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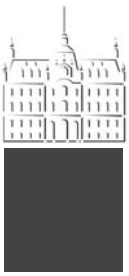

letnik VI, številka 2, julij 2008

ISSN 1581-7555

Revija Uprava je znanstvena revija, ki združuje različne discipline povezane z javno upravo. Obravnava teoretična in praktična vprašanja ter rešitve s področja javne uprave, upoštevajoč upravne, pravne, ekonomske, organizacijske in informacijske vidike delovanja in razvoja javne uprave.

izdajatelj / publisher
Fakulteta za upravo Univerze v Ljubljani

naslov uredništva / address
Fakulteta za Upravo Univerze v Ljubljani
Gosarjeva 5, SI-1000 Ljubljana
tel.: +386 (0)1 5805-500 faks: +386 (0)1 5805-521
e-pošta: uprava@fu.uni-lj.si

odgovorna urednica / editor
Stanka Setnikar-Cankar

tehnična urednica / tehnical editor
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oblikovanje / design
Primož Fijavž, studiobotas™

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ISSN
1581-7555

Revija izhaja štirikrat letno. Cena posamezne številke je 15,00 EUR. Letna naročnina za pravne osebe je 60,00 EUR, za posameznike 45,00 EUR, za študente 30,00 EUR, za tujino 80,00 EUR.

Znanstveno revijo Uprava je Javna agencija za raziskovalno dejavnost RS opredelila kot znanstveno periodično publikacijo in jo v letu 2008 tudi sofinancira.

vsebina

summaries / povzetki

Public Private Partnership in the European Union: Experiences in the UK, Germany, and Austria

UDK: ~~353(497.4)~~

Ronald W. McQuaid
Employment Research Institute, Napier University Edinburgh
r.mcquaid@napier.ac.uk

Walter Scherrer
Department of Economics and Social Sciences, University of Salzburg
walter.scherrer@sbg.ac.at

ABSTRACT

The political context of governments differs between the UK, Germany and Austria, but each government currently has a positive view of Public private Partnership (PPP). There are many similarities to the drivers for PPPs in Austria, Germany and the UK. The UK has had more experience, and the conservative-led government in Austria has been moving towards greater use of PPPs of the "privatisation"-type, but only very cautiously towards PPPs of the "PFI-type". The major motives for moving towards PPPs are macroeconomic or budgetary, especially in Germany and Austria, but also microeconomic or improving the efficiency of public service delivery, especially in the UK. In all three countries PPPs appear to be a systematic middle response to the alternatives of privatisation or public service provision of infrastructure and operational support. There are more significant multi-tiered levels of government in the Federal systems of Germany and Austria, with many autonomous players including federal government, states and municipalities. Investment by the latter two exceeds investment expenditure of the federal government. In the more centralised UK system policies towards PPPs have been relatively rapid and similar, although not identical, across the UK. In Germany the search for a comprehensive approach (Gesamtkonzept) has slowed the dissemination of PPP; Austria seems to handle the issue more pragmatically. One issue that remains crucial to the future impacts of PPPs is whether they offer genuine and sustainable increases in efficiency and effectiveness compared to the alternatives. If they do then they should have a positive impact on future public resource availability, but if they do not then they may provide short-term financial and political benefits, but at the cost of constraining future decision makers and placing greater pressures on public finances in the longer-term.

Key words: Public Private Partnership, European Union, UK, Austria, Germany, Economic Policy

Ronald W. McQuaid, Walter Scherrer
Public Private Partnership in the European Union: Experiences in the UK, Germany, and Austria

1. Public Private Partnership and Challenges for Economic Policy

Economic policy has been confronted with a need to re-consider its role in order to pave the way for grasping the full benefit of a potential long-term economic upswing (a "Kondratieff"-wave) based on the diffusion of new information and coummunication technologies throughout the economy (Scherrer 2001, McQuaid 2003). The scope of economic policy to help shape the economic impact of ICT, and national economic policy autonomy in particular have been restricted by a variety of causes (Scherrer 2005). From a long-term perspective, the most important economic policies may be those which aim at fostering creativity and facilitating change in order to enhance the economic agents' abilities to unfold the economic potential of these technologies (Michalski et al. 1999, McQuaid 2002). These policies target: first, the redesign of the regulatory framework which has been set up in the era of mass-production and which has partly become either obsolete or even an obstacle to reaping the economic benefits of the spread new technologies; second, the re-arranging of traditional work and incentive schemes; and third, the design of a framework which is conducive to experimental initiatives that create new spaces where entrepreneurship can succeed. Public Private Partnerships (PPPs) are relevant with respect to all three aspects. While the successful implementation of PPPs requires some re-regulation and has a somewhat experimental character, the redesign of the traditional incentive structure in a market economy is at the core of the concept. In this paper the term PPP will be restricted to those projects involving the private provision, but continued public funding, of services formally provided by the public sector, although it is recognised that PPPs may include other forms of partnership.

There are many reasons for (and against) public and private bodies considering working in public private partnerships such as: resource availability; effectiveness; and legitimacy (McQuaid 1999). The motivations for, and types of, PPPs have varied over time, across sectors and between countries (see for example: the European Community's Green Paper on PPPs, CEC 2004; Grout and Stevens 2003). Budget constraints have become a major restriction of national policy autonomy, and the concept of PPP has become relevant in this context in most European countries. More precisely: PPP has become relevant again, especially since the 1980s, because it is not an entirely new concept but it has had a long history in many countries. The paper does not seek to consider

the many advantages and disadvantages of individual types of PPP (see for instance: Coulson 2005; Budäus and Rüning 1997), but rather concentrates on comparing the broader motivations and implications of PPPs in the U.K., Germany, and Austria. After a brief overview of a typology of PPPs, sections 3 and 4 consider more general reasons for government involvement. Section 5 discusses the potential for sustainable overall (i.e. macro-economic) efficiency gains deriving from the implementation of PPPs. Conclusions are drawn in Section 6.

2. Types of Public Private Partnership

The UK has been a leader in the large-scale introduction of PPPs across the economy (for example: Ball et al. 2002). From the first PFIs/PPPs in 1987 to the end of 2004 the UK government had signed 677 PPPs (or PFIs), worth nearly £43 billion (euro 65 billion), (Treasury 2005a) (Table 1). Although PFIs were initiated by the Conservative government (which were in power from 1979 to 1997), the number of new PPPs peaked in the year 2000, after a sharp growth in the years just after the Labour government was elected in 1997 (and it is still in power in 2006). Indeed there were 62 new PFI/PPPs up until 1997, 60 in that year and 467 since 1997 (with 10 having no specified date). The values of PPPs have grown greater in more recent years as some large PPPs have some into place (especially in transport and health – see below). In terms of value, only 8% of all PFI/PPPs were initiated before 1997, 6% in 1997 and 86% after 1997.

The UK government considers PPPs "to cover a range of business structures and partnership arrangements, from the Private Finance Initiative (PFI) to joint ventures and concessions, to outsourcing, and to the sale of equity stakes in state-owned businesses" (Treasury 2000, p. 8). The private sector has also played an important role in the dissemination of PPPs as the UK has a quite highly developed set of private institutions (funders, developers, project managers, operators as well as banks, legal firms etc.) and a growing secondary market whereby PPP projects can be žsold on' by the developers of the project to other firms to carry on the contracts. The public sector (locally and nationally) has also considerable experience in the UK. However, at a local level, individual public bodies may be inexperienced, so for any individual project the private sector will often have considerably more experience than the local public body,

and may be better able to manipulate the long run return on the project to their advantage.

Table 1: UK PPP Projects signed by year 1987 to 2004

Year	Number of Signed Projects	Capital Value (£m)	Percentage of total value
1987	1	180,0	0,40
1988	0	0,0	0,00
1989	0	0,0	0,00
1990	2	336,0	0,80
1991	2	6,0	0,00
1992	5	518,5	1,20
1993	1	1,6	0,00
1994	2	10,5	0,00
1995	11	667,5	1,60
1996	38	1 560,1	3,70
1997	60	2 474,9	5,80
1998	86	2 758,0	6,50
1999	99	2 580,4	6,00
2000	108	3 934,2	9,20
2001	85	2 210,8	5,20
2002	70	7 732,5	18,10
2003	52	14 854,1	34,80
2004	45	2 809,8	6,60
N/A	10	64,6	0,20
TOTAL	677	£42 699.4	100.0%

Source: Treasury 2005a

The UK government set out three main categories of public private partnerships concerning: ownership; provision of services (including infrastructure) to the public sector; and the selling of public sector services to others (such as through the exploitation of patents). In addition PPPs have fourth, overlapping role in providing enabling organisations to provide common ground between public, private and third sectors to promote economic and social development policies.

Under the first category PPPs are concerned with the introduction of private sector ownership into state-owned businesses. This involves a range of possible structures including a stock market flotation, or the introduction of a strategic partner, or with the sale of either a majority or a minority ownership stake to the private sector. Hence this can be seen as a continuation of the privatisation philosophy of the 1980s and 1990s primarily introduced by the Conservative government after 1979. The sectors that PPPs have covered in the UK are diverse, contributing to 20 departments or devolved governments (Table 2) and particularly in Transport (with 50.2% of all projects by value), Defence (10%), Health (11%) and Education and Skills (7%). Devolved governments (Scotland, Wales and Northern Ireland) projects cover a range of areas, but are often focused on health and transport. Although accounting for around 9% of the UK population, Scotland only accounted for 5.3% of PPPs, perhaps because of the relatively high government expenditure per capita (funded from the UK government as it does not raise its own revenue), and partly perhaps due to a slowness in introducing PPPs. This may partly be explained by some very bad examples of early PFI/PPPs in Scotland, such as the Skye Bridge, which was opened in 1995 but brought back into public ownership in 2004. For instance Monbiot (2000) describes some of the background and several government reports were highly critical on its poor value for money (House of Commons Public Accounts Committee, 1998; NAO, 1999).

The second form of PPP concerns the provision of and/or operation of infrastructure. The Private Finance Initiative (PFI) and other arrangements are where the public sector contracts to purchase services on a long-term basis, so as to take advantage of private sector management skills and also to provide an incentive for the private sector by having a risk element in the private finance. This type of PPP includes concessions and franchises, where a private sector partner takes on the responsibility for providing a public service, including maintaining, enhancing or constructing the necessary infrastructure (e.g. many school or hospital investments or, in transport, the ill fated Skye Bridge

PFI which was returned to public ownership after less than a decade). Basically such PPPs may be classified on two continuums, with different levels of ownership and involvement, of: who operates the service; and who provides the facilities (building and/or equipment etc.). PPPs may involve build and operate schemes (where the private sector both builds a facility and operates it for a defined period, such as 25 years, before handing it back to the public sector); to purely operating a service, while using public sector owned and constructed facilities; to providing a private sector facility, to be operated by public sector staff (or using private sector staff to maintain the facility and public sector staff to provide services basedin the facility, such as health services). In some cases the private firm may sell on their interests to other firms with, as mentioned above, a market for aspects of the žsecond phases' of PPPs being developed in countries such as the UK.

Table 2: UK PPP Projects Signed by December 2004 by Department

Department	Number of Signed Projects	Capital Value (£m)	Percentage of total value
Cabinet Office	2	347.7	0,8
HM Customs & Excise	2	170.3	0,4
Constitutional Affairs	13	306.4	0,7
Culture, Media & Sport	7	68.6	0,2
Environment, Food & Rural Affairs	13	632.7	1,5
Transport	45	21 432.1	50,2
Education & Skills	121	2 922.8	6,8
Health	136	4 901.2	11,5
Trade & Industry	8	180.8	0,4
Work & Pensions	11	1 341.0	3,1
Foreign & Commonwealth Office	2	91.0	0,2
HM Treasury	2	189.0	0,4
Home Office	37	1 095.8	2,6
Inland Revenue	8	453.8	1,1
Defence	52	4 254.8	10,0
Northern Ireland	39	528.8	1,2
Office of the Deputy Prime Minister	61	972.1	2,3
Office of Government Commerce	1	10.0	0,0
Scotland	84	2 249.3	5,3
Wales	33	551.3	1,3
TOTAL	677	£42 699.4	100.0%

Source: Treasury 2005a

The third type of UK PPP is generating commercial value from public assets, such as selling Government services into wider markets, and other partnership arrangements where private sector expertise and finance are used to exploit the commercial potential of Government assets. For example innovations from government research laboratories, including defence research, may be exploited through a joint PPP.

Fourth, PPPs have also been used to provide organisations to promote specific policies. These may range from general local economic development policies (McQuaid 1999) to more specific policies aimed at helping the UK to improve the ICT infrastructure and to meet the Lisbon Agenda targets for employment and productivity growth through ICT (HM Treasury 2005b). To take a specific case, the UK Government set targets for both the competitiveness and the extensiveness of the broadband market, including having the most extensive and competitive broadband market in the G7 by 2005, although in the short term there may be a trade-off between these goals, and focussing on rolling out broadband may be at the expense of competition (DTI 2004). To advise them on the development and implementation of the government's broadband strategy a UK public/private partnership, the Broadband Stakeholder Group (BSG), was established in April 2001. The BSG is co-funded by the Department of Trade and Industry (DTI) and a number of private sector companies. The BSG notes that a wide range of broadband initiatives are being planned or implemented across the country with differing levels of public sector intervention, including: integrated public private partnerships; public sector funded infrastructure provision; public sector demand aggregation; subsidised broadband trials and technology pilots; promotion and content commissioning schemes and community network initiatives (DTI 2004). Hence PPPs are seen as one of a number of options for different circumstances (particularly where there is likely to be little commercial provision due to, for instance, low population density as in rural areas).

Germany and Austria both historically have had experience with public-private sector partnerships dating back to at least the 19th century (e.g. the construction of parts of the Austrian railroad network by PPP) and more recently in the second half of the 20th century (e.g. key urban development projects in Germany in the 1980s). Nevertheless both countries have been latecomers within the recent PPP-movement (compare: Bastin 2003 and Beirat 1998, for Austria; and Friedrich Ebert Stiftung 2002 and Sack 2003, for Germany). The overall amount of investment has been very limited, notwithstand-

ing a few large investment projects (e.g. the heavy goods vehicles toll systems which have been deployed in both countries) and several smaller projects.

In Germany, PPPs have reached a significant level only very recently. A survey of PPPs in infrastructure (DIFU 2005) shows that the number of contracts doubled in 2004 and 2005 compared to the years before. The stock of investment in PPPs in which German municipalities have involved amounts to approximately 3 billion Euro; this is between two and three per cent of communities' gross fixed investment. The average investment of projects at the central state and federal states level is 70 million Euro compared to 13 million Euro at the municipal level. The survey also captures planned projects by municipalities, federal states, and the central state which are together estimated to comprise an additional two billion Euro. Currently communities use PPPs mostly in providing infrastructure for educational and sports/tourism/leisure purposes (which comprise approximately 30 per cent of all projects, each), while the federal states and the central state engage in PPPs predominantly for building traffic infrastructure, prisons and administrative buildings.

In Austria, among public sector PPP partners, municipalities dominate. Schaffhauser-Linzatti (2004) identified 185 existing PPP projects and found that in 58% of projects municipalities were involved, while the central state and the federal states were the public partners in 21% of all PPP projects, each. Communities are mostly involved in the energy, health, sewage and wastewater disposal, and urban development industries; this structure largely reflects the municipalities' constitutional competencies. PPP projects at the municipality level on average are small, and as far as energy projects are concerned "contracting" models are dominating. The central state is predominantly involved in education and technology projects, while most projects of the federal states are in the traffic sector.

There is a range of economic, social and political reasons and motives for the growth of PPPs in the three countries over the last two decades. These revolved around: firstly budget or macro-economic factors (the availability of public investment resources); and secondly around more micro-economic arguments concerning the efficiency and effectiveness of public spending. It is argued that in Germany and Austria the main drivers of PPPs have so far appeared to focus predominantly, but not exclusively, upon macro-economic budget factors, such as the gap between public expenditure requirements and desires and potential revenues. In the UK, while these may be important, there has been an emphasis upon micro-economic factors – bringing in greater inno-

vation and efficient management, as well as, especially in the 1980s and 1990s, being linked to a transfer of ownership and control from the public to private sector. Hence the comparison of the countries is of some interest.

3. Macro-Economic Drivers of Public Private Partnership

In each of the three countries there has been a large requirement for public investment in services and infrastructure, especially since the 1990s. This investment need is due to a variety of factors, some of them being specific to, or at least significant in, Germany and Austria compared to other countries (Budäus 2003). In the transport sectors the enlargement of the European Union has shifted both countries from the border into the centre of the European Union, with a strong need to improve transport infrastructure to the new Member States. In some traditional utility sectors, like water supply and wastewater disposal, urbanisation trends and re-investment requirements have increased the current investment need. In all three countries demographic change and technological advances require heavy investment in the health sector. In the UK in the late 1990s there was also a legacy of under-investment in public infrastructure (schools, hospitals, transport etc.) from the previous two or three decades. This was worsened as during the 1980s and 1990s as local government, in particular, had often reacted to budget constraints through reducing maintenance, resulting in a long-term repair and re-building backlogs, together with requirements to bring in new technology infrastructure.

As public finances were insufficient for the levels of investment required private resources were used to fund services and facilities previously paid directly through public expenditure. In Germany the cost of re-unification turned out to be much higher than expected, and PPPs have been increasingly considered as a means to relieve public budgets. So, for example, from the public's point of view this has been a major motivation for establishing the highway-toll system – which is set to raise finance for highway construction – as a PPP. Nevertheless in the recent academic debate on PPPs in Germany the argument has been called a "wide spread misunderstanding" by the members of the scientific board of the Journal of Public and Non-profit Enterprises (ZögU

2004), the leading German journal in this area, claiming that private sector financial contributions regularly are only of a transitory nature.

In Austria, the central government's budget was hit by the impacts of the increases in public consumption and transfer spending programmes in the early 1990s and by relatively increased demands for public funding due to slow economic growth. Therefore tapping new sources of finance for public infrastructure was one of the major motives for PPP in Austria listed by the Beirat für Wirtschafts- und Sozialfragen (which is a committee of the informal but still influential Austrian "social partnership"; Beirat 1998). Accordingly budget reasons were the major motives for PPPs in a variety of fields, particularly in the construction and operation of waste water treatment plants by municipalities (Föller and Freitag 1999), and in the transport sector where a few roads have already been realised (see a critical report by Oberösterreichischer Landesrechnungshof/court of audit of the province Upper Austria, 2002), and major highway links in the Vienna area are to be realised using PPP.

In the UK in some local cases the PPP mechanism is used to raise public investment for realising land values that would normally be unavailable to the public body without the PPP. For example, some local authorities have promoted PPPs that would result in greenbelt or recreation sites (such as sports fields) being developed. Normally such sites could not be developed because they are žprotected' by the planning system and other local and national policies (e.g. to promote sports and maintain the provision of sports fields). Private housing would not normally be allowed to be developed on such sites, and local authorities permitting such developments would be accused of succumbing to the interests of private developers. However, under the PPP, proposals are made to build the school (or other facility) on such žprotected' sites, in the expectation that local people will not oppose a new public facility. The local authority (or other public body) is then able to sell the former school site as housing. The net result is that the previous greenbelt has been built upon and there has been an increase in housing development in locations that local planning policies often would not necessarily have permitted.

In Germany and Austria, which are members of the European Monetary Union (EMU), public finances are constrained by the requirements of the European Monetary Union and the stability and growth pact, particularly in times of weak economic conditions. The impact of the restrictions has been felt at all levels of government due to intra-national "stability pacts" which require state and municipal governments to keep in line with the national requirements to

meet the targets stipulated in the national stability programmes as part of the EU's stability and growth pact procedure. As state and municipal governments cover the bulk of public investment expenditure, PPPs have become particularly attractive for them as a measure to relieve their budgets. The pressure to use PPPs to relieve pressure on government budgets has been stronger in Germany, compared to Austria, as public finances are strained more severely. In the UK policy has been to maintain state finances somewhat similar to the requirements of the European Monetary Union. The žGolden Rule' whereby public finances are balanced over the economic cycle may limit the amounts that taxes should rise and encourage žoff balance sheet' funding where PPP finances do not appear as large capital expenditures in the year in which they occur, but rather as a series of smaller annual žrevenue' expenditures over the life of the project.

Reducing the overall tax burden (including social security contributions) is another driver of PPP, particularly in Germany and Austria, countries in which the tax burden on Gross Domestic Product (GDP) is well above EU-average. Tax competition within and outside the European Union – in particular with the new Member States – has made it difficult and risky to raise these ratios further. Thus the size of the tax burden has become a key issue of political debate both in Germany and Austria in which (micro-) economic arguments have begun to play a role. In the UK, in general, there is also pressure from opposition parties, which may make most governments reluctant to raise direct taxation. Pressures from globalisation and the ageing demographic structures of the countries also suggest that in the longer term significant tax rises are likely to be more difficult than in the past.

The greater use of user charges (rather than paying for individual services out of general taxation) can also more generally be seen as a move towards using market mechanisms to achieve more efficient management of demand for infrastructure rather than primarily providing new infrastructure to meet existing or expected demand. It can be seen as partly linked to wider user or polluter pays principles, whereby market mechanisms are used to change behaviour and the distribute the costs concerning environemntal pollution. Road user charging is an example of the greater use of usetr charges in transport, with some pilots schemes being developed in the UK as a possible forerunner for national road pricing, while Germany has already developed a scheme for heavy goods vehicles. The technology for such large scheme may well require the greater use of ICT based PPPs in future, in order to develop the necessary

technology and the implementation of the policies, although Fietelson and Solomon (2004) suggest that adoptioning transport innovations is the outcome of a political process rather than simply diffusing technical innovation.

Deregulation and economic structural change has made some sectors, which had been dominated by public firms, attractive for PPPs. Formerly sheltered sectors such as parts of the transport or health services have turned or are expected to become more competitive markets with the entry of private competitors or the transfer of organisations from public to private, or the creation of žinternal markets' (internal to the public providers, as in the UK health service in the 1990s).

Finally, the European Union Green Paper on PPPs (CEC 2004) and other development policies at the local, national and European Union levels (Jones 1999) deliberately promoted network building between private and public partners, particularly in the fields of structural and regional policies and the creation of PPPs in order to reinforce collective entrepreneurship (Silva and Rodriguez 2005).

4. Micro-Economic Drivers of Public Private Partnership

Part of the PPP agenda, particularly in the UK, is to improve the efficiency and effectiveness of the provision of public services. This is done mainly through innovations from other, usually private sector, approaches, and the development of appropriate incentives to each party. These incentives are claimed to include the introduction of competition or the threat of competition in the early stage of deciding upon the PPP (as firms compete to have their PPP chosen) and a transfer of real risks to the developer or operator.

The UK government (Treasury 2000) argues that PPPs enable them to tap into the disciplines, incentives, skills and expertise that private sector firms have developed in the course of their normal everyday business, while releasing the full potential of the people, knowledge and assets in the public sector. An analysis of the internet-based provision of information about a business location (Scherrer 2002) shows that these arguments seem to be particularly relevant for providing ICT based public services. Here PPPs might be supportive for changing the organisational structure of the units which provide the service, for adjusting the organisational culture in order to enable these institutions

to meet the needs of customers, including those in the private business sector, better and for closing specific knowledge gaps. The private sector involvement, the Treasury (2000) argues further, should result in greater commercial incentives for delivering efficient and effective services, a greater focus on customer requirements, and new and innovative approaches to providing services or infrastructure. PPPs then may help improve the operation of state-owned enterprises or replace them with private providers. Meanwhile Government retains the responsibility and democratic accountability for: deciding between competing objectives; defining the chosen objectives, and then seeing that they are delivered to the standards required; and ensuring that wider public interests are safeguarded.

The micro-economic drivers of PPPs emphasize the importance of choice and implementation schemes to exploit possible efficiency gains in the provision of public services. This reflects the outcomes of the debates in the 1980s concerning whether the public sector should have an enabling role, determining the form and level of public services, or a role as sole provider of services (see for instance: Giloth and Mier 1993). In other words, the public sector has to decide whether they should provide services or carry out activities themselves or should they get someone else (in the private or Third-sector) to do them for them? The increased role of PPPs suggests that the enabling view of government and governance has to a degree prevailed. In addition to the benefits of an enabling approach, PPPs have potential problems concerning: the ability to learn the lessons from providing the service in order to develop a policy; the availability of actors who can carry out the service, be they in the private, public or Third-sectors; and the danger of the organisation failing to žlearn' from past experience and so repeating mistakes of the past or žreinventing the wheel' as there may be a lack of corporate memory. The theoretical and empirical benefits of economies of scale may be outweighed by the disadvantages of lack of local knowledge and the lack of continuity on the part of large-scale providers. In the UK PPPs have also restricted the ability of decision makers to reduce their maintenance, or even provision, of facilities at times of budget tightening (see below). Some of the constraints on decision makers related to PPPs are now considered.

In Germany and Austria micro-economic factors are not neglected, of course, but compared to the UK, žValue for Money' considerations are less prominent in the debate about advantages and disadvantages of PPP. As in the UK, "privatisation-type" PPPs and "PFI-type" PPPs have to be distinguished.

Due to the historically large share of state owned enterprises in sectors like mining, heavy industries, and banking (particularly in Austria) a process of privatisation has aimed at reducing government interference in management decisions, partly as government pursued goals other than micro-economic or efficiency-oriented ones. While formally, in many cases, more or less private sector-type corporate governance mechanisms existed in most of these firms, actual interference by governments at the federal, state, and sometimes even local levels, was common. The formal corporate governance structures are likely to converge towards private sector governance structures as most formerly government owned enterprises have become at least partly privatised. In the public, and even in the scientific, debate this process was labelled "privatisation" both in Germany and Austria, even in those cases when only a minority ownership stake was sold to private investors. The public to (partly-) private-enterprises in most cases have not been considered as being PPPs (for example the survey of PPP projects in Austria by Schaffhauser-Linzatti (2004) includes virtually no fully privatisation-type PPPs).

PFI-type PPPs have been less important in Germany and have only rarely been implemented in Austria. In both countries the provision of public infrastructure (particularly in the transport sector) has been largely state provided and funded. Most infrastructure which is provided by central, regional and municipal government is in relatively good condition and, although the quality of some government services has been criticized, this criticism has been limited. The scientific community both in Austria (e.g. Puwein et al. 2004) and in Germany (e.g. ZgöU 2004) formulated very differentiated positions towards the possible efficiency gains through PPP. Such efficiency gains could only be expected if a wide range of conditions are met, and to realise efficiency gains of increased private sector involvement in the provision of public infrastructure would not necessarily require PPP models as traditional public investment (based on the concept of "Generalunternehmer" taking comprehensive responsibility for the construction process) could yield similar results in terms of efficiency (ZgöU 2004, p. 412). Reports about the negative implications of privatisation of public infrastructure in other countries have added to the concerns about private sector involvement in the provision of infrastructure in the German and even more so in the Austrian public debate.

Public awareness and interest in PPP has been increased in Germany and Austria by some major domestic firms' involvement in PPP projects. Interest increased in order to help make these and other firms fit for international com-

petition and to warrant that a bigger piece of the PPP-cake would be distributed to domestic firms. This motive is particularly important in the the two countries' construction industries, which have suffered severely from a drop in domestic public investment, and thus had been forced to focus more on the export business. Construction firms, partly due to international competition, have often tried to become infrastructure operators; a few have achieved this very successfully. In addition large firms with core businesses in a variety of industries – like Siemens and Deutsche Telekom in Germany, and the national highway operator ASFINAG in Austria – have entered this market. The firms' lobbying for PPP-financed infrastructure gained more momentum when a few banks, which started to specialize in PPP-finance in the second half of the1990s, joined the effort.

