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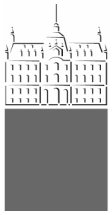

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Gosarjeva 5, SI-1000 Ljubljana
tel.: +386 (0)1 5805-500 faks: +386 (0)1 5805-521
e-pošta: revija.uprava@fu.uni-lj.si

odgovorna urednica / editor
Stanka Setnikar-Cankar

tehnično uredništvo / tehnical editor
Nataša Svržnjak

oblikovanje / design
Branka Smodiš

fotografije / photography
arhiv fakultete, Matevž Paternoster

prelom / text design
Anamarija Leben

lektoriranje / editing
Katarina Puc

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Uvodnik

Spoštovani,

Tokratna številka revije Uprava prinaša članke, ki potrjujejo interdisciplinarnost upravno-pravnih, ekonomskih, organizacijskih in informacijskih vidikov obravnave javne uprave. Tako v enem od prispevkov avtorja predstavita analizo informatizacije javne uprave v Sloveniji, ki odpira nekatera vprašanja modernizacije javne uprave in širšega javnega sektorja.

Za modernizacijo javne uprave, ki naj bi omogočala večjo storilnost in kakovost storitev, je ključna podpora sodobne informacijske tehnologije. Za njeno uspešno uporabo pa so potrebne tudi organizacijske spremembe in ekonomika poslovanja.

Prenovi poslovanja se v gospodarstvu namenja veliko pozornosti tudi v času gospodarske krize. Prav s prenovo so bili doseženi najboljši rezultati, ki so pozitivno vplivali na finančne rezultate poslovanja. Z uporabo informacijske tehnologije so organizacije s področja gospodarskih dejavnosti spreminjale svoje poslovne procese zato, da bi znižale stroške poslovanja, povečale produktivnost, ekonomičnost in rentabilnost ter izboljšale konkurenčno prednost. Podatki kažejo, da je bil samo tak pristop alternativa zapiranju delovnih mest in preseljevanju proizvodnje v cenejša okolja zaradi globalizacije svetovne ekonomije.

Prenos dobre prakse iz zasebnega v javni sektor tudi pri modernizaciji poslovanja bi zahteval, da morajo upoštevati razvojni projekti vsa področja, potrebna za modernizacije uprave: informacijsko, pravno, upravno, organizacijsko in ekonomsko oz. finančno področje. Informacijski vidik je nedvomno nujen del sprememb, ni pa zadosten, brez preostalih ukrepov. Kadar ekonomisti vključijo potrebo po analizi stroškov in koristi, informatiki nanjo praviloma odgovorijo z nujno potrebo po tehnološkem razvoju. Uvajanja sodobne tehnologije pa ne bi smeli ocenjevati le kot strošek.

Kadar se odloča o spremembah in modernizaciji v javnem oz. državnem sektorju, sta zato najpogostejši dve možnosti: prva možnost je izredno varčevanje in omejevanje nakupov zaradi pomanjkanja finančnih sredstev in gospodarske krize. Druga skrajnost pa je odločitev za najsodobnejšo tehnologijo, ne glede na finančna sredstva, stopnjo njene izrabe, povezanosti s sistemom, usposobljenosti zaposlenih. Oba pristopa sta neoptimalna, kar pokažejo kasnejše primerjave doseženih rezultatov z načrtovanimi. Zato je pomembno, da ne pozabimo razloga za reformna prizadevanja, t.j. krizo javnih financ, ki istočasno zahteva standardizacijo storitev, njihov nadzor in ugotavljanje stroškov in koristi uvedenih sprememb.

Nedvomno pa je klasični administrativni sistem preživel vse politične nestabilnosti in spremembe: od monarhije do republike, od ekonomskega razcveta do gospodarskih kriz, od diktature do demokracije. Malce ironično bi lahko trdili, da je birokracija starejša od demokracije. Zato bo obstajala tudi v prihodnje in želeti je, da v podporo sodobnemu pozitivnemu razvoju v družbi, upoštevajoč vsakokratne značilnosti okolja.

Odgovorna urednica

red. prof. dr. Stanka Setnikar-Cankar

1.01 Izvirni znanstveni članek

Seznanjenost javnega in zasebnega sektorja z ukrepi odprave administrativnih ovir v Sloveniji

UDK: 658:35(497.4)

Urška Milavec

urskamilavec1@gmail.com

Maja Klun

Univerza v Ljubljani, Fakulteta za upravo

maja.klun@fu.uni-lj.si

IZVLEČEK

Ukrepi odprave administrativnih ovir so del ukrepov izboljšanja kakovosti regulative. Z raziskavo, opravljeno leta 2010 tako v javnem kot zasebnem sektorju, smo želeli preveriti, ali ukrepe javni in zasebni sektor različno zaznavata ter ugotoviti, ali oba sektorja opredeljujeta isto skupino regulative kot najbolj obremenilno. Rezultati so pokazali, da je informiranost o ukrepih odprave administrativnih ovir v Sloveniji slaba, posebej v zasebnem sektorju, ki naj bi bil glavni deležnik teh ukrepov. Kljub temu zasebni sektor ugotavlja, da se je regulativa za mala in srednje velika podjetja izboljšala v času izvajanja ukrepov odprave administrativnih ovir. Javni sektor regulativo s področja javnih naročil ocenjuje kot najbolj obremenjujočo, medtem ko zasebni sektor na prvo mesto uvršča regulativo s področja zaposlovanja.

Ključne besede: administrativne ovire in bremena, administrativnih stroški, konkurenčnost, informiranost, javni in zasebni sektor, Slovenija

JEL: H83, K2, K3

1 Uvod

Pojem regulativa v najširšem pomenu označuje poti, s pomočjo katerih se odloča in uvajajo odločitve javnega pomena. Najbolj splošno pa se pojem regulativa uporablja kot pojem, ki označuje doseganje ciljev

javnega sektorja z uporabo pravil ali standardov (Hood et al., 2000). Kadar regulativa povzroča učinke, ki presegajo javni namen, govorimo o administrativnih ovirah. Prvi ukrepi na področju odprave administrativnih ovir (OAO) v Sloveniji so se začeli leta 2000 s tako imenovanim "antibirokratskim programom". Ukrepi so bili logična posledica vrste ukrepov in raziskav, ki so se pojavile v svetu. Poleg OECD in Evropske komisije, je bilo aktivnih kar nekaj skupin kot je SCM Network (mednarodna skupina, ki deluje na področju izmenjave najboljših praks, izkušenj in znanj med državami in tako želi doseči svoj cilj, ki je zmanjšanje administrativnih bremen in odstranitev nepotrebne birokracije) ali mreža višjih uradnikov, ki dela na področju boljše pravne ureditve v svojih državah in ima svoj forum za izmenjavo najboljših praks pri oblikovanju novih predpisov (primarna in sekundarna zakonodaja). Pomembnejše raziskave administrativnih ovir pa so bile izvedene v okviru Evropske banke za obnovo in razvoj z raziskavo, imenovano BEEPS (*Business Environment and Enterprise Performance Survey*), Svetovna banka z WGI (*Worldwide Governance Indicators* – svetovni kazalniki upravljanja), indeks svetovne konkurenčnosti – IMD, ki ga meri švicarski center za konkurenčnost, raziskava OECD s področja kakovosti institucij in administrativnih stroškov (OECD, 2001) ter nekatere druge parcialne raziskave s tega področja (Radaelli & DeFrancesco, 2007; Brunetti et al., 1998; Chittenden et al., 2003; Massey, 2003, itd.). Skupna vsem študijam je ugotovitev, da kakovost institucij in regulative pomembno vplivata na konkurenčnost podjetij in gospodarstva.

Kot smo že omenili, so se prvi ukrepi v Sloveniji začeli s predstavitvijo tako imenovanega antibirokratskega programa. Prvo poročilo o poenostavitvi regulative je bilo objavljeno leta 2005. Potem je sledil akcijski načrt, imenovan "Program ukrepov za odpravo administrativnih ovir", ki je vsako leto predstavljen na vladnih spletnih straneh. Leta 2005 je bilo v poročilu predstavljenih 40 ukrepov, ki pa niso bili finančno ovrednoteni. Napredek je bil prikazan šele v poročilu za leto 2006, ko so bili nekateri od ukrepov tudi finančno ocenjeni (npr. letni prihranki lokalnih skupnosti za nekatere javne storitve, potem tudi to, da lahko upravni uradi overijo podpis na nekem potrdilu, ki je enakovreden overitvi notarja, …). V akcijskem načrtu 2006 je bilo sprejetih 34 ukrepov (92 % ukrepov je bilo realiziranih do oktobra 2008), v letu 2007 pa 30 ukrepov (realiziranih je bilo 60 % ukrepov do oktobra 2008), zlasti na področju tako imenovanih življenjskih dogodkov, ki so pomembni za podjetja in

državljane. Model za merjenje administrativnih stroškov EMMAS (enotna metodologija za merjenje administrativnih stroškov) je bil dokončno razvit konec julija 2007. V poročilu, objavljenem leta 2008, je bil prikazan skupni pregled izvedenih ukrepov za obdobje 2006–2008 in podana je bila skupna ocena prihranka administrativnih stroškov, narejena s pomočjo enotne metodologije in ocenjena za večino ukrepov. Iz meritev izhaja, da je bilo z realizacijo ukrepov, doseženo preko 100 mio € prihrankov oziroma poenostavitev (npr. na področju registracije podjetij na točkah e-VEM se je prihranilo preko 10 mio € na letnem nivoju, poenostavili so se postopki za mala podjetja na področju varstva osebnih podatkov, kjer prihranek znaša 36 mio € na leto, npr. ukinitev obrtnih dovoljenj za preko 60 gospodarskih dejavnosti, …). V letu 2008 je bilo sprejetih 44 ukrepov, ki so bili vsi realizirani. Akcijski načrt, ki ga je potrdila vlada maja 2009 (sprejet je bil na podlagi mednarodnih zavez, gre za realizacijo cilja, da bo Slovenija, tako kot druge države članice EU, znižala administrativna bremena za 25 % do leta 2012), vključuje v prvem delu 41 hitrih ukrepov na različnih področjih ureditve (dela, davkov, okolja, …), ki so rezultat predlogov državljanov, podjetnikov in različnih zbornic (Ministrstvo za javno upravo, 2009) in v drugem delu sistematično merjenje administrativnih stroškov izbranih predpisov z uporabo enotne metodologije, ki izhaja iz metode SCM (*Standard Cost Model*). Junija 2010 je Vlada Republike Slovenije sprejela "Načrt aktivnosti za skrajševanje postopkov in odpravo administrativnih ovir", ki se osredotoča na 6 področij zakonodaje (pridobitev gradbenega dovoljenja, delovno pravna zakonodaja, plačevanje davkov in prispevkov, prenos lastništva, mednarodno poslovanje in izvrševanje pogodb).

Poseben poudarek je dan tudi presoji učinkov regulative – PUR (Regulatory Impact Analysis – RIA), ki jo je Slovenija leta 2007 vsaj na formalni ravni uvedla v naš pravni red (sprememba 8. člena vlade RS – Ur. l. RS, št. 43/2001, 21/2007). Gre za pravne vidike analize učinkov predpisov od leta 2002. V letu 2007 je OECD poročal, da Slovenija kaže veliko izboljšav na področju zmanjševanja administrativnih ovir, vendar je treba izboljšati presojo učinkov regulative. Na slednje je v poročilu opozoril tudi varuh človekovih pravic. V mesecu novembru 2009 je bila v Državnem zboru sprejeta Resolucija o normativni dejavnosti (UL RS, št. 95/2009), ki je akt programske narave in je politično zavezujoč dokument, pripravljen v skladu z obstoječimi pravnimi predpisi, ki določajo postopek sprejemanja predpisov. Resolucija se nanaša na širše

področje normativne dejavnosti, katere nosilci so vlada, ministrstva in drugi organi (nosilci javnih pooblastil in organi lokalnih skupnosti) kot celote. Resolucija povzema ustaljena ustavna, pravno-sistemska in nomotehnična načela in pravila, hkrati pa naj bi pomenila zavezo vsakokratne politične oblasti in javnih uslužbencev, da bodo pri oblikovanju politik in pripravi predpisov upoštevali glavna načela dobre zakonodajne politike. Pripravljavci predpisov in politik bodo morali vestno izvajati presoje posledic predlogov predpisov in politik na gospodarstvo, okolje, socialo in na javne finance oziroma širši segment javne uprave ter v skladu z minimalnimi priporočili in smernicami sodelovati s strokovno in z drugimi zainteresiranimi javnostmi. Na podlagi resolucije je bila junija 2010 sprejeta sprememba poslovnika vlade, skupaj z navodili za pripravo vladnih gradiv. Da bi bilo izvajanje programa za odpravo administrativnih ovir oziroma zmanjševanje administrativnih bremen učinkovito, ta navodila vsebujejo zahtevo po presoji učinkov novega ali spremenjenega predpisa. Tako morajo resorji posebno pozornost nameniti presoji učinkov in opredeliti vplive na posamezna področja, med drugim morajo jasno zapisati tudi vpliv na administrativne obremenitve/razbremenitve.

Iz navedenega je razvidno, da se večina raziskav osredotoča na merjenje administrativnih stroškov regulative in s tem iskanja najbolj obremenjujočih dejavnikov posamezne regulative ter tako iskanja možnosti za poenostavitve. Po drugi strani raziskave ugotavljajo najbolj obremenjujočo regulativo z vidika konkurenčnosti gospodarstva in razvrščajo države v določene lestvice. Uspehi različnih ukrepov se ponavadi kažejo v napredovanjih države po različnih lestvicah, bolj specifično pa v poročilih pristojnih organov v različnih državah o izvedenih in doseženih poenostavitvah regulative.

V prispevku želimo prikazati drugi vidik, ki ni pogost v raziskavah, in sicer seznanjenost javnosti z uspehi in ukrepi na področju odprave administrativnih ovir. V okviru raziskave smo skušali preveriti dve trditvi. Prva je, da se seznanjenost o projektu odprave administrativnih ovir (v nadaljevanju OAO) ne razlikuje med zasebnim in javnim sektorjem. Druga trditev pa je, da zasebni in javni sektor različno ocenjujeta obremenitev posameznih področij regulative. S tem smo želeli oceniti uspešnost ukrepov odprave administrativnih ovir. To pomeni, da v kolikor ukrepi niso bili zaznani tudi v praksi, niso bili dovolj ciljno usmerjeni. Pri tem smo javnost razdelili na dve skupini, in sicer na javni in zasebni sektor. V nadaljevanju najprej sledi poglavje o ugotovitvah različnih

avtorjev in raziskav o povezanosti kakovosti regulative s konkurenčnostjo gospodarstva. Potem sledi opredelitev raziskave, metodologije in rezultatov.

2 Pomembnost odprave administrativnih ovir za konkurenčnost gospodarstva

Na pomladanskem vrhu marca leta 2000 so voditelji držav članic EU sprejeli Lizbonsko strategijo, ki predvideva, da bi EU do leta 2010 postala najbolj dinamično, konkurenčno ter na znanju temelječe gospodarstvo na svetu. Izboljšanje konkurenčnosti podjetij je tudi eden od temeljnih ciljev slovenske strategije razvoja (Vlada RS, 2010). V okviru "novega začetka za Lizbonsko strategijo" je Svet EU marca 2005 objavil obvestilo o širših smernicah ekonomske politike ter poudaril posebno smernico (št. 14) o kakovosti zakonodaje, sistematičnem ocenjevanju administrativnih stroškov in koristi ter zmanjševanju administrativnih bremen za podjetja (Council of the European Union, 2005, str. 23–24). Cilja te smernice sta z boljšo zakonodajo ustvariti bolj konkurenčno poslovno okolje in spodbujanje zasebnikov. Štiri leta prej (leta 2001) je bilo v Mandelkernovem poročilu (načrt za boljšo pravno ureditev, ki so ga sestavili ministri za javno upravo) v povzetku zapisano, da je izboljšanje kakovosti zakonodaje javno dobro že samo po sebi, saj krepi (povečuje) verodostojnost vodenja procesa in prispeva k blaginji državljanov. Projekt odpravljanja administrativnih ovir in birokratskih postopkov ter načrtnega zmanjševanja administrativnih bremen, predvsem usmerjen v gospodarstvo, je ključen element teh prizadevanj, saj podjetja in posameznike v državah članicah rešuje pretirane regulative in odvečne birokracije ter s tem osvobaja energijo za podjetniško aktivnost, inovacije in državljansko vključenost (Mandelkern, 2001).

Na ravni EU so aktivnosti usmerjene v "čiščenje" že sprejetih predpisov in izboljšanje postopkov sprejemanja novih predpisov. Tako imenovano čiščenje starih predpisov se izvaja v okviru dveh projektov. Prvi se nanaša na poenostavitev predpisov, drugi pa na zniževanje administrativnih bremen oziroma odpravljanje administrativnih ovir. Cilj obeh projektov je poenostaviti in predvsem "debirokratizirati" zakonodajno okolje in s tem prispevati k znižanju stroškov. Poseben poudarek je namenjen malim podjetjem in v okviru te skupine predvsem mikronivoju (Zatler, 2009).

Kakovost regulative vključuje razvoj boljših neregulatornih instrumentov in večjo preglednost (Klun & Slabe-Erker, 2009). Pojem

"boljši predpisi" vključuje vrsto ukrepov javnih politik, ki so namenjeni krepitvi sposobnosti institucij, da le-te izvajajo visoko kakovostno regulativo (Radaelli, 2007; Virant & Kovač, 2010; Virant, 2010). V Mandelkernovem poročilu (2001) je v povzetku tudi zapisano, da izvajanje Akcijskega programa in drugih ukrepov pomembno prispeva k povečanju konkurenčnosti evropskega gospodarstva in dobremu počutju državljanov ter k večji verodostojnosti in legitimnosti vlade. V poročilu OECD (1997) so predstavljeni "novi načini" regulative, in sicer stroškovna učinkovitost, sodelovanje javnosti, pristop od spodaj navzgor, fleksibilnost, dinamičnost, odzivnost itd.

Regulativa nikoli ne sme biti sama sebi namen, ampak mora biti vedno sredstvo za zagotavljanje javnega interesa ali doseganje javnega cilja. V zadnjih nekaj desetletjih je sistem pravil v številnih državah postal bolj zapleten, zaradi česar podjetja in posamezniki ne razumejo vedno logike nekega pravila. Kot že omenjeno, regulativa pogosto zahteva izpolnjevanje določenih obrazcev, ki je včasih nepotrebno, zamudno ter drago. Zato morajo vse države ustvariti najboljše možne pogoje za poslovanje podjetij z državno upravo. Država mora torej vzpostaviti neko ravnotežje (SCM Network, 2010). V Sloveniji je v praksi precej napotil na druge člene in predpise, npr. na področju davčne zakonodaje je rekorder Zakon o dohodnimi (ZDoh-2, Ur. l. RS, št. 117/2006), saj o povprečenju dohodkov samo v treh odstavkih napotuje na 25 členov istega zakona, mnogi od njih pa napotujejo naprej (kaskadno napotovanje).

Evropska komisija (2009a) je objavila pravila pisanja predpisov, ki zahteva, da naj bodo ti:

- jasni, razumljivi, enostavni, nedvoumni;
- uporabljajo naj se v večji meri izrazi, ki se uporabljajo tudi v pogovornem jeziku;
- terminologija naj bo koherentna, isti pojmi v povezanih zakonih pa enaki;
- napotovanje na druge predpise naj bo minimalno, prav tako se je treba izogniti navzkrižnemu napotovanju (člen na člen).

Najbolj razvite države članice EU so se projektov za odpravljanje administrativnih ovir in poenostavitev zakonodajnega okolja lotile že bistveno pred Evropsko komisijo. Tako je Nizozemska razvila metodologijo za merjenje administrativnih stroškov (metodologija SCM), v

letu 2005 pa jo je za delo pri zniževanju administrativnih stroškov prevzela tudi Evropska komisija. Poleg Nizozemske so pomembne aktivnosti potekale tudi v Veliki Britaniji in na Danskem. S sprejetjem akcijskega programa v smeri minus 25 na ravni EU se je sprožil val aktivnosti tudi v drugih državah članicah. Na Nizozemskem so administrativni stroški ocenjeni na 16,4 milijard evrov letno. To ustreza 3,6 % bruto domačega proizvoda. Na Danskem je celoten znesek administrativnih bremen ocenjen na približno 4,5 milijarde evrov, kar ustreza 2,4 odstotkom BDP (SCM Network, 2010). V Sloveniji ta delež znaša 4,1 % BDP, kar škoduje konkurenčnosti gospodarstva. Če bi v celoti izvedli projekt OAO, bi lahko celotni prihranki za gospodarstvo znašali od 2 do 3,5 % slovenskega BDP (Zatler, 2009). To je glavni razlog, zakaj je pomembno, da se vlade osredotočijo na zmanjševanje administrativnih stroškov za podjetja in tudi državljane. Ekonomska perspektiva torej daje poudarek na uspešnosti in učinkovitosti z minimalnimi sredstvi (stroški). Z ekonomskega vidika je odprava administrativnih ovir ključnega pomena za konkurenčnost gospodarstva, saj omogoča porabo sredstev za inovacije, utrjuje konkurenčnost in izboljšuje ekonomsko učinkovitost in uspešnost. Nekateri empirični poskusi so pokazali pozitiven vpliv kakovostne regulative na gospodarsko rast, merjeno z BDP na prebivalca (Jalilian et al., 2007).

Komisija je sprožila vseevropski projekt (manj birokracije), da bodo podjetja v EU bolj konkurenčna. Od sedmih držav članic ob koncu leta 2006 je sedaj vseh 27 določilo ambiciozne cilje za zmanjšanje obremenitev, ki izhajajo izključno iz nacionalnih predpisov. Aktivnosti za zniževanje bremen so na nacionalni ravni nujne, saj v nasprotnem primeru enotnega evropskega cilja ni mogoče doseči. Aktivnosti EU in tudi posameznih držav članic potekajo v več segmentih. Tako se na eni strani izvajajo ukrepi za spremembo že obstoječe zakonodaje, in sicer gre za projekt zniževanja administrativnih bremen in odprave administrativnih ovir na posameznih prioritetnih področjih, na drugi strani pa se izvajajo aktivnosti sistematičnega merjenja administrativnih stroškov in preverjanja zakonodaje v postopku njenega sprejemanja (European Commission, 2010). Komisija je že opredelila mogoča zmanjšanja bremen. Ukrepi, ki jih je sprejela in nekatere tudi že uvedla (48 ukrepov = 6 %), bi prinesli znižanje v višini 7,6 milijard evrov. Ukrepi, ki jih je Komisija predlagala (18 ukrepov = 25 %), bi lahko prinesli 30,7 milijard evrov prihrankov. Pripravljalna dela za nadaljnje zmanjševanje administrativnih obremenitev

bi lahko privedla do predložitve dodatnih 31-ih ukrepov (2 %), kar prinaša dodatno zmanjšanje v višini najmanj 2,1 milijardi evrov. Vse to bi torej pomenilo zmanjšanje administrativnih obremenitev za 40,4 milijard evrov od zmerjenih 123,8 milijard evrov. To je 33 % zmanjšanje celotne ocenjene obremenitve evropske zakonodaje (European Commission, 2009b, str. 6).

3 Predstavitev raziskave

3.1 Predstavitev vprašalnika in vzorec

V nadaljevanju je predstavljena raziskava, ki je bila izvedena v Sloveniji. Podobna raziskava o odmevnosti ukrepov v tujini ni bila izvedena, čeprav države v svojih poročilih omenjajo, da se pri odpravi administrativnih ovir posvetujejo z javnostjo ali pa je le-ta vključena v sam postopek. Na pomanjkanje podobnih raziskav opozarjajo predvsem delovne skupine v različnih državah, ki bi želele učinke ukrepov oceniti tudi s tega vidika (SCM Network, 2010).

V raziskavo v Sloveniji sta bila vključena zasebni sektor (podjetja) in javni sektor (javni uslužbenci). Z vsebinsko enotnim vprašalnikom smo želeli ugotoviti razlike, ki se pojavljajo pri zaznavanju problematike administrativnih ovir in seznanjenosti z ukrepi na tem področju. Vprašalnik je bil sestavljen iz 13 medsebojno povezanih vprašanj. Prvi sklop vprašanj je bil namenjen pridobivanju osnovnih podatkov o anketirancih (kateri del javnega sektorja predstavlja anketirani oziroma velikost podjetja), sledilo je vprašanje o seznanjenosti z ukrepi odprave administrativnih ovir in pomembnosti teh ukrepov ter aktivnost anketirancev pri sodelovanju. Sledila so vprašanja o zaznavanju ovir in definiranju področij, kjer so ovire najbolj zaznane.

Obe ciljni skupini sta bili anketirani z anketo po e-pošti. Anketa javnih uslužbencev je bila izvedena z vprašalnikom, poslanim preko elektronske pošte na centralne naslove vseh organov državne uprave in občin, od koder je bil vprašalnik poslan v e-poštne nabiralnike vseh zaposlenih. Poslanih je bilo 306 vprašalnikov. Prejeli smo 197 vrnjenih vprašalnikov, z vsemi podanimi odgovori je bilo 90 vprašalnikov, zato se število odgovorov pri posameznih vprašanjih razlikuje.

Elektronska anketa podjetij je bila izvedena aprila 2010 z uporabo spletnega programa za izvajanje anket na vzorcu 600 podjetij v štirih

reprezentativnih velikostnih skupinah: velika podjetja, srednje velika podjetja, majhna podjetja, s.p.-ji in mikro podjetja. Od tega se je odzvalo 125 vprašanih, popolnoma veljavnih pa je bilo le 82 vprašalnikov. Največ podjetij, ki so izpolnili anketo, spada v tretji razred, kjer je število zaposlenih med 10 in 50 (37 %), torej gre za mala podjetja, nato sledi drugi razred (27 %), kjer je zaposlenih do 9 ljudi, najmanj podjetij pa je zastopanih v petem razredu (2 %), kjer je število zaposlenih nad 250. Struktura realiziranega vzorca je torej zadovoljiva glede na strukturo v celotni populaciji. Ciljna oseba je bil v velikih in srednjih podjetjih vodja splošnega sektorja, v malih in mikro podjetjih ter s.p.-jih pa direktor. V primeru nedosegljivosti je lahko anketo izpolnila tudi druga odgovorna oseba. Vzorčenje je potekalo na podlagi metode iskanja kvot, zato je vzorec reprezentativen samo znotraj posameznih velikostnih skupin in upošteva ustrezno porazdelitev dejavnosti in regionalno zastopanost.

Vsi rezultati so podani v obliki deležev (%) ali srednjih (povprečnih) vrednosti odgovorov. V slednjem primeru so anketiranci posamezne možnosti ocenjevali na lestvici od 1 do 5, pri čemer je 1 vedno pomenila najslabšo oceno (popolnoma nepomembno), ocena 5 pa je vedno pomenila najboljšo oceno (popolnoma pomembno).

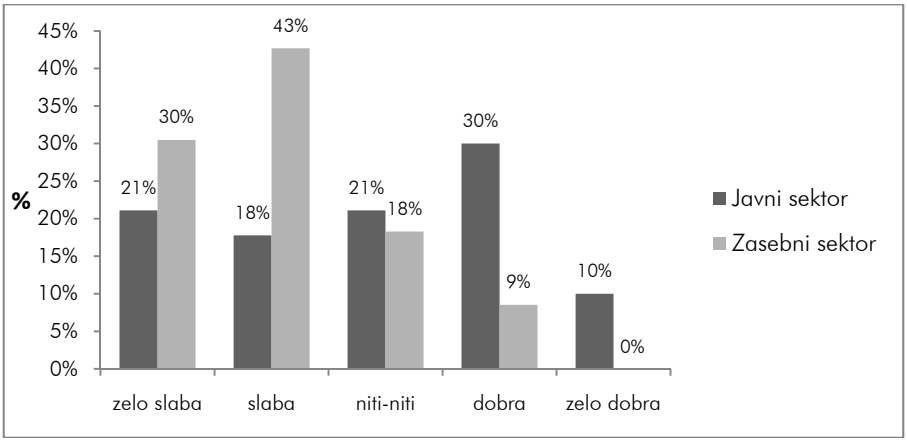
3.2 Rezultati raziskave

Kot je že omenjeno v uvodu, želimo predstaviti rezultate tistega dela raziskave, v katerem smo ocenili seznanjenost obeh sektorjev z ukrepi in določanjem področij zakonodaje, za katere posamezni sektor meni, da povzročajo najvišje administrativne ovire.

Na vprašanje o tem, ali so anketiranci že slišali za projekt odprave administrativnih ovir, je pritrdilno odgovorilo le 38 % podjetij, medtem ko je seznanjenost v javnem sektorju višja, saj je pritrdilno odgovorilo 70 % vprašanih. O ukrepih odprave administrativnih ovir je torej seznanjena le dobra tretjina zasebnega sektorja, čeprav je večina ukrepov namenjenih prav zasebnemu sektorju. Naslednje vprašanje je bilo kontrolno in povezano s prvim vprašanjem, in sicer ali so anketiranci seznanjeni s cilji in ukrepi projekta OAO. Iz grafikona 1 je razvidno, da tudi tisti anketiranci zasebnega sektorja, ki so za projekt že slišali, le-tega ne poznajo dobro, saj je dobro seznanjenih le 9 % anketiranih podjetij, medtem ko zelo dobre seznanjenosti ni označil noben anketirani iz zasebnega sektorja. Podrobnejša seznanjenost s cilji in ukrepi OAO je slabša tudi v javnem sektorju, saj je dobro ali zelo dobro seznanjenih

s cilji in ukrepi le 40 %. Glede na to, da ta projekt poteka že od vstopa Slovenije v EU, so rezultati pokazali na slabo informiranost anketirancev s cilji in ukrepi, ki se želijo doseči v okviru tega projekta v obeh sektorjih. Kar tretjina vprašanih v poslovnem sektorju zelo slabo pozna vsebino (bistvo) tega projekta, tudi 21 % vprašanih v javnem sektorju je enakega mnenja.

Grafikon 1: Seznanjenost s cilji in ukrepi projekta OAO



Vir: anketa

Slaba seznanjenost s cilji in ukrepi ter samim projektom OAO kot celoto se kaže tudi v neaktivnosti deležnikov za sodelovanje pri tem projektu. Na vprašanje o tem, ali so anketirani že kdaj predložili svoje predloge za odpravo administrativnih ovir, je večina odgovorila negativno. Predloge je tako podalo le 3,7 % anketiranih zasebnega sektorja in 16,7 % v javnem sektorju.

Večina zasebnega in javnega sektorja meni (v povprečju 63 % v obeh skupinah), da jih obstoječa zakonodaja ovira pri poslovanju. Vendar struktura odgovorov znotraj zasebnega sektorja kaže, da to mnenje prevladuje predvsem v manjših podjetjih, saj tako meni kar 38 % malih in 29 % mikro podjetij (odgovori zelo ovira), medtem ko je mnenje 'zelo ovira' izpostavilo le 5 % velikih podjetij. Nobeno od vprašanih podjetij pa ni menilo, da ga zakonodaja ne ovira.

V okviru raziskave smo želeli preveriti tudi, ali javni in zasebni sektor različno zaznavata rezultate ukrepov OAO, posebej v tistem delu, ki se nanaša na zniževanje administrativnih stroškov zakonodaje. Zanimivo je, da večina anketiranih meni, da so se stroški v zadnjih treh letih povečali.

Kljub temu pa zasebni sektor zaznava tudi zniževanje administrativnih stroškov, kar pomeni, da se nekateri rezultati že kažejo (struktura odgovorov je podana v tabeli 1). Podrobnejša analiza odgovorov kaže, da zniževanje administrativnih stroškov zaznavajo samo mikro in majhna podjetja ter samostojni podjetniki posamezniki, medtem ko srednje velika podjetja in velika podjetja tega odgovora niso označila. Ker je večina ukrepov dejansko usmerjena k majhnim in srednje velikim podjetjem, je ta odgovor tudi pričakovan. Ocenimo lahko, da se nekateri učinki ukrepov OAO že zaznavajo v zasebnem sektorju, čeprav v majhnem obsegu.

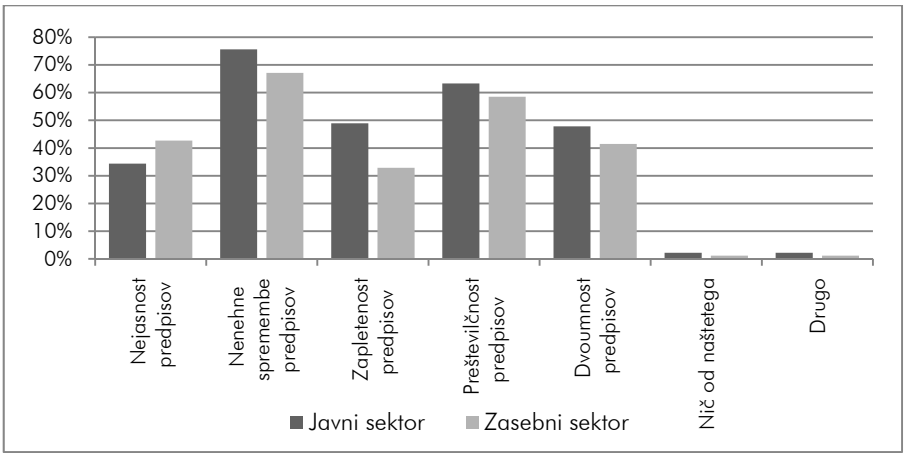
Tabela 1: Gibanje administrativnih stroškov izpolnjevanja predpisov v zadnjih 3 letih

Gibanje stroškov	Zasebni sektor (%)	Javni sektor (%)
Zelo povečali	8,5	11,1
Povečali	64,6	51,1
Ostali enaki	11,0	18,9
Znižali	1,2	0
Precej znižali	1,2	0
Ne vem	13,4	18,9

Vir: anketa

V okviru stroškov, povezanih z izpolnjevanjem predpisov, so pomembni tudi razlogi za povečevanje stroškov. Največ anketirancev v obeh sektorjih meni, da se stroški povečujejo zaradi nenehnih sprememb predpisov (grafikon 2). To meni 67,1 % vprašanih v zasebnem sektorju in 75,6 % vprašanih v javnem sektorju. Nepotrebno obremenjena poslovna administracija je običajno zelo povezana s prilagajanjem na novo ureditev. Drugi najpomembnejši razlog, da se stroški povečujejo, je po mnenju anketirancev številčnost predpisov. To meni 63,3 % anketiranih v javnem sektorju in 58,5 % anketiranih v zasebnem sektorju. Kot razloga sledita še zapletenost in nejasnost predpisov.

Grafikon 2: Razlogi za povečevanje stroškov predpisov



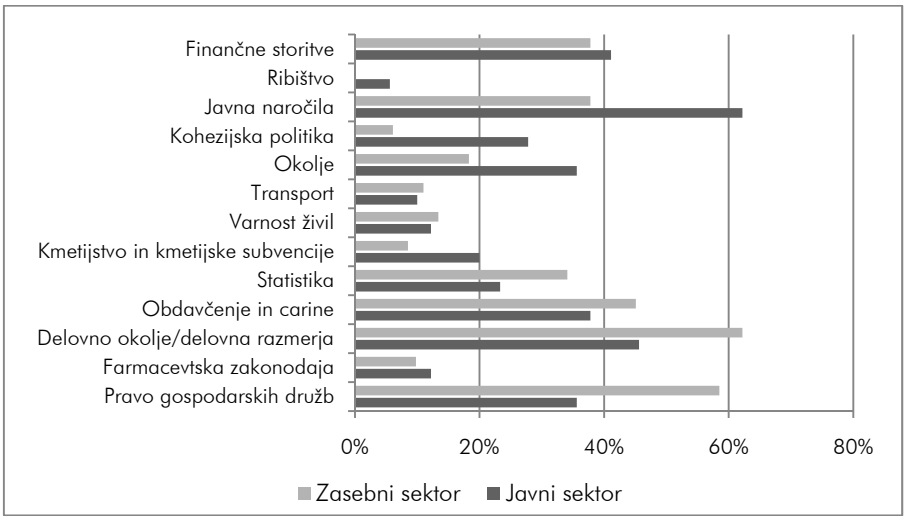
Vir: anketa

Čeprav so ukrepi OAO transparentno prikazani na spletnih straneh Ministrstva za javno upravo, iz raziskave izhaja, da je seznanjenost javnosti relativno slaba. Ukrepov za večjo odmevnost je lahko več, in sicer boljše obveščanje o ukrepih predvsem v ustreznih združenjih zasebnega sektorja, boljša promocija v medijih, poročilih o delovanju ipd. Največji učinek bi dosegli z večjo vključenostjo obeh sektorjev v sam projekt. Tako meni tudi večina anketiranih, ki so z visokimi ocenami ocenjevali trditve o tem, da bi morala biti v projekt vključena širša javnost oziroma zainteresirane skupine pri določenih sklopih regulative neposredno, ne pa samo s samoiniciativnimi predlogi na spletni strani ministrstva. Kot drugi najbolj visoko ocenjeni predlog za izboljšanje učinkov ukrepov in tudi seznanjenosti pa oba sektorja vidita v tem, da bi se morali projekti OAO izvajati kot povezani sklopi v okviru posameznih poslovnih dogodkov.

Evropska komisija in podobno tudi Slovenija sta določili 13 prioritetnih področij regulative, ki so najbolj obremenilna. V raziskavi smo želeli preveriti, ali sektorja različno zaznavata obremenitev posameznih področij regulative, oziroma na katerem področju si želijo največ izvedenih ukrepov za poenostavitev (grafikon 3). Najslabši rezultat je v zasebnem sektorju doseglo področje delovnih razmerij, kar meni kar 62,2 % vseh vprašanih podjetij. To so pokazale tudi druge raziskave (npr. glej Klun & Slabe-Erker, 2008), zato so se v Sloveniji sistematičnega znižanja administrativnih stroškov po modelu SCM lotili najprej na področju delovnopravne zakonodaje, s sprejetjem prvega akcijskega programa. Program naj bi bil realiziran do konca leta 2010. Med

anketiranci v zasebnem sektorju je na drugem mestu področje prava družb in letnih računovodskih izkazov. To meni 58,5 % podjetij. Tudi javni sektor v sam vrh uvršča delovno zakonodajo (45,6 %), vendar javni sektor kot najbolj obremenjujočo zakonodajo na prvo mesto uvršča področje javnih naročil (62,2 %).

Grafikon 3: Razlogi za povečevanje stroškov predpisov



Vir: anketa

Sami rezultati raziskave so pričakovani. Nefleksibilnost delovne zakonodaje je znan problem slovenske zakonodaje. Regulativa na tem področju je v Sloveniji precej kompleksna. Z regulativo so določeni vsi pomembni postopki zaposlovanja, in sicer razpisi prostih delovnih mest, obveščanje ustreznih organov o zaposlovanju, vodenje ustreznih evidenc, omejeno trajanje zaposlovanja za določen čas, visoki stroški delovne sile, določanje minimalne plače itd. V javnem sektorju so omejitve večje, saj so predvsem v državni upravi določene sistemizacije, plačni razredi, trajanje razpisov ipd. Velika konkurenčnost na trgu in nefleksibilnost regulative sili zasebni sektor v omejeno zaposlovanje za nedoločen čas, reorganizacije, ki so vezane izključno na zamenjavo delovne sile ali umetnega podaljševanja zaposlitev za določen čas. Vsi taki ukrepi pomenijo neustrezno rabo resursov in zmanjšujejo produktivnost dela. Po drugi strani je regulativa s področja javnih naročil za javni sektor pričakovano med najbolj obremenjujočimi, saj je večina poslovanja javnega sektorja vezana na javna naročila, ki zahtevajo kompleksno vodenje postopkov in pripravo ustreznih razpisnih dokumentacij. Poudariti je treba tudi dejstvo,

da je bila anketa izvedena neposredno v času spremembe regulative na tem področju in je lahko na oceno vplivalo tudi to. Čeprav nova zakonodaja poenostavlja nekatere postopke, po drugi strani uvaja nove zahteve kot je npr. obvezno izobraževanja (licenca) in podpis pogodbe šele po preteku roka za pritožbe.

Odprava administrativnih ovir na obeh najbolj obremenjujočih področjih regulative za oba sektorja je mogoča, na kar kažejo tudi poročila o prvih merjenjih administrativnih stroškov na področju predvsem delovnopravne regulative (podrobneje glej Klun et al., 2008), medtem ko za področje javnih naročil merjenje ni bilo izvedeno.

4 Zaključek

Slovenija si že od leta 2001 dalje prizadeva za poenostavitev postopkov in boljšo zakonodajo, tako domačo kot tisto, ki je del evropskega pravnega reda. Ministrstvo za javno upravo na svoji spletni strani navaja in razlaga poti, ki vodijo k poenostavitvam v okviru odprave administrativnih bremen: (i) odstranitev, zmanjšanje, združevanje ali izboljšanje zakonodajnih predpisov, (ii) poenostavitev procesov znotraj zakonodajnih predpisov, (iii) izmenjava podatkov znotraj uprave, (iv) razvoj informacijsko telekomunikacijskih rešitev in storitev ter (v) zagotavljanje boljših navodil in informacij. Očitno je, da so se administrativna bremena v evropskih in nacionalnih predpisih leta brezskrbno in nekritično kopičila. Če ni v zadostni meri izoblikovana zavest pripravljavcev predpisov ali če niso vsaj vzpostavljeni kontrolni mehanizmi, se administrativna bremena neizogibno kopičijo. Največkrat so posledica birokratskega načina razmišljanja pripravljavcev predpisov, odsotnosti analize učinkov predpisov, zanemarjanja pomena dejanske izvedljivosti predpisa, pa tudi težnje birokracije po povečevanju moči. Edina rešitev za preprečevanje nastajanja administrativnih bremen in za odstranjevanje starih je resna politična zaveza. Politika je dolžna voditi in usmerjati javno upravo in brez njenih usmeritev je malo verjetno, da bo prišlo do sprememb v načinu razmišljanja in ravnanja. S pogostim merjenjem administrativnih stroškov in ocenjevanjem kakovosti predpisov in informacij ter ustreznimi časovnimi, področnimi ter mednarodnimi primerjavami rezultatov je treba zagotavljati, da bo smer ukrepa prava, v smislu ustreznosti, učinkovitosti in trajnosti.

V okviru raziskave smo ugotovili, da so različni deležniki ukrepov OAO še vedno slabo seznanjeni s projektom, čeprav zasebni sektor že zaznava rezultate. Zanimivo je, da oba sektorja ocenjujeta po pomembnosti enake razloge za nastanek administrativnih ovir, po drugi strani pa različno ocenjujeta najbolj obremenjujoča področja regulative. Iz rezultatov raziskave je razvidno, da bi bila potrebna aktivnejša promocija projekta OAO in s tem večja vključenost deležnikov v sam projekt.

Urška Milavec je leta 2010 zaključila magistrski študij na Fakulteti za upravo.

Dr. Maja Klun je izredna profesorica na Fakulteti za upravo. Njeno primarno področje raziskovanja in znanstvenega ter strokovnega proučevanja so javne finance s poudarkom na davčnem sistemu, k rezultatom usmerjeni proračun in merjenje učinkovitosti in uspešnosti javnega sektorja.

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1.01 Original scientific article

Familiarity with Measures to Reduce Administrative Burdens in The Public and Private Sector in Slovenia

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Urška Milavec
urskamilavec1@gmail.com

Maja Klun
University of Ljubljana, Faculty of Administration
maja.klun@fu.uni-lj.si

ABSTRACT

Measures to reduce administrative burdens are part of efforts to improve regulation quality. The aim of the research carried out in 2010 in the public and private sector was to determine whether their staff display different levels of familiarity with the measures and whether both sectors define the same groups of regulation as the most burdensome. The results indicated that information provision on measures to reduce administrative burdens in Slovenia is poor, particularly in the private sector, which is intended as the main beneficiary of these measures. Despite this, the private sector reported that regulation for small and medium-sized businesses had improved over the period in which measures to reduce administrative burdens had been implemented. The public sector assessed public procurement regulation as the most burdensome, while the private sector ranked employment regulations as the most burdensome.

Key words: administrative barriers and burdens, administrative costs, competitiveness, information provision, public and private sector, Slovenia

JEL: H83, K2, K3

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1 Introduction

The concept of regulation in its broadest sense indicates the methods used to arrive at and implement decisions of public significance. The most general concept of regulation defines it as the achievement of public sector objectives through the application of rules or standards (Hood et al., 2000). When regulation has effects that exceed the public purpose one can talk of administrative barriers. The first measures in the field of reducing administrative burdens (RAB) in Slovenia started in 2000, with the so-called "anti-bureaucracy programme". The measures were a logical consequence of a series of actions and research that appeared around the world at that time. In addition to the OECD and the European Commission, many other groups were also active, such as the Dutch SCM Network (an international group operating in the field of exchanging best practice in order to reduce the administrative burden and eliminate unnecessary bureaucracy), and a network of senior officials working in the field of improving their countries' legal systems who created a forum to exchange best practice in writing new regulations (primary and secondary legislation). The most prominent research into administrative burdens has been carried out by the European Bank for Research and Development Bank (the BEEPS – Business Environment and Enterprise Performance Survey), the World Bank (WGI – Worldwide Governance Indicators), the IMD World Competitiveness Yearbook ranking from Switzerland's International Institute for Management Development, the OECD research into the institution quality and administrative costs (OECD, 2001) and a number of other partial research in this field (Radaelli & DeFrancesco, 2007; Brunetti et al., 1998; Chittenden et al., 2003; Massey, 2003). Common to all these studies is the finding that institutional and regulatory quality has a significant impact on business and economic competitiveness.

As stated, the first measures in Slovenia were introduced as part of an anti-bureaucracy programme. The first report on the simplification of regulations was published in 2005. This was followed by an action plan entitled Programme of Measures to Eliminate Administrative Burdens, which was presented annually on the government's website. The 2005 report presented 40 measures, which were not financially evaluated. Progress was demonstrated in the 2006 report, in which some of the measures were financially evaluated (e.g. local communities' annual saving on various public services, as well as the fact that certification by

administrative offices was made equal to that of a notary public for certain documents). The 2006 Action Plan included 34 measures (92% of measures had been realised by October 2008), in 2007 there were 30 measures (60% realised by October 2008), particularly in the field of "life events", which are important to businesses and individuals. The EMMAS (Standard Methodology for Measurement of Administrative Costs) was finally developed at the end of July 2007. A report published in 2008 provided an overview of measures implemented from 2006 to 2008 and gave an overall assessment of administrative cost savings as measured by the EMMAS methodology for most measures. The measurements indicate that the implementation of measures achieved savings or standardisations of over 100 million euros (e.g. in the fields of business registration at One-Stop-Shops – over 10 million euros were saved annually, data protection procedures were simplified for small businesses – saving of 36 million euros annually, and the abolition of craft/small business permits for over 60 economic activities). In 2008 all 44 measures adopted were realised. The first section of the Action Plan approved by the Government in May 2009 (adopted on the basis of an international commitment that Slovenia, along with other EU members, would reduce the administrative burden by 25% by 2012) included 41 fast-track measures in various fields (employment, taxation, environment), which were the result of suggestions from citizens, business people, and various representative chambers (Ministry of Public Administration, 2009), while the second section included systematic measurements of administrative costs for selected regulations using the standard methodology based on the Standard Cost Model (SCM). In June 2010 the Slovenian Government adopted the Action Plan to Reduce Procedures and Eliminate Administrative Burdens, which focused on six areas of legislation (acquiring a building permit, employment law, payment of taxes and contributions, ownership transfer, international transactions, and implementation of contracts).

Specific focus was placed on Regulatory Impact Analysis (RIA), which Slovenia introduced to its legal regime, at least formally, in 2007 (amendment to Article 8 of the Rules of Procedure of the Government of the Republic of Slovenia – Official Gazette of the Republic of Slovenia, nos 43/2001, 21/2007). It sets out the legal aspects of regulatory impact analysis since 2002. In 2007 the OECD reported that Slovenia had demonstrated major improvements in the reduction of administrative burdens, but stated that its regulatory impact analysis had to improve. The

Human Rights Ombudsman made a similar point in a report. In November 2009 the Slovenian parliament adopted the Resolution on Regulatory Work (OGRS, no. 95/2009), a programming act that represents a politically-binding document prepared in line with existing legal regulations defining the procedure for amending regulations. The Resolution relates to the broader field of regulatory work, as performed by the government, ministries and other agencies (holders of public authorisations and local community bodies) as a whole. The Resolution summaries the established constitutional, systemic legal and technical regulatory principles and rules, and also represents a commitment by all political authorities and civil servants to respect the main principles of good legislative policy in policy-making and the preparation of regulations. Those writing regulations and policy should conscientiously analyse the impact of proposed regulations and policies on the economy, environment, social welfare and public finances or the broader public administration, and in line with minimum recommendations and guidelines, cooperate with specialists and the general public. In June 2010 an amendment to the government rules of procedure was adopted on the basis of the Resolution, along with instructions on the preparation of material for the government. To ensure that the programme to eliminate administrative burdens and reduce the administrative burden is effective, these instructions required a regulatory impact analysis of all new or amended regulations. Ministries and similar bodies must therefore pay close attention to this impact analysis and the definition of potential effects on individual areas, including clear definition of the positive or negative impact on the administrative burden.

The above makes clear that most research has focused on measuring the administrative costs of regulation and hence finding the most burdensome factors within individual regulations and seeking possibilities for simplification. Some research, however, defines the most burdensome regulation in terms of economic competitiveness and ranked countries accordingly. The success of various measures is usually indicated by a country's rise up various ranking systems, and more specifically within the reports produced in such countries on the regulatory simplification they have attempted and achieved.

The paper highlights a different aspect, which is not often featured in the research, which is a target population's knowledge of or familiarity with achievements and measures in the field of reducing administrative

burdens. Two hypotheses were tested in the research. The first was that familiarity with the reducing administrative burden project (RAB) does not differ in the public and private sector. The second hypothesis is that the public and private sector perceive the burden of individual areas of regulation differently. This was intended to assess the effectiveness of RAB measures. This means that if the measures are not actually perceived in practice, they have not been sufficiently well targeted. The target population was divided into two groups: the public and the private sector. The following chapter addresses the findings of various authors and research on the correlation between regulatory quality and economic competitiveness. The definition of the research, the methodology and the results follow.

2 Significance of reducing administrative burdens to economic competitiveness

At the Spring Summit in March 2000 the EU heads of government and state adopted the Lisbon Strategy, which set the EU the objective of becoming the most dynamic, competitