	29,31	29,34	30,93	29,33
Netherlands	29,34	30,67	35,05	35,68
Austria	25,88	25,67	25,80	25,23
Poland	19,64	19,80	25,08	23,13
Portugal	32,01	30,15	28,65	25,05
Romania	25,93	28,42	24,53	25,13
Slovenia	30,65	32,35	32,90	31,57
Slovakia	34,85	29,90	31,51	30,49
Finland	23,77	25,86	25,59	25,53
Sweden	26,78	25,94	25,28	25,70
United Kingdom	25,51	30,87	31,30	31,51

Source: Eurostat, 2013. (Retrieved 25th April 2014 from http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tps00106&plugin=1)

After the article 35 of the Charter a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities, which is an objective of the EU and not a subjective right.

2.2 Regulation of the EU Primary Law

1.1.1 Rules on Public Health

The primacy of national responsibilities on the health care legislation is indicated by the above mentioned regulation of the Charter of Fundamental Rights of the European Union. This approach appears in the TFEU as well. The point k) paragraph 2 article 4 of the TFEU states, that the "common safety concerns in public health matters, for aspects defined in this Treaty" belong to the shared competences between the Union and the Member States. These shared competences are mirrored by the article 6 of the TFEU: in the field of the "protection and improvement of human health" the EU has competence to "carry out actions to support, coordinate or supplement the actions of the Member States". Thus the main activity of the Union is the *Open Method of Coordination (OMC)* of the health care activities of the Member States (Clasen, 2011, p. 411).

Important regulations by which the health care services are affected are regulated by the Title XIV of the TFEU on the public health (which is based on the approach of the article 35 of the Charter of Fundamental Rights). The paragraph 7 article 168 states, that the "Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care." The primacy of the national responsibilities is highlighted by the article 153 of the TFEU on the field of the European social policy as well. And article 168 of the TFEU states that Union actions shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. These actions include the promotion of research into the causes, the transmission and prevention of physical and mental illness and diseases, the health information and education, the monitoring and early warning of them and combating serious border-cross threats to health. The complementary responsibilities of the EU in the field of the drug policies of the Member States is regulated by Public Health Chapter if the TFEU as well.

In summary, the Member States have obviously primary responsibilities, thus the national interest dominates the public health policy. The main and most important responsibility of the European Union is the coordination of national policies. The Open Method of Coordination does not include direct, legally enforceable interventions, but the convergence of the different and various health care systems and the increased efficiency of these systems can be helped by the exchange of good practices, by mutual learning. This OMC can be observed in several areas of the health care and not only the changes of

the funding of health care (mainly the changes of the social insurance systems), however the service delivery system and the health care organization and management and the regional health services are impacted by it. Thus this (legally) soft tool can be a catalyst of the convergence in the EU, and might have greater influence on the national policies and legislation than the top-down legal harmonisation (Koivusalo, 2013, pp. 100–101; Hervey & McHale, 2004, pp. 412–413).

1.1.2 Provisions of the Treaties on Social Policy

Title X of the TFEU on the social policy has a significant impact on the health care services organised at the national level even if the priority of the national responsibility prevails. The role of the national interest in the field of the social policy can be the topic of a separate publication therefore I would like to remark only several facts. The coordination of the national social security systems and policies has a great impact on the national interest because this soft tool resulted in several convergence phenomena in the field of the access to the health care services and benefits. The European Social Fund (ESF) is regulated by the Title XI of the TFEU, thus it is defined practically as a part of the European social policy in a broad sense. The actions of this Fund have a great impact on the health policies of the new, Eastern Central and Baltic EU Member States, because those countries are the recipients of the majority of the grants of the ESF (Koivusalo, 2013, pp. 113–115).

2.3 Provisions of the Secondary Law

The national legislation and the national interest are mainly indirectly impacted by the regulations based on the rules of the Title X, XI and XIV. The intergovernmental public health relations are impacted by the regulations based on the public health rules of the TFEU (Fazekas & Koncz, 2013, p. 31). The norms of the secondary law which impact the national systems and the national interest significantly are the rules on the Four Freedoms and the EU competition law.

1.1.3 The Impact of the Four Freedoms on the National Interest in the Field of the Health Care

The health care can be considered as a service as well, therefore – having regard to the shared competences of the Union and the Member States in the field of health care – the EU rules on freedom to provide services can be applied at least partially (the limits of the application of these rules will be reviewed later). These norms and decisions of the ECJ impacted the health care because the framework of the cross-border health services emerged from them.

The access to the welfare services (including the health care) is one of the most important preconditions of the free movement of persons. Therefore

the access to the health care is strongly impacted by the provisions on the coordination of social security services. The health care is a kind of personal care which is based on the personal activities of the employees organised by the providers authorized by the law. Therefore the national policies are impacted by the EU labour law rules (for example the directives on the fixed-term employment and on the working hours). Last but not least the mutual recognition of medical classification has a strong impact on the free movement of medical employees within the EU.

The national health care policies are impacted by the rules on the free movement of goods. The production, commerce and official monitoring of the pharmaceuticals and medical devices have been changed by the EU legislation.

The national health care services are influenced by the EU competition law, the law on the state aid and the regional development policy as well.

Although competencies of the EU are ensured by these rules, the enforcement of the national interest is widely provided by the *public health clause* which allows the limitations of the four freedoms (Koivusalo, 2013, p. 98; Hervey & McHale, 2004, p. 70).

1.1.4 Health Care as a Special Service – The Impact of the Freedom to Provide Services on the National Interest in the Field of the Health Care

The "services" are defined by the article 57 of TFEU, the services are normally provided for remuneration in so far as they are not governed by the provisions relating to freedom of movements for goods, capital and persons. The health care is basically provided for remuneration – generally funded or supported by the mainly public health insurance agencies, the health insurance companies, governed by the public law or by the central government – and the personal care (excluding the medication and the medical device supply) is not governed by the provisions relating to freedom of movements for goods, capital and persons (Fazekas & Koncz, 2013, p. 52–54) therefore the application of the provisions relating freedom to provide services has been incurred.

The finance of the health care service has been impacted significantly by the "Insurance Directives". Market-based private insurance was authorised by First Non-Life Insurance Directive (Directive 73/239/EEC) thus the private sector has had the opportunity to provide additional or replacement health services (Gronden, 2011, p. 135). A "single license system" was introduced by the "Third Non-Life Insurance Directive" (Directive 92/49/EEC) and this European legislative act allows individuals and business to buy insurance in another Member States. Thus the insurance market – and the market of the health insurance – was liberalized and the competition was strengthened by the Directives. The main impact of this Directive was the increasing competition within the different national markets (den Exeter, 2002,

p. 274–275). Although the competition was encouraged, the article 54 of the "Third Non-Life Insurance Directive" defined a strong "public interest" exception. Therefore the general rules on competition may be just limitedly applicable.

One of the first major decisions of the ECJ which allowed the application of the provisions relating to freedom to provide services was the case *Luisi & Carbone*.[5] The ECJ states in the *Luisi & Carbone* that if somebody travels to another country for taking health care then this activity can be considered as service. Therefore this right (for travelling) cannot be limited. The impact of this case was just indirect because the main point of it was not the major area of the health care (Nistor, 2011, p. 36).

The *Grogan case* cited above was the first one in which the ECJ stated that the health care (in the given case the health care services relating to the abortion) can be considered as services because of the direct economic relation between the provider and the recipient. In this case the ECJ recognised that the *private health care* is practically a type of service (Hervey, 2011, p. 221). After the *Grogan case* it was an open question whether the health care funded by social insurance belongs to the services or not. The service nature of the health care services and benefits funded by the social insurance agencies was recognized by the *Kohll case* cited above. However the ECJ highlighted in the *Kohll case* – based on the decision of the *Webb case*[6] – that several special phenomena of the services funded by social insurance do not allow automatic access to the cross-border services. Nevertheless, the social security agency of Luxembourg was condemned for violation of the free movement of services because the agency did not want to reimburse the cost of orthodontic treatment of the minor daughter of the Luxembourgian Raymond Kohll which was provided in Germany (Bekkedal, 2011, p. 65). The cross-border access to welfare services was recognised by this decision, but the ECJ took into account the primality of the national responsibilities in the field of health care services as well. Thus the prior authorisation of the service was not constituted basically unlawful.[7]

Thus the health care was considered as service by the European Court of Justice but the priority of the national policies and responsibilities have been taken into account relating to the lawful limitations of the free movement of services. The transforming juridical practice was the base of the secondary legislation of the cross-border health services (Fazekas & Koncz, 2013, pp. 51–52).

The new approach of the legislation was embodied by the Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare. By this directive the healthcare is considered as service unambiguously and the national legislations

5 Joined cases C-286/82 and C-26/83 *Luisi and Carbone* [1984] ECR 377.

6 C-297/80 *Webb* [1981] ECR 3305.

7 See case *Geraets Smits*, C-157/99 *B.S.M. Geraets-Smits vs. Stichting Zickenfonds* [2001] ECR I-5473.

on the cross-border health care were harmonized by this norm which is practically a paradigm shift after the coordinative approach basing on the rules on European social policy, the rules on the coordination of the national social security systems and the rules on the coordination of the national public health policies (Peeters, 2012, p. 29). The new directive is based on the free movement of the persons (Fazekas & Koncz, 2013, p. 51). Although the cross-border healthcare was a reality before the publication of this directive, after the leading cases of the ECJ the funding of these services are well-defined by this rule. Thus the national funding authority of the patient should reimburse the costs of the services. The maximum rate of the reimbursement is the publicly financed costs of healthcare provided by healthcare providers established on its own territory of the recipient but if this maximum is higher than the costs of the cross-border providers than the – cheaper – foreign costs shall be reimbursed. The expenses shall be anticipated by the patient and the reimbursement will be received by the patient. In accordance with the decision of the *Geraets-Smits* decision, the Member States are permitted to restrict the freedom to provide medical and hospital services in so far as the maintenance of treatment capacity or medical competence on national territory is essential for public health. Therefore the directive states that the prior permission of the national funding authority of the patient is required for the in-patient care services and for the special and expensive care (Fazekas & Koncz, 2013, pp. 52–53).

Thus the possibility of the cross-border health care was extended by the directive. Therefore the competition between health care providers has increased which can improve the quality of the services. On the other hand the unifying "health care market" can help the compensation of the allocation of capacities thus the waiting lists may be decreased because the economy of scale of the system is promoted. Thus services can be provided to patients in the countries where these lists are shorter (Lamping, 2013, p. 23–24).

The relationship of trust in health care, the linguistic differences and the lack of information about the cross-border healthcare services and the complicated national regulation on the finance, accounting and reimbursement of these benefits are strong limitations of the cross-border healthcare. Thus the "single European healthcare market" is rather a wish than a reality (Meyer, 2013, p. 102); the number of cross-border patients is relatively low. The directive had a relatively significant impact on the providers close to borders. The impact is more significant if the linguistic differences between the countries are not remarkable (identical or very similar language is spoken in the given countries). Thus (a partial) opening of the health care markets have been evolved in several border regions (Legido-Quigley et al., 2008, pp. 48–51).

2.3.1 Free Movement of Persons

The roots of the EU law on health care are related to the rules on the free movement of persons. The coordination of the social security systems

is based on the free movement of labour and by the dismantling the barriers to labour migration. One of the major barriers was the social insurance status of the migrant workers (Carter, 2002, pp. 187–188) which included the health insurance status of these persons as well. Firstly the regulation 1408/71/EEC addressed these questions and now the rules on the coordination of social security system are found in the regulation 883/2004/EC. The philosophy of these regulations was the equal status of migrant workers to resident workers with regard to the benefits of the social security systems.

Therefore the cross-border (non-residential use of) social – including health care services – is permitted in two cases by the Regulation 883/2004/EC. Firstly the article 19 of the Regulation covers the situation where an insured person and the members of his family are staying in a Member State other than the competent Member State (Nistor, 2011, p. 336). These persons shall be entitled to the benefits in kind which become necessary on medical grounds during their stay, taking into account the nature of the benefits and the expected length of the stay. Secondly, the additional services which are approved in advance by the health insurance body of the given person (by an E112 or S2 form). The equal status of the patients is secured by the regulation therefore the total cost of the care (except the mandatory deductibles which should be paid because payment obligation is defined by the legislation country of the service provision) is reimbursed by the national insurer of the provided person. The reimbursement is received by the health insurer of the country of the service provision and the cost of the care will be paid to the provider by the insurer. The occasional care influences the health systems only slightly as it is an emergency or emergency like care.[8]

The national health systems could be more significantly impacted by the care which is approved in advance (and are based on the form E112 or S2), because the costs of this service are fully reimbursed by the national insurer of the patient. But the permission process and the principle of the total reimbursement – thus the national insurer shall reimburse the total costs of the given service even if it is much higher than the similar service provision in the home country – caused a limited impact on the national interest. These tools are used when a rare disease shall be healed or a complicated treatment is needed. Therefore this tool is in harmony with the national interest: those patients can receive the service which cannot be sufficiently cared by the national provider. This legal instrument impacts on a narrow segment of the national health systems.

The national health systems and the national interest in health policies are impacted by the rules on the mutual recognition of medical qualifications which are based on the rules on public health of TFEU. The public health exception prevails in this field as well. Although the main aim of these norms

8 This regulation has a more important impact on the travel insurance market in the EU because the private health insurance as part of the travel insurance packages lost their significance partially (Greber et al., 2001, p. 245).

to secure the free movement of the employees who hold medical degrees the national legislations have the possibility to define several special norms to secure the proper level of training of the medical employees (Hervey & McHale, 2004, pp. 418–420).

1.1.5 Free Movement of Goods

The national interest in health care is impacted by the free movement of goods however not so significantly. The article 28 of TFEU states that the EU is a customs union (Fabio, 2010, p. 11–12). Therefore the distribution and trade of medical devices, medicaments (drugs) are included within the free movement of goods as well. A strong limit of this freedom is the public health exception which will be reviewed in the section 2.4.

The ECJ stated that this freedom should be applied in the trade of medical devices and drugs as well. This regulation impacted the funding of the services because several restrictive and protective national financial and reimbursement regulation were considered as provision having equivalent effect with customs and quantitative restrictions (Waltermann, 2011, pp. 44–45). Thus the ECJ stated in the case Decker that the Luxembourgian social law violated the regulation on the free movement of goods because the price of the glasses bought in Belgium was not reimbursed by the social insurance agency of Luxemburg.[9] Similarly the absolute ban of the mail-order services could violate – in certain circumstances – the principle of free movement of the goods as well.[10]

Thus the trade of the medicaments has been impacted by the European rules on the free movement of goods. These regulations and the system of European reference pricing of pharmaceuticals resulted in a unifying European pharmaceutical market and a stronger competition has evolved (Dawson, 2011, pp. 171–712).

1.1.6 The Public Health Exception

The legislation of the European Union could be characterised as a "market-friendly" one from the 1980s and 90s in the field of the health care. The national interest which primarily has been embodied in the public health exception was a strong limit of the pro-market approach.

As mentioned above, the ECJ stated that the EU regulation on the free movement of the goods and services could be infringed by the general and unconditional bans. Those bans which are not general and have specific conditions could be in harmony with the EU law because of the restrictions which could be permitted by the public health exception. The prohibitions have been reviewed by the ECJ and those prohibitions can be permitted

9 L. C-120/95 *Nicolas Decker vs. Caisses de Maladie de Employés Privées* [1998] ECR-I 1831.

10 See C-322/01 *Deutscher Apothekerverband eV vs. 0800 DocMorris NV & Jacques Waterval* [2003] ECR I-14887.

which could be effective. If the Member States could not prove that the given prohibition was necessary and it could substantially improve the public health of the given country, then the ban was classified as an infringing one (Moens & Trone, 2010, pp. 52–53).[11]

This necessity and proportionality test based on the public health clause allowed the legitimate restrictions of the enforcement of the four freedoms. Thus the ECJ stated that the mandatory retirement of doctors above a defined age is not contrary to the discrimination ban because these rules could improve the national public health (Craig & de Búrca, 2011, p. 900).[12]

Thus the national interest has been a strong limit of the Europeanization of the rules on health care. Therefore the "silent shift of the regulation on public services" – by which the solutions governed by the public law have been preferred (Horváth M., 2013, p. 180) – has less influence on the provision of the health care services because the EU law allowed just a partial service delivery opening. The reformation of the market structure has not been necessary because the market structures have only partially evolved.

2.4 Application of EU Competition Law

The rules on competition had the least influence on the health services. The application of the market or market type solutions were contributed by the classification of the funding agencies as undertakings. If the funding agencies – practically the social insurance agencies or the funding agencies of the central governments – were undertakings, then the EU regimes on competition, on public procurement and on state aid would be applied.

The ECJ is being consistent that the health insurance (social insurance) bodies are not to be considered as undertakings. The ECJ stated firstly in the *Poucet* and *Pistre* joined cases that the social insurance agencies are not undertakings.[13] The ECJ highlighted in the *AOK Bundesverband* case that the federations of these social insurance bodies are not undertakings.[14] In the INAIL case the ECJ stated that it does not infringe the EU competition law if just one accident insurance body is established in a country.[15]

The application of the public health clause resulted in the evolvement of a special regime in the field of the health care public procurement which allowed

11 Thus the ECJ stated in the case C-170/04 *Rosengren and Others vs. Riksåklagaren* [2007] ECR I-4071 that the restrictive regulations on the alcohol import of the Swedish citizens is not in harmony with the EU rules on the free movement of goods because the structure and level of the Swedish alcohol consumption is not substantially influenced by these national provisions.

12 See the case C-341/08 *Domnica Petersen vs. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47 in which the ECJ stated that it is in harmony with the defence of the (national) public health that the German dentists should retire when they reach the age of 68.

13 See more the joined cases C-159/91 and C-160/91 *Poucet* and *Pistre* [1993] ECR I-637.

14 See more the case C-264/01 [2004] ECR I-2493.

15 See more the case C-218/00 *Cisal di Battistello Venanzio & C. Sas vs. INAIL - Istituto Nazionale per l'assicurazione contro gli Infortuni sul Lavoro* [2002] ECR I-691.

just a restricted and controlled (national) market opening (Waltermann, 2009, p. 45; Hatzoupolous & Stergiou 2011, pp. 416–419).

3 The Transformation of the System in Hungary: Clear and Strong Enforcement of the National Interest – A Legal Analysis

As mentioned above broad national legislative and regulatory competences are allowed by the EU law. The coordination of the national social security systems and the cross-border health care services are regulated by the Union. The definition of the main elements of the health systems – for example the funding of health care, the structure and ownership of the providers, the legal status and number of the insurers – belong to the national competences. This framework provides a broad scope for the national regulation.

3.1 The Changes of the Approaches of the Hungarian Legislation on Health Care – Until 2011/13

From 1975 the health care system of the Hungarian socialist (communist) state was a universal one. This system was modified after the Change of the System. From 1992/93 a Bismarckian model was followed which was managed by corporate authorities (corporate self-governments).

The Hungarian system has had significant funding difficulties therefore the main aim of the reforms since the 1990s has been the cost reduction. In these reforms several elements of the New Public Managements and the Good Governance were used (Hoffman, 2013, p. 640). Thus several pro-market solutions and market-type mechanisms were applied as well.

3.2 Recent Legislative Reforms on Health Care – And the Impact of the Reforms

3.2.1 A Centralised Health Care System

The former approach was radically changed by the change of government in 2010 when new, state-centred and public law governed service management trends had evolved. In the last two decades the health system was based on the – mainly limited – competition of the providers, the distribution of the powers and duties between the central and the local government – in which model the central government was primarily responsible for the regulation, for the funding and for the inspection of the system and for the maintenance of several central institutes (for example the university clinics) and the local governments were responsible for the maintenance of the providers and for ensuring the access to the health care. The new model is a centralized system. Because the inspection of the providers and the funding was centralized in the former system the service delivery was strongly impacted by the reforms.

The first step of the transformation of the system was the elimination of the Health Insurance Inspectorate in 2011. The tasks of this body were based on a pro-market approach therefore the paradigm shift was indicated by the liquidation of this organ. The county agencies of the funding body – National Health Insurance Fund – and county and district agencies of the body responsible for public health and health inspection – National Public Health and Medical Officer Service – was integrated into the new general county level agency of the central government, into the County Government Office. This integration indicated the centralization trends of the health reforms as well.

From 2010/11 the Bismarckian approach of the funding has been partially changing. Although the access to the services have been based on insurance entitlement, the majority of the sources have been ensured by the tax revenues of the budget because the former employer's health insurance contribution was replaced by a tax, by the social contribution tax and the former independency of the Health Insurance was abolished and this Fund became a relatively integrant element of the budget of the central government.

The major transformation was the modification of the maintenance of the health care providers. The former local government centred approach has been replaced by a central government centred model. The reform had three steps: firstly the county hospitals were nationalized, secondly the town hospitals became state hospitals and thirdly those local hospitals which were maintained by private entities and the maintenance rights were based on concession contracts became state hospitals as well.

Thus the local self-governments (and their inter-municipal associations) are responsible now only for the basic health care and for the outpatient care institutes which are not integrated into hospitals.

The centralization of the system is very strong. In the new system the National Health Insurance Fund is responsible for financing the system, the National Public Health and Medical Officer Service is responsible for the inspection of the providers and for the protection of the patient's rights, the National Institute for Quality- and Organizational Development in Healthcare and Medicines are responsible for the maintenance of the state hospitals (except the university clinics) and for the coordination of the development of the hospitals. These three bodies are directed by the Ministry of Human Resources (for the direction of the health system has been appointed a state secretary). The former distribution of the service management tasks – which was the main element of the pro-market, pro-competition approach (Horváth, 2005, pp. 117–120) – has been discontinued. Thus in the last four years, one of the most centralized European health care systems has evolved in Hungary.

The private providers are not excluded from the health care system although their financing is disadvantageous, because the public institutes have had tax exemptions and tax relief compared to the private providers (Tóth, 2008, p. 28). The costs of health care public services can be financed by the National Health Insurance Fund. Private insurers mainly purchase above-standard hospital services and services of non-contracted providers (mainly outpatient services) (Földes, 2014, p. 214). Thus the Hungarian system is a centralised and public law governed one and the competition is not contributed by the Hungarian legislation. Therefore the minimum standards of the EU law are harmonised, but the limited pro-market approach of the EU very limitedly prevails in the national legislation. Obviously the public administration and the centralised management are preferred. The private providers have only an additional role and the former public institutions which were transferred into publicly owned companies became public institutes after 2013 (Földes, 2014, pp. 215–217).

The rules on competition have a minor significance in the Hungarian juridical practice (Sárközy, 2001, pp. 52–55). Because of the dominant role of the public providers and insurers the decisions of the Curia (the Hungarian Supreme Court) are about the competition between the manufacturers of the medical equipment (see for example the judgement of the Curia No. Kfv. VI.37.162/2011/5).

The Hungarian legislation on cross-border health services are mostly harmonized by the EU law. The Hungarian acts on health insurance and health care were amended after the new provisions of the regulation 883/2004/EC. The Act LXIII of 1997 was amended by the Act CXXVII of 2013 which amendment tried to implement the rules of the Directive 2011/24/EU. Thus the minimum standards of the common European health care system are mostly prevailed in Hungary (Panurjasz, 2014, pp. 68–69).

Although the system is strongly centralised and the rules of the legislative acts do not enhance the competition between the providers, this level of centralisation may be justified by the "public interest" and "public health" exceptions of the EU law.

1.1.7 The challenges of the Directive 2011/24/EU

The limited impact of the new rules of the Directive 2011/24/EU on the provision of health care services can be observed in Hungary where the above mentioned problems (linguistic differences etc.) are very significant. Thus the foreign trade (export and import) of the government services which includes the import of the health services has a relatively little importance which is shown by the following table.

Table 2: Foreign trade of government services from January 2012 to September 2013 (current prices in million HUF)

Quarter	Import of services		Export of services	
	Total	Government services	Total	Government services
2012. Q1	817 184	11 868	1 047 578	5 237
2012. Q2	862 063	10 918	1 157 723	7 386
2012. Q3	897 648	10 793	1 255 553	6 792
2012. Q4	918 962	11 593	1 136 508	6 789
2013. Q1	799 092	10 832	1 069 312	6 237
2013. Q2	880 927	10 425	1 191 413	8 166
2013. Q3	936 395	11 160	1 280 568	6 710

Source: Központi Statisztikai Hivatal[16].

Following the entry into force of the Directive 2011/24/EU the number of the cross-border health services has been increased, especially in the Eastern Hungarian counties. Mainly the orthopaedic and partly the gynaecological treatments are provided for foreigners especially for Romanian citizens. The Hungarian services have good quality and the language difficulties have less significance and the Hungarian hospitals are close to the border and close to the Western Romanian large municipalities (Kovács, Szócska & Knai, 2014, pp. 333–335).

The export of the privately paid health care services – especially the major dental procedures – has a greater significance in Hungary. In 2007 the incomes from the dental services for foreigners in private providers were between 32–52 billion HUF (ca. 130–200 million EUR) (Kincses, 2010, p. 6). These services are mainly co-paid by the social insurance agencies of the EU Member States and the prices are relatively low in Hungary (Fazekas & Koncz, 2013, pp. 53–54).[17]

The EU law on cross-border health care services and the coordination of the social security systems prevails. As mentioned above the EU competition law has a limited scope in the field of the health policy and the public health exception can be widely applied, thus the centralization of the health care services can be in harmony with the EU legislation. The relatively limited influence of the EU legislation on the national policies in the field of the solidarity type public services is highlighted by Márton Varju as well as by whom the national freedom of the provision of these public services – secured by the exceptions of the EU law – is highlighted (Varju, 2013, p. 119; Varju, 2014, pp. 172–173).

16 Retrieved from http://www.ksh.hu/apps/shop.kiadvany?p_kiadvany_id=16761&p_temakor_kod=KSH&p_session_id=215734252791128&p_lang=HU

17 This export is just partly realized among the export of government services: the revenues are mainly realized as revenues of tourism and transport.

4 Closing Remarks and Discussion

The influence of the EU legislation on the national health policies and the role of the national interest – in the light of the recent Hungarian reforms on the health legislation – were reviewed by this article. The approach of the analysis was jurisprudential and comparative. Main elements of the EU law by which the health legislation could be impacted were analysed. The review of the EU rules was followed by the analysis of the recent Hungarian legislative and management reforms on health care.

Thus the priority of the national interest is secured by the rules of the TFEU, the Charter of Fundamental Rights of the European Union and by the secondary law as well. Although several market-type and pro-competitive solutions have appeared, they can have only a limited influence on the national systems. The main reasons of the limited influence of the EU regulations are the primary responsibilities of the Member States, the widely applicable public health exceptions, and the limited application of the EU competition rules.

Although the national legislation is the determinative, the EU regulations on the free movement of persons and services could be applied in the field of the health care services. This principle was recognized by the landmark decisions of the European Court of Justice (ECJ). The Directive 2011/24/EU is based on these principles and a limited competition has evolved. Because the competition is limited and the creation of a single European health care area has just begun, the "silent revolution" of the public service provision has a minor importance.

The strong centralization of the Hungarian health system from 2011 to 2013 may be in harmony with the EU legislation because broad regulatory and service provision competences of the Member States are allowed by the Union in the field of health policy. The law of the European Union provides a great freedom to the national legislations. The TFEU declares that the management and provision of these services are primarily defined by the Member States. The application of the EU law is limited by 'public interest' and the 'public health' exceptions as well. The minimum standards are defined by the regulations and decisions of the EU. If the national law is in harmony with these minimum standards a centralised health care system may be in harmony with the pro-market rules of the EU.

Thus the regulatory limitations of the EU policies and legislation on health care could be shown by the Hungarian reforms. The EU approach is mainly pro-market and the competition is enhanced by the EU legislation but the new Hungarian regulation – which is strongly centralised, public law centred and with strongly limited competition – may be in accordance with the EU legislation because the minimum standards – the patient movement and the coordination of the social security systems – are secured by the Hungarian law.

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References

Bekkedal, T. (2011). Article 106 TFEU Is Dead. Long Live Article 106 TFEU!. In E. Szyszczak, J. Davies, M. Andenæs & T. Bekkedal (Eds.), *Developments in Services General Interest* (pp. 61–102). The Hague: T.M.C. Asser Press. DOI: 10.1007/978-90-6704-734-0_4

Carter, C. A. (2002). Debates on Social Policy. In J. Gower (Ed.), *The European Union. Handbook* (pp. 185–203). Abingdon (UK) – New York (NY): Routledge.

Clasen, J. (2007). Comparative Social Policy and the European Union. In J. Baldock, N. Manning & S. Vickerstaff (Eds.), *Social Policy* (pp. 601–626). Oxford: Oxford University Press.

Clasen, J. (2011). Comparative Social Policy and the European Union. In J. Baldock, N. Manning & S. Vickerstaff (Eds.), *Social Policy* (pp. 396–416). Oxford: Oxford University Press.

Craig, P., & de Búrca, G. (2003). *EU Law. Text, Cases and Materials*. Oxford: Oxford University Press.

Craig, P. & de Búrca, G. (2011). *EU Law. Text, Cases and Materials* (5th ed.). Oxford: Oxford University Press. DOI: 10.1093/he/9780199576999.001.0001

Dawson, M. (2011). *New Governance and the Transformation of European Law.* Cambridge: Cambridge University Press. DOI: 10.1017/CBO9781139017442

den Exeter, A. P. (2002). *Health Care Law-making in Central and Eastern Europe. Review of a Legal-Theoretical Model*. Antwerp – Oxford – New York: Intersentia.

de Vries, S. A. (2011). BUPA; a Healthy Case, in the Light of a Changing Constitutional Setting in Europe?. In J. W. van de Gronden, E. Szyszczak, U. Neergard & M. Krajewski (Eds.), *Health Care and EU Law* (pp. 295–316). The Hague: T.M.C. Asser Press. DOI: 10.1007/978-90-6704-728-9_12

Fabio, M. (2010): *Customs Law of the European Union*. Alphen aan den Rijn: Kluwer Law International.

Fazekas M., & Koncz, J. (2013). Egészségügyi jog és igazgatás. In A. Lapsánszky (Ed.), *Közigazgatási jog. Fejezetek szakigazgatásaink köréből. III. kötet Humán közszolgáltatások igazgatása* (pp. 17–82). Budapest: Complex.

Földes, M. É. (2014). Addressing Equality in Health Care at the Public-Private Intersection: The Role of Health Rights Enforcement in Hungary. In: C. M. Flood & A. Gross (Eds.), *The Right to Health at the Public/Private Divide. A Global Comparative Study* (pp. 208–235). Cambridge: Cambridge University Press. DOI: 10.1017/CBO9781139814768.011

Greber, P.-Y., Rilliet Howald, A., & Kahil-Wolff, B. (2001). Who Gets What? New Policies Relating Access and Adequacy of Health Care. In D. D. Hoskins, D. Dobbernack & Ch. Kuptsch (Eds.), *Social Security at the Down of the 21st Century* (pp. 231–269). New Brunswick (NJ): Transaction Publishers.

Hatzopoulos, V., & Stergiou, H. (2011). Public Procurement Law and Heaéth Care: From Theory to Practice. In J. W. van de Gronden, E. Szyszczak, U. Neergard & M. Krajewski (Eds.), *Health Care and EU Law* (pp. 413–452). The Hague: T.M.C. Asser Press. DOI: 10.1007/978-90-6704-728-9_17

Hervey, T. K., & McHale, J. V. (2004). *Health Law and the European Union*. Cambridge: Cambridge University Press. DOI: 10.1017/CBO9780511617553

Hervey, T. K. (2011). If Only It Were So Simple: Public Law Services and EU Law. In M. Cremona (Ed.), *Market Integration and Public Services in the European Union* (pp. 179–250). Oxford: Oxford University Press. DOI: 10.1093/acprof:oso/9780199607730.003.0007

Hoffman, I. (2013). Some Thoughts on the Main European Models of the Municipal Health Services. *Lex localis, 11*(3), 631–650.

Horváth, M. T. (2005). *Közmenedzsment*. Budapest – Pécs: Dialóg-Campus.

Horváth, M. T. (2013). Csendes fordulat. *Jogtudományi Közlöny, 67*(4), 173–182.

Kaczorowska, A. (2013). *European Union Law*. Abingdon (UK) – New York (NY): Routledge.

Kincses, G. (2010). Az egészségügyi turizmus helyzete, jövôképe, szükséges fejlesztési irányai. *IME – az egészségügyi vezetők szaklapja, 9*(6), 5–12.

Koivusalo, M. (2013). We are all in this together – European policies and health systems change. In P. Wilson (Ed.), *Health Care Reform and Globalisation. The US, China and Europe in Comparative Perspective* (pp. 93–117). Abingdon (UK) – New York (NY): Routledge.

Kovács, E., Szócska, G., & Knai, C. (2014). International Patients on Operation Vacation – Perspectives of Patients Travelling to Hungary for Orthopaedic Treatments. *Health Policy and Management, 3*(6), 333–340. DOI: 10.15171/ijhpm.2014.113

Lamping, W. (2013): European Union Health Care Policy. In S. L. Greer & P. Kurzer (Eds.), *European Union Public Health Policy: Regional and global trends* (pp. 19–35). Abingdon (UK) – New York (NY): Routledge.

Legido-Quigley, H., McKee, M., Nolte, E., & Glinos, I. A. (2008). *Assuring the Quality of Health Care in the European Union*. Copenhagen: WHO Regional Office for Europe.

Meyer, H. J. (2013). Current Legislation on Cross-Border Health Care in European Union. In I. G. Cohen (Ed.), *The Globalization and Health Care. Legal and Ethical Issues* (pp. 83–103). Oxford: Oxford University Press. DOI: 10.1093/acprof:oso/9780199917907.003.0005

Moens, G., & Trone, J. (2010). *Commercial Law of the European Union*. Dordrecht: Springer. DOI: 10.1007/978-90-481-8774-4

Nistor, L. (2011). *Public Services and the European Union. Healthcare, Health Insurance and Education Services*. The Hague: T.M.C. Asser Press. DOI: 10.1007/978-90-6704-805-7

Panurjasz, A. A. (2014). A határon átnyúló egészségügyi ellátásra vonatkozó betegjogok érvényesítéséről szóló irányelv. *Európai Tükör, 19*(2), 67–71.

Peeters, M. (2012). Free Movement of Patients: Directive 2011/24 on the Application of Patient's Rights in Cross-Border Healthcare. *European Journal of Health Law, 19*(1), 29–60. doi: 10.1163/157180912X615158

Sárközy, T. (Ed.). (2008). *Versenyjog*. Budapest: HVG-Orac.

Tóth I. (2008). A nem költségvetési formában mûködô egészségügyi intézmények finanszírozási hátrányai. *IME – az egészségügyi vezetők szaklapja, 7*(7), 24–28.

van den Gronden, J. W. (2011). Social Services of General Interest and EU Law. In E. Szyszczak, J. Davies, M. Andenæs & T. Bekkedal (Eds.), *Developments in Services of General Interest* (pp. 123–154). The Hague: T.M.C. Asser Press. DOI: 10.1007/978-90-6704-734-0_6

Varju, M. (2013). A közszolgáltatások szabályozása az Európai Unióban. In M. T. Horváth (Ed.), *Kilengések. Közszolgáltatási változások* (pp. 103–138). Budapest – Pécs: Dialóg-Campus.

Varju, M. (2014). A közszolgáltatási piacon történő állami szerepvállalás keretei az Európai Unió jogában. In M. T. Horváth (Ed.), *Külön utak. Közfeladatok megoldásai* (pp. 161–184). Budapest – Pécs: Dialóg-Campus.

Waltermann, R. (2011). *Sozialrecht*. Heidelberg: C. F. Müller.

POVZETEK

1.02 Pregledni znanstveni članek

Nacionalni interes in evropsko pravo v zakonodajni in pravni praksi zdravstvene dejavnosti – z vidika reform madžarskega sistema zdravstvenega varstva[1]

Ključne besede: zdravstveno varstvo, harmonizacija, vpliv EU na nacionalno zdravstveno politiko, nacionalne zdravstvene politike, Madžarska

Članek se v luči nedavnih madžarskih reform na področju zdravstvene zakonodaje osredotoča na vpliv zakonodaje Evropske unije na nacionalne zdravstvene politike in na vlogo nacionalnega interesa. Pristop k analizi je bil jurisdiktičen in primerjalen. Članek analizira elemente prava Evropske unije, ki bi lahko vplivali na nacionalno zdravstveno zakonodajo. Pregledu pravil Evropske unije sledi še analiza nedavne madžarske zakonodaje in upravljanja reform na področju zdravstva.

Vpliv Evropske unije na področju socialne politike je že tradicionalno šibek, vendar je zdravstveno varstvo treba obravnavati kot izjemno specifičen sektor. Evropsko sodišče namreč več storitev zdravstvenega varstva obravnava kot storitve, ki so vsaj delno v skladu z Uredbo o prostem pretoku storitev. Vendar pa je zaščita zdravja in življenja ljudi dopustna oz. sprejemljiva izjema t. i. »štirih temeljnih svoboščin«. Dostop do storitev zdravstvenega varstva za prebivalce Evropske unije v drugih državah članicah velja za instrument prostega gibanja oseb. Tako se je zagotavljanje storitev zdravstvenega varstva znašlo na razpotju nacionalne in Evropske uredbe, medtem ko vpliv evropske politike velja za pomemben in pogosto obravnavan element.

Obseg javnozdravstvene politike v Evropski uniji je omejen, nacionalne pristojnosti, kot del socialne politike v širšem smislu, pa so odločilne. Opredelitev strukture in financiranja nacionalnega zdravstvenega sistema ter opredelitev sredstev za dostop sta del odgovornosti nacionalne zakonodaje, v zveznih državah včasih tudi del podnacionalne (članice zveze) zakonodaje. Ti sistemi se na prvi pogled razlikujejo.

Prosto gibanje oseb je sprožilo koordinacijo socialnih politik, in kot del tega procesa, tudi koordinacijo dostopa do zdravstvenega varstva. Evropsko sodišče je storitve zdravstvenega varstva od konca 1980-ih let opredelilo kot storitve, ki so predmet predpisov o prostem pretoku storitev (glej primera Poucet/Pistre ali primer Watts). Konvergenčni okvir nacionalnih sistemov je bil razvit z odprto metodo koordinacije, ki jo je institucionalizirala Amsterdamska

1 Ta študija temelji na raziskavah raziskovalne skupine pri Madžarski akademiji znanosti in Univerze v Debrecenu (MTA-DE) o Uredbah lokalnih javnih služb (2012–2016).

pogodba. Zato je konvergenco mogoče upoštevati pri storitvah zdravstvenega varstva, čeprav so »preživele« tudi številne razne administrativne in finančne storitve.

Pomembne razlike je tako mogoče zaznati zlasti med državami z decentraliziranimi modeli zdravstvenega varstva in državami s centraliziranimi modeli zdravstvenega varstva. Pri decentraliziranih modelih so lokalne skupnosti odgovorne za organizacijo večine storitev splošnega zdravstvenega varstva, pri čemer samoupravne enote na ravni naselja organizirajo osnovne (primarne) zdravstvene storitve, medtem ko lokalni vladni organi na vmesni stopnji organizirajo ambulantno in bolnišnično nego. Decentralizirani model je v Evropi tipičen, a ne tudi splošno privzet: osrednji vladni organi so široko odgovorni za zagotavljanje zdravstvenih storitev v več državah. Prav nasprotno pa pri centraliziranem modelu lokalni vladni organi niso odgovorni za zdravstvene storitve oziroma so za njih odgovorni le v manjšem obsegu.

Čeprav je način za dostop do varstva različen po vsej Evropi (v skladu z nacionalnimi pristojnostmi glede sistemov socialne varnosti), pa odločilna večina Evropskega prebivalstva lahko uporablja storitve zdravstvenega varstva. To je mogoče interpretirati kot praktično konvergenco, ki ima pomemben vpliv na nacionalne sisteme financiranja.

Evropska uredba je bila nekoliko razširjena tudi na tem področju. Uporabo pacientovih pravic v čezmejnem zdravstvenem varstvu ureja Direktiva 2011/24/EU, ki je razširila zagotovitev čezmejnih storitev, obenem pa je nanjo mogoče gledati kot na »katalizatorja« čezmejne konkurenčnosti in konvergence sistemov.

Ta sprememba nakazuje, da je konkurenčnost med (nacionalnimi) ponudniki pomemben element evropske politike. Konkurenčno pravo velja za pomemben element konvergence storitev zdravstvene nege – primeri Evropskega sodišča so bili deloma primeri o upoštevanju proste konkurence.

Čeprav se je konvergenca teh sistemov povečala, so nacionalni sistemi ostali. Nacionalni interes priznava tudi Evropska unija. Prvič, omejeni obseg evropske socialne politike in drugič, izjema o zaščiti zdravja in življenja ljudi kažeta na dejstvo, da je zgolj okvir skupne evropske politike institucionaliziran s pogodbami. Nacionalne zakonodaje imajo namreč močne pristojnosti in kot take lahko služijo glavnim elementom nacionalnih sistemov. Zato je nacionalni interes (zaščita zdravja) močan omejitveni dejavnik skupne evropske politike.

Čeprav so bili instrumenti za zagotavljanje storitev, ki jih ureja javno pravo, v zadnjih nekaj desetletjih močno okrepljeni v evropski uredbi in v praksi Evropskega sodišča, pa je paradigma, ki temelji na širjenju konkurenčnosti na področju zdravstvenega varstva, še vedno prisotna. Ta pojav ima namreč več izvorov. Konkurenca je bila na področju zdravstvenega varstva omejena, medtem ko imajo po drugi strani odločilno vlogo (nacionalni) akterji, ki jih ureja javno pravo.

Z analizo sprememb madžarskega sistema zdravstvenega varstva je bilo mogoče ugotoviti »razpotje« ali »dvoličnost« zdravstvenega varstva med močnim nacionalnim interesom in vse bolj obsežno čezmejno konkurenčnostjo. Med komunističnim obdobjem je na Madžarskem bilo še več elementov nekdanjega Bismarckovega sistema, zato je bil proces rekonstrukcije modela socialnega zavarovanja hiter. Novi sistem zdravstvenega varstva je temeljil na upravljavski paradigmi, medtem ko so bile odgovornosti za zagotavljanje storitev močno deljene. Ta sistem se je v zadnjih nekaj letih spremenil: novi madžarski sistem zdravstvenega varstva je močno centraliziran in upravljan večinoma z instrumenti javnega prava. V zaključnem delu članka je analiza te spremembe in njene skladnosti s pravom Evropske unije.

Močna centralizacija madžarskega zdravstvenega sistema od leta 2011 do leta 2013 je morda v skladu z zakonodajo Evropske unije, saj Unija na področju zdravstvene politike dovoljuje široke regulativne pristojnosti in pristojnosti zagotavljanja zdravstvenih storitev držav članic. Pravo Evropske unije omogoča veliko svobode nacionalnim zakonodajam. Iz Pogodbe o delovanju Evropske unije (PDEU) namreč izhaja, da je upravljanje in zagotavljanje zdravstvenih storitev primarno določeno v zakonodaji držav članic. Uporabo prava Evropske unije omejujejo tudi »javni interes« in izjeme »javnega zdravja«. Minimalni standardi so opredeljeni z uredbami in odločitvami Evropske unije. Če je nacionalno pravo v skladu z omenjenimi minimalnimi standardi, je najverjetneje centralizirani sistem zdravstvenega varstva v skladu s tržno usmerjenimi pravili Evropske unije.

Regulativne omejitve politik in zakonodaje Evropske unije glede zdravstvenega varstva bi bilo zato mogoče prikazati s primerom madžarskih reform. Pristop Evropske unije je večinoma tržno usmerjen, konkurenčnost pa je podkrepljena z zakonodajo Evropske unije. A nova madžarska uredba (ki je močno centralizirana, ima osredotočeno javno pravo in močno omejeno konkurenčnost) je morda v skladu z zakonodajo Evropske unije, saj so z madžarskim pravom zagotovljeni tudi minimalni standardi (gibanje pacientov in koordinacija sistemov socialnega varstva).

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1.08 Objavljeni znanstveni prispevek na konferenci. Predavanje, referat, načeloma organiziran kot znanstveni članek.
1.19 Recenzija, prikaz knjige, kritika. Prispevek v znanstveni ali strokovni publikaciji (reviji, knjigi itd.), v katerem avtor ocenjuje ali dokazuje pravilnost/nepravilnost nekega znanstvenega ali strokovnega dela, kriterija, mnenja ali ugotovitve in/ali spodbija/podpira/ocenjuje ugotovitve, dela ali mnenja drugih avtorjev. Prikaz strokovnega mnenja, sodbe o znanstvenem, strokovnem ali umetniškem delu, zlasti glede na njegovo kakovost.
1.21 Polemika, diskusijski prispevek. Prispevek, v katerem avtor dokazuje pravilnost določenega kriterija, svojega mnenja ali ugotovitve in spodbija ugotovitve ali mnenja drugih avtorjev.

uporabljate slike ali tabele drugih avtorjev, navedite sklic pod sliko, tabelo ali kot sprotno opombo. Enačbe oštevilčite v oklepajih desno od enačbe.

6. Članek naj obsega največ 30.000 znakov.
7. Članku dodajte kratek življenjepis avtorja/avtorjev (do 8 vrstic).
8. V besedilu se sklicujte na navedeno literaturo na način: (Novak, 1999, str. 456).
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2 Če ima članek dodeljeno DOI številko, jo v seznamu literature obvezno navedite.

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Odgovorna urednica
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