Finally, the distribution of costs and benefits of new ICT PPPs on different parts of society is important, especially where they are funded out of public expenditure (McQuaid et al. 2004). The proposed use of ICT in the provision of public services has been argued, in the UK and elsewhere, as reflecting a belief in the potential for new technologies to promote the social inclusion of disadvantaged individuals and communities. This is partly based on the idea that: "ICT can have a far-reaching impact on the quality of life of marginalised segments of the population, by providing more responsive and transparent governance as well as improving the reach and delivery of health, education and other social services" (ILO 2001). The UK government has argued for using ICT as a tool for social inclusion policy (DTI 2000). For example, the New Opportunities Fund invested over £250 million to develop a national želectronic library network' which provided web-based facilities and resources through existing public libraries and dedicated žICT learning centres' in disadvantaged areas (Liff and Steward 2001). The UK government's žWiredUp Communities' initiative provided broadband Internet access, digital television, mobile and standard telephone links, and advice and support services for all residents in selected pilot areas (DfES 2002). The objective was to assess how individual access to the Internet can transform opportunities for people living in these communities, by developing new ways of accessing learning, work and public services. The take up of Internet services has varied widely between and within communities, with overall Internet use in pilot areas ranging between 50% and 90% (Devins et al. 2003).

It has also been argued that the Internet's capacity to help in the sharing of information, and in increasing the participation of individuals, can lead to the

growth of more demand-responsive services from the žbottom up', and so facilitate a more democratic and dynamic relationship between public service professionals and their clients (Carter and Grieco 2000). However, the introduction of new technologies has generally tended to benefit the more advantaged, (Servaes and Heinderyckx 2002) and ICT infrastructure development (including broadband) lags behind in many rural and disadvantaged urban areas, when compared with more affluent communities and centres of employment (US Department of Commerce 1999). By carefully specifying the terms of PPPs it may be possible to improve (or make worse) such distributional effects.

5. Efficiency Gains or Losses through Public Private Partnership?

For most OECD member states it may be assumed that so far there exists only a minor macro-economic impact of PPP on macro-economic efficiency because – the United Kingdom, Australia, New Zealand being possible exceptions – this dimension of PPP may be assumed to be relatively small. As infrastructure and services are provided by the public sector, and thus financed by taxes, resources are distributed from the private sector to the public sector. Assuming the – debatable – position that PPPs may be instrumental in reducing government activity to its core competences, because private production of goods is claimed by some to be "always more cost efficient" and "stronger oriented towards the needs of demand than public production" (Oberender and Rudolf 2004, translation by the authors), PPPs would potentially lead to sustainable gains in overall economic efficiency which would be reflected by a reduced tax burden (tax to GDP ratio) and/or by an improved quality of services. The argument is based on the idea that the distortion of the allocation restricts economic freedom, which might reduce overall economic efficiency and competitiveness; and also a high (marginal) taxation is further considered a major cause of tax avoidance.

Although it is of limited significance, the tax to GDP ratio has become an influential indicator of the tax burden and thus of the intensity of government intervention. Thus, in the context of PPPs and overall efficiency, a major issue of concern is whether PPPs are used as a means to reduce the apparent tax burden as measured by the tax to GDP-ratio? If activities can be shifted, at

least partly, from the public sector to the private sector then it can be argued that, *ceteris paribus*, a reduction of the tax burden should be achieved. This may be only an apparent shift in tax burden as public sector liabilities will remain even if capital or operating expenditure is reduced in the short term. However, if PPPs actually improve efficiency then there could be a reduction in tax to GDP-ratios without a loss of public sector provision (and the reverse if PPPs are less efficient overall). For identifying the potential impact of PPPs on overall efficiency and tax to GDP-ratios several dimensions of PPPs have to be distinguished in order to define the relevant scenario for comparisons with alternative forms of providing and financing.

First, what is the alternative to PPP finance of a project that is relevant for comparison? The impact of a PPP-project on overall efficiency and tax to GDP-ratios will be different: if the project could not be accomplished otherwise; if it could be achieved only at a later period when the financial situation of public budget would have improved; or if it could be achieved only by debt finance. If most of a construct and operate-type PPP project's construction is funded by government debt, then PPP normally will reduce debt, interest payments, and government spending on public sector staff and other costs. However, if the costs of the contracts are allocated to current government expenditure, then there should not be any difference in operating costs between a PPP situation and direct government provision (assuming efficiencies are the same in each case and that all labour, capital and other costs, including pensions are fully costed in). The capital expenditure on a public sector project will normally lead to an increase in debt, while the PPP expenditure may not be allocated against government capital expenditure (although in a perfect market the long-term costs of each should theoretically be the same).

Second, experience with public private partnerships has been mixed so far (Joumard et al. 2004; Puwein et al. 2004). Some projects have been considered a success, having been completed on time and budget and having proved to be a cost effective method of delivering public services, while others have failed to deliver the expected gains. There have been significant delays associated with the interpretation of relevant contracts, cost overruns have been experienced because parts of projects had not been fully submitted to competitive pressures, and PPPs have also entailed bailouts by the public sector in a number of countries (see for example, WATIAC 2004). A recent survey of approximately 200 PPP projects in Germany, sponsored by the "PPP Task Force" of the German Ministry of Transport and Construction, suggests a

more optimistic view of the experience PPPs finding out that the public administration's efficiency expectations have been regularly met (DIFU 2005). However, care needs to be taken concerning these optimistic views as it may be that the efficiency of PPP projects has been solely measured by overall efficiency judgements of those persons who initiated the projects and were responsible for its implementation, and that most respondents in the survey did not answer the question about efficiency expectations. So assumptions have to be made on the efficiency of a PPP project in comparison with other forms of service delivery. If a PPP project – particularly of the construct and operate type – is less financially efficient than a debt financed project then taxes will go up and vice versa. In the case of ICT projects there are many UK, and other, examples of large cost and time overruns and poorly performing projects (e.g. the Inland Revenue etc.), due to accountability, technology and project management issues (POST 2003), each of which can be affected by the use of PPPs although it is not necessarily clear if a purely public sector procurement would have been more efficient.

Third, it makes a difference if a PPP project is financed by government taxes or by user charges over its life cycle. User charge financed PPP projects may have a downward impact on the tax burden and tax to GDP-ratios, although some sort of a financial illusion might be involved: citizens might prefer paying user charges for the use of (semi-) private services to paying taxes for public goods. However, if it is hard to avoid such expenditure there is – given equal efficiency of the alternatives – an equal burden on private income in both cases. Economically user charges then come very close to taxation, which is unproblematic if the principle of equivalence finance is considered to be superior to ability-to-pay-finance and if the supply of the service is the same in each case (arguably tax funded public provison could over or under estimate the supply and demand). Nevertheless it is likely that efficiency considerations may stand against equity considerations. There may also be distributional and equity issues and the burden of taxes and user charges may vary between individuals.

If a PPP project is financed by government debt, and if taxes are collected during the use and pay-back period of the project, then the contractual design could make a difference for tax burden-comparisons. Assuming that PPP and government funded projects are equally efficient there should be no cash flow if the debt to pay for the project is paid back evenly every year. However, if the debt is paid back unevenly (e.g. in early years more interest but even amounts

of capital are paid) then PPPs might result in less expenditure in early years and more in later years – which is attractive for government, of course. However, when inflation is considered the picture may differ according to contract details: if PPP payments go up with inflation then in later years there could be greater real public expenditure – and overall efficiency could be reduced.

Fourth, the statistical treatment of public expenditure may play a role in the time path of tax to GDP-ratios and thus in the interpretation of "efficiency gains". Conventional public investment is treated as expenditure in public account statistics in the periods when projects are undertaken. In the case of PPP – e.g. when the public sector purchases services from infrastructure utilities – public expenditure is spread over a much longer period. Consequently in periods when reliance on PPPs is increasing there will be a transitory reduction of public expenditure and of the tax to GDP-ratios.

Fifth, as discussed earlier, PPPs can be used to realise the value of public assets that could not normally be achieved (for political reasons). The example of building new schools on greenbelt land and then selling the former school site for housing has been discussed earlier. While such a transaction could possibly be carried out solely through public transactions, it is much more difficult to argue to do so politically, as opposed to žblaming it' on private developers. In such cases PPPs could contribute to raise overall efficiency.

However, sixth, there may be changes in future freedom of action. There is a danger of long-term PPP contracts tying an organisation (such as a government department) into a specific type of technology (or a particular building layout and usage) for decades, and hence reducing flexibility and the introduction of newer techologies in the future. For example, a major issue is if a PPP is used to build a school or hospital suitable for 2000 IT technology, but when technology, and/or the organisation of the activity, changes it may be very expensive to change the IT and other infrastructure and building layouts and so reduce future adaptability and efficiency and effectiveness.

As the dimensions of PPP interact, a comprehensive analysis would have to take into account quite a large number of different cases or scenarios. Our analysis demonstrates that there is a broad scope of potential outcomes regarding the impact of PPP on overall efficiency and tax to GDP-ratios, and that there is no straightforward answer to the relationship between PPP and overall efficiency.

6. Conclusions

The political context of governments differs between the UK, Germany and Austria, but each government currently has a positive view of PPP. In Germany, and even more so in Austria, there is a strong preference for a consensus society, and the call for reduction of government intervention is, arguably, not as strongly motivated by ideological concerns as in Anglo-Saxon countries. In the UK the current government has argued for PPPs on resource availability, efficiency and quality of delivery grounds while accepting continued government control and financing of most services and infrastructure. The consensus preference has been stronger in Austria although a change occurred in Austria after 2000, as reducing government intervention and the tax to GDP-ratio has since been formulated as a deliberate policy goal, and PPPs could serve as one way to achieve this. In all three countries there appears to be a reluctance to increase the level of direct privatisation in most cases, although PPPs can in some cases be seen as a middle way between privatisation and public delivery.

There are more significant multi-tiered levels of government in the Federal systems of Germany and Austria, with many autonomous players including federal government, states and municipalities. Investment by the latter two exceeds investment expenditure of the federal government. In the more centralised UK system, there has been the devolved government in Scotland, Wales and Northern Ireland since the late 1990s. However, public expenditure and infrastructure investment in these devolved territories is still highly controlled by central UK government, who fund the vast majority of their income. Hence policies towards PPPs have been relatively rapid and similar, although not identical, across the UK. In Germany the search for a comprehensive approach ("Gesamtkonzept") has slowed the dissemination of PPP; Austria seems to handle the issue more pragmatically.

There are many similarities to the drivers for PPPs in Austria, Germany and the UK. The UK has had more experience, and the conservative-led government in Austria has been moving towards greater use of PPPs of the "privatisation"-type, but only very cautiously towards PPPs of the "PFI-type". The major motives for moving towards PPPs are macro-economic or budgetary, especially in Germany and Austria, but also micro-economic or improving the efficiency of public service delivery, especially in the UK. In all three countries

PPPs appear to be a systematic middle response to the alternatives of privatisation or public service provision of infrastructure and operational support.

In summary, being confronted with enormous investment needs, with tax income increasing only slowly and overall tax burdens being high, and with restrictions being placed on government's ability to draw on borrowed money, new forms of investment finance received the attention of policy makers. PPPs are therefore primarily considered as a possible means to raise private funds and thus to close infrastructure gaps faster, and to improve the efficiency of the provision of infrastructure. In addition, however, PPPs restrict the choices of future decision makers. Although PPPs have so far only played a minor role in Austria and Germany, there is considerable potential for expansion, as has occurred in the UK. More theoretical analysis of PPP would be useful, for instance through adapting principal-agent models, theories of co-operation, trust and partnership. One issue that remains crucial to the future impacts of PPPs is whether they offer genuine and sustainable increases in efficiency and effectiveness compared the alternatives. If they do then they should have a positive impact on future public resource availability, but if they do not then they may provide short-term financial and political benefits but at the cost of constraining future decision makers and placing greater pressures on public finances in the longer-term. Our analysis demonstrates that there is a broad scope of potential outcomes regarding the impact of PPP on overall efficiency and that it is unclear if Public Private Partnerships are a sustainable solution for the information society.

~~*Dr. Stane Vlaj, assistant professor at the Faculty of Public Administration in Ljubljana and director of its Institute of Local Self Government, member of the Expert Group at the Constitutional Commission of the National Assembly of the Republic of Slovenia for the field of local self government and alternate member from the Republic of Slovenia in the Group of Independent Expert on the European Charter of Local Self Government at the Congress of Local and Regional Authorities of Europe (CLRAE) in Strasbourg. He is also member of the International Institute IFIMES.*~~

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Ronald W. McQuaid, Walter Scherrer
Public Private Partnership in the European Union: Experiences in the UK, Germany, and Austria

POVZETEK

JAVNO-ZASEBNO PARTNERSTVO V EVROPSKI UNIJI: IZKUŠNJE IZ VB, NEMČIJE IN AVSTRIJE

Avtor obravnava regionalizacijo Republike Slovenije, pri čemer vladne predloge pokrajinske zakonodaje sooča s strokovnimi merili, nameravano uvedbo pokrajin pa umešča tudi v evropska dogajanja na tem področju.

Po njegovem mnenju je temeljni cilj uvedbe pokrajin učinkovito in pregledno upravljanje za zagotavljanje kakovostnih storitev za lokalno in regionalno prebivalstvo. Gre za povezanost nove enote teritorialne samouprave z vsebinskimi vprašanji, zlasti z dobrim upravljanjem, ki bo v korist tam živečega prebivalstva. Z uvedbo in ustanovitvijo pokrajin se bo tudi v naši ureditvi odprla pot za proces decentralizacije in uveljavljanje načela subsidiarnosti, ki ju obstoječa odsotnost vmesne ravni ne dopušča. Ustanovitev pokrajin je tudi eden ključnih korakov k uresničevanju skladnega regionalnega razvoja. Olajšale bodo tudi povezavo Slovenije z EU, še posebej glede uspešnejšega kandidiranja za sredstva EU iz strukturnih in kohezijskega sklada za spodbujanje skladnega regionalnega razvoja. Okrepile naj bi tudi čezmejno ozemeljsko sodelovanje lokalnih in regionalnih skupnosti.

Slovenija je zaenkrat ena najbolj centraliziranih držav v Evropi. Lokalna samouprava je vsebinsko in finančno pod odločilnim pokroviteljstvom države. Pokrajine kot obvezna druga raven lokalne samouprave bodo zelo pomembne za decentralizacijo Slovenije in s tem uresničevanje načela subsidiarnosti kot temeljnega načela za ureditev razmerij med državo in poddržavnimi ravnmi oblasti. S sistemskega vidika gledano bodo pokrajine kot nova upravnoteritorialna struktura prinesle številne spremembe v ostalih delih družbenega sistema - pravnem redu oz. zakonodaji, javnih financah, državni upravi, položaju občin, delovnem področju posameznih ministrstev, čezmejnem sodelovanju lokalnih skupnosti, mednarodnih razmerjih in povezavah (SE, EU in drugih) ter seveda tudi v položaju državljanov.

Ustanovitev štirinajstih pokrajin je po večinskem strokovnem gledanju preveč. Določanje pokrajinskega območja mora izhajati najprej iz naravnih danosti ter skupnih potreb in interesov prebivalcev. Vse države si prizadevajo za takšno velikost lokalnih in regionalnih skupnosti, ki bo omogočala potrebne finančne in človeške vire za čim kakovostnejše javne storitve za zadovoljevanje sodobnih potreb prebivalcev. Pomembnost teritorija je

povsem jasna, pa naj gre za gospodarski, socialni, politični ali upravni vidik.

Glede na geografsko, poselitveno in gospodarsko sestavo Slovenije, sodobne evropske regionalizacijske težnje in predvidene široke naloge pokrajine bi členitev na osem pokrajin po mnenju večine strokovnjakov omogočala glede na razmerje med učinkovitostjo in stroški najbolj smotrno, optimalno izpolnjevanje zahtevnih avtonomnih nalog in opravil. Predlog členitve na osem srednje velikih (z vidika Slovenije) pokrajin je po strokovnih kriterijih za geografsko, prebivalstveno, urbano in gospodarsko sestavo Slovenije ovrednoten kot najprimernejši. Členitev na štirinajst pokrajin (koncept t. i. razvojnih regij) z vidika predvidenih širokih pristojnosti in nalog pokrajin postavlja upravičen strokovni dvom o možnosti kakovostnega opravljanja upravnih in drugih, zlasti razvojnih in storitvenih funkcij. Z vidika skladnejšega regionalnega razvoja pa je to (zgolj) ena od mogočih različic.

Regionalizem in krepitev regionalne samouprave sta v središču procesa politične demokratizacije ter socialnega in gospodarskega razvoja v večini držav članic SE. Regionalizacija je povezana z globalnimi, evropskimi in nacionalnimi političnimi procesi, ki države silijo v reforme vseh temeljnih sestavin oblasti. Regionalizacija je del vseobsežnih političnih procesov v državi in ne izoliran vidik teh reform.

Modeli lokalne samouprave se razlikujejo po obsegu, strukturi, zadevah in njihovih razmerjih do države. Njihova skupna značilnost je, da temeljijo na njihovi lastni tradiciji in zgodovinskem razvoju. Različni modeli lokalne samouprave bodo obstajali tudi v prihodnje, ker ni in ne more biti enega modela, tudi znotraj posamezne (federalne) države ne.

Dobra lokalna in regionalna samouprava je javna dobrina, ki jo žele zagotoviti države članice SE. Za dobro upravljanje lokalnih in regionalnih skupnosti so izzivi in potrebne aktivnosti v naslednjih letih te: demokratično državljanstvo in participacija na lokalni in regionalni ravni; pravni okvir in institucionalna struktura lokalne in regionalne samouprave; lokalne in regionalne finance; vodenje in upravljanje zmogljivosti lokalnih in regionalnih skupnosti; javna etika na lokalni in regionalni ravni; obmejno in čezmejno sodelovanje teritorialnih skupnosti ali oblasti.

Razmerje med sektorsko regulacijo in konkurenčnim pravom pri regulaciji elektronskih komunikacij

UDK: 353 712(497.4)

Tanja Muha
Mestna občina Novo mesto
janez.zore@novo.mesto.si

IZVLEČEK

Ob spoznanju, da pravila konkurenčnega prava ne morejo odgovoriti na izzive, ki se pojavljajo na področju elektronskih komunikacij, ter z začetki liberalizacije trga elektornskih komunikacij, je bil na nivoju Evropske unije vzpostavljen harmoniziran regulatorni okvir, ki predstavlja temelj za ustanovitev nacionalnih regulatornih organov, ki naj bi ta okvir izvajali in ga nadzorovali. Regulatorno poseganje na trg mora biti natančno, jasno in predvsem učinkovito. Vprašanje, ki se pojavlja in ga je treba v luči razvoja regulatornega okvira vsaj upoštevatii, je vprašanje doseganja in spoštovanja teh načel v primeru, ko se uporabljajo tako pravila sektorske regulacije kot splošna pravila konkurenčnega prava. V članku predstavljamo, kako pogosto prihaja do vsebinskih in postopkovnih prekrivanj med nalogami nacionalnih regulatornih organov in nacionalnih organov za varovanje konkurence.

Ključne besede: elektronske komunikacije, konkurenčno pravo, sektorska regulacija, »ex-post« in »ex-ante« regulacija

1. Razvoj sektorske regulacije

Z razvojem liberalizacije določenih sektorjev ekonomije se je pojavilo tudi vprašanje samega administrativnega urejanja oz. nadzora nad spoštovanjem in izvajanjem pravil, ki so postala nujni sopotnik tega procesa. Ugotovljeno je bilo, da trg kot tak ne ponudi rešitve, ker ne delujejo temeljne ekonomske zakonitosti ponudbe in povpraševanja. Vzpostavitev pravno-regulatornega okvira seveda ni dovolj in ne more biti zadosten cilj, saj sama pravna pravila kaj hitro ostanejo mrtva črka na papirju.

Na podlagi navedenega in ob spoznanju, da pravila konkurenčnega prava, ki so del daljše tradicije pravnega urejanja gospodarskih razmerij na trgu in

delovanja le-tega, ne morejo odgovoriti na izzive, ki jih ponujajo določeni sektorji, so bili vzpostavljeni regulatorni okvir in regulatorni organi, ki naj bi ta okvir izvajali in ga nadzorovali.

Sektor elektronskih komunikacij ni v okviru navedenega nobena izjema in zato nikakor ne more biti presenečenje, da je sekundarna zakonodaja (3. člen Okvirne direktive[1]) naložila državam članicam Evropske unije, naj vzpostavijo neodvisno regulatorno telo, ki bo nadzorovalo izvajanje sprejetih pravil in bo predvsem skrbelo, da ne bi prihajalo do anomalij na trgu.

Glede spremljanja stanja na trgu in vplivanja na morebitne prepovedane poslovne prakse na trgu se torej na področju elektronskih komunikacij srečujemo z dvema sklopoma pravnih pravil in sicer: (i) konkurenčno-pravna pravila in (ii) pravila sektorske regulacije.

Prva skupina pravil je bila oblikovana zaradi generalnega urejanja stanja na trgu in obravnava oz. skuša preprečiti predvsem naslednje prakse: (i) sklepanje protikonkurenčnih sporazumov, katerih namen ali učinek je omejevanje konkurence na določenem upoštevnem trgu[2], (ii) zlorabo prevladujočega položaja na upoštevnem trgu oz. v ekonomskem kontekstu zlorabo pomembne tržne moči na upoštevnem trgu[3] in (iii) strukturne spremembe, katerih učinek utegne negativno vplivati na stanje konkurence na trgu in lahko v nekem časovnem obdobju vodi do potencialnih težav v obliki prej navedenih praks[4].

Druga skupina pravil je bila oblikovana precej drugače in z drugim namenom. Temeljno vodilo sektorske regulacije oz. pravnih pravil, ki jo sestavljajo, je odstranitev morebitnih vstopnih ovir na trg, s čimer naj bi se vzpostavilo stanje na trgu, ki bi samo po sebi omogočalo razvoj konkurence. Seveda so pravila sektorske regulacije pomembna tudi z vidika oblikovanja drugih elementov, ki pa so pomemben sestavni del izvajanja nalog sektorskih regulatorjev (npr. določitev pristojnosti cenovne regulacije, podeljevanje številskega prostora itd.).

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1 Direktiva Evropskega parlamenta in Sveta 2002/21/ES z dne 7. marec 2002 o skupnem regulatovnem okviru za elektronska komunikacijska omrežja in storitve (OJ L 108, str. 33-50).
2 Navedeno vprašanje ureja na nacionalni ravni Zakon o preprečevanju omejevanja konkurence in na ravni EU primarno Pogodba o ustanovitvi Evropske skupnosti (81. člen).
3 Navedeno vprašanje ureja na nacionalni ravni Zakon o preprečevanju omejevanja konkurence in na na ravni EU primarno Pogodba o ustanovitvi Evropske skupnosti (82. člen).
4 Navedeno vprašanje ureja na nacionalni ravni Zakon o preprečevanju omejevanja konkurence in na ravni EU primarno Uredba o koncentracijah ter podrejeno Pogodba o ustanovitvi Evropske skupnosti (82. člen).

2. Temeljni cilji sektorske regulacije

Da bi lažje analizirali razmerje sektorske regulacije in pravil konkurenčnega prava, moramo pogledati sam razvoj obeh skupin pravil ter predvsem cilje, ki jih posamezna pravila zasledujejo. Ker je predmet tega članka analiza sektorske regulacije v Republiki Sloveniji in primerjalno v nekaterih državah članicah na konkretnem primeru, se bomo podrobneje lotili le analize ciljev sektorske regulacije. Hkrati bomo, ko bo to potrebno zaradi lažjega razumevanja, poskušali analizirati tudi nekatere vidike konkurenčnega prava, ki pomembno vplivajo na samo uporabo teh pravil in njihovo sobivanje v razmerju do sektorskih pravil.

2.1 Razvoj učinkovite konkurence

Na začetku moramo poudariti, da konkurenca sama po sebi ni cilj sektorske regulacije ampak gre za pomemben, če ne celo vitalen instrument, s katerim lahko sektorski regulatorni organ vpliva na oblikovanje poslovne politike predvsem nacionalnega (vodilnega) telekomunikacijskega operaterja, saj gre načeloma za podjetje, ki ni učinkovito, ki ne ravna gospodarno in kjer je predvsem miselnost zaposlenih še vedno neprimerna za uspešno poslovanje v pogojih tržne ekonomije. Organ s svojim poseganjem na trgu lahko ustvari pogoje za odstranitev ovir za vstop na trg.

Da bi dosegli razvoj ustrezne ponudbe, kar je najučinkoviteje mogoče doseči s pomembnim pritiskom na ponudbeni strani, morajo nacionalni regulatorni organi s svojimi ukrepi zagotoviti, da bo operater omrežja (npr. operater s pomembno tržno močjo na trgu dostopa do razvezave krajevne zanke) omogočil dostop drugim ponudnikom, da bodo odstranjene predvsem pravne (regulatorne) ovire za dostop in bodo ponudniki ravnali v skladu s povpraševanjem na trgu.

2.2 Upoštevanje specifičnosti in značilnosti sektorja

Sektor elektronskih komunikacij je prav gotovo eden tistih sektorjev ekonomije, ki ima svoje individualne značilnosti (npr. visoki potopljeni stroški povezani z izgradnjo omrežja), kljub temu pa odraža tudi temeljne zakonitosti trga kot takega.

V zvezi z navedenim je izrednega pomena, da regulatorni okvir, predvsem pa njegovo izvajanje, zagotovi, da bodo upoštevane tiste značilnosti, ki bistveno

prispevajo k ukrepom, ki jih nacionalni regulatorni organi sprejemajo, hkrati pa ne pomenijo bistvenega posega v poslovno politiko subjektov na trgu ter pretiranega in nepotrebnega administrativnega bremena pri nastopanju na trgu.

Namen teh ukrepov je, da naj bi liberalizacija zmanjševala obseg sektorske regulacije in dejansko vodila sektor pod »okrilje« pravil konkurenčnega prava, ki so oblikovana zato, da varujejo stanje konkurence na trgu (učinkovito konkurenco[5]).

2.3 Učinkovito izvajanje regulatornih funkcij

Nedvomno je mogoče že iz zgoraj navedenega ugotoviti, da je izvajanje regulatornih funkcij administrativni poseg državnega organa v delovanje subjekta na trgu in je zato bistvenega pomena, da to poseganje ne gre dlje kot je nujno potrebno in se zagotovi izpolnjevanje določenih ciljev, predvsem delovanja trga.

Proces liberalizacije naj bi zagotovil, da se bo sektorska regulacija slej ko prej »poslovila« in da bodo tudi na področju elektronskih komunikacij intervenirali le konkurenčno-pravni organi.

Ali v Evropi in Evropski Uniji ter na enotnem evropskem trgu dejansko lahko govorimo o tem procesu, je težko ugotoviti. Trenutno objavljeni predlog Evropske komisije glede sprememb in dopolnitev regulatornega okvirja za področje elektronskih komunikacij nakazuje, da bodisi proces liberalizacije ni tako daleč kot se je v določenem trenutku zdelo ali da smo bodisi priča pretiranemu poseganju regulatornih organov na delovanje na trgu.

V tem trenutku je mogoče ugotoviti, da gre prav gotovo za skupek obeh elementov, pri čemer pa se vseeno zdi, da prevladuje prvi. Dejansko je mogoče ugotoviti, da Evropska komisija poskuša omejiti sektorsko regulacijo predvsem na tista področja, ki so se zares izkazala za najbolj problematična ter hkrati zanimiva za vstopajočo konkurenco (npr. širokopasovni dostop do interneta).

5 Pomembno je poudariti, da je cilj konkurenčnega prava učinkovita konkurenca in ne popolna konkurenca, kot se pogosto uporablja v laični javnosti. Pojem popolne konkurence je le postulat in ideja, saj dejansko takega stana na trgu razen v teoriji ni mogoče doseči.

3. Administrativno poseganje na stanje na trgu

Ob upoštevanju spoznanj ekonomske teorije, da poseganje države na stanje na trgu ni zaželeno ali primerno, je treba poudariti, da mora biti regulatorno poseganje na trg natančno, jasno in predvsem učinkovito. To so temeljni postulati in načela regulacije, ki veljajo ne le za sektor elektronskih komunikacij, temveč tudi za druga področja, kjer nastopajo nacionalni regulatorni organi.

Vprašanje, ki se pojavlja in ga je treba v luči razvoja regulatornega okvira vsaj upoštevati, če ne tudi čim prej in čim bolj učinkovito tudi rešiti, je vprašanje doseganja in spoštovanja zgoraj navedenih načel v primeru, ko se uporabljajo tako pravila sektorske regulacije kot splošna pravila konkurenčnega prava.

Načelo *good regulatory governance*, ki ga zasleduje Evropska komisija pri oblikovanju posameznih sektorskih politik, naj bi bilo spoštovano tudi na področju elektronskih komunikacij. In načeloma je temu ob hitrem vpogledu v pravna pravila celo mogoče pritrditi. Nacionalni konkurenčni organi uporabljajo pravila konkurenčnega prava (npr. Zakon o preprečevanju omejevanja konkurence; v nadaljevanju ZPOmK), medtem ko nacionalni regulatorni organi uporabljajo pravila sektorske regulacije (npr. Zakon o elektronskih komunikacijah). Hkrati gre v prvem primeru za intervencijo na *ex post* osnovi, medtem ko nacionalni konkurenčni organi nastopajo na trgu na *ex ante* osnovi. V določenih primerih je celo jasno, da lahko ukrepajo le nacionalni konkurenčni organi (npr. področje koncentracij). Vendar, ali je temu res tako?

V nadaljevanju bomo videli, da na področju, ki ga obravnava ta članek, prihaja do vsebinskih in postopkovnih prekrivanj med nalogami nacionalnih regulatornih organov in nacionalnih organov za varovanje konkurence.

Dejansko z razvojem določenih pravil ni več mogoče govoriti o jasni razmejitvi med konkurenčnim pravom in pravili sektorske regulacije. Prvi argument, ki govori v prid nejasni razmejitvi, je naraščajoča konvergenca pravil konkurenčnega prava in pravil sektorske regulacije. Kaj to pomeni? Gre dejansko za razvoj, ko lahko predvsem na področju elektronskih komunikacij govorimo o uporabi konceptov konkurenčnega prava v sektorski regulaciji (npr. koncept operaterja s pomembno tržno močjo). Vendar ne gre za razvoj, ki bi šel le v smeri konkurenčnega prava nasproti sektorski regulaciji.

V okviru konkurenčnega prava vedno večkrat ugotavljamo, kako se ravnajo sektorski regulatorji pri svojem delu. Tipičen primer tega je uporaba ukrepa obveznosti medomrežnega povezovanja, ki je eden od temeljnih ukrepov, s

katerim nacionalni regulatorni organi zagotavljajo, da vstopajoči na trg lahko dostopajo do končnih uporabnikov pri uporabi infrastrukture operaterja s pomembno tržno močjo. Hkrati pa se v okviru konkurenčnega prava razvija t.i. teorija bistvene dobrine[6], v okviru katere se postavlja vprašanje, ali je podjetje s prevladujočim položajem na trgu upravičeno zavrniti dostop do svojega omrežja, še posebej v primeru, ko se izkaže, da gre za bistveni element, katerega odsotnost pomeni nezmožnost delovanja in nastopanja na trgu.

Hkrati se pristojnosti nacionalnih regulatornih organov razvijajo tako, da rešujejo pritožbe in spore, ki po svoji vsebini posegajo na področje konkurenčnega prava ter so tradicionalno del pristojnosti v okviru splošne regulacije stanja konkurence na trgu.

3.1 Vsebinsko prekrivanje

Kot že omenjeno, se v okviru izvajanja pristojnosti nacionalnih regulatornih organov srečujemo z vprašanji, ki po svoji naravi bodisi spadajo v konkurenčno pravo, bodisi jim v okviru slednjega lahko najdemo vsebinsko podobne primere.

Tipičen primer tega je regulacija dostopa do elektronskega komunikacijskega omrežja. V okviru Direktive o dostopu[7] (9., 10. in 13. člen) najdemo več ukrepov, ki jih lahko nacionalni regulatorni organi naložijo operaterju s pomembno tržno močjo če ugotovijo, da je dostop do njihovega omrežja bistvenega pomena za razvoj konkurence (npr. dostop do javnega telefonskega omrežja na fiksni lokaciji ali dostop do javnega mobilnega telefonskega omrežja).

Obenem se v okviru konkurenčnega prava razvija t.i. teorija bistvene dobrine, ki v okviru ugotovljenih zlorab prevladujočega položaja zaradi zavračanja dostopa do neke bistvene dobrine, nalaga imetniku oz. lastniku te dobrine, da zagotovi dostop do nje.

Prav gotovo bi lahko sklepali, da gre po vsebini za zelo podobni zadevi, kar bi bilo mogoče prerekati oz. trditi, da so pravila konkurenčnega prava (predvsem zaradi sodne prakse) nekoliko bolj jasna in stroga ter dopuščajo veliko

6 Ali lahko res govorimo o teoriji bistvene dobrine, je zelo težko povedati. čeprav se pojem uporablja, pa je njegova uporaba omejena predvsem na akademsko sfero. Dejstvo je, da je tudi ameriško Vrhovno sodišče v zadevi Trinko na neki način odstopilo od tega pojma (essential facility) in razlaga navedeno zlorabo skozi določbo 2. člena Sherman Acta (ekvivalent 82. členu PES).
7 Direktiva Evropskega parlamenta in Sveta 2002/19/ES z dne 7. marec 2002 o dostopu do elektronskih komunikacijakih omrežij in pripadajočih naprav ter o njihovem medomrežnem povezovanju (OJ L 108, str. 7-20).

manj manevrskega prostora Evropski komisiji pri sprejemanju odločitev na podlagi Uredbe 1/2003[8].

V okviru regulacije dostopa do določenega omrežja je treba na tem mestu poudariti značilnost oz. bistveno razliko med sektorsko regulacijo in pravili konkurenčnega prava. Slednja namreč niso preveč primerna za cenovno regulacijo, saj le-ta zahteva veliko naknadnih aktivnosti pri spremljanju cenovne politike določenega subjekta na trgu in sam nadzor nad izvajanjem naloženih obveznosti. S tega vidika, čeprav prihaja do prekrivanja glede možnosti izvajanja te funkcije, je sektorski regulator v okviru svojega poznavanja sektorja v veliko boljšem položaju kot konkurenčni organ, prav tako pa ima na voljo več in učinkovitejše instrumente nadzora.

V zadnjem času ugotavljamo tudi določene posebnosti v razvoju sektorske regulacije z vidika upoštevanja drugih politik (npr. varovanje okolja). čeprav so možnosti sektorskega regulatorja širše, predvsem ima slednji več diskrecije, pa prihaja tudi v okviru uporabe pravil konkurenčnega prava do vedno večje vloge nekaterih drugih politik (npr. v okviru 81. člena PES[9] – kolektivne pogodbe niso upoštevane kot pogodbe, ki bi lahko bile prepovedane v okviru tega člena, čeprav mogoče tudi vplivajo na konkurenco na trgu).

3.2 Prekrivanje pristojnosti

Nacionalni regulatorni organi imajo vedno več pristojnosti v okviru reševanja raznih medoperaterskih ali medpotrošniških sporov. Ne glede na izvajanje te funkcije pa v praksi lahko pride do situacije, ko je neki spor lahko tudi predmet postopka pred nacionalnim konkurenčnim organom (npr. v okviru presoje nekega sporazuma z vidika prepovedi v 81. členu PES).

Zelo zanimivo področje, kjer prihaja do potencialnega prekrivanja pristojnosti, je možnost nalaganja denarnih kazni. V okviru izvajanja slednje funkcije ima tako npr. nacionalni regulatorni organ kot prekrškovni organ pravico in dolžnost, da v primeru ugotovljenih kršitev ZEK-oma kršitelju poleg naloženega ukrepa v postopku nadzora naloži tudi plačilo globe.

8 Uredba Sveta (ES) št. 1/2003 z dne 16.decembra 2002 o izvajanju pravil konkurence iz členov 81 in 82 Pogodbe (OJ L 1, str. 1)
9 Pogodba o ustanovitvi Evropske skupnosti (konsolidiran tekst dostopen na: http://eur-lex.europa. Eu/en/treaties/dat/12002E/pdf/12002E EN.pdf)

Hkrati pa ima nacionalni konkurenčni organ pravico in dolžnost, da po ZPOmK naloži globo v primeru, da je določeni subjekt kršil pravila konkurenčnega prava.

V primeru, da bi oba organa ugotovila kršitev materialnih zakonov z istim dejanjem, bi oba organa lahko naložila plačilo globe, saj gre za dve različni materialni podlagi in torej načeloma ne moremo uporabiti pravila *ne bis in idem*[10].

4. Potencialna nevarnost regulatornih konfliktov

Ne glede na očitno podobnost materialnih vsebin oz. pravil sektorske regulacije in konkurenčnega prava lahko pride do konflikta v odločitvah obeh organov. Kot primer slednjega lahko navedemo odločbi Evropske komisije na področju elektronskih komunikacij in sicer v primeru *Deutsche Telecom* (2003) in v primeru *Telefonica* (2007).

V obeh primerih sta pristojna nacionalna regulatorna organa dala soglasje k cenam veleprodajnih storitev na trgu širokopasovnega dostopa do interneta in hkrati nista nasprotovala cenam maloprodajnih storitev. V obeh primerih je Evropska komisija ugotovila, da sta nacionalna telekomunikacijska operaterja zlorabila prevladujoč položaj na trgu širokopasovnega dostopa do interneta s tem, da sta s postavljanjem (pre)visokih veleprodajnih cen in (pre)nizkin maloprodajnih cen s politiko škarij cen onemogočila razvoj konkurence.

Evropska komisija je v obeh primerih izdala odločbo na podlagi 86(3). člena PES, pri čemer pa se upravičeno postavlja vprašanje, ali ne bi morala Evropska komisija dejansko ukrepati proti državi članici, ker nacionalni regulatorni organ ni zagotovil, da bi cene veleprodajnih storitev odražale stroškovno ceno te storitve in bi cena maloprodajnih storitev ne bila rezultat politike roparskih cen oz. politike škarij cen. Nekoliko drugačna pa kljub temu konfliktna situacija bi se lahko pojavila v primeru reševanja vprašanja dostopa do elektronskega komunikacijskega omrežja. Medtem ko je ukrep dostopa v okviru določbe 12. člena okvirne direktive v popolni diskreciji nacionalnega regulatornega organa, ki na podlagi presoje stanja na trgu po navadi naloži ta ukrep, v kolikor ugotovi, da je na določenem trgu stanje tako, da ima neki operater položaj operaterja s pomembno tržno močjo.

10 Gre za eno temeljnih načel kazenskega prava katerega temeljna vsebina je, da nekdo ne more dvakrat biti obsojen za isto kaznivo dejanje

Hkrati pa bi nacionalni konkurenčni organ v primeru reševanje pritožbe podjetja, ki mu lastnik omrežja ni dovolil dostop do tega omrežja, moral presojati kriterije v primeru *Brönner*. Kot je mogoče ugotoviti iz prakse Evropske komisije, slednja le v redkih, izjemnih primerih tudi dejansko ugotavlja, ali so vsi kriteriji iz tega primera izpolnjeni in je zato treba podjetju naložiti ukrep dopustitve dostopa do t.i. bistvene dobrine.

Tabela 1: Primerjava uporabe pravil sektorske regulacije in konkurenčnega prava

	NACIONALNI REGULATORNI ORGAN	NACIONALNI KONKURENčNI ORGAN	KONFLIKT?
DOPUSTITEV DOSTOPA	favoriziranje konkurence – pogost ukrep	nevtralen – strogi pogoji v primeru Brönner	ni kršitve 82. člena PES če je dostop zagotovljen
POGOJI DOSTOPA	favoriziranje lastnika omrežja – upoštevanje investicij	favoriziranje konkurence – ne upošteva investicij	previsoke cene dostopa – potencialna kršitev 82. člena PES
DELITEV INFRASTRUKTURE	favorizira – varstvo okolja, javnega zdravja	manj favorizira – očiten cilj le varovanje konkurence	potencialna kršitev 81. člena PES – omejevalni elementi sporazuma

Vir: Lasten prikaz na podlagi literature

Navedena nekonsistentna regulatorna praksa ima lahko torej precej negativnih učinkov: Slednje bi lahko razdelili v naslednje skupine:

- negativni in nejasno signali industriji glede možnosti vstopa na upoštevni trg in uporabo različnih regulatornih pravil;
- potencialno negativni vplivi na investicije v sektorju zaradi regulatornih nejasnosti in nedoslednosti;
- potencialni razvoj t.i. forum shoppinga (izbire pristojnosti glede na verjetnost pozitivne rešitve pritožbe).

Naslednja nejasnost in nedoslednost, ki se lahko pojavi in se odraža tudi v dveh zgoraj navedenih primerih, je problematika, ki izhaja iz načela, zapisanega v sektorskem regulatornem okviru in sicer, da pravila slednjega oz. njihova uporaba ne onemogočajo nacionalnim konkurenčnim organom sprejemanja drugačne odločitve v isti zadevi. Da bi bila zadeva še nekoliko bolj zanimiva oz. zapletena, je treba omeniti možnost pritožnikov, da se v skladu z reformo konkurenčnega prava pritožijo tudi na nacionalno sodišče, saj sta tako 81. kot 82. člen PES neposredno učinkovita in ju nacionalno sodišče lahko uporabi oziroma celo mora uporabiti.

5. Omejevanje regulatornih konfliktov

Kot je mogoče ugotoviti iz zgoraj navedenega, pojav regulatornih konfliktov prav gotovo ne prispeva k preglednosti, jasnosti in pravni varnosti, ki jih vsak udeleženec na trgu (upravičeno) pričakuje. Zaradi tega je bistvenega pomena, da se tako nacionalni regulatorni organi kot tudi nacionalni konkurenčni organi zavedajo navedenih omejitev in jih tudi poskušajo odpraviti. V nadaljevanju bomo pogledali nekatere aktivnosti oz. potencialne ukrepe, ki bi bili primeri za omejitev ali celo odpravo navedenih prekrivanj.

5.1 Obveznost spremljanja pravil konkurenčnega prava

Prav gotovo je mogoče pritrditi dejstvu, da so pristojnosti in naloge nacionalnih regulatornih organov jasno in nedvoumno določene v sekundarni zakonodaji Evropske skupnosti, ki se kasneje uvaja v nacionalno zakonodajo (npr. 120. člen ZEKom). čeprav je splošno pravilo, da nacionalni regulatorni organi nimajo pristojnosti uporabe pravil konkurenčnega prava, pa sama sekundarna

zakonodaja (npr. 22(3). člen poštne direktive[11]) ali praksa (npr. Ofcom) omogočata, da nacionalni regulatorni organi uporabljajo tudi pravila konkurenčnega prava.

Ne glede na navedeno pa slednje izhaja že iz splošnih pravil prava Skupnosti, ki nalaga vsem državnim organom, da pri svojem delu upoštevajo pravo Skupnosti. Slednje načelo je tudi jasno in nedvoumno izraženo v odločbi Sodišča Evropskih skupnosti v primeru *GB-Inno-BM*, kjer je slednje jasno reklo da »države članice ne smejo, ne glede na dejstvo, da je 82. člen PES naslovljen na podjetja, sprejemati ali uveljavljati pravna pravila, ki bi onemogočila učinkovanje in učinkovitost pravil Skupnosti«.

Pri tem je pomembno, da pojem države članice ne gledamo ozko, ampak kot državo članico upoštevamo vsak subjekt v zvezi s katerim ali na katerega ima predmetna država članica bistven vpliv.

Navedeno pravilo je bilo še jasneje in nedvoumno razvito v primeru *Italian Matches*, kjer je Sodišče Evropskih skupnosti reklo da »obveznost neupoštevanja nacionalne zakonodaje, ki je v nasprotju s pravnim redom Skupnosti ne velja le za nacionalna sodišča, ampak tudi za druge organe državne uprave in javne uprave, katerih naloga je, da zagotovijo učinkovito in pravilno uporabo tega pravnega reda.«

Ne glede na navedeno in ob upoštevanju splošnega pravila, da nacionalni konkurenčni organi niso nujno aktivni uporabniki pravil konkurenčnega prava, je treba ugotoviti, da je poznavanje slednjih bistvenega pomena za učinkovito ter pravilno uporabo same sektorske regulacije. Nedvoumno je namreč, da je predvsem trenutno veljavni regulatorni okvir za področje elektronskih komunikacij v veliki meri oblikovan po načelih splošnega konkurenčnega prava in je zato bistvenega pomena, da nacionalni regulatorni organi poznajo ta pravila oz. se o njihovi vsebini ustrezno seznanijo.

5.2 Posebni ukrepi za izogibanje regulatornih konfliktov

Prav gotovo se ni mogoče v določenih primerih izogniti situaciji, ko pritožnik vloži svojo pobudo (pritožbo) tako pri nacionalnem regulatornem organu kot nacionalnem organu za varstvo konkurence ali celo pri Evropski komisiji. Gre za povsem legitimno in legalno pravico pritožnika, ki verjetno z vložitvijo

11 Direktiva 97/67/ES kot je bila spremenjnea in dopolnjena z Direktivo 2008/6/ES.

pobude na več naslovih poskuša, da bi vsaj kateri od teh organov tudi v resnici postopal v skladu z njegovimi pričakovanji.

Upoštevaje navedeno pa je vseeno treba posebno pozornost nameniti izogibanju podvajanj v reševanju določenih primerov, še posebej če je mogoče, glede na vsebino pravnega pravila, da bosta oba organa odločala podobno. Pri tem naj opozorimo, da je Evropska komisija na področju elektronskih komunikacij izdala posebno sporočilo v zvezi z uporabo pravil konkurenčnega prava v sektorju elektronskih komunikacij, v katerem je kot temeljno načelo predstavila načelo *lex specialis*[12].

Bistvena prednost slednjega je v tem, da je Evropska komisija mnenja, da naj se primer rešuje že na nacionalni ravni in zato sama v primeru, da nacionalni regulatorni organ ali nacionalni organ za varstvo konkurence že rešujeta primer, ne bo ukrepala. Slednje velja v vseh primerih, razen ko odločitev na nacionalni ravni ni sprejeta v nekem doglednem časovnem okviru oz. ko pritožnik na nacionalni ravni nima učinkovitega pravnega varstva v smislu začasnih odločb (odredb).

Tak pristop je seveda dobrodošel z več vidikov:

- prioriteta se dodeljuje organu, ki je dejansko specializiran za določen sektor in veliko bolje pozna njegovo delovanje;
- v primeru, da je treba izreči ukrepe, katerih učinkovitost je odvisna od nadzora nad izvajanjem teh ukrepov, so nacionalni regulatorni organi veliko bolj usposobljeni, da dejansko izvajajo nadzorne funkcije;
- časovni okvir, v katerem morajo odločati nacionalni regulatorni organi, je veliko bolj strog in zagotavlja zato več pravne jasnosti in varnosti za akterje na trgu.

Ne glede na navedeno pa ima pravilo *lex specialis* tudi določene nejasnosti, saj Evropska komisija ni jasno odgovorila na vprašanje razmejitve pristojnosti med nacionalnimi regulatornimi organi in nacionalnimi organi za varstvo konkurence, ni definirala pojma izrednih okoliščin, ki dovoljujejo prevzem pristojnosti, in ni opredelila aktivnosti v primeru, da nacionalni regulatorni organ, kljub njihovi prisotnosti, ne analizira konkurenčno-pravnih vidikov zadeve.

12 Načelo lex specialis derogate lex generalis pomeni, da v primeru posebnih pravil ta prevladajo nad splošnimi pravili. V konkretnem primeru to pomeni, da pravila sektorske regulacije prevladajo nad pravili splošnega konkurenčnega prava, če seveda urejajo isto vprašanje.

Tudi če upoštevamo te omejitve, je treba pogledati način, ki bi omogočil izogibanje dvojnim postopkom na nacionalni ravni. čeprav ni jasna možnost uporabe pravila *lex specialis*, to še ne pomeni, da na voljo niso druga, prav tako učinkovita sredstva.

Eden najbolj priporočljivih načinov izogibanja regulatornih konfliktov je primerno sodelovanje pristojnih državnih organov. To pomeni, da v primeru, ko nacionalni regulatorni organ pri izvajanju svojih funkcij ugotovi, da se pojavljajo določena konkurenčno-pravna vprašanja oz. problemi, o tem obvesti nacionalni organ za varstvo konkurence. V okviru sektorja elektronskih komunikacij je to delno že opredeljeno v okviru postopka posvetovanja nacionalnih organov za varstvo konkurence pri analizi upoštevnega trga in posvetovanju urada za varstvo konkurence. Navedeno neformalno pravilo pa seveda velja tudi v obratni smeri, kar pomeni, da tudi nacionalni organi za varstvo konkurence o določenih sektorskih vprašanjih obvestijo pristojni nacionalni regulatorni organ.

Sodelovanje državnih organov je praviloma prisotno tudi v tistih državah članicah, kjer je dejansko prišlo do prenosa dela pristojnosti nacionalnih organov za varstvo konkurence na nacionalne regulatorne organe (npr. Ofcom, Postcomm). Obenem naj poudarimo, da je pravilo sodelovanja državnih organov del splošnega upravnega postopka, ki se po navadi uporablja tako v primeru nacionalnih regulatornih organov kot tudi nacionalnih organov za varstvo konkurence.

6. Izkušnje iz preteklosti in uporaba v prihodnosti

Kot je bilo mogoče videti do sedaj, dvojna pristojnost v isti zadevi ni primeren niti učinkovit način regulacije in zato pomeni veliko tveganje pri zagotavljanju spoštovanja načel, ki smo jih opredelili v uvodu tega članka.

V skladu s tem pravna in regulatorna teorija predlagata dvojni pristop k reševanju problematike:

- v primeru sektorske intervencije pravila konkurenčnega prava naj ne bi bila več (sploh) uporabljena;
- v primeru nejasne ali neučinkovite intervencije sektorske regulacije bi lahko Evropska komisija ukrepala proti sami državi članici in ne nujno vzpostavljala dodatno (dvojno) breme operaterju.

6.1 Sektorska intervencija – razlog za neuporabo konkurenčnega prava?

Kot je bilo mogoče zaključiti iz zgoraj omenjenih primerov, se lahko zgodi, da odločitev nacionalnega regulatornega organa še ne zagotavlja operaterju, da ne bo v prihodnosti subjekt postopka pristojnih konkurenčno-pravnih organov.

V skladu s tem je torej vprašanje, ali lahko v primeru prava Skupnosti uporabimo pravilo, ki je bilo razvito v zadevi *Trinko* v ZDA, kjer je Vrhovno sodišče reklo, da kadar so bile določenemu operaterju že naložene neke obveznosti v okviru sektorske regulacije, pravila konkurenčnega prava naj ne bi bila uporabljena[13].

Glavna ideja, ki je vodila Vrhovno sodišče pri sprejemu te odločitve, je bila, da bi bila intervencija konkurenčnega prava v primerih, ko je nekemu operaterju že naložena sektorska obveznost, omejenega značaja ter predvsem neučinkovita.

V zvezi s samo možnostjo uporabe tega načela v pravu Skupnosti je potrebno biti zelo previden. čeprav je Evropska komisija v nekaterih primerih (npr. primer *O2/T-Mobile*) že nakazala, da ni pripravljena ukrepati v okviru pristojnosti, ki so ji podeljene v Uredbi 1/2003, v primeru, da so na voljo ukrepi sektorske regulacije, pa je treba tako rešitev analizirati skozi prizmo pravne tradicije in značilnosti kontinentalnega pravnega reda ter *common-law* sistema.

Dejansko se je v Evropski uniji že zgodilo, da nacionalni regulatorni organi bodisi niso dovolj učinkovito preprečevali določenih poslovnih praks, ki so imele negativen učinek na delovanje trga, bodisi niso dovolj učinkovito izvajali svojih nalog. V takem primeru je Evropska komisija po navadi začela s široko analizo določenega sektorja (*sector inquiry*) zato, da bi nacionalne regulatorne organe opozorila na določene probleme. V prvem primeru take široke analize je Evropska komisija izdala odločbi v primeru *Deutsche Telecom* in *France Telecom (Wanadoo)*, medtem ko je v drugem takem primeru izdala Uredbo o roamingu[14] s katero je določila regulatorne ukrepe v zvezi s cenami uporabe storitev mobilne telefonije v drugi državi članici.

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13 Sodba Vrhovnega sodišča ZDA dostopna na:
http://www.fcc.gov/ogc/documents/opinions/2004/02-682-011304.pdf.
14 Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC

Prav tako pa je treba ugotoviti, da so določene zgodovinske razlike v pravnih redih Evropske unije in ZDA, ki narekujejo, da sodbo v primeru *Trinko* beremo z veliko mero previdnosti ter ob upoštevanju omenjenih omejitvenih dejavnikov.

Vsekakor je z vidika trenutnega in prihodnjega (potencialnega) razvoja regulatornega okvira za področje elektronskih komunikacij mogoče najti zelo zanimiv primer, kjer bi se lahko pojavilo vprašanje smiselnosti in upravičenosti uporabe pravil konkurenčnega prava v primeru intervencije sektorske regulacije.

Gre za primer t.i. funkcionalne ločitve, ki je v predlogu sprememb in dopolnitev predstavljen kot eden izmed možnih ukrepov, ki bi jih lahko nacionalni regulatorni organi naložili operaterju (operaterjem – *joint dominance*) s pomembno tržno močjo, kjer je to potrebno zaradi preglednosti in zagotovitve nediskriminacije. Vprašanje, ki se pojavi, je seveda ali bi naložitev takega ukrepa pomenila nemožnost ukrepanja Evropske komisije na podlagi 7. člena Uredbe 1/2003, ki slednji podeljuje možnost naložitve ravnalnega ali strukturnega ukrepa v primeru kršitev pravil konkurenčnega prava. Vsekakor gre za zanimivo vprašanje, kjer ni mogoče dati enega in edinega odgovora. Mogoče kot nekakšen indic se lahko uporabi eden redkih primerov v zgodovini Evropske Komisije, ko je bil v končni odločbi omenjen strukturni ukrep (primeru *Deutsche Post*), pri čemer pa je subjekt odločbe sam predlagal, da bo ustanovil samostojni pravni subjekt, da bi ustrezno obravnaval in rešil probleme, ki jih je identificirala Evropska komisija.

6.2 Ukrepanje zoper državo članico

V primeru izdane odločbe nacionalnih organov se seveda lahko zgodi (kar je v reguliranih sektorjih) pogosta praksa, da se naslovniki teh odločb odločajo za uporabo pravnih sredstev.

V takih primerih lahko pridemo do situacije, ko se v postopku pred nacionalnim sodiščem pojavi vprašanje pravilne razlage neke določbe nacionalne zakonodaje, ki je dejansko uvedba določbe prava Skupnosti. V takem primeru lahko nacionalno sodišče na Sodišče Evropskih skupnosti v okviru postopka po 234. členu PES (postopek predhodnega vprašanja) naslovi vprašanje razlage določene določbe sekundarne zakonodaje Skupnosti v luči nacionalne določbe.

Sodišče Evropskih skupnosti lahko poda razlago določene pravne norme, pri čemer je nacionalno sodišče na to razlago pravno vezano. Pri tem Sodišče

Evropskih skupnosti ne rešuje in ne reši primera pred nacionalnim sodiščem, ampak le poda zavezujočo razlago neke pravne norme. čeprav je s tem več kot nedvoumno zagotovljena pravna pravilnost neke odločbe, pa je slednji postopek dolgotrajen in predvsem precej neprimeren za sektor kot so elektronske komunikacije, kjer se zadeve odvijajo veliko hitreje, kot pa sodišča dejansko rešujejo zadeve.

Obenem ima Evropska Komisija kot varuh PES možnost, da zoper državo članico, ki ne zagotavlja spoštovanja pravnega reda Skupnosti, sproži več postopkov. Za potrebe tega dela sta pomembna in zanimiva predvsem dva.

Prvi je postopek po 226. členu PES, ki ga Evropska Komisija sproži zoper državo članico, ki ne bi zagotavljala spoštovanja pravnega reda Skupnosti bodisi z uporabo določenih pravil Skupnosti bodisi zi neuporabo teh pravil. V primeru, da bi Sodišče Evropskih skupnosti ugotovilo, da država članica dejansko krši pravni red Skupnosti, bi ji naložilo, da mora slednje v nekem časovnem okvirju odpraviti (v nadaljevanju tudi kot možnost denarne kazni). Zadevni postopek je prav tako precej dolgotrajen, pri čemer se velikokrat dejansko zgodi, da države članice odpravijo zatrjevano nepravilnost najkasneje v trenutku, ko Evropska komisija vloži tožbo pred Sodiščem Evropskih skupnosti zaradi nespoštovanja prava Skupnosti.

Drugi postopek po 86. členu PES sproži Evropska komisija zoper podjetje, ki krši pravila Skupnosti. Po navadi gre za pravila konkurenčnega prava, in sicer uporabo 86. člena v povezavi z 82. členom PES. Dejstvo je namreč, da države članice v več primerih zagotovijo nacionalnim telekomunikacijskim operaterjem določene ekskluzivne ali posebne pravice, ki te postavljajo v ugodnejši položaj nasproti njihovim konkurentom na trgu (npr. primera *GSM Italy* ali *GSM Spain*) s čimer lahko pride ali je dejansko prišlo do zlorabe prevladujočega položaja.

7. Zaključek

Z razvojem pravil regulacije trga elektronskih komunikacij z namenom njegove liberalizacije ni več mogoče govoriti o jasni razmejitvi med konkurenčnim pravom in pravili sektorske regulacije. Zaradi naraščajoče konvergence med pravili konkurenčnega prava in pravili sektorske regulacije se v okviru izvajanja pristojnosti nacionalnih regularonih organov srečujemo s prekrivanjem pristojnosti obeh. Ne glede na očitno podobnost materialnih vsebin oziroma pravil sektorske regulacije in konkurenčnega prava pa lahko pride do konflikta v

odločitvah obeh organov. Eden najbolj priporočljivih načinov izogibanja regulatornih konfliktov je primerno sodelovanje pristojnih državnih organov. Ob upoštevanju splošnega pravila, da nacionalni regulatorni organi niso nujno aktivni uporabniki pravil konkurenčnega prava, je poznavanje slednjih bistvenega pomena za učinkovito ter pravilno uporabo sektorske regulacije.

Tanja Muha je diplomirala na Ekonomski fakulteti v Ljubljani ter leta 2006 zaključila specialistični študij na Fakulteti za upravo v Ljubljani. Zaposlena je na Agenciji za pošto in elektronske komunikacije RS kot specialistka za regulacijo telekomunikacijskega trga.

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Tanja Muha

Razmerje med sektorsko regulacijo in konkurenčnim pravom pri regulaciji elektronskih komunikacij

SUMMARY

THE RELATIONSHIP BETWEEN EX ANTE AND EX POST REGULATION – CASE OF ELECTRONIC COMMUNICATIONS REGULATORY FRAMEWORK

The purpose of the article is to identify sector-specific rules in electronic communication, their relationship to general competition law and to identify some potential areas of conflicts, proposing some valid and possible solutions.

The European Commission has identified that the sector of electronic communications does not deliver its benefits due to lack of competition on the relevant market. In order to avoid negative consequences and to stimulate the sector appropriate steps have been taken. The first step was the so called liberalization package, which enabled the full opening of the telecommunications market. However it has been established that this is not sufficient and that new solutions have to be laid down.

According to the principle of subsidiarity the European Commission proposed a new regulatory framework, which was adopted in 2002. Its main elements were based on the principles of competition law.

However the fact that national regulatory authorities started to use sector-specific legislation, which was largely based on competition law principles, led to the question how, if any, conflicts between these two sets of rules should be solved. It is obvious from the regulatory practice today that these conflicts indeed arise and can be put under the two larger groups: material (substance) and procedural conflicts.

It is clear that the purpose of the sector-specific (ex ante) regulation is to establish a level playing field for all market players and to remove all actual or potential barriers to entry. In order to achieve that, relevant competencies have been given to national regulatory authorities, which go beyond the competencies of the national competition authorities. Nevertheless there are still some overlaps, as for example in case of essential facility doctrine and use of Article 82 of the EC Treaty and provisions on access to the network of the significant market player (Access Directive) or in case of behavioural/structural remedy in case of breach of Article 82 of the EC Treaty and the possibility to impose separate cost accounting obligation on significant market player (framework Directive).

It is obvious in the electronic communications sector that national regulatory authorities have to be aware of the substance of the competition law rules. Principles as significant market power, the relevant market and barriers to entry are principles have been identified long ago by the competition law. It is therefore vital that national regulatory authorities apply these rules in cases of market analysis that they have to undertake. Such principle has been also clearly laid down also in the jurisprudence of the ECJ (cases *GB-Inno-BM* and *Italian Matches*).

It is also vital that competent national authorities cooperate under the umbrella of administrative law and apply the principle of *lex specialis*. The latter implies that in case that sector regulator and national competition authority are dealing with the complaint the first should take it over, due to its sector knowledge and awareness and due to the fact that competition authorities usually do not have at their disposal the right instruments to supervise (monitor) application of the imposed remedies.

However it should be emphasized that even though it has been mentioned that this principle can/should be applied the situation is not as clear as one might want it to be. The fact remains that some principles (e.g. extraordinary circumstances) are not clearly defined; it is also not clear what happens if national regulatory authority does not take into account the competition law.

The easiest way to solve the problem is a close cooperation of the two authorities and maybe even a clear memorandum of understanding and cooperation (e.g. UK).

One of the questions that has been looked at in this article is the question of the objective justification of competition law intervention after the sector-specific actions already took place. There is no decisive answer to this question, but it should be emphasized that even though US Supreme Court indicated in *Trinko* that the application of sector-specific regulation prevents competition law actions, this principle should not be applied in European Union without looking at the facts of the case. Rather to the contrary, many signs show that in the Community law this principle would not apply (e. g. cases *Deutsche Telecom* and *Wanadoo*).

Social Dialogue in Public Sector Reflection about Hungarian and Slovenian approach

~~UDK: 35(497.4): 005.6~~

Zvone Vodovnik
Univerza v Ljubljani, Fakulteta za upravo
zvone.vodovnik@fu.uni-lj.si

Aniko Noemi Turi
~~Univerza v Ljubljani, Fakulteta za upravo~~
~~zvone.vodovnik@fu.uni-lj.si~~

ABSTRACT

The process of last years' expended enlargement of the European Union leads EU governmental bodies towards enacting new European documents. These documents must be considered as legal bases for making the EU the most dynamic and competitive economy in the world being capable of sustainable economic growth with more and better jobs and greater social cohesion. In the area of the EU legislation the social dialogue must be regarded as an important issue. For time being the EU documents regulate some elements of social dialogue in private sector however the social dialogue in public sector is still outside of the EU regulation.

The paper elaborates a comparative view between two Member States such as Hungary and Slovenia by exploring and analyzing EU industrial relations, and the relationship between the industrial relations of these Member States. It is evident that the EU enlargement has further increased this diversity, and the EU industrial relations in many parts distinguish from national industrial relations. This article analyses the process of the legislative activities at the EU legislative bodies, as well as in the national legislations of Hungary and Slovenia. It emphasizes also the concept of EU industrial relations and shows, which are the frames of the social dialogue in public sector of Hungary and Slovenia.

Key words: social dialogue; Public sector, European union, Hungury, Slovenia, labour law, International Regulation, International Labour Organization

1. Introduction

As a starting point of any reflection of the harmonization of industrial relations in the EU and possible improvements of single elements of regulations, it is necessary to have an insight into the differences of the labour relations systems of the different Member States.

Despite some convergent trends and a general process towards decentralization by the enlargements, the national industrial relations are characterized by diversity in the Member States. The significant differences can be found in trade union density, and the coverage, as well as the structures of collective bargaining. This refers to the interactions between the social partners, cross-industry and sectoral levels that shape in different levels of collective agreements, bargaining and mechanism of conflict resolutions. The EU labour law as a legal dimension is a part of the harmonization of the different Member States' labour law.

The EU industrial relation, as a dimension of the industrial relations that is situated above the national industrial relations, is responsible to constitute new and common European industrial relations. Its principal aim is to get separated from the national industrial relations, and to reach a higher level.

The social dialogue, as a product of the process of the Europeanization of labour relation, is highlighting instances where the social dialogue has had an impact on working conditions. The impact of social dialogue on working conditions is considered at all levels, namely, sectoral, company and workplace levels. In the process of the convergence of employment relations regulation of private sector and public sector the social dialogue is gaining an important role also in the public sector.

After having presented the wider historical background of employment relations in EU and the two countries the article elaborate the thesis that there exist different approaches to the social dialogue and especially the social dialogue in public sector in the Member States. Diversity of the regulations may be the advantage in search of ways for improvements of regulation of this area.

2. International Regulation of Social Dialogue in Public Sector

2.1 International Labour Organization and social dialogue in public sector

The guideline for the legislature in the area of social dialog could be somewhat important, however abstract the ILO documents. The area of social dialogue in the public sector in modern states including Slovenia - could be successfully regulated if ILO Convention 150, 1978 (Labour Administration) and ILO Convention 151, 1978 (Labour Relations in Public Service) were taken into account. The first Convention provides to states the impetus to transfer a certain degree of state authority in the area of labour to civil society institutions, whereas the second

Convention requires that states develop and regulate "soft" methods of conflict prevention and conflict resolution in the public sector in their respective legislations. As reported in literature such an approach has been widely used, e.g. in Great Britain. Some British institutions (e.g. the HSC and Acas) were formed when functions previously performed by government departments were spun off to independent bodies. The relevant department, however, retains mechanisms of influence through funding, appointments, target setting, audit and review (Dickens, Neal, 2006; Bevan 1992).

The constitutional requirements and problems of their implementation must be observed also from the perspective of international law. It is important to note that the essential subjects of the employment law in both sectors, such as wage systems, collective bargaining, and the regulation of strikes, are not subjects of regulation in the European Union. On the other hand, the ILO directly or indirectly addresses these questions in its regulations. It is possible to conclude that ILO regulations deal with these questions less than it could be expected considering the importance of these matters in the modern world. There is a contradiction between the regulatory approach of the ILO and the EU. Differences in culture as well as in economic and social development are legitimate grounds for international organizations to abstain from the regulation of a specific subject. Regarding the social dialogue, this area of communication and social relations could be easier regulated within the EU than within the ILO, because the EU is much more homogeneous than the whole world. From the point of view of industrial democracy and the doctrine of industrial relations, the lack of provisions in EU regulations with regard to social dialogue,

with the exception of workers' direct participation, is not acceptable. At least the European Council legal acts do contain some regulation concerning the social dialogue (the European Social Charter). The interpretations of its provisions by the competent bodies of the organization are also important.[1]

2.2 European social dialogue

EU industrial relations and its dimension gave a new common European dimension of the EU law. EU industrial relations are multifaceted and relate to the interactions between the European social partners at cross- industry sectoral levels. The two cornerstones of employment and social policies are the European Employment Strategy on job creation and labour market reform strategies, and a Social Agenda designed to ensure that the benefits of the EU' s growth reaches everyone in society and every region of the EU. The principle of subsidiarity (cf. article 5 EC) is fundamental to the evaluation and content of EU labour law.

Other aspects of national rights are principally excluded from EU's competence (cf. article 137.5 EC) such as the right of association, the right of strike, pay, and the right to impose lock-outs.

The European Union provides major impetus for the convergence of Community and national policies through the method of open co-ordination. In this way EU labour law is aiming at partial harmonization of the different labour law models in the Member States, result of which is a European social model. This EU model that is recognized by the EU institutions is edified by democracy, individual rights, collective bargaining, the market economy, equality of opportunity and flexicurity. The power and interaction between the social partners within the framework of social dialogue, the European Employment Strategy, the open method of coordination, worker participation, and information and consultation form part of these EU industrial relations.

From the European legislative point of view, the legal regulation of the European Community contains two principles. The above mentioned sudsidiarity means that "in areas which do not fall within its exclusive competence, the

1 They are providing criteria for the interpretation of the legal position of social partners in this area. Expert bodies of the ILO also play an important role in the process of the implementation of even basic labour standards concerned in countries with the no tradition of industrial democracy like African countries (Fashoyin, 2006).

Community shall take action", and the principal of proportionality means that the Community "shall not go beyond what is necessary to achieve the objectives" of the Treaty.[2]

In 1985 the European level-social dialogue was initiated and supported by the Commission. This means an integration of social partners into the legislative machinery, because the trade unions as well as Employers' Associations of the member states do have inter-professional roof organizations on European level.

Today social dialogue takes place on both, at cross-industry and sectoral level. On workers' side ETUC (European Trade Union Congress) is representing employees, and employers are represented by UNICE (Union des Confédération de l'Industrie et des Employeurs d'Europe) and CEEP (Centre of Enterprises with Public Participation and of Enterprise of General Economic Interest).

Article 138 and 139 of the EC Treaty is based on the promotion of the consultation of management and labour at Community level. Article 139 of the EC Treaty results the contractual relations and the European collective agreements, namely the agreements on part-time work, telework, parental leave, fixed-term work, work-related stress, and harassment and violence at work.

According to the Article 139.2 of the EC Treaty the European collective agreement can be implemented in accordance with procedures and practices specific to management and labour and the member state, or these can be implemented both, through a decision by the Council and a directive.

European collective agreements can also cover collective agreements and other contractual relations between social partners in transnational European companies.[3] Amsterdam Treaty adopted the Employment Title and the European Employment Strategy (EES) which goal is to promote a skilled, trained

2 Distinction between the two principles can be seen also between primary and secondary law. Primary law is contained in the Treaty and the secondary law is enacted on the basis of the Treaty main instruments being Regulations and Directives. Regulation without any kind of transformation shall be binding in its entirety and directly applicable in the member states. Directive is considered as a more flexible instrument than Regulation, and at the same time more important instrument in the diversity of the member states' legislative frameworks.

3 Weiss 2006, p. 10

and adaptable workforce, as well as labour markets responsive to economic change.[4]

Open method coordination (OMC) is also the EES's achievement, which added value is described as convergence, country surveillance, subsidiarity, management by objectives and integrated approach. According to Article 137.2 of the EC Treaty open method coordination gained importance as a primary method that means in addition to hard law that the focus to an increasing extent has to be on soft law. The basic strategy is the OMC institutionalizing a mutual learning process by search for best practices.

Directives concerning worker participation, information, and consultation, show, that EU labour law clearly emphasize the harmonization of rules regarding information and consultation. Directive 98/596EC concerns collective dismissals, 94/45/EC is about the European works councils. We can find provisions regarding transfers of undertakings in the directive 2001/23/EC and to European Company Statute in the 2001/21/EC and 2001/86/EC.

The process of European integration has already indicated that a more diverse Community is unable to go forward by the traditional institutional structure. It is evident that a common constitutional framework is needed for the EU.[5]

The Treaty of Lisbon, known as Reform Treaty as well, would alter the functioning of the EU through a series of amendments to the Treaty on European Union, Treaty establishing the European Community and the Treaty on the Functioning of the European Union. The two consolidated treaties would form the legal basis of the Union, and combined constitute most of the content of the rejected European Constitution. The Lisbon Treaty is scheduled to be ratified by the end of 2008, as of May 23, 2008 fourteen countries have finished ratification.

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4 EES built on Employment Guidelines, National Action Plans, Joint Employment Report and Recommendations.
The Employment Guideline that was adopted before Amsterdam Treaty came into four pillars: employability, adaptability, entrepreneurship, and equal opportunities.

5 The Constitutional Treaty, establishing a Constitution of Europe (TCE), commonly referred to as the European Constitution was an unimplemented international treaty intended to create a constitution for the European Union. TCE was signed in Rome by the representatives of the member states on 29 October 2004, when French and Dutch voters rejected the treaty in referenda. Following the period of reflection, the European Council in June 2007 decided to start negotiations on a Reform Treaty as a replacement.

3. Employment relations in private and public sector

From the point of view of the individual employment relationship, there are no systematic or comprehensive approaches, because most of the legislative acts of the EU member states only set minimum conditions in favors of the employees. By the process of Europeanization of labour relations, in the private sector, the most important achievements have been reached in the area of the collective employment relations. Namely it is the area of the involvement of employees in management's decision making. In this field, the EC developed two strategies: 1) to establish a minimum framework for information and consultation in the Member States and 2) to establish systems of employee involvement in trans-nationally operating undertakings and groups of undertakings.

There are some Directives, which set up the minimum standards of the member states, such as, safeguarding of employees' rights, or establishing information and consultations procedures that have to meet several requirements. Information and consultation has to take place on decisions likely to lead to substantial changes in work organisation or in contractual relations in private as well as in public sector.

Hungary has passed the deep political and economic transformation since the collapse of its former state socialist regimes in the late 1980's, which can be seen in the light of progress towards democracy and accession to the EU in May 2004. By means of the legal harmonization of the EU, the collective bargaining at the sectoral level, as the major development in the beginning of 2006, was a ministerial decree in the extension of the newly concluded agreement in the construction sector. The coverage rate of single-employer agreements remained 30%, while the proportion of employees covered directly by sectoral agreements grew from 9% to 15%.[6]

During the legislative development, another recurring issue was the creation of legal foundation for national and sectoral social dialogue and in this respect the regulation of representativeness of the social partner organisations. The social partners in the inter-professional social dialogue are not only

6 In regard to legislative developments, the most outstanding changes of the Hungarian labour law occurred in the field of the regulation of public sector employment, which assisted the government in its attempt to streamline public administration and to reduce the budget deficit.

integrated into the machinery of the legislation, but they are also entitled to conclude voluntary agreements. The voluntary framework agreements are an offer for the actors on national scale to give them some guidance and to enrich their apprehension. Sectoral social dialogue, in addition to the inter-professional social dialogue, was not very successful in producing framework agreements. The sectoral dialogue's main goal may be to coordinate in a better way the collective bargaining in the Member States. Also it may to improve the vertical dialogue between European actors and national actors for a multi-level structure in all the sectors.

For an example in Hungary, after a long but fruitful discussion with the social partners, the government submitted to the Parliament the bills of the tripartite national forum, the National Interest Reconciliation Council, established in 1988, (Országos Érdekegyeztető Tanács, OÉT), the Sectoral Social Dialogue Committees (Ágazati Párbeszéd Bizottságok), and other aspects of social dialogue. In the organization of social partners there were no meaningful changes. Therewith there is no considerable change since 1992, in balance between legislation and either collective bargaining.

In regard to legislative developments, the most outstanding changes of the Hungarian labour law occurred in the field of the regulation of public sector employment as a matter of fact. This work will focus on the new changes in the industrial relations related to the Hungarian Labour Code's amendments according to the EU legal harmonization, and developments of the social dialogue in the country.

Workers' freedom of association rights in Hungary have been considerably strengthened since free elections were held in 1990, but Hungary also has consistently faced criticisms that it has failed to adequately implement existing labour laws, according to trade unions and organizations that monitor freedom of association rights. From a legal perspective, Hungary has the basic framework for workers' freedom of association protections in place.

The Constitution (Act XX. of 1949) protects workers' rights in both the private and public sectors to form and join unions by the article 63 and also the right to strike by the article 70/C (1), (2). Collective bargaining rights are secured by statute. In 1957, Hungary ratified both ILO Convention 87, concerning freedom of association, and Convention 98 on the Right to Organize and Collective Bargaining. Moreover, in the years leading up to 2004, when it joined the European Union, Hungary took a number of measures to improve workers' rights including increasing some penalties and enacting a groundbreaking equal

rights law that offers some prospect of improving protections for union members. Hungary's Constitution guarantees also the right to establish or join trade unions "to protect and represent the interests of employees." The Labour Code, article 15(1) and Act II of 1989 on the Right of Association, article 1 ensure workers' rights to form and join unions.

From the point of view of Slovenia, it is a country which has also undergone fundamental social and political transition in the last two decades. After introducing political democracy, the privatization of the means of production, and a market economy the reorganization processes also affected the state structures and employment relations. All these changes have a political and social basis in the new Constitution adopted in 1991. The Constitution introduced new principles to the Slovene legal system and stressed the common European values. The majority of these already existed before the transition, whereas some were introduced as a consequence of political changes.[7] Along with the profound social changes, it was necessary to adapt the state organization to modern standards. This ambition of the Slovene people went along with the intentions of Slovenia to enter European political and economic integrations.[8]

In the process of preparations to make this step, Slovenia accepted the acquis communautaire, which means that it obliged itself to make necessary legal and other changes to harmonize with European Union Member States. In this process, the legal regulation of employment relations was improved. The principle of the legal regulation of minimal standards of working conditions by statute was introduced into the legal system; however other areas regarding the regulation of working conditions were left to contractual regulations. This was the beginning of a rapid development of collective employment relations through the activities of emerging social partners and their social dialogue (Vodovnik, 2006).

The principle of the "soft law" regulation of working conditions was not introduced only in the private sector but also in the public sector.[9] It was a consequence of the traditional Slovene legislative orientation towards

7 Slovenia has made the fastest social and economic progress among the countries in transition. Today, Slovenia's economic growth is nearly the European average and the country suffers from a shortage of manpower

8 Slovenia joined the European Council in 1993 and was among the first countries of Central and Eastern Europe to join the European Union in 2004.

9 »Soft law« is the expression which means that the single area of social and economic relations my be regulated by the autonomous legal resources like collective agreements.

strengthening the principle of the uniformity of employment relations in the private and the public sectors. At the same time, the fact that these two areas of employment relations cannot be regulated entirely in the same manner was taken into account. The legislature paid attention to the need to protect the public interest and to ensure the functioning of the state and local governmental bodies on one hand, and the execution of public services on the other. On these bases, the legislature has made reservations for the authoritative regulation of certain elements of the legal position of employees (Ker'evan, 2005, Tičar 2005) Very few of these exceptions were made in the area of public services, many more, however, were made in the area of the employment relations of civil servants in state and local governmental bodies. The latter was left to the contractual regulation of individual and collective employment relations. The social dialogue was therefore introduced in both areas of the Slovene public sector. Similar happened in other European countries in transition. (Rychli , Pritzer, 2002).

4. Social Dialogue in Public Sector

4.1 General remarks

In Hungary the composition and operation of European works councils introduced in 1992, but mainly pointing out importance of EWCs at multi-national companies.

Actually, EWCs are new phenomenon in Hungary, as it became mandatory only when Hungary joined the EU to invite representatives of Hungarian employees to the bodies working at the European company headquarters or to set up EWCs at the few multi-national companies headquartered in Hungary.

Hungary's most important long-term objective after joining the EU is the increase of economic growth and employment. In order to achieve this, however, a stable macro-economic environment has to be created and long term, sustainable financial balance ensured. Three-fold strategy is in the focus of the strategy of the government: restore macro-economic balance, implement the reform process covering the entire operation of the state and work out and implement a comprehensive development policy.

The industrial relation of the public sector in Hungary can, on the whole, be considered well-organized. Institutions of consultation and negotiation are

well developed. An important feature is the large number of agreements substituting upper-level collective agreements. It is also important for the development of industrial relations that the representativeness of trade unions is measured by membership. In Hungary, the Interest Reconciliation Council of Budgetary Institutions (IRCBI) was the most important forum of the national level interest reconciliation of public servants. Questions specifically concerning public servants or rather the whole public sector were handled by IRCBI, while more general questions were arranged by Interest Reconciliation Council (IRC). Besides employee and governmental representatives the forum included the associations of local governments and representatives of the institutions as employers; however, this latter side did not have the right to vote. During its seven years of operation IRCBI concentrated on the questions concerning public servants, and rarely dealt with issues related to the labour relations of civil servants and employees of "professional" status.

One third of the items on the agenda of plenary sessions dealt with salaries and the system of classification

in which fields IRCBI concluded 12 agreements. As a result of the breaking-up of public sector employment status, the Forum for the Conciliation of Interest of Public Servants (FCIPS*)* was established in July 1993. FCIPS was a four-sided organisation as well, its stable governmental, trade union and local government groups were fully authorised to conduct negotiation. The fourth group composed of the Hungarian Chamber of Public Administration (later the Body of Public Administration) and the National Union of Chief Municipal Officers had only consultative rights. FCIPS was empowered with the right of consultation, opinion and recommendation, while its decision making power was limited to internal procedural matters. Besides these two national forums (IRC, FCIPS) every ministry operated forum or lower level departmental forum where employer and employee representatives and in some cases NGO organisations worked. Two basic types of forum were formed at the ministry level: the bipartite interest reconciliation council in which trade unions had discussions and consultations with the leaders of the ministry. These forums endeavoured to make agreements mainly in connection with salaries and working conditions (for instance the Council for Reconciliation of Interest of Home Affairs (CRIHA) and the Council for Reconciliation of Interest of the Hungarian Army. The multilateral interest reconciliation forum including NGOs which discussed, in addition to questions concerning working conditions,

professional questions as well (for instance the Council for the Reconciliation of Interests in Public Education or the Social Council).

The government reorganised the system of interest reconciliation and created new forum starting in 1999.

In the system of social dialogue – operated between 1999 –2002 – the role of consultation was emphasized because the government took decision making completely under its own authority, while social partners demanded tools to enforce their own interests. The objective of the new government in 2002 was the establishment of a system of uniform public sector employment status and the creation of a consultation forum dealing with questions covering the entire public sector and competent to consult with the government regarding questions of standardised employment relations. In accordance with these objectives the National Council for the Reconciliation of Interests in Public Services (NCRIPS) was established which is nowadays the highest forum for interest reconciliation in the whole public sector.

The development of regions brings great changes and novelties to the organization of the public sector and to the legal regulation of this field in Slovenia (Vlaj, 2007).

These developments concern all fields of law, including the field of labour relations. In view of the fact that the new conception of regions as organizational forms in the public sector is placed between a central state organizational structure on one hand, and the more localized area of the public sector, on the other, the question is raised who will carry out the tasks, and in what manner, due to which regions are being established and what their legal position will be in this new legal organizational form. Regions will be territorial units in which various organizations in the public and private sectors will carry out special tasks determined by law (Trpin, 2004, Bohinc, 2005).

The interests of employers and employees in the field of labour relations in organizations and at other levels of the social dialogue are not the same. Their interests can be the opposite in the short-term and regarding individual matters, however, they are directed towards the same direction in the long-term and in their foundation. A fundamental interest of both is the success of an organization from which all benefit. Due to oppositions and incompatibilities of interests, mechanisms that can effectively prevent and resolve disputes must be regulated and maintained in the system of labour relations. These mechanisms must be regulated so that they can effectively serve their purpose at all levels at which communication between the social partners occurs,

either as co-deciding or as concluding collective agreements regarding work or other collective agreements. Mechanisms for the prevention and resolution of disputes are contained in regulations which regulate or support individual types of social dialogue; however, it must be taken into consideration that in Slovenia this subject has not yet been regulated on the whole.

In EU, there is an increasing need for a better coordination of collective bargaining policy. This policy would be an important tool for the integration of EU. Despite the endeavor in this field, the results are very modest. It means that the social actors should act more efficient, and the interactions between actors and the European sectoral social dialogues should be more efficient as well.

Prevention and resolution of disputes is an important issue in the area of collective employment relations in public sector. Before a more detailed presentation of the mechanisms which serve this goal and before consideration of the question whether it is possible to formulate these mechanisms effectively and logically also at regional levels, attention must be drawn to a distinction between legal and interest disputes which may arise between social partners (*Novak, 2004*). This distinction is important because a method which can be applied or which is most appropriate for resolving a dispute depends on the nature of the dispute.[10] Legal disputes are disputes which arise between the participants to collective bargaining and the content of such disputes is a disagreement whether there exists a certain right or obligation on the part of any of the parties or participants to the collective agreements, whereas interest disputes are disputes which arise if one side does not accept the proposal of another side regarding the regulation of a certain question by the collective agreement, and both sides wish that such be regulated, upon their proposal, with the help of the intervention of a third party. In the field of collective bargaining in the private sector, the methods of mediation, conciliation, and arbi-

10 This distinction is not appropriately executed in the Collective Agreements Act of 2006, in which methods for different consideration of disputes are not appropriately distinguished. Most of all it must be noted that the "bargaining" which is mentioned in the Act as a method for resolving legal disputes is not a possible method for resolving such disputes. This can also importantly influence problems which refer to resolving collective labour disputes in the public sector. In accordance with the Collective Agreements Act, a system of collective bargaining in the public sector is namely separated from the system of collective agreements and collective bargaining in the private sector. In addition, such system is not regulated on the whole. Certain key elements of the system of the legal regulation of collective bargaining in the public sector are not regulated. Consequently, there can be found gaps in the law which must be filled by applying the principles of legal analogy and thereby inappropriate solutions from a general regulation are transferred to the sphere of social dialogue in the public sector.

tration can be applied for the resolution of both types of disputes. The same methods could in principle be applied in the public sector if collective bargaining were entirely voluntary. However, due to the fact that collective bargaining is envisaged as an obligation in the system of the regulation of employee relations and its outcome as a key and necessary element of the legal regulation of employee relations, the situation in this field is different. In cases in which no agreement is reached, the state regulates such questions authoritatively, which cannot have a positive influence on the relations between the state and trade unions. In comparative law there are solutions stipulating that in such cases "forced arbitration" is applied for the regulation of an urgent question (*Brien, 2006, Bordogna, 2006*). In some systems this method is also applied for the resolution of disputes which arise in cases of a strike in the public sector if an inadmissible level of threat to the public interest could arise because of a strike. Also forced arbitration has its negative sides and it has been used less and less often in modern states. A system that guarantees that all matters which are in the public interest be regulated by state regulations creates the possibility that also collective bargaining in the public sector becomes entirely free (*Vodovnik, 2006*), whereas the question of the resolution of disputes in cases of a strike in the public sector remains open and is regulated in various manners in different legislations (Nunin, Vodovnik 2007).

A special type of collective bargaining at the national level is also the negotiation of social partners within the framework of so called "tripartite social dialogue". Such bargaining can be carried out directly between trade unions, employers, and the state, or within the framework of special tripartite bodies of social partnership. In Slovenia this body is the Economic and Social Council of the Republic of Slovenia. The principal outcome of bargaining is usually a social agreement by which the social partners agree on the main guidelines for the development of the state in the economic and social fields. In addition, the agreement serves as a basis for all policies which are carried out by social partners. From this viewpoint, the social agreement is an important document which substantially contributes to the prevention of misunderstandings and conflicts between social partners. In some states such a body functions also at levels lower than the national level (*Kessler, Dickens, 2006*). Such systems could in principle serve as a model for a similar regulation and implementation of social dialogue also in regions. For appropriate development in this field, the functioning of such a body should be regulated by the statute. In addition, appropriate organizational units should also be regulated which could effectively

be used by the social partners in order to successfully resolve disputes at national and regional levels.

The Hungarian public sector consists of a central and a local sector. The decentralised-offices also exist between these two sectors with the competence of performing some central government functions on the countries basis. The central government sector is accepted as a contrast of the local one, but the central government sector means different offices and law enforcement agencies of public administration.

After the collapse of the socialist regime, the labour legislation brought a new Labour Code (Act XXII of 1992) that regulates employment conditions and terms in case of private sector, government-owned enterprises, and non-profit organizations. The public sectors' achievements are four regulations: 1) on the legal status of public service employees (Act XXXIII. of 1992, LSPSE.), 2) on the legal status of civil servants (Act XXIII. of 1992, LSCS.), 3) on professional staff's service at the armed forces (Act LXIII of 1996, PSSAF.), 4) on the professional and contractual staff's service in the army (Act XCV of 2001, PCSSA.). LSPSE regulates the employment relationship education, health care and social work and LSCS assumed to provide regulation for civil servants at the central and local government. By the amendment of the LSCS in 2001, those manual workers in government offices who do not hold public powers, the Labour Code (LC.) regulates the terms of their employment.

In Slovenia, viewing the employment relations in the public sector through the constitutional principles, the similarities of the employment relations in both sectors can be noted. In Slovenia, the legislature has been relatively successful when implementing constitutional principles in the regulations of the employment relations in the public sector. The principle of a democratic state (Article 1 of the Constitution) has been the starting point in making the social dialogue an important factor in regulating the employment relations in the public sector as well as in the private sector. The same holds true for the principle of a state governed by the rule of law (Article 2 of the Constitution),which was the basis for the extensive regulation of the employment relations in the public sector by statute and at the same time provided grounds for autonomous regulation. The principle of equality (Article 14 of the Constitution) led the legislature to make efforts to create the legal position of persons employed in the public sector as comparable as possible with persons employed in the private sector.

In the chapter of the Constitution dealing with economic and social relations, three specific rights which are the principal constitutional basis for the legal development of collective employment relations can be found.[11] The comprehension of the meaning and dimensions of these rights as well as their connection with international law are considered the essential preconditions for the correct drafting of the legal basis of the social dialogue in the public sector. The examination of the meaning of these rights for the employment relations in the public sector can therefore be a criterion for the evaluation of the existing legal regulation. On a constitutional basis, the Slovene public sector has been continuously changing from 1992 on. One important paradigm has been the aim to transfer some parts of the public sector to the private economic area. Methods of management in the private sector were introduced to the public sector where possible. The most radical changes which are important for the development of the new nature of employment relations were introduced by the Civil Servants Act of 2002 (CSA) and the Public Sector Wage System Act of 2002 (PSWSA). These acts were designed on the basis of the legislature's intention to put the employment relations in the public sector on a contractual basis to the greatest extent possible, including the introduction of a specific collective bargaining approach in the public sector. On the way to achieving this goal, the legislature adopted some regulations which can be identified as controversial. The legislature caused a too significant institutional effect on the collective contracts - some kind of legislative "overdose" in its efforts to ensure the principles of social dialogue in the public sector. The transfer of state authority was exaggerated to the extent that it endangered the public interest by paralyzing the process of introducing the new wage system in the public sector.[12] With changes in the PSWSA, the state arranged a

11 The first right is the employees' right to participation in decision making (Article 75 of the Constitution). This right is rarely recognized to the employees in the public sectors of other states. In Slovene legislation, some modest forms of this right (e.g. information, consultation) are ensured to the employees in the public sector - less in state and local governmental bodies, and more in public services. The right to the freedom of trade unions (Article 76 of the Constitution) is also ensured for employees in the public sector. This right seems to be largely ensured for employees; however there are some indications that this right is formed in such a manner that certain responsibilities of the state are probably unwillingly transferred to trade unions. Right to strike is guaranteed also by the Constitution (Article 77 of the Constitution). This provision guaranteed the right to strike to all employees irrespective of the sector in which they are employed.

12 This fact soon caused conflicts among the social partners in the public sector. On the other hand, the state did not succeed in ensuring regulatory, organizational, and financial grounds for conflict prevention and conflict resolution in the public sector. This situation caused the problem of bringing the PSWSA into force. There have been serious delays in achieving results in the processes of collective bargaining.

new formula which should help to overcome the frozen position in the processes of collective bargaining on the wage system. The changes did not introduce any efficient tools from comparative law. By the statute the absent or deficient agreements should be replaced by statutory provisions or by government decisions. Such a solution is hardly sustainable from the political point of view. It would reveal that the state had to resort to its authority after being unable to play the role of a social partner democratically.[13]

The PSWSA deals with different kind of collective contracts and also contains certain specific provisions on these collective contracts as autonomous legal sources. There is no statutorily established hierarchy among them. If different views regarding the value or use of these contracts appear, the problem can be resolved by the application of the general principles of the validity of legal sources (e.g. general - special, prior - posterior, in favour laboratoris). Regarding the procedure for stipulating collective contract in the public sector, the Slovene legal framework does not determine a separate authority with its own competence to take part in the procedure on the employers' side, and the competence to accept the proposals of the unions, as is the case in Italy for example. On the employers' side, the representatives of employers, with the strictly determined authorization of the ministers or governmental bodies, take part in the process of collective bargaining.

The members of the negotiating parties on the employers' side and their representatives must also take into account the financial limits arising from the budget.

4.2 Collective Bargaining

The idea of developing a uniform European Collective Bargaining system was out in the early stages of the EEC, but later, it turned out to be a naïf conception. Collective bargaining has remained to be proposition of member states. There are some areas, such as collective bargaining, where EC does not have legislative power.[14]

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13 Such cases are reported from different countries, i.g. Australia or South Korea. In last decade the government of the last state has been even under the pressure form the International Monetary Fond to introduce the essential methods of consultations and trade union freedom in some areas of the public sector- which was the condition for its support (O'Brien 2006, Park-Lee, 2006)

14 Weiss, 2006, p.15

In spite of the various regulation dimensions of employment relationships in Hungary, since 1992 there is no considerable change in balance between legislation and collective bargaining in the liaison of industrial relations and public service employees. Rules of collective agreement are regulated by the Labour Code of 1992 and the Act on public servants.

In accordance with the whole set of the (ten previously mentioned) acts only employees covered by LSPSE and LC can conclude workplace collective agreements. Higher level collective agreements concluded at sectoral and macro-level have been discussed above. The amendments of the Mt. regarding collective agreements targeted the extension negotiations and agreements. The system changed again as a result of the LSPSE amendment of December 2004. There are two basic features of the transformation: 1. Until the end of 2008 a dual system will exist as concerns representativeness; on the one hand, representativeness based on the results of Public Servants' Councils' elections, on the other hand, it should be measured in terms of union membership; 2. The way is open to conclude sectoral collective agreements, consequently, the new article 12/A of LSPSE re-regulated the right of trade unions to conclude collective agreements based on, primarily, representativeness and, secondly, on membership. The basic problems in concluding collective agreements are the division of employers' functions and the structure of finance.

Consequently, it should be clarified during collective bargaining that questions to be laid down in the agreement can only be settled partially within the institution because as a result of the division of the employers' function the workplace director is not a competent negotiating partner. The practice that the director of the budgetary institution can not make a collective agreement individually but with the approval of the local government pushes the problems one level upwards and does not help at all to solve the problems of sectoral collective agreements. LSPSE allows collective agreements with employer's interest representation organisations as well. There is no such employer's interest representation organisation in the public sector at present. However, some so-called multi-employer collective agreements have been concluded in the past few years under the scope of LSPSE with the application of the rules of LC.

According to collective bargaining at sectoral level, that is the sectoral Minister, the representative trade unions and sectoral interest reconciliation forum that is responsible for the agreements. They do estimate about agreements'

drafts, proposals about wages and advancements. For civil servants, and for those who are occupied by service at armed forces, there is no possibility for collective bargaining neither at workplace level, nor at sectoral level.

According to the regulation of public service employees in Hungary, the trade union has right for the collective bargaining on the workplace level. As the wage scale and budget of the public sector institutions are set by the laws, collective bargaining, in the strict legal sense, is limited to workplace level agreements.

Moreover, in government offices even workplace level bargaining is not allowed. In turn, national and sectoral negotiations on the annual wage rises are of paramount importance, which may conclude agreements between the government and trade unions.[15]

The development of regions brings great changes and novelties to the organization of the public sector and to the legal regulation of this field in Slovenia. These developments concern all fields of law, including the field of labour relations. In view of the fact that the new conception of regions as organizational forms in the public sector is placed between a central state organizational structure on one hand, and the more localized area of the public sector, on the other, the question is raised who will carry out the tasks, and in what manner, due to which regions are being established and what their legal position will be in this new legal organizational form.[16]

The interests of employers and employees in the field of labour relations in organizations and at other levels of the social dialogue are not the same. Their interests can be the opposite in the short-term and regarding individual matters, however, they are directed towards the same direction in the long-term and in their foundation. A fundamental interest of both is the success of an organization from which all benefit. Due to oppositions and incompatibilities of interests, mechanisms that can effectively prevent and resolve disputes

15 Those trade unions command with the right of representation, which public service employees' number at the employer come up to the 10% of the number of occupied public service employees' number, or at least 2/3 part of the public service employees belong to the same group or profession of employment. On a sectoral level, those trade unions have representative rights, which sectoral employees' number come up to the 10% of the number of occupied sectoral employees' number. On a national level the National Trade Union Confederation has representative right, but at least three sectoral trade unions have to be members and the union density has to amount 5% of the all public service employees.

16 Regions will be territorial units in which various organisations in the public and private sectors will carry out special tasks determined by law (Trpin, 2004, Bohinc, 2005).

must be regulated and maintained in the system of labour relations. These mechanisms must be regulated so that they can effectively serve their purpose at all levels at which communication between the social partners occurs, either as co-deciding or as concluding collective agreements regarding work or other collective agreements. Mechanisms for the prevention and resolution of disputes are contained in regulations which regulate or support individual types of social dialogue; however, it must be taken into consideration that in Slovenia this subject has not yet been regulated on the whole.

5. Conflict Prevention and Resolution

In Hungary, specialized labour courts exist, however the system of labour dispute resolution permits also a pre-court procedure, involving workplace-level conciliation, before the individual disputes get to the court. The 1967 Labour Code entitled trade unions to take a decisive part in the mandatory pre-labour court procedure for handling disputes over individual rights. Workplace-level grievances boards (munkaügyi döntőbizottságok), run by unions, and were the juridical forums of first instance in such disputes. The 1992 Labour Code thus repealed the mandatory workplace-level grievance boards, and included only a brief passage concerning a pre-court conciliation procedure between the employer and the employee. It stipulated, for example, that within 15 days of the employer taking a measure allegedly injuring the rights of an employee, the employee had the right to initiate steps and demand a conciliation process in writing. The role of trade unions in pre-court dispute resolution procedures has been narrowed to providing consultation and some legal advice for employees involved. The concept of the collective labour dispute was introduced in 1989, right after the disintegration of the state socialist regime. According to the 1992 Labour Code, there is a difference between collective dispute of interest and legal dispute.

In Hungary there is a voluntary use of mediation in collective labour disputes. The Labour Mediation and Arbitration Service (Munkaügyi Közvetítői és Döntőbírói Szolgálat) had been set up in 1996 by the national tripartite body with the help of an EU PHARE project. The institution's goal is to harmonize the industrial relation at company, intersectoral and sectoral levels.

The Hungarian sectoral consultative forum next to National Public Service Interest Reconciliation Council is the Interest Reconciliation Council of Civil

Servants that assimilates other parties such as National Body of Administration, Association of Chief Urban Municipal Officers, national trade union confederations, trade union federations and the government as well. In the sectoral consultative forum, if any kind of representative disagreement occurs, in this case for the interested party's requirement in a non-litigant way the court will adjudge. The armed professional service's consultative forum is the Interministerial Interest Reconciliation Forum of Law Enforcement Organizations (Rendvédelmi Szervek Tárcaközi Érdekegyeztető Fóruma) that embodies government and national trade unions.

The separate central governmental interest reconciliation forum is responsible for civil servants to effect the agreements. In case of the legal questions in the field of civil service, wage-settings, and the budget of central and social security influencing the civil servants interests, come under the civil servant interest reconciliation forum. On the national and sectoral level the consultative forum is the National Public Service Interest Reconciliation Council (Országos Közszolgálati Érdekegyeztető Tanács), which is affected to the civil servants, public service employees and armed force professional employment status.

This institution was established in 1992, which provides an institutional framework for concluding agreements covering all the public sector employees.

As far as the content of collective contracts in the public sector is concerned, this is the weakest point of the system. In Slovenia problems related to the content of collective contracts caused a stoppage in the process of implementing the PSWSA in practice. The legislature did not take a decision to regulate all wages and other minimal working conditions of employees in the public sector by statute, making the collective contracts an additional tool for extending the rights of employees. The statute declared the regulation of certain essential elements of the wage system as falling within the "competence" of social partners (the evaluation of job performance, the majority of additional payments, which are essential elements of a wage).

As already mentioned collective bargaining about the new wage system was very hard and long lasting process which has finished recently (June 2008). The delay has been a consequence of the conflict of interests among social partners in the public sector. The strong position of trade unions on one side and the temptation of state authorities to resort to the use of state power instead of bargaining, on the other, generated dangerous conflicts among social partners.

Another element is the compulsory conciliation procedure, which should arrive at solutions acceptable to both parties (Novak, 2004). The substantive limitations imposed by the statute are more rigorous for the protection of the public interest's compared to private interests. The starting point of these limitations is the requirement that essential public services and the functioning of the state and other governmental bodies must be ensured and maintained. Under Slovene law, the competence to decide what kind of work activity should be considered essential is given to managers, and cases of conflicts concerning such are brought before labour court judges, both on the grounds of abstract regulations in legislation. The theory of industrial relations has already pointed out that this function is a very heavy burden for managers and for courts as well (Rose, 2006).

One of the most important rights of the industrial relations is the right of strike. In the field of public sector the major reason of strikes are about the wage agreements. In Hungary in 2007 by the reason of difficult bargain rounds in wage-agreements, a Unified Public Service Strike Committee was formed. What is the background of this new institution? In mid 2006, the government announced its plans to introduce austere reform measures, involving significant cuts in the budget, services and staff of public institutions. The announcement met with strong resistance from the more radical trade unions, which issued a call for strike action.[17] In the end, the government and strike committee concluded an agreement and as a result, the strike action was immediately cancelled. According to strike regulation, public service employees have right to strike, for civil servants special rules are applied, when those occupied in service at armed forces have no right to strike.

In 2008, there was a nation-wide protest strike against of the health system privatization. Trade union confederations unanimously rejected the reform proposal, and employer organizations, on the other hand, supported the reform proposal as well. In this case, the social dialogue failed to reach consensus. Even this situation, in Hungary social dialogue for better working and safe work is in development, although in the majority of sectors, however, the occupational health and safety related dialogue does s not exist.

17 The president of the Trade Unions' Cooperation Forum (Szakszervezetek Együttműködési Fóruma,) announced that the trade unions had hoped for a 6.5% gross increase in salaries. On 9 November 2006, all of the negotiating trade union confederations issued an open letter, in which they jointly condemned the fact that public sector employees would suffer a larger wage decline than other employees due to the government's austere measures.

EU regulations also demand a strong partnership between the government and social as well as civil actors, which further upgrades the role of Hungarian social and civil partners beyond their traditional role shaped by domestic written rules and code of conducts. The content of the discussions between the government and social partners, however, revealed the need for further reinforcement of the expert capacity of the social partners in order to be able to contribute more significantly.

In Slovenia, the right to strike is guaranteed also by the Constitution (Article 77 of the Constitution). This provision guaranteed the right to strike to all employees irrespective of the sector in which they are employed. The provision gives to the state the right and duty to impose on employees restrictions of this right by law. In Slovene reality the Strike Act was adopted by the parliament before the new Constitution 1991 came into force.

In the Slovene legal system all employees have the right to strike. This right can be limited by statute if the protection of the public interest so requires. According to the Constitution and international standards limitations of the right to strike can be imposed on employees in the public sector as well as those in the private sector (Gernigon, Odero, Guido, 2000). The statute which regulates these limitations has already been mentioned, i.e. the Strike Act of 1991. The Act contains the procedural (formal) as well as substantive limitations. The principal formal limitation is the duty of employees who intend to strike to announce the strike within the time-limits determined by the statute. The time limits are different for the public sector compared to the private sector.

The Act has not been amended since, although certain parts cannot be applied in practice because of the constitutional requirement that those parts of former legislation which are in contradiction with the new constitutional provisions (values) may not be applied after the coming into force of the Constitution.

In the process of introducing the new role of social partners in the area of employment relations, the conflicts between them and between the individual employees and employers emerged and consequently the character of the strike also changed. Together with other methods for conflict prevention and conflict resolution in both sectors, the strike must be controlled with modern formal tools, determined by legislation. The most delicate area for the creation and application of these tools is the public sector. Considering the fact that there are no specific statutory provisions in this area, it can be concluded that

the legislature did not devote enough attention to this problem. The Slovene legal system does not have any efficient mechanisms to control the legality of announced strikes. The limitations or self-limitations on strikes in collective agreements are not an element of the legal system. Limitations can be imposed unilaterally by general enactments of employers. There is no such institution in the Slovene system, as is known in Italy in the form of a Guarantee Commission, which has a strong position in the process of evaluating the self regulation of strikes by the collective agreements.

6. Conclusion

The comparative analyse of social dialogue regulation in the international law and in different EU member states points out that EU faces the need of higher degree of unification or at least harmonization of the regulation of social dialogue. The EU regulation does not contain a wide range of solutions in the area of social dialogue in public sector however the ILO has already enacted some important documents in support of the social dialogue in public sector. Insight in national legislation of different EU member countries enables the conclusion that there is a great diversity of approaches in national legislations. The comparison between the legal regulation of social dialogue in Hungary and Slovenia provides us with information about some similar approaches in the regulation of social dialogue in private sector of the two countries. They are more or less the consequence of the influence of EU law (e.g.. European Works Councils). A great difference can be however registered over the regulation of the social dialogue in public sector. Such differences aggravate the international basic regulation of this area by the competent EU legislative bodies. In the same time such differences may be the consequence of the international regulations. Namely the EU does not provide the regulation which could be the starting point of the unification or at least harmonization of this area. The composition of the statutory regulation of the social dialogue in public sector in the two EU Member States brings to light the fact that collective bargaining in public sector is a important legal subsystem of both countries. A further analysis also presents the fact that there are great differences in ways of prevention and resolution of the collective interest disputes in public sector. This finding which has been expected enables the conclusion that the public sector employees of different countries are being in the unequal position regarding to their influence on the processes of creation of the legal regulation of

their working conditions. This problem can be resold by the use of results of further comparative analyses of this area, which points on the best solutions in the practice of some states and proposed by the theory as well. At last but not at least - the important contribution to such analyses is supposed to be recognized to the activities of professional organizations which deal with the social dialogue like the International Industrial Relations Association (IIRA).

Prof. dr. Zvone Vodovnik ~~Dr. Polona Kovač je višja predavateljica na Fakulteti za upravo in Fakulteti za socialno delo. Magistrirala je leta 1999 na temo možnosti in ovir za uvajanje načel novega javnega menedžmenta v slovensko državo upravo, doktorirala pa na temo javnih pooblastil leta 2005 na Pravni fakulteti v Ljubljani. Sprva je bila zaposlena na Upravni enoti Kranj, nato od leta 1996 do 2003 na Ministrstvu za notranje zadeve, od leta 2003 pa na Univerzi v Ljubljani. Predava in raziskuje ter publicira predvsem na področjih pravne ureditve javne uprave, upravnih postopkov in kakovosti oz. odličnosti v javnem sektorju~~

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POVZETEK

SOCIALNI DIALOG V JAVNEM SEKTORJU ODSEV MADŽARSKE IN SLOVENIJE

In this paper, the author examines the objectives, significance and best practices in the integration of approaches (tools) of quality development / business excellence, with an emphasis on public administration organisations.

The tools discussed in the paper, i.e. excellence models (EFQM and CAF) on the one hand and the system of balanced scorecards (BSC) on the other both have their advantages and disadvantages. Therefore, an organisation cannot achieve optimal improvements in performance until it integrates several approaches. While this recognition, both with regard to the general integration of tools and the concrete integration of excellence models and balanced scorecards, is still nascent in the Slovenian public administration, there are examples of organisations in Slovenia and other administrations that have already recorded some concrete positive effects of such good practice. The paper outlines both approaches and describes concrete examples of best practices, e.g. in the Vienna city administration, the Triglav Insurance Company, the Health Insurance Institute of Slovenia and others.

In practice, the integration of excellence models – the EFQM or the CAF (Common Assessment Framework, a model developed under the auspices of the Commission of the EC especially for the public sector) – with the system of balanced scorecards has proved to be the most fruitful over the last few years. Therefore, there have been attempts in Slovenia to introduce it in the public administration at least as pilot projects, while some organisations have endeavoured to integrate the EFQM model as an analytical-diagnostic tool with the BSC system as a strategic-managerial tool. This integrated approach optimises the matching goals of both tools, while complementing the deficiencies of individual tools, which recognise as relevant different indicators, both financial and non-financial, as upgrades of the classic method for measuring performance. The purpose of using the described and similar tools is twofold:

1. to analyse the situation in all segments of an organisation's activity by identifying the weakest link in its performance that hampers progress in achieving common goals; and at the same time

2. to (constantly) improve the performance of the organisation on the basis of information and analysis of the situation.

All these tools, used as part of the overarching concept of continual improvement as a strategic guideline for organisations, are based on the so-called Deming's PDCA (*Plan, Do, Check, Act*) Cycle. They make up a comprehensive approach to the organisation and its management and are, in essence, holistic, since they extend to all key areas of activity. This is essential because quality and innovation are an integral part of the total managerial process.

The EFQM excellence model was designed in the 1980s. In 1992, it started to be used as the assessment tool for awarding the European (business) excellence award, initially for the private sector only, while nowadays it is used in the categories of large, small and medium-sized enterprises, as well as the public sector. The trustee of the EFQM excellence model is the European Foundation of Quality Management, which has national partner organisations in more than 25 countries that organise national contests. In Slovenia, the partner organisation is the Metrology Institute of the Republic of Slovenia, which awards the Business Excellence Prize of the Republic of Slovenia (PRSPO). Organisations can also undertake self-assessment using the EFQM excellence model. The RADAR matrix is used for scoring. Organisations are evaluated against 32 sub-criteria grouped into 9 fundamental criteria (five "enablers" and four "results"). The sub-criteria are weighted; the highest weightings are assigned to customer results (200 points out of a total 1000). Based on the EFQM excellence model, the Common Assessment Framework for organisations in the public sector was developed in 2000 and upgraded in 2002 and 2006.

The system of Balanced Scorecards (BSC) is a tool used to align business activities to the strategy of an organisation. It was developed in the late 1990s by two Harvard professors, Robert S. Kaplan and David P. Norton. The first public presentation of the model dates to 1992. In Slovenia it began to be introduced in 1999, 2000 and later (e.g. in the NLB, Iskra Avtoelektrika, Lesnina, Institute of Oncology of Ljubljana). The method of measuring results with balanced scorecards allows company management to define goals that go beyond mere financial success and

Spremembe zakona o varstvu okolja – v kateri smeri?

UDK: ~~351.712(497.4)~~

Adrijana Viler Kovačič
Agencije RS za okolje za izvajanje okoljevarstvene zakonodaje
~~adrijana.viler-kovacic@ri.t-com.hr~~

IZVLEČEK

Pravico do zdravega življenjskega okolja, ki jo ustava deklarira kot eno izmed temeljnih ustavnih pravic, ureja več zakonov, med katerimi je najpomembnejši Zakon o varstvu okolja. V okviru uresničevanja omenjene ustavne pravice Zakon o varstvu okolja določa obveznosti javne oblasti, kakor tudi dolžnosti onesnaževalcev, da bi tako zagotavljali čim manjše obremenjevanje okolja in trajnostni razvoj. V članku so predstavljena načela tega zakona ter okvir zakonodaje varstva okolja. Podani so tudi razlogi, ki narekujejo zahteve za spremembo tega zakona, nanašajo pa se po eni strani na prenos evropskih direktiv (odgovornost za okoljsko škodo in trgovanje z emisijami), po drugi pa na odpravljanje nekaterih ne preveč posrečenih rešitev pri izvedbi postopka presoje vplivov na okolje in izdaje okoljevarstvenega soglasja, kakor tudi na nekoliko drugačna razporeditev pridobivanja gradbenih in okoljevarstvenih dovoljenj.

Ključne besede: zakonodaja, okoljevarstvo, Slovenija, ustavne pravice, onesnaževanje

1. Varstvo okolja – ustavna kategorija

Okoljevarstvena zakonodaja oziroma pravo varstva okolja je namenjeno zagotovitvi takega stanja okolja, da ni ogroženo zdravje in človeka vredno življenje. Gre predvsem za varovanje zraka, voda, tal, rastlinskega in živalskega sveta pred škodljivimi posegi človeka, ustreznega ravnanja z odpadki, za odpravljanje škode ter škodljivih posledic zaradi varovanja človeka. Varstvo okolja ne more pomeniti samo varstva pred onesnaženjem, temveč tudi varstvo prijetnega, dostojanstvenega in kakovostnega življenja.

Slovensko pravo varstva okolja ima svojo izhodišče v Ustavi Republike Slovenije, ki v prvem odstavku 72. člena določa, da ima vsakdo v skladu z zakonom pravico do zdravega življenjskega okolja. Določba je sicer uvrščena v tretje poglavje ustave, ki nosi naslov »Gospodarska in socialna razmerja« in ne med temeljne človekove pravice in svoboščine, a ne glede na to je to ustavno

varovana pravica, oziroma je uresničljiva že samo na podlagi ustave in je lahko predmet varstva v postopku odločanja o ustavni pritožbi[1]. Pravica do zdravega življenjskega okolja bi posredno lahko tudi sodila med človekove pravice glede na dejstvo, da je za varovanje te pravice izrecno pristojen tudi varuh človekovih pravic.

Ustava v drugem odstavku 72. člena določa tudi, da država skrbi za zdravo življenjsko okolje ter da v ta namen zakon določa pogoje in načine za opravljanje gospodarskih in drugih dejavnosti. S tem je dana državi aktivna vloga v zvezi z varstvom okolja oziroma ohranjanjem naravnega ravnovesja. To svojo nalogo izvršuje prek instrumentov zakonodajne, izvršilno upravne in sodne veje oblasti. Neizvajanje te naloge, torej opustitev normativnega urejanja pogojev in način za opravljanje gospodarskih in drugih dejavnosti, bi bilo neustavno[2].

Med instrumenti izvršilno upravne veje oblasti sodi sistem nadzora nad izvajanjem dejavnosti, ki lahko povzročajo negativne posledice na okolje. Ta sistem po eni strani pomeni uveljavitev obveznosti pridobitve vrste upravnih aktov (soglasij, dovoljenj, potrdil) pred izvajanjem teh dejavnosti, v okviru katerih državna oblast preverja predvidene posege v okolje ter zaradi varstva okolja morebiti določa še posebne dodatne pogoje posegov, po drugi pa podreditev sistemu upravnega in inšpekcijskega nadzora tako nad izvrševanjem okoljskih predpisov kakor izdanih upravnih aktov.

2. Stanje okolja v Sloveniji

V drugi polovici 20. stoletja sta dva razvojna procesa, industrializacija in urbanizacija, tako hitro in učinkovito napredovala, da skrb za naravo in varstvo obdelovalnih tal ni bila dovolj učinkovito sito pri posegih v naravo in urejanju človekovega okolja. Po eni strani se Slovenija ponaša z lepoto ter biotsko in pokrajinsko zelo pestro in ohranjeno naravo, po drugi pa so nekatera gosteje naseljena območja prizadeta zaradi onesnaževanja tal, zraka in vodovja ter neurejenega ravnanja z odpadki. To vsekakor vpliva tudi na življenje prebivalcev.

Koncept uravnoteženega gospodarskega, socialnega in okoljskega razvoja se v Sloveniji ne uresničuje v celoti. Gospodarska razvitost se povečuje ob

1 sklep Ustavnega sodišča Republike Slovenije Up 41/94
2 odločba Ustavnega sodišča U-I-263/95

hkratnem socialnem razvoju, vendar počasnejšem uveljavljanju skrbi za okolje. Tako je gospodarska rast delno dosežena tudi na škodo okolja, na kar vpliva visoka energetska intenzivnost ter neugodne stopnje rasti emisijsko najbolj intenzivnih industrij in intenzivnega kmetijstva ter drugih sektorskih netrajnostnih politik[3].

Zakonodaja varstva okolja mora pripomoči k doseganju višje ravni varstva okolja, pri čemer pa se mora zavedati skladnosti s cilji gospodarskih in socialnih razsežnosti trajnostnega razvoja. Varstvo okolja zahteva izvedbo vseh ukrepov za zmanjšanje njegovega obremenjevanja, uravnoteženo gospodarsko proizvodnjo in rabo energije, gospodarstvo pa za svoj razvoj pričakuje učinkovitost upravnih organov, manj birokracije in nižje stroške nadzora nad izvajanjem predpisov.

3. Zakon o varstvu okolja

Temeljni predpis, ki ureja področje varstva okolja v Sloveniji, je Zakon o varstvu okolja[4] (v nadaljevanju ZVO-1). Zakon je bil sicer sprejet v letu 2004, a je bil v letu 2006 spremenjen in dopolnjen z Zakonom o spremembah in dopolnitvah Zakona o varstvu okolja[5], izdan je bil tudi v prečiščenem besedilu[6]. Zakon je posredno doživel spremembe v letu 2007 z Zakonom o prostorskem načrtovanju[7], po katerem so bili črtani določeni členi, ki so se nanašali na postopek za izdajo okoljevarstvenega soglasja v okviru sprejemanja prostorskih aktov. Z uveljavitvijo ZVO-1 je prenehal veljati prejšnji Zakon o varstvu okolja[8], sprejet leta 1993, ki je že tedaj postavil temelje sodobnega varstva okolja v Republiki Sloveniji, saj je poenotil principe varstva okolja tako, da je do tedaj običajni način reševanja vedno večjih okoljskih problemov z uporabo tehničnih rešitev omejevanja onesnaževanja prevedel v kontekst zagotavljanja trajnostnega razvoja.

ZVO-1 ureja varstvo okolja pred obremenjevanjem kot temeljnim pogojem za trajnostni razvoj in v tem okviru določa temeljna načela in ukrepe varstva

3 Resolucija o Nacionalnem programu varstva okolja 2005-2012 /ReNPVO/ (Ur.l. RS, št. 2/2006)
4 ZVO-1, Uradni list RS, št. 41/2004
5 ZVO-1A, Uradni list RS, št. 20/2006
6 ZVO-1-UPB1, Uradni list RS, št. 39/2006
7 ZPNačrt, Uradni list RS, 33/2007
8 ZVO, Uradni list RS, št. 32/1993, 1/1996, 56/1999 – ZON, 22/2000 – ZJS, 67/2002 – ZV-1

okolja, načine in pogoje spremljanja stanja okolja in informacije o okolju, ekonomske in finančne instrumente, javne službe in druga z varstvom okolja povezana vprašanja. Med najpomembnejšimi načeli velja poudariti:

- načelo preventive, po katerem je uvajanje novih tehnologij, proizvodnih postopkov in izdelkov dopustno le, če ob upoštevanju stanja znanosti in tehnike ter možnih varstvenih ukrepov ni pričakovati nepredvidljivih škodljivih učinkov na okolje ali zdravje ljudi;
- načelo previdnosti, po katerem morajo biti mejne vrednosti emisije, standardi kakovosti okolja, pravila ravnanja in drugi ukrepi varstva okolja zasnovani, vsak poseg v okolje pa načrtovan in izveden tako, da povzroči čim manjše obremenjevanje okolja. Za uresničevanje teh določb se uporabljajo najboljše razpoložljive tehnike, dostopne na trgu;
- načelo dopustnosti posegov v okolje, po katerem je poseg v okolje dopusten le, če ne povzroča čezmerne obremenitve;
- načelo plačila za obremenjevanje, po katerem povzročitelj obremenitve krije vse stroške predpisanih ukrepov za preprečevanje in zmanjševanje onesnaževanja ter tveganja za okolje, rabo okolja ter odpravo posledic obremenjevanja okolja.

Zakon je posegel tudi na področje graditve objektov, saj je zahteval, da mora investitor pred izvedbo posega v okolje oziroma gradnjo določenih objektov, ki imajo vpliv na okolje, pridobiti več upravnih aktov (okoljevarstveno soglasje, okoljevarstvena dovoljenja). Te zahteve so tako pomembne tudi za organe, ki izdajajo gradbena dovoljenja za zagotavljanje njihove zakonite in pravilne izdaje, saj je pridobitev okoljevarstvenih aktov marsikdaj tudi predpogoj za izdajo gradbenega dovoljenja.

Zakonodajo varstva okolja tvorijo tudi podzakonski akti (uredbe, pravilniki), ki so bili sprejeti na podlagi ZVO-1 (teh je bilo do konca septembra 2007 že več kot 150), pa tudi tisti, ki so bili sprejeti na podlagi Zakona o varstvu okolja iz leta 1993 in so po izrecni določbi ZVO-1 še vedno veljavni. Gre za podzakonske akte na področju varstva kakovosti zraka, voda in tal, varstva pred hrupom in sevanji, ki velikokrat tudi določajo tehnične pogoje in okoljevarstvene zahteve za gradnjo objektov kot virov onesnaževanja okolja.

4. Spremembe Zakona o varstvu okolja

Po štirih letih od uveljavitve novega Zakona o varstvu okolja je tako napočil čas za ugotovitev, ali je ta izpolnil pričakovanja oziroma ali je še v celoti ustrezen. Vse več je namigovanj, da bi bilo treba uveljaviti nekatere spremembe, po eni strani zaradi zahtev evropske zakonodaje, po drugi pa zaradi uveljavitve nekaterih fleksibilnejših institutov varovanja okolja. Zahtevo po spremembi oziroma dopolnitvi pa narekujeta tudi sodna in upravna praksa zaradi različnega tolmačenja nekaterih zakonskih določb.

Ne gre pozabiti tudi na to, da se je Republika Slovenija zavezala k celovitemu izvajanju Lizbonske strategije oziroma izvajanju njenih ukrepov na nacionalni ravni, v gospodarskih, socialnih in okoljskih razsežnostih. V sklopu politike boljših predpisov in s ciljem doseganja višje konkurenčnosti se mora tako spoprijeti s pripravo boljših predpisov, z zmanjšanjem administrativnih bremen vključno z merjenjem administrativnih stroškov ter s pripravo ocene učinkov predpisov na državljane in gospodarstvo[9]. Gre torej za poenostavitev zakonodaje ter za odpravo administrativnih ovir kot procesa zmanjševanja, odprave ali preprečitve administrativnih bremen, ki implicitno zajema tudi proces poenostavitve upravnih postopkov. Pri vsem tem se pa mora tudi zavedati, da se vse spremembe ne smejo zgoditi na škodo varstva okolja oziroma varstva človekovih pravic.

4.1 Prilagoditev direktivi 2004/35/ES glede odgovornosti za okoljsko škodo

V naš pravni sistem še nimamo vgrajene Direktive 2004/35/ES10, ki so jo morale države članice prenesti v nacionalne pravne rede do 30. aprila 2007. Ta direktiva je bila sprejeta zaradi spoznanja, da je na območju skupnosti že sedaj veliko onesnaženih območij, ki povzročajo večje tveganje za okolje, v zadnjem času pa se je dramatično povečala tudi izguba biotske raznovrstnosti. Direktova izhaja iz načela, da onesnaževalec plača vse stroške, ki so potrebni za preprečevanje in sanacijo okoljske škode. Direktiva določa, da mora povzročitelj nevarnosti za nastanek okoljske škode sam nemudoma izvesti preventivne ukrepe, s katerimi prepreči nastanek okoljske škode. V primeru nastanka okoljske škode mora povzročitelj izvesti vse potrebne ukrepe za ustavitev in

9 Več o tem http://ec.europa.eu/growthandjobs/index.htm
10 Direktiva 2004/35/ES Evropskega parlamenta in Sveta z dne 21. aprila 2004 o okoljski odgovornosti v zvezi s preprečevanjem in sanacijo okoljske škode

zmanjšanje posledic, o nastanku škode nemudoma obvestiti pristojni organ, ki ga določi država članica, in izvesti sanacijske ukrepe za sanacijo okoljske škode. Lastniki zemljišč in druge osebe, ki bi jim bil zaradi nastale škode prizadet pravno varovan interes, med katere se uvrščajo tudi nevladne organizacije, imajo pravico aktivne pobude za naprtitev preventivnih ali sanacijskih ukrepov, pri čemer pa je državam članicam prepuščeno, ali bodo to pravico podelile le v primeru nastanka okoljske škode ali pa tudi v primeru nevarnosti za njen nastanek.

Direktiva vsebuje tudi zahtevo, da naj države članice sprejmejo ukrepe, s katerimi bodo spodbujale razvoj finančnih instrumentov, ki naj bi jih povzročitelji uporabljali za finančno pokritje svojih obveznosti za izvedbo preventivnih ali sanacijskih ukrepov, pri čemer pa ne določa vrste oz. načine izvedbe tega kritja. Prav tako nalaga državam članicam, da sprejmejo takšno ureditev, ki bo državi omogočala povrnitev stroškov subsidiarnega ukrepanja in sicer z jamstvom na premoženju povzročitelja ali drugimi ustreznimi garancijami.

Naj poudarimo, da direktiva ne posega v odgovornost za škodo, ki je urejena v civilnem pravu, v Republiki Sloveniji torej v obligacijskem zakoniku, in v odgovornost za povzročitev škode, ki je urejena s posameznimi mednarodnimi pogodbami.

4.2 Trgovanje z emisijskimi kuponi[11]

Po uveljavitvi ZVO-1 in njegovih sprememb se je v letu 2005 praktično začelo prvo poskusno obdobje trgovanja z emisijskimi kuponi, kot popolnoma novem ekonomskem institutu varstva okolja, s katerim večina držav članic Evropske unije (razen Velike Britanije in Danske, ki sta imeli že prej uveljavljen nekakšen sistem trgovanja z določenimi emisijskimi pravicami), ni imela praktično nobenih izkušenj. Praktične izkušnje v prvem obdobju, ki se je začelo leta 2005 in se bo zaključilo konec leta 2007, so pokazale na nekatere pomanjkljivosti, ki zahtevajo bolj natančno ureditev določenih vprašanj oziroma prilagoditev določenih rešitev.

Da bo Republika Slovenija lahko omogočila izvajanje skupnih naložb in da bodo slovenska podjetja lahko pridobila enote na podlagi skupnih naložb, je treba urediti ves postopek preverjanja in odobritve skupnih naložb ter podelitev

11 Trgovanje z emisijami toplogrednih plinov ureja Direktiva 2004/101/ES Evropskega parlamenta in Sveta z dne 27. oktobra 2004 o dopolnitvi Direktive 2003/87/ES o vzpostavitvi sheme za trgovanje s pravicami za izpuščanje toplogrednih plinov v Skupnosti, upoštevajoč projektne mehanizme Kjotskega protokola (UL L št. 338 z dne 13. 11. 2004, stran 18)

ustreznih kjotskih enot. Administrativno kompleksen in zahteven postopek odobritve projektne dejavnosti od pristojnega organa Republike Slovenije vključuje pregled in ovrednotenje projektnega dokumenta z vidika njegove ustreznosti in skladnosti s Sklepi 7. konference pogodbenic Okvirne konvencije ZN o spremembi podnebja iz Marakeša (Marakeški sklepi). Za sodelovanje v skupnih naložbah mora država pogodbenica Kjotskega protokola imenovati pristojno koordinacijsko telo in o tem obvestiti sekretariat Okvirne konvencije ZN o spremembah podnebja; to je *Designated Focal Point* za sodelovanje pri skupnem izvajanju in *Designated National Authority* za sodelovanje pri mehanizmu čistega razvoja. Na podlagi Marakeškega sklepa št. 16 mora država pogodbenica predpisati tudi postopek za odobritev projektov skupnega izvajanja, njihovega spremljanja in preverjanja ter svoja navodila, skupaj z upoštevanjem pripomb zainteresirane javnosti, posredovati sekretariatu Okvirne konvencije. Nadalje je treba opredeliti, na kakšen način organ, pristojen za odobritev skupnih naložb, zagotovi, da je pri opredelitvi izhodiščnega stanja skupnih naložb pri projektih, izvedenih v drugih državah EU, v celoti upoštevana zakonodaja EU, oziroma na kakšen način je to mogoče preveriti z neodvisnim preverjanjem. Prav tako je treba na podlagi strokovnih podlag sprejeti odločitev in jo tudi zakonsko urediti, ali bo Republika Slovenija na svojem ozemlju sploh dovolila projekte skupnega izvajanja in če bo, določiti postopek odobritve ustrezne projektne dejavnosti.

4.3 Presoja vplivov na okolje in okoljevarstveno soglasje

Postopek izvedbe presoje vplivov na okolje (PVO) in izdaje okoljevarstvenega soglasja je urejal že prvi Zakon o varstvu okolja, sprejet v letu 1993[12], ko je v naš pravni sistem prenesel zahteve Direktive 85/337/EGS[13]. Postopek PVO se je tedaj izvedel v postopku izdaje okoljevarstvenega soglasja kot akcesornega akta pri izdaji gradbenega dovoljenja. Zaradi kasneje sprejetih direktiv (Direktiva 97/11/ES[14] in Direktiva 2003/35/EGS[15]), ki sta uvedli še posebne

12 Uradni list RS, št. 32/93
13 Direktiva Sveta 85/337/EGS z dne 27. junija 1985 o oceni vplivov določenih javnih in zasebnih projektov na okolje
14 Direktiva Sveta 97/11/EGS z dne 3. marca 1997 o dopolnitvi Direktive 85/337/EGS z dne 27. junija 1985 o oceni vplivov določenih javnih in zasebnih projektov na okolje
15 Direktiva 2003/35/EGS Evropskega parlamenta in Sveta z dne 26. maja 2003 o zagotavljanju udeležbe javnosti pri sprejemanju določenih planov in programov, ki se nanašajo na okolje, in dopolnitvah, ki se nanašajo na udeležbo javnosti in dostop do pravice.

zahteve glede sodelovanja javnosti, kakor tudi izhajajoč iz Aarhuške konvencije[16], taka rešitev ni bila več ustrezna v celoti. Taka ureditev ni bila več ustrezna tudi zaradi sprejema novega Zakona o graditvi objektov koncem leta 2002, ki je zožil nabor primerov, ko je gradbeno dovoljenje potrebno pridobiti, kar je povzročilo, da se postopek presoje vplivov na okolje za določene posege ni mogel izvesti (npr. za izkoriščanje gramoza v vodotokih).

Kot podlago za izvedbo PVO obstoječi zakon zahteva poleg poročila o vplivih na okolje tudi revizijo tega poročila. Poročilo lahko izdeluje kdorkoli, medtem ko revizijo lahko izdelujejo le okoljski izvedenci, imenovani s posebno odločbo ministra za okolje. Ta način naj bi zagotavljal pretehtano in dobro proučeno preverjanje ustreznosti posega z vidika njegovega vliva na okolje, po drugi strani pa olajšal upravnemu organu (Agenciji RS za okolje) postopek izdaje okoljevarstvenega soglasja.

Štiriletne izkušnje pa so pokazale, da revizije ne pomenijo dviga kakovosti izdelave poročil o vplivih na okolje, kot je bil namen uvedbe revizij, saj je treba v marsikaterih primerih kljub pozitivnemu revizijskemu mnenju dopolniti poročilo o vplivih na okolje, ker je ta pomanjkljiv oziroma neustrezen. Zato mogoče ne bi bilo narobe, če bi se revizije ukinile, pri čemer pa bi bilo treba nujno ponovno zahtevati določeno strokovno usposobljenost za izdelovalce poročil o vplivih na okolje. Izdelovalci poročil bi lahko bili le tisti, ki jih imenuje oziroma pooblasti Ministrstvo za okolje in prostor. Naj za primerjavo navedemo sistem izdelave projektov pri pridobivanju gradbenih dovoljenj, ko zakonodaja ne omogoča, da bi lahko projekt izdeloval kdorkoli, pač pa le projektant, ki je za vse načrte, ki sestavljajo projekt, imenoval odgovorne projektante, ki izpolnjujejo določene pogoje[17]. Več pozornosti bi pa morali posvetiti tudi sankcijam, ki bi prizadele izdelovalce neustreznih poročil, predvsem z vidika varovanja interesov investitorja in kakovosti tako pomembnega dokumenta.

V postopku PVO ter izdaje okoljevarstvenega soglasja je treba javnosti zagotoviti vpogled v vlogo, v poročilo o vplivih na okolje reviziji in na osnutek odločitve, to se pa izvede v okviru javne razgrnitve omenjenih dokumentov. Ta razgrnitev je strošek, ki bremeni stranko. V praksi se je že zgodilo, da je bila izdana negativna odločba brez izvedbe javne razgrnitve, a ne zaradi tega, ker bi bil vpliv na okolje preveč škodljiv, pač pa zaradi dejstva, da obstoječi predpisi predvidenega posega niso dopuščali. Odločujoči organ je namreč ocenil, da

16 Zakon o ratifikaciji konvencije o dostopu do informacij, udeležbi javnosti pri odločanju in dostopu do pravnega varstva v okoljskih zadevah (MKDIOZ) – Uradni list RS, št. 62/2004
17 45. člen Zakona o graditvi objektov (ZGO-1-UPB1, Ur.l. RS, št. 102/2004, 14/2005 - popr.)

skladno z načelom ekonomičnosti ni primerno stranki po nepotrebnem zadati dodatne in nepotrebne stroške javne razgrnitve. Vendar pa je v pritožbenem postopku organ druge stopnje odpravil to odločbo z obrazložitvijo, da se postopek ni odvijal do konca točno tako, kot ga predvideva ZVO-1. Zagotovo bi se to različno pravno gledanje oziroma anomalija odpravila, če bi ZVO-1 določil, da javne razgrnitve ni treba izvesti, če obstoječi predpisi že sami po sebi prepovedujejo ali pa ne omogočajo izvedbe posega tako, kot ga je investitor nameraval izvesti.

V postopku izdaje okoljevarstvenega soglasja lahko kot stranski udeleženci sodeluje velik krog oseb, ki imajo lastnost stranke v postopku (osebe, ki na vplivnem območju stalno prebivajo ter lastniki in posestniki zemljišč v vplivnem območju, nevladne organizacije, ki imajo poseben status delovanja v javnem interesu). Izhodišče ZVO-1 o tem, da mora organ sam poiskati te osebe, je morebiti preveč restriktivno, saj to terja preverjanje vsemogočih evidenc. Velik problem je tudi identifikacija posestnikov nepremičnin, saj take evidence naš pravni sistem sploh ne predvideva. Poleg tega se lahko zgodi, da stranski udeleženec zahteva vstop v postopek tik pred izdajo okoljevarstvenega soglasja, kar pomeni avtomatično podaljšanje že tako dolgega postopka. Sodelovanje javnosti bi se lahko skladno z direktivo uredilo tako, da bi se za stranskega udeleženca zahtevalo več lastne aktivnosti za priznanje tega statusa. Zato bi bilo primerno določiti, da je lahko stranski udeleženec le oseba, ki aktivno izkaže namero sodelovati v postopku in sicer če sama da vlogo za priznanje statusa stranke v postopku in je v času javne razgrnitve (in ne po njenem izteku) podala svoje mnenje na dokumentacijo.

Izredno velik problem in tudi medijskega prahu je nedavno povzdignilo vprašanje, ali gre društvu, ki sicer ni pridobilo statusa nevladne organizacije, ki na področju varstva okolja deluje v javnem interesu po 153. členu ZVO-1, pač pa status društva po 138. členu Zakona o ohranjanju narave[18], status stranke v postopku izdaje okoljevarstvenega soglasja za poseg na območju, varovanem po ZON-UPB2. Mnenja upravnih organov, sodišč ter pravnih strokovnjakov so si bila v konkretnem primeru[19] diametralno nasprotna tudi v okviru istega nivoja obravnave, saj je bilo vse odvisno od konkretne osebe, ki je tolmačila zakonodajo. Takemu stanju, ki je povzročilo investitorju tudi velike stroške, je botrovalo nedodelano določilo 64.člena ZVO-1, ki napotuje na 153. člen, zaradi česar

18 Zakon o ohranjanju narave (ZON-UPB2, Uradni list RS, št. 96/2004)
19 gre za primer izdaje okoljevarstvenega soglasja za gradnjo vetrne elektrarne na Volovji rebri v občini Ilirska Bistrica

ga je treba spremeniti in tako bolje ter natančneje opredeliti, da se bodo tako preprečile različne interpretacije istega zakonskega besedila.

Namesto ničnosti dovoljenja za poseg v prostor, kot morebiti preveč hudo sankcijo za primer, če okoljevarstveno soglasje ni bilo pridobljeno, ki ga predvideva obstoječi ZVO-1, bi lahko vpeljali možnost, da se za pridobitev gradbenega dovoljenja zahteva pravnomočnost tega soglasja ter da se za primer upravnega spora sodišču določi rok za odločanje.

4.4 Skupno vodenje presoje vplivov na okolje (PVO) in celovite presoje vplivov na okolje (CPVO)

Presoje vplivov na okolje (PVO) ne smemo zamenjevati s celovito presojo vplivov na okolje (CPVO), ki jo je prav tako vpeljal ZVO-1 v letu 2004 zaradi zahtev Direktive 2001/42/ES[20]. CPVO je postopek, ki se izvede pred sprejemanjem prostorskega ali drugega plana, če obsega posege, za katere je presoja vplivov na okolja obvezna ali pa če je zanje zahtevana presoja sprejemljivosti po Zakonu o ohranjanju narave (to je, ko gre za posege na zavarovanih območjih in Natura območjih ali pa bi nanje imeli poseben vpliv). To je proces uvajanja okoljskih vidikov pri načrtovanju in optimizacijski postopek izbiranja okoljsko primernih variant z vključevanjem javnosti. CPVO je tudi upravni postopek, ki ga vodi Ministrstvo za okolje in prostor tako, da presoja verjetne pomembne vplive plana, preverja kakovost okoljskega poročila in odloča o sprejemljivosti posega (s sklepom o potrditvi plana oziroma odločbo o zavrnitvi izdaje potrdila o potrditvi plana).

Poudariti pa je treba, da CPVO ne izključuje presoje vplivov na okolje, če je ta obvezna, kar pomeni, da je treba kljub izvedeni CPVO izvesti tudi presojo vplivov na okolje in tudi tako pridobiti okoljevarstveno soglasje. Načeloma naj se C postopka PVO in PVO ne bi prekrivala, saj se CPVO nanaša na načrte in programe, PVO pa na konkretne posege. Kadar pa se z načrtom ali programom pripravlja tudi eden ali več posegov, ki zapadejo pod obveznost CPVO, lahko pride do vsebinskega prekrivanja in podvajanja. V slovenski praksi zaradi načina transpozicije obeh direktiv v pravni red preko ZVO-1 prihaja ponekod do takšnega vsebinskega podvajanja, okoljsko poročilo, kot podlaga za CPVO, je tedaj vsebinsko zelo blizu poročilu o vplivih na okolje, kot podlage za PVO. Postopka se skladno z zakonodajo sicer vodita ločeno, najprej CPVO in nato

20 Direktiva 2001/42/ES Evropskega parlamenta in Sveta o presoji nekaterih načrtov in programov na okolje

PVO. Posebna določila o sodelovanju javnosti in strankah v postopku so v ZVO-1 vključena v 58. in 64. členu, ki govorita o postopku PVO in ne o C postopku PVO.

Da bi poenostavili postopke ter se izognili vsebinskemu podvajanju bi lahko v spremembe ZVO-1 vključili takšne rešitve, da bi se za določene projekte, za katere je potrebno izvesti CPVO, lahko PVO izpeljal vzporedno ali skupaj. Na ta način bi preprečili možnost podvajanja, omogočili uporabo relevantnih ugotovitev iz postopka CPVO v postopku PVO itd. Tudi v 11. členu Direktive 2001/42/ES je navedeno, da države članice lahko za načrte in programe, pri katerih je obveznost izvesti PVO predpisana hkrati s to direktivo in tudi po drugi zakonodaji Skupnosti, poskrbijo za usklajene ali skupne postopke, ki izpolnjujejo zahteve ustrezne zakonodaje Skupnosti, zato da med drugimi preprečijo podvajanje presoje.

4.5 Izdajanje okoljevarstvenih dovoljenj

Okoljevarstveno dovoljenje je popolnoma nov upravni akt, ki ga je v letu 2004 uvedel ZVO-1. Vezano je na zahtevo, da mora biti vsak poseg v okolje načrtovan in izveden tako, da povzroči čim manjše obremenjevanje okolja (načelo preventive). Povzročitelj onesnaževanja mora tako po izrecni zakonski dikciji za napravo, v kateri poteka dejavnost, ki lahko onesnažuje okolje z emisijami, imeti okoljevarstveno dovoljenje, kar pa ne velja v vseh primerih onesnaževanja, pač pa tedaj, ko naprava izpolnjuje v zakonu ali podzakonskem aktu določene pogoje. Tako je okoljevarstveno dovoljenje treba pridobiti za obratovanje

- naprav, ki lahko povzročajo onesnaževanje večjega obsega (naprave iz 68. člena zakona),
- drugih naprav, ki niso naprave iz prejšnje alinee (naprave iz 82. člena zakona), če se v njih:
  - izvaja dejavnost, ki povzroča emisije v zrak, vode ali tla, za katere so predpisane mejne vrednosti,
  - izvaja dejavnost, za katero je predpisana obveznost pridobitve okoljevarstvenega dovoljenja po drugih predpisih,
  - predelujejo oziroma odstranjujejo odpadki;
- obratov, ki pomenijo večja tveganja za okolje (obrati iz 86. člena zakona).

Vsa dovoljenja izdaja ARSO. Razlika med njimi je zlasti v obsegu zahtev, ki morajo biti izpolnjene za pridobitev dovoljenja, v roku za izdajo dovoljenja in v

udeležbi javnosti. Vsem dovoljenjem pa je skupno to, da se morajo pridobiti pred pričetkom obratovanja naprave oziroma obrata, pri čemer pa je tudi določen rok za pridobitev tega dovoljenja za obstoječe naprave (najkasneje do 31. oktobra 2007 oziroma za nekatere izjeme do 31. oktobra 2011). če pa obratovanje ali večja sprememba v obratovanju zahteva gradnjo, mora upravljavec okoljevarstveno dovoljenje pridobiti pred začetkom gradnje.

Zahteve po izdajanju teh dovoljenj slonijo predvsem na evropskih direktivah. Direktive zahtevajo od držav članic, da sprejmejo potrebne ukrepe za zagotovitev, da nobena naprava, ki sodi pod specifično direktivo, ne obratuje brez dovoljenja; nekatere direktive so določile tudi datum prilagoditve obstoječim napravam. Izdaje posebnega dovoljenja pa ne zahteva Direktiva Sveta 96/82/ES[21], ki je podlaga za uvedbo ureditve obvladovanja nevarnosti večjih nesreč, v katere so vključene nevarne snovi in izdaje okoljevarstvenega dovoljenja po 86. členu ZVO-1. Ta direktiva namreč v smislu upravnega nadzora zahteva le prijavo oziroma priglasitev naprave ter potrditev varnostnega poročila pred gradnjo oziroma obratovanjem. Direktiva torej ne zahteva izrecnega okoljevarstvenega dovoljenja; izrecno pa uvaja obveznost odreditve prepovedi obratovanja, če upravljavec naprave ni posredoval priglasitve oziroma če so ukrepi za preprečevanje in ublažitev posledic večjih nesreč zelo pomanjkljivi[22]. Zahteva slovenske zakonodaje o tem, da morajo upravljavci obratov, ki pomenijo večje tveganje za okolje, pridobiti pred gradnjo okoljevarstveno dovoljenje, ni v nasprotju z določili direktive, sodi pa v okvir ukrepov, ki jih mora država sprejeti za izvajanje direktive. Vendar pa tu nastopi vprašanje, ali ni taka zahteva morebiti odveč, posebno še zato, ker doslej ni bilo izdanega nobenega tovrstnega okoljevarstvenega dovoljenja, niti ni nobene perspektive, da bi bilo katero za obstoječe obrate sploh izdano do 31.10.2007, kakor je to zahteva iz Uredbe o preprečevanju večjih nesreč in zmanjševanju njihovih posledic[23] . Zakonodajalec se je odločil za ta način urejanja predvsem zaradi velike okoljevarstvene nediscipline in relativno premalo uspešne okoljske inšpekcije. Morebiti pa ne bi bilo narobe ponovno preveriti, ali je zahteva po izdaji okoljevarstvenega dovoljenja za te primere še potrebna oziroma ali ne bi bilo možno zadostiti direktivi tudi na kakšen drug način, na primer z izboljšanjem sistema upravnega in inšpekcijskega nadzora.

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21 Direktiva Sveta 96/82/ES z dne 9. decembra 1996 o obvladovanju nevarnosti večjih nesreč, v katere so vključene nevarne snovi
22 17. člen direktive
23 Uradni list RS, št. 88/05

Izdajanje okoljevarstvenih dovoljenj po 82. členu ZVO-1 podrobneje ureja cela vrsta podzakonskih aktov, tako na področju varstva voda, varstva zraka, varstva pred hrupom in ravnanja z odpadki. Bolj ali manj gre za uvedbo evropskih direktiv na tem področju, ki zahtevajo izdajo predhodnega dovoljenja bodisi pred izpustom v okolje ali pa za izvajanje dejavnosti ravnanja z odpadki. Po sedanjem slovenskem sistemu se okoljevarstvena dovoljenja izdajajo pred gradnjo oziroma pred izdajo gradbenega dovoljenja. Problem nastopi zaradi tega, ker v tem času ni mogoče tako natančno določiti pogojev obratovanja, tako da se v teh dovoljenjih bolj ali manj prepišejo zahteve iz posameznih uredb. čestokrat se pa tudi zgodi, da stranka šele po pridobitvi gradbenega dovoljenja oziroma v času gradnje dokončno predvidi svoj tehnološki postopek, oziroma vrsto odpadkov, ki jih bo predelovala ali odstranjevala.

Veliko primerneje in bolj racionalno bi bilo, če bi se pridobivanje okoljevarstvenega dovoljenja po 82. členu ZVO-1 zahtevalo šele pred izdajo uporabnega dovoljenja, saj bi bili tedaj veliko bolj jasni in nedvoumni pogoji obratovanja. S tem bi to dovoljenje postalo »obratovalno dovoljenje«, kot ga je nekoč zakonodaja tudi poznala. Okoljevarstvene zahteve pred gradbenim dovoljenjem bi bile lahko ustrezno zavarovane v okviru PVO oziroma okoljevarstvenega soglasja, če bi bila presoja obvezna. če pa PVO ne bi bila obvezna, bi bilo treba predvideti izdelavo mnogo cenejše strokovne ocene vpliva posega na okolje, kot sestavnim delom vloge za pridobitev gradbenega dovoljenja. S tem bi se zagotovo skrajšal postopek izdaje gradbenega dovoljenja. Naj poudarimo, da je sistem izdelave strokovnih ocen deloval do uveljavitve ZVO-1 leta 2004 in je bil tako v javnosti kakor pri ekspertih dobro sprejet.

5. Zaključek

Če hočemo doseči visoko raven stanja okolja, uresničevanje ustavne pravice do zdravega življenjskega okolja ter slediti zahtevam evropskih direktiv, je treba nujno sprejeti takšno okoljevarstveno zakonodajo, ki bo lahko dosegla ta cilj. Za dosego ciljev pa je lahko več poti in več načinov. Zahteve okoljevarstvene zakonodaje so večkrat v nasprotju z interesi gospodarstva, ki zahteva čim višje dobičke. Vlaganje v ekologijo je za gospodarstvo strošek. Zaradi tega je treba to zakonodajo toliko dograditi, da bodo uvedena taka sredstva za dosego ciljev varstva okolja, ki so povezana s čim manjšimi stroški tako za onesnaževalce, kakor za državo in posledično temu tudi davkoplačevalce. Jasna in pregledna zakonodaja je prvi izmed aksiomov, h kateremu bi morali

stremeti. Zakon ne bi smel dopuščati tako različnih tolmačenj glede pravic strank v postopek, kot se dogaja zdaj. Zagotovo obstajajo še katere druge rešitve, ki lahko pripeljejo do cilja na drug način, kot je obstoječi. Odprava revizorjev pri presoji vplivov na okolje, ki niso doprinesli h kakovosti poročil o vplivih na okolje, pač pa le strošek za investitorja, je nujna. Pri tem pa je se je treba tudi zavedati, da jih je treba nadomestiti z drugim enostavnejšim in učinkovitejšim sredstvom, ne pa enostavno črtati, saj bi tak radikalen poseg povzročil nezadostna in nepopolna poročila o vplivih na okolje in dolgotrajnejše postopke izdaje okoljevarstvenih soglasij, kar pomeni več stroškov za investitorja in tudi več za državo. Prav tako je umestno razmišljanje o drugačni umestitvi okoljevarstvenih dovoljenj po 82. členu Zakona o varstvu okolja v sam postopek gradnje; če bi se ta izdajala pred uporabnim in ne pred gradbenim dovoljenjem, bi bilo doseženo dvoje: investitor bi začel hitreje graditi, upravni organ bi pa tudi lažje in z veliko bolj zanesljivimi podatki izdal okoljevarstveno dovoljenje. Varstvo okolja pa pri tem ne bi bilo v ničemer oškodovano.

Torej – spremembe Zakona o varstvu okolja so na pohodu, a v kateri smeri?

Mag. Adrijana Viler Kovačič, svetovalka generalnega direktorja Agencije RS za okolje za izvajanje okoljevarstvene zakonodaje, se kot diplomirana pravnica profesionalno že dlje časa ukvarja s problematiko varstva okolja, ohranjanja narave ter upravljanje z vodami, večkrat predava na fakulteti ter na več seminarjih in posvetih, ki jih med drugim organizira tudi Ministrstvo za javno upravo oziroma Upravna akademija. V okviru svoje publicistične aktivnosti je objavila vrsto člankov in prispevkov ter dva priročnika (Varstvo okolja in upravni postopki, Ravnanje z odpadki), z delom Koncesije v Sloveniji pa je v letu 2002 zaključila tudi podiplomski magistrski študij na Fakulteti za družbene vede.

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- DIRECTIVE 2006/11/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
- of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community

SUMMARY

CHANGING PROCESS OF ENVIRONMENT PROTECTION ACT (EPA) – IN WHICH WAY?

According to the Slovenian Constitution everyone has the right to a healthy living environment. Moreover, the state should make effort to promote it. With this purpose the conditions and manner in which economic and other activities are pursued is enacted by the law. The law defines under which conditions and to what extent a person who has damaged the living environment is obliged to provide compensation.

Environment Protection Act (EPA) is the most important act in Slovenia, which regulates the protection of the environment in our country. EPA defines instruments for establishing basic conditions for sustainable development, and within this framework lays down basic environmental protection principles, (environmental protection) measures, (environmental) monitoring and (environmental information) as well as, economic and financial instruments for environmental protection, public services for environmental protection and other related issues.

The most important basic principles are:

- **The principle of prevention** specifying that emission limit values, environmental quality standards, rules of conduct and other environmental protection measures shall be designed and each activity affecting the environment shall be planned and carried out in such way that it causes minimal environmental burden.
- **The precautionary principle**, specifying that introduction of new technologies, production processes and products shall only be permissible when no unforeseeable detrimental effects on the environment or human health could be expected.
- **The "payment for burden" principle**, specifying that the person responsible for the burden shall cover all the costs of prescribed measures for the prevention and reduction of pollution, environmental risk, use of the environment, and elimination of the consequences of environmental burden.
- **The principle of admissibility of activities affecting the environment**, specifying that an activity affecting the environment shall only be admissible if it does not cause an excessive burden. EPA specifies the cases where an environmental protection consent or

> permit shall be required for an activity affecting the environment. EPA specifies the cases where an environmental protection consent or permit shall be required for an activity affecting the environment.

EPA was adopted in 2004. Nowadays, there are several reasons that demand an amendment of this act.

The first one is the implementation of the Directive of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedy of environmental damage into the Slovenian law. This directive entered into force on 30 April 2004, but EU Member States have had three years to implement the Directive into the national law. The Directive 2004/35/EC was adopted after the realisation that there are currently many contaminated sites in the Community, posing significant health risks, and that the loss of biodiversity has dramatically increased over the last decades. Failure to act upon could result in an increased site contamination and greater loss of biodiversity in the future. Preventing and remedying environmental damage, insofar as is possible, contributes to the implementation of objectives and principles of the Community's environmental policy as set out in the Treaty. Local conditions should be taken into account when deciding how to remedy the damage. The Directive defines and establishes the rule according to the "polluter-pays" principle, stating that an operator causing environmental damage or posing an imminent threat of such damage should, in principle, bear the costs of necessary preventive or remedial measures. In cases where a competent authority acts itself or through a third party on behalf of the operator, that authority should ensure that the costs incurred are recovered from the operator. It is also appropriate that the operators ultimately bear the costs of assessing environmental damage and, as the case may be, assessing an imminent threat of occurance of such damage. This Directive aims at preventing and remedying environmental damage and does not affect rights of compensation for traditional damage granted under any relevant international agreement regulating civil liability. Slovenia has not implemented this directive yet, but it will have done so since the time has run out.

The second reason that forces Slovenia to amend EPA is to eliminate the current problems in the EU Emission Trading Scheme. According to the Directive 2004/101/EC of the European Parliament and of the Council

of 27 October 2004 amending the Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms, Slovenia must, as all other European countries in EU, facilitate in the most cost-effective manner joint investments in projects on environmental burden reduction (hereinafter (referred to as) "joint investment") with a view to reduce the burden on the environment by greenhouse gas emissions. Joint investment shall be of a legal or natural person under domestic law and a foreign natural or legal person having residence or registered office outside the territory of the Republic of Slovenia. Joint investment shall comprise of the investment of capital into development and use of technologies that eliminate or reduce pollution or use of the environment, and of their transfer. The amendments of the EPA must provide the verification process more consistent and more comparable to the legislations/verification processes of other EU Members States especially if Slovenia decides to host project activities.

In these four years, in which EPA is in force, we have gained a lot of experience in environmental impact assessment. According to EPA, environmental impact assessment shall be carried out on the basis of the report on environmental impacts of planned activity (hereinafter (referred to as) "the environmental impact report"). The report maker can be anyone. The entity responsible for the planned activity must provide for a revision of the environmental impact report. A revision of the environmental impact report should present an independent expert control over the quality and suitability of environmental impact report. These reports in fact did not bring more quality in environmental impact reports, which was the purpose of revisions. Analysis showed that revisions represent more or less only costs for the applicant. A better solution would be to abolish this expert control and provide that no one but the persons, who have obtained a licence to do reports, do the reports.

In the procedure for environmental impact assessment the ministry must make the application for environmental protection consent and other concerning documents available to the public. A person permanently residing in the area or owning or possessing a real estate, has a legitimate interest in line with the regulations on administrative procedure and has the status of an accessory participant in the procedure. The status of accessory participant in the procedure for granting the environmental protection consent is enjoyed by a non-governmental organisation. It is

evident that EPA is not clear enough about the question who can be involved and what is the appropriate time to enter this process. This problem has caused a lot of different opinions by different decision makers.

Environmental protection permit is a permit that the operator must obtain for the operation of:

- Installations where an activity might cause large-scale environmental pollution;
- any other installation that is not specified above, if an activity is pursued in that installation that causes emissions into air, water or soil for which limit values are prescribed or if it treats or disposes of waste,
- a plant posing a risk.

When the operation of installation or a substantial change in its operation requires construction, the operator must obtain the environmental protection permit prior to the start of such construction, and in other cases prior to putting it into operation.

The requirement of these permits is ordered by many directives, except environmental protection permit for the operation of a plant posing a risk. In this case the Directive 96/82/EC, which regulates the rules for persons who operate a plant posing a risk, does not demand to have a special permit. The question is whether this permit is necessary and whether EPA can replace the obligatory permits according to the Directive with other instruments (i.e. better inspections). The latter would be an approximation of Lisbon strategy because the procedure of issuing permits by the competent body is very long and expensive. The next question is whether it is necessary to obtain the environmental protection permit for any other installation that is not specified above, where an activity takes place causing emissions of air, water or soil pollutants falling under the prescribed limit values or treatment or disposal of waste activities or disposes of waste, prior to the start of construction, that means before obtaining a construction permit. This situation means a delay for the operator to start building a construction and for the competent body to issue a permit with hypothetical data. The regulation when the environmental protection permit is not mandatory before the start of the construction is not against the directives. If we change the time of obtaining this permit to after having built a construction and before operating the installation, it could be much easier for the operator to start building and for the competent body to issue a permit as well.

Spreminjanje upravljanja javnega potniškega prometa v Sloveniji na podlagi avstrijskih izkušenj

~~UDK: 35 : 004.9 : 659.2~~

Janez Blaž
Ministrstvo za promet, Direkcija RS za ceste
janez.blaz@~~gov.si~~

Marko Hočevar
Univerza v Ljubljani, Ekonomska fakulteta
marko.hocevar@ef.uni-lj.si

IZVLEČEK

Direkcija RS za ceste je kot organ v sestavi Ministrstva za promet upravljalec javnega potniškega medkrajevnega cestnega prometa v Sloveniji. Kot koncedent ima z različnimi avtobusnimi prevozniki – koncesionarji sklenjenih 47 koncesijskih pogodb.

V prispevku je najprej prikazano trenutno stanje na tem področju oziroma obstoječe relacije med koncedentom in koncesionarji in sicer z vidika usklajevanj, dodajanj in ukinjanj voznih redov, zagotavljanja finančnih sredstev kot tudi drugih zadev, ki so sestavni del koncesijskih pogodb.

Izdelane so bile prikazane primerjalne analize z Avstrijo na področju ureditve integriranega, to je mestnega in medkrajevnega cestnega in železniškega javnega potniškega prometa (JPP) in sicer predvsem z vidika učinkovitosti JPP, prikazanega kot število prepeljanih potnikov glede na razpoložljiva finančna sredstva. Predstavljen je 3-nivojski model organizacije integriranega JPP v Avstriji in sistemska razdelitev odgovornosti in pooblastil na teh nivojih.

V nadaljevanju so prikazane aktivnosti na Ministrstvu za promet oziroma Direkciji RS za ceste glede prihodnje ureditve področja javnega potniškega prometa in sicer po l. 2009, ko se iztečejo obstoječe koncesijske pogodbe na tem področju.

Ključne besede: javni potniški promet, Slovenija, Avstrija, koncesije, koncendenti,

1. Trenutno stanje na področju javnega potniškega prometa

Javni linijski prevoz potnikov se v Republiki Sloveniji od leta 2004 izvaja kot gospodarska javna služba (v nadaljevanju GJS). Direkcija RS za ceste (v nadaljevanju DRSC) ima s koncesionarji sklenjenih 47 koncesijskih pogodb. Koncesijske pogodbe so bile sklenjene septembra 2004 in sicer so bile dodeljene neposredno obstoječim prevoznikom, ki so v prometnem letu 2003/2004 opravljali javne linijske prevoze.

Obseg ponudbe izvajanja cestnega primestnega oz. medkrajevnega javnega potniškega prometa (v nadaljevanju JPP) se zmanjšuje. V l. 2004 je bilo prevoženih ca. 51,5 mio. km, v l. 2005 49,5 mio. km, v l. 2006 48,3mio. km. Tudi število prepeljanih potnikov na področju medkrajevnega potniškega cestnega prometa se zmanjšuje. V l. 1985 je bilo prepeljanih več kot 300 mio. potnikov, l. 1995 ca 120 mio., l. 2000 ca. 74 mio., l. 2005 ca. 40 mio. potnikov.

Direkcija RS za ceste, ki je l. 2004 po obstoječi zakonodaji podelila koncesije obstoječim prevoznikom brez razpisa do l. 2008, se srečuje z zahtevami prevoznikov po:

- dodatnem "ukinjanju" nerentabilnih linij;
- izločevanju šolskih prevozov iz sistema javnega potniškega prometa na eni strani, na drugi strani pa združevanju šolskih prevozov v sistem javnega potniškega prometa; zahteve se postavljajo v glavnem z vidika interesov prevoznikov;
- dodatnih finančnih sredstvih v višini ca. 10,4 mio.euro, zaradi (po trditvah prevoznikov) izkazanih izredno visokih stroških; kot glavni razlog se navaja potrebna razpoložljivost avtobusov ob konicah. Izven konic so avtobusi dejansko "neizkoriščeni", stroški pa ostajajo.

V poslovanju podjetij obstajajo velike razlike. Na eni strani so podjetja, ki imajo nizke stroške na km (npr.1,07 euro) , vendar tudi nadpovprečno nizke prihodke na km (isto podjetje 0,75 euro)). Na drugi strani so podjetja, ki imajo nadpovprečne prihodke in tudi nadpovprečne stroške (na primer: 1,58 euro) prihodka na km in 1,92 euro) stroška na km). Ob padanju števila potnikov postaja sistem JPP vse dražji, kar pomeni zmanjšanje prihodkov in potrebo po večjih subvencijah (Hočevar, 2007, str. 23 - 37, Hočevar, 2006, str. 89 - 103).

Trenutni sistem javnega potniškega prometa (JPP) temelji na »bruto« modelu, vanj pa so vgrajeni elementi »neto« modela - maksimiranje kompenzacije (Gabrovec., Lep., Kotar, 2003, str. 78 - 83). Izdelan je bil obračunski

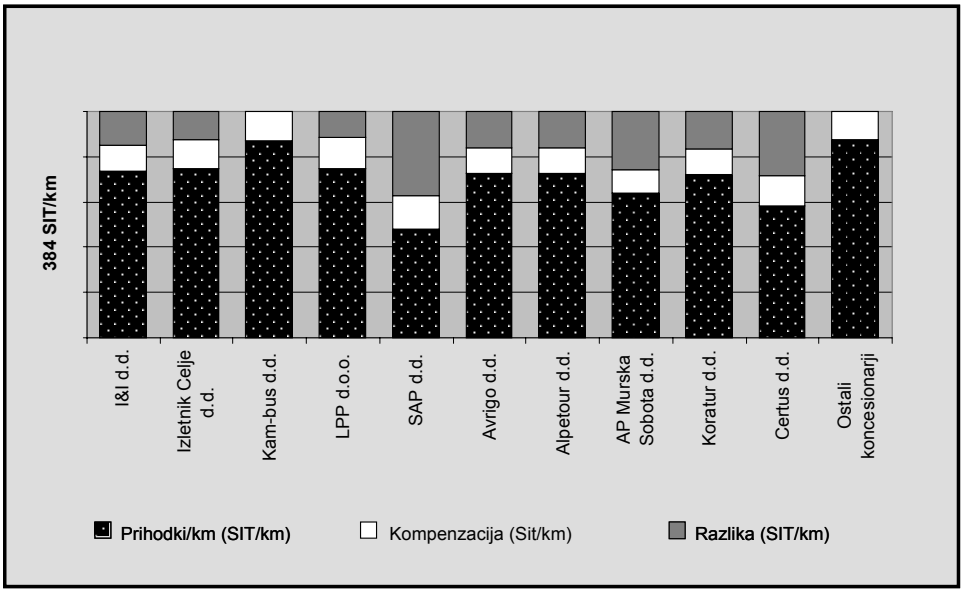
sistem, po katerem država koncesionarjem plačuje kompenzacijo, ki naj bi pokrila razliko med normiranimi stroški in realiziranimi prihodki. Ker je največja možna izplačana kompenzacija po prevoženem kilometru omejena, prevozniki dejansko nosijo velik del rizika za prihodke. Maksimalna kompenzacija je izračunana na podlagi zagotovljenih proračunskih sredstev in pričakovanega obsega izvajanja JPP v kilometrih.

Značilnosti obstoječega sistema so še naslednje:

- država ne pokriva v celoti razlike med priznanimi stroški in realiziranimi prihodki, zato praktično niti ne more »naročati« dodatnih linij;
- vsi koncesionarji imajo enake priznane stroške na vozilo-kilometer;
- med prevozniki (koncesionarji) so velike razlike glede opravljanja tako imenovanih «rentabilnih« in »nerentabilnih« linij;
- nekateri prevozniki (osrednji – severni del Slovenije) beležijo sorazmerno visoke prihodke, ki se približujejo priznanim stroškom;
- drugi (vzhodni del Slovenije) pa pokrivajo izrazito nerentabilne linije. Zaradi omejenega izplačevanja kompenzacij so prevozniki (koncesionarji) v neenakopravnem položaju.
- Sistem financiranja dejavnosti GJS je izjemno tog. Zaradi financiranja te dejavnosti iz proračuna RS se ne da mesečno izvajati obračunavanja in prerazporejanja sredstev glede na priznane stroške in prihodke, kajti vsak prevoznik ima svojo koncesijsko pogodbo, svoj FEP (finančni element predobremenitve), ki se ga predvidi pred vsakokratnim podpisom «finančnega aneksa«, dejanska izplačila pa se obračunavajo glede na poročane prihodke.

Iz slike 1 na naslednji strani je razvidno, da praviloma koncesionarji s prihodki ne pokrivajo normiranih priznanih stroškov izvajanja kilometra GJS. Tako na primer pri koncesionarju Veolia transport Dolenjska in Primorska (bivši SAP d.d.) prevladujejo daljinske linije, kjer je zaradi velikega števila prevoženih kilometrov dejanska proizvodna cena na kilometer nižja od normirane in realne izgube prav gotovo niso tako visoke, kot bi bilo moč sklepati iz grafa. Po drugi strani – na primer – ima prevoznik Kam-bus tudi objektivno »srečo«, da posluje na gosto naseljenem območju z velikim povpraševanjem. Manjši prevozniki (skriti v stolpcu »drugi«) praviloma izvajajo majhno število dobro zasedenih linij z odhodi, povezanimi s šolskim poukom ali delovnim časom podjetij (v bistvu imajo te linije prevladujoče značilnosti posebnega prevoza).

Slika 1: Pokritost normiranih oz. priznanih stroškov s prihodki in kompenzacijami po koncesionarjih, stanje 2006



Vir: DRSC (Blaž, Bele, Lep, Đurić 2006)

2. Primerjalne analize z deželo Štajersko (Avstrija)

Narejena je primerjava z upravljalcem javnega potniškega cestnega (mestnega in primestnega) in železniškega prometa v deželi štajerski, to je štajersko prometno združenje ("Steirische Verkehrsverbund GmbH oz. Styrian transport Association" - STA), ki ima naslednje značilnosti:

- lastnik podjetja ""Štajersko prometno združenje" je dežela Štajerska;
- podjetje ima 13 zaposlenih, njihovi letni stroški znašajo 1, 97 mio. euro (v teh stroških je zajeta oddaja del tujim podjetjem za področje marketinga).

Glavne naloge so:

- prometno upravljanje mestnega in primestnega cestnega in železniškega prometa;
- upravljanje s tarifnim sistemom in sistemom vozovnic;

- raziskava potreb po JPP, informiranje uporabnikov (potnikov);
- izvajanje kalkulacij, dodeljevanje finančnih sredstev in izvajanje poračunavanja ter kontrola.

Avstrijski sistem ima 3-nivojsko strukturo integriranega javnega potniškega prometa in sicer:

- nivo je "politični nivo", ki združuje predstavnike mesta Graz, dežele Štajerske in Republike Avstrije na katerem se sprejemajo strateške odločitve o izvajanja JPP;
- nivo je upravljalec JPP (Štajersko prometno združenje), ki ima z zakonom določena pooblastila na nivoju upravljalca JPP (sklepanje pogodb s prevozniki, operativno izvajanje financiranja sistema, usklajevanje voznih redov, prodaja vozovnic, izvajanje nadzora);
- nivo - izvedbeni nivo so prevozniki.

Iz primerjalnih analiz učinkovitosti z avstrijskim sistemom se neposredni vidni učinki in sicer:

- Avstrijski integrirani sistem cestnega in železniškega mestnega in primestnega prometa potrebuje 126,9 mio. euro na letnem nivoju, da prepelje 100,4 mio. potnikov;
- Obstoječi slovenski sistem na državnem cestnem (medkrajevnem) in železniškem nivoju skupaj z izvajanim JPP na območju MO Maribor potrebuje 124,4 mio. euro, da prepelje 59,9mio potnikov;

Če obstoječemu slovenskemu sistemu (zgornja alinea) dodamo prevoze na MO LJ in se oceni število prepeljanih potnikov: 44 mio. pomeni da v Sloveniji potrebujemo 161,1 mio. euro, da se prepelje 103,9 mio. potnikov.

Tabela 3: Primerjava med državnim in lokalnim delom JPP (cestni in železniški) v Sloveniji in integriranim JPP v Avstriji (mestni in primestni cestni in železniški)

	Slovenija					Avstrija (Štajerska)
Površina	20.273km2					16.000 km2
Število prebivalcev	1,99637mio					1,2 mio.
Število občin	210					535
	cestni primestni, medkrajevni potniški	železniški potniški	MO LJUBLJANA	MO MARIBOR		Integrirani primestni (medkrajevni), mestni cestni in železniški promet
Število izvajalcev Javnega pot. prometa	47 avt. podjetij - koncesionarjev	SŽ	LPP	Veolia Transport		63
Število zaposlenih v teh podjetjih		717	921	120	4500	
Število linij	2200	147	21	20	500	
Število postajališč	7500	266	479	350	6200	
Število odhodov na delovni dan	8000	593			13.500	
Število prodanih vozovnic		4,3mio.		500.000	10,3 mio. in 90.000 dnevnih vozovnic (pupils)	
Prepeljani potniki	40mio	14,9mio	89,7mio*	5mio	100,4 mio	
Prihodki od prodaje vozovnic	33,4. mio	21,4 mio	19,5mio	2,34mio	44,8 mio (cost recovering rate-pod 50%)	
Razpoložljiva finančna sredstva za pokrivanje stroškov izvajanja JPP	Skupaj: 63,2mio -51,9mio - po poročilu koncesionarjev o prihodkih od prodaje vozovnic in javnih virov -11,3mio - dodatna subvencija s strani DRSC	Skupaj: 57,1mio - 21,4 mio - prihodki od prodaje kart - 34,3 mio - pogodba z JAŽP - 1,3mio - ostali tržni prihodki	Skupaj: 36,7mio Subvencija MOL: 4,57mio	Skupaj: 4,1mio. Subvencija MO: 1,38mio		Skupaj: 126,9 mio: 33,3 mio + 48,8 mio za subvencioniranje dnevnih vozovnic+ 44,8 mio kot prihodek od prodaje kart 33,3 mio pridobi 'Verkehrsverbund - 'VVS'' iz -8,6 mio Republika Avstrija -12,5 mio dežela Štajerska -4,5 mio mesto Gradec -7,7mio 'ostala posebna panoga'
Struktura pokrivanja stroškov			LPP: vsi stroški 38,7mio			Upravljalec JPP ('verkehrsverbund') razdeli 33,3 mio za: -20,3mio za subvencioniranje vozovnic -11mio za nerentabilne linije - 1,1mio za marketing -0,9mio za planiranje in organizacijo

* MO Ljubljana (LPP) uporablja drugačno metodologija štetja potnikov; Vir: Hensle, 2007 podatki SŽ, LPP,DRSC.

3. Predlogi prihodnje ureditve javnega potniškega prometa v Sloveniji

Na Direkciji RS za ceste smo v sodelovanju z Ministrstvom za promet pripravili 2 možni obliki prihodnje ureditve JPP (Pirnat, et al., 2007) in sicer:

- po avstrijskem modelu JPP je bil pripravljen predlog za ustanovitev "Centra za javni potniški promet" (v nadaljevanju CJPP) , ki bi bil primerljiv delovanju štajerskega prometnega združenja;
- koncesijski model ureditve JPP.

3.1 Model centra za javni potniški promet (CJPP)

Center za javni potniški promet bi bil pravna oseba javnega prava v celoti v lasti Republike Slovenije. Temeljne naloge tega centra bi bile:

- vzpostavitev enotnega (usklajenega) voznega reda;
- vzpostavitev, organizacija in upravljanje sistema enotne vozovnice (upravni sistem, tehnični sistem, finančni sistem);
- predlaganje linij voznih redih ter cen vozovnic;
- zbiranje sredstev, namenjenih javnemu potniškemu prometu (sredstva vozovnic, sredstva državnega in občinskih proračunov, sredstva za šolske prevoze, sredstva gospodarskih družb za prevoze delavcev, sredstva turističnih organizacij za javne prevoze v turistične kraje, drugo) in njihovo upravljanje;
- sklepanje (tudi manjših) pogodb s prevozniki o izvedbi prevozov;
- zagotavljanje racionalnega prevoza potnikov na ustrezni kakovostni ravni.

Prednosti tega modela so naslednje:

- enostavna zagotovitev sistema enotne vozovnice, ki lahko vključuje tudi železniške prevoze;
- velik vpliv države nad zagotavljanjem kakovosti prevoznih storitev na vsem ozemlju RS enako;
- poenotenje cen in tarif;
- center in država imata natančen pregled nad ekonomiko celotnega sistema;
- fleksibilnost sistema, saj ga lahko s kratkimi in majhnimi pogodbami center sproti prilagaja potrebam;

- možnost angažiranja sredstev zainteresiranih uporabnikov (turizem, šolski prevozi, delavski prevozi…).

Pomanjkljivosti so naslednje:

- nadzor nad višino kompenzacij, torej državnih pomoči, je težavnejši, ker so nekatere manjše pogodbe sklenjene tudi brez javnega razpisa;
- prehodni režim od ustanovitve centra do zagona celotnega sistema je precej zahteven.

Ekonomska upravičenost vzpostavitve CJPP se kaže še v naslednjem:

- znižali bi se skupni upravljalski stroški;
- na področju železniškega prometa se ob ukinitvi nerentabilnih linij pričakuje znižanje stroškov, saj bi se jih lahko nadomestili z določenimi avtobusnimi prevozi;
- CJPP se bi pogajal s posameznimi prevozniki in za posamezne linije, tako da bi se lahko zmanjšali povprečni stroški na kilometer na avtobusnem medkrajevnem prometu iz sedanjih 1,6 na 1,5 . To je cena, po kateri že danes vozijo dobro organizirani prevozniki, ki obenem vlagajo v kakovost prevoznih storitev.
- število medkrajevnih javno linijskih avtobusnih kilometrov (glede na razpoložljiva finančna sredstva) bi se lahko znižalo za 5 odstotkov oziroma 2.416.000 km. Zmanjšanje števila km ne sme iti na račun slabšanja kakovosti ponudbe, temveč je treba ukiniti neatraktivne linije (praviloma gre za zelo dolge linije) in pa določene medkrajevne linije opredeliti kot mestne oziroma občinske (tu gre predvsem za linije pri velikih mestih: Ljubljana, Maribor, Celje…).
- CJPP bi lahko povečal prihodke, saj bi bil v večji meri fleksibilnejši pri sprejemanju poslovnih odločitev. Javni prevozi (šolski in občinski) se sofinancirajo tudi iz občinskih proračunov in prek Ministrstva za šolstvo in šport. CJPP bi moral znati poiskati ekonomsko upravičenost združevanja javnih virov financiranja in javnih linij v najširšem pomenu. Tam, kjer je interes »zasebnega kapitala« po javno linijskem prometu, bi lahko k sofinanciranju javnih linij CJPP pritegnil tudi privatna sredstva (hoteli, podjetja).

Center za javni potniški promet bi bila pravna oseba javnega prava v celoti v lasti Republike Slovenije. Temeljne naloge tega centra bi bile podobne kot pri avstrijskemu štajerskem prometnem združenju (izvajanje upravljalskih nalog na 2. nivoju).

3.2 Koncesijski model

Ta model izhaja iz sedanje zakonske ureditve, ki predvideva koncesije. Temeljni element koncesijskega razmerja je, da prevoznik nosi tveganje povpraševanja po prevoznih storitvah, torej številu potnikov. To pomeni, da je pri oblikovanju razpisnih pogojev treba upoštevati naslednje:

- pogodbena razmerja morajo omogočati ekonomska tveganja na daljše obdobje (8-10 let za avtobusne prevoze, 15 let za železniške);
- koncesijsko območje mora biti dovolj veliko, da omogoča koncesionarju kombinacijo rentabilnih in nerentabilnih linij ter potrebno ekonomijo obsega; idealno bi bilo le eno koncesijsko območje v Sloveniji, saj druge rešitve zelo zapletejo sistem;
- nujna pa je izključna pravica enega prevoznika na določeni liniji, saj bi sicer prišlo do prevzemanja potnikov med koncesionarji, ki bi po različnih voznih redih vozili na isti liniji ali njenem delu;
- razpisne zahteve glede storitev morajo biti določene bolj okvirno in večinoma se mora sam ponudnik odločiti, kako bo organiziral svoje delo;
- državna pomoč mora biti določena vnaprej kot najvišja možna kompenzacija;
- po sklenitvi pogodbe mora biti zagotovljena možnost prilagajati obseg prevoznih storitev dejanskim potrebam.

Prednosti:

- ni potreben podrobnejši nadzor nad ekonomiko poslovanja;
- rešitev omogoča zasebno iniciativo glede kvalitete storitev in nova vlaganja v prevozna sredstva;
- rešitev spodbuja prevoznike, da si prizadevajo pridobiti večje število potnikov;
- postopki podelitve koncesije so enostavnejši, čeprav ekonomsko bolj zapleteni;
- praviloma ni pričakovati težav z državno pomočjo, čeprav tega ni mogoče izključiti zaradi relativno ohlapnega postopka podelitve koncesije.

Pomanjkljivosti:

- zelo težko je oblikovati večje število koncesijskih območij z izključno pravico enega koncesionarja; enostavna rešitev je le ena koncesija za vse območje Slovenije;
- obstaja možnost, da vse koncesije dobi en, finančno velik tuj prevoznik;

- sistem enotne vozovnice je enostavno vpeljati le v primeru enega koncesionarja, sicer terja zapleten sistem medsebojnih kompenzacij;
- potreben je natančen nadzor kakovosti storitev koncesionarja;
- manjša fleksibilnost sistema, ki se sicer lahko prilagaja okoliščinam poselitve;
- že pred objavo javnega razpisa je potrebna zelo natančna ekonomska analiza.

4. Predlog urejanja ekonomskega odnosa s koncesionarji po sklenitvi koncesijske pogodbe

Pri predlogu urejanja ekonomskih odnosov s koncesionarjem oziroma koncesionarji smo izhajali iz naslednjih izhodišč:

1) med oba partnerja (državo in avtoprevoznikom) naj bo tveganje čim bolj sorazmerno porazdeljeno;
2) pregleden in jasen način urejanja medsebojnega ekonomskega odnosa;
3) relativna enostavnost kontrole poslovanja.

V koncesijski pogodbi se določi kompenzacija Ministrstva za promet na naslednji način, kot ga prikazuje tabela 4.

Tabela 4: Izračun kompenzacije za leto 2009

1. Stroški goriva	
2. Neposredni stroški brez goriva	
3. SKUPAJ NEPOSREDNI STROŠKI (1 + 2)	
4. Posredni stroški (% x 2)	
5. Stroški financiranja + dobiček	
6. SKUPAJ STROŠKI (3+4+5)	
7. Prihodki od prodaje vozovnic	
8. Prihodki iz javnih virov (občine, min. za šolstvo itd)	
9. SKUPAJ PRIHODKI (7+8)	
10. KOMPENZACIJA (6-9)	

Opomba: Posredni stroški se določijo z odstotkom na neposredne stroške brez goriva, stroški financiranja in dobiček pa so določeni z absolutno številko

Predpostavimo, da je prevoznikova kalkulacija na km naslednja (glej tabela 5):

Tabela 5: Izračun LC za leto 2009

1. Stroški goriva	0,4
2. Neposredni stroški brez goriva	1,0
3. SKUPAJ NEPOSREDNI STROŠKI (1 + 2)	1,3
4. Posredni stroški (30 % 1EURO)	0,3
5. Stroški financiranja + dobiček	0,1
6. SKUPAJ STROŠKI (3+4+5)	1,7

Lastna cena se praviloma spreminja enkrat na leto, ko so znane spremembe letnih cen posameznih elementov cene. Med letom se lahko lastna cena spremeni, če se je cena posameznega elementa lastne cene spremenila za več kot 20 % (na primer stroški goriva). Prav tako se lahko lastna cena na novo določi, če je prišlo do spremenjenega povpraševanja oziroma posebnih investicij (na primer uvajanje enotne vozovnice, informiranje itd.). Zaradi kalkulacijskih zmot in spremenjenih količinskih elementov kalkulacije (na primer: prevoženi km avtobusov oziroma voznikov), se lastna cena ne bi spreminjala.

Ob predpostavki, da prevoznik prepelje 40 mio. km in bo ustvaril navedene prihodke v tabeli 4, bi dogovorjeno kompenzacijo izračunali na način, kot je prikazan v tabeli 6.

Tabela 6: Izračun zahtevane kompenzacije za leto 2009

1. Stroški goriva	16.000.000
2. Neposredni stroški brez goriva	40.000.000
3. SKUPAJ NEPOSREDNI STROŠKI (1 + 2)	56.000.000
4. Posredni stroški (30% od 40.000.000)	12.000.000
5. Stroški financiranja + dobiček	4.000.000
6. SKUPAJ STROŠKI (3+4+5)	72.000.000
7. Prihodki od prodaje vozovnic	35.000.000
8. Prihodki iz javnih virov (občine, min. za šolstvo itd)	11.000.000
9. SKUPAJ PRIHODKI (7+8)	46.000.000
10. KOMPENZACIJA (6-9)	26.000.000

Predpostavimo, da bo junija 2009 cena goriva za 25 % večja od izhodiščne cene. To pomeni, da so prevozniki upravičeni do povečanja kompenzacije za (20.000.000 km x 0,1 euro) oz. za 2 mio. euro v letu 2009.

31.12.2009 se lahko na podlagi primerjave cen ugotovi nova – popravljena lastna cena. Predpostavimo, da so se cene neposrednih stroškov brez goriva povečale za 10 %. Izračun nove lastne cene in kompenzacije za leto 2010 bi bil takšen (glej tabelo 7):

Tabela 7: Izračun LC za leto 2010

1. Stroški goriva	0,5
2. Neposredni stroški brez goriva	1,1
3. SKUPAJ NEPOSREDNI STROšKI (1 + 2)	1,6
4. Posredni stroški (30 % 1 EURO)	0,33
5. Stroški financiranja + dobiček	0,1
6. SKUPAJ STROšKI (3+4+5)	1,93

Na podlagi tega izračuna, se lahko ugotovi kompenzacija za leto 2010, kot jo prikazuje tabela 8.

Tabela 8: Kompenzacija za leto 2010 (predpostavimo 40.000.000 km)

1. Stroški goriva	20.000.000
2. Neposredni stroški brez goriva	44.000.000
3. SKUPAJ NEPOSREDNI STROšKI (1 + 2)	64.000.000
4. Posredni stroški (30% od 44.000.000)	13.200.000
5. Stroški financiranja + dobiček	4.000.000
6. SKUPAJ STROšKI (3+4+5)	81.200.000
7. Prihodki od prodaje vozovnic	35.000.000
8. Prihodki iz javnih virov (občine, min. za šolstvo itd)	11.000.000
9. SKUPAJ PRIHODKI (7+8)	46.000.000
10. KOMPENZACIJA (6-9)	35.200.000

Marca leta 2010 se izdela obračun poslovanja za leto 2009. Ob predpostavki, da dobiček s stroški financiranja ni presegel dogovorjene postavke (4.000.000), se kompenzacija ne zmanjša, prav tako država ne poveča kompen-

zacije, če je podjetje doseglo izgubo do 4 mio euro. Poglejmo si takšen primer v tabeli 9.

Tabela 9: Ustvarjeni poslovni izid prevoznika v letu 2009

1. Stroški goriva	18.000.000
2. Neposredni stroški brez goriva	42.000.000
3. SKUPAJ NEPOSREDNI STROŠKI (1 + 2)	60.000.000
4. Posredni stroški (30% od 42.000.000)	12.600.000
5. SKUPAJ STROŠKI (3+4+5)	72.000.000
6. Prihodki od prodaje vozovnic	40.000.000
7. Prihodki iz javnih virov (občine, min. za šolstvo itd)	8.000.000
8. Prihodki kompenzacije (dogovorjena +medletno povečanje)	28.000.000
9. SKUPAJ PRIHODKI	76.000.000
10. Poslovni izid + stroški financiranja (9-5)	4.000.000

Opomba: posredne stroške se prizna le z dogovorjenim odstotkom na neposredne stroške brez goriva. Če bi podjetje doseglo izgubo, bi država pokrila tisti del izgube, ki bi presegal 4. mio .

Podobno bi se naredil tudi obračun za leto 2010. Marca 2011 bi bili znani podatki o ustvarjenih prihodkih v letih 2009 in 2010. če so bili ustvarjeni prihodki leta 2010 manjši od prihodkov iz leta 2009, je prevoznik upravičen do višje kompenzacije za to razliko. Vendar mu povišana kompenzacija ne sme ustvariti večjega dobička od dogovorjenega.

5. Zaključek

Glede na sprejeto Resolucijo o prometni politiki Republike Slovenije (Ur.l., 2006), se kažejo nujne spremembe na področju javnega potniškega prometa v Sloveniji. Same spremembe v smislu nadaljnjega razvoja na tem področju so povezana s spremembami na treh področjih: organizacijsko - pravnem, operativno tehničnem in finančnem področju.

Nadaljnji razvoj integriranega (mestnega, medkrajevnega cestnega in železniškega) javnega potniškega prometa v Sloveniji je odvisen ne samo od aktivnosti na Ministrstvu za promet, ampak tudi od drugih ministrstev, lokalnih skupnosti oz. preostalih zainteresiranih institucij, ustanov ipd. Z razvojem tega

področja se namreč rešujejo ne samo okoljevarstvene zahteve po zmanjšanju emisijskih delcev (Ministrstvo za okolje) ampak se tudi zagotavlja mobilnost različnih struktur potnikov: osnovnošolcev, dijakov (Ministrstvo za šolstvo), delavcev, upokojencev, invalidov (Ministrstvo za delo, družino, socialne zadeve), študentov (Ministrstvo za visoko šolstvo).

Vse to pa zahteva, da se v Sloveniji najprej vzpostavi ustrezna 3-nivojska organizacijska struktura delovanja integriranega javnega potniškega prometa (kot je bilo prikazano s primerjalnimi analizami z Avstrijo) in sicer na političnem, upravljalskem in izvajalskem nivoju.

~~*Doc. dr. Marko Colnar je diplomiral, magistriral in doktoriral je na Ekonomski fakulteti Univerze v Ljubljani. Leta 2004 je bil na Univerzi v Ljubljani habilitiran za docenta. Sodelovali je pri planiranju in razvoju informacijskih ter organizacijskih sistemov: od priprave metodoloških osnov, pisanja strateških in planskih dokumentov, do vodenja konkretnih informacijskih in drugih projektov. Je tudi avtor več kot 70 strokovnih in znanstvenih prispevkov. Od leta 1984 do 1993 je bil zaposlen na SŽ – Prometni inštitut, od leta 1993 pa v državni upravi (Davčna uprava RS, Center Vlade RS za informatiko, Ministrstvo za šolstvo in šport).*~~

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Janez Blaž, Marko Hočevar

Spreminjanje upravljanja javnega potniškega prometa v Sloveniji na podlagi avstrijskih izkušenj

SUMMARY

RENOVATION OF BUSINESS, OCCURRING E-GOVERNMENT AND AT THE MOMENT CONDITION IN THE REPUBLIC OF SLOVENIA

Modern administration should aim to achieve optimal internal functioning and effective customer operations to the satisfaction of both employees and customers; to a great extent, this can be achieved through e-commerce, provided certain starting points, facts and assumptions are taken into account.

The development of informatisation within the Slovene administration up to now should (like in that of the developed organisations and states we tend to compare ourselves to) have led towards optimizing (manual) functioning of administration, establishing information solutions (first for the so-called 'common functions' in terms of their effective interconnection), and via the Internet towards opening up to customers in a convenient way; all of this should be upgraded with systems for governance and decision-making.

The development of the Slovene e-government up to now has lacked concept, an objective analysis of the needs of customers and employees, and a clear specification of competences of individual ministries, despite the fact that a list of projects for e-services within individual ministries formed an important part of the AN-2004 action plan. As a result, there are several separate web portals in an otherwise common Slovene e-government: on the one hand there is the State portal 'E-uprava' under the umbrella of the Ministry of Public Administration, on the other hand there are other important portals for electronic commerce of administration bodies which are at least equal in importance as the 'E-uprava' portal (e.g. e-taxes, e-land register, e-cadastre etc). What's more, the Ministry of Public Administration runs and carries out two other projects, one for corporate entities called »e-VEM« and one for citizens »the online extension of a vehicle registration document«, which is otherwise a project of the Ministry of the Interior, so the confusion is more than obvious.

Aims, services and data of the e-government, or rather its concept, should be »transposed« into the (re)organisation and better functioning (optimised procedures) of administration bodies. This would give us a framework for a complete reform of operations (instead of just drafting/amending legislation). In addition, both customers and employees in

administration bodies should be heard as well (what their needs are, where bottlenecks are…). This would provide criteria for determining priorities for the development of individual services within the e-government system.

If we look at the Slovene administration as an organisational system, it is appropriate to approach its reform as systematically as possible; this makes the task significantly easier later on since the analysis itself together with a strict application of appropriate work methods and techniques for displaying results provides models which show a complete picture of the existing state of affairs in Slovene administration, and which can be then used to build the target state of affairs (models) using the same methods and techniques.

The main (but not the only) result for everyone involved – customers and employees (i.e. the users) of e-government – would be a user-friendly web portal which would offer the required and suitable e-services of administration and other bodies interconnected in such a way that customers and employees could solve the majority of the problems, the former from their homes and the latter without the customers. This would rid the employees in administration bodies of most routine and administrative work giving them time for management, decision-making and further operations reform.

To constantly blame the lack of necessary legislative changes for current state of affairs is unproductive and misleading.

Today (re)organisation is an effective tool for the improvement of functioning. In the case at hand, this involves mainly more or less big/small changes in the internal structure of administration bodies in close connection with changes in the structure of administrative and other procedures (but not the change of the procedures themselves). Organisation is a relatively cheap tool and a hidden reserve in the system (there is always room for improvement, which does not require a big investment).

Staff, management and staff management are the foundation of modern organisation, however, members of the staff themselves must change their way of thinking (their attitude towards customers – the buyers of administrative services, their attitude towards the sources for their work = a key to a more effective operations). Special attention should be given to educating managers; the so-called new public management is one of the bases for the professionalisation of modern administration. It involves a constant increase in and a constant improvement of online

administrative services, which should be cheap and should contribute to economic development, improve governance, increase accessibility to quality (public) information, and augment the transparency of administration operations and possibilities for democratic dialogue.

E-government did not yield the results expected of the project (also from the investment point of view). The low percentage of citizens using e-income tax return and e-vehicle registration document extension, which seem attractive and useful e-services, is sending a negative message. The many years of investment into developing information solutions for e-income tax return has become very questionable since it has been announced that this year income tax return might be abolished. It is essential to make a realistic evaluation of the state of affairs as soon as possible; excessive confidence on the part of developers, protests from evaluators, all of the investments so far and the actual results show that we cannot afford a seemingly successful period of the Slovene e-government despite the exceptional result on the European commission scale.

E-government should be a model for optimal organisation and functioning of administration bodies; it should mainly include those services customers need the most; information solutions of e-government should represent a reduction in administrative burdens for employees in administration bodies; all information solutions of e-government should be simple, while the structure (the selection of services) of the e-government portal should be consistent, clear and transparent.

Navodila avtorjem

Revija Uprava objavlja originalne prispevke domačih in tujih avtorjev. Članke objavljamo v slovenskem jeziku z daljšimi povzetki v angleškem jeziku, prispevke tujih avtorjev objavljamo v angleškem jeziku. Vsak članek mora za objavo prejeti dve pozitivni recenziji. Prispevki morajo biti lektorirani, v uredništvu opravljamo samo korekturo.

Polno ime avtorja naj sledi naslovu prispevka. Imenu dodajte naslov institucije in avtorjev elektronski naslov. Prispevki naj imajo dolžino cca 30.000 znakov. Članek mora vsebovati še:

- izvleček v slovenskem jeziku, ki v 8 do 10 vrsticah opiše vsebino prispevka oz. dosežene rezultate raziskave ter
- "summary" v angleškem jeziku, v obsegu 3 strani, ki naj vsebuje prevod naslova in povzetek vsebine (opredelitev problema in ugotovitve).

Prispevek naj bo pisan v urejevalniku besedil WORD (*.doc) v enojnem razmaku, brez posebnih ali poudarjenih črk. Za ločilom na koncu stavka napravite samo en prazen prostor, ne uporabljajte zamika pri odstavkih.

Na koncu članka navedite literaturo, ki ste jo uporabili za prispevek, po naslednjem vzorcu:

- Novak, F., Bernik, S. (1999): "Naslov članka", ime revije, letnik, štev., str. 12-15.
- Bernik,S.: (1999): "Naslov knjige", založba, kraj.
- Novak, F.(1999): "Naslov magistrskega dela", magistrsko delo, univerza, fakulteta.
- Žagar, A. (2003): "Naslov referata", X. Dnevi slovenske uprave, Zbornik posvetovanja, Fakulteta za upravo, str. 12 -15.

V besedilu članka se sklicujte na navedeno literaturo na način (Novak, 1999, str. 456).

Članku dodajte kratek življenjepis avtorja (do 6 vrstic).

Prispevke pošljite po elektronski pošti gospe Pečarič na naslov:

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The title of the article must be followed by a full name of the author, accompanied by the title of the institution and the author's e-mail address. The article should contain around 30,000 characters. An article must also comprise:

- "abstract" in English, which in 8 to 10 lines describes the contents of the article or the results achieved in the research; and
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The articles must be written in WORD (*.doc), with single spacing between lines, without special or bold characters, with only one space after the punctuation mark at the end of the sentence, and without indented paragraphs.

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- Novak, F., Bernik, S. (1999): "Title of the article", name of the magazine, year, no., p. 12-15.
- Bernik, S. (1999): "Title of the book", publishing house, town.
- Novak, F. (1999): "Title of the master's thesis", master's thesis, university, faculty.
- Žagar, A. (2003): "Title of the paper", X. Days of the Slovene Administration, Proceedings, Faculty of Administration, p. 12 -15.

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marjeta.pecaric@fu.uni-lj.si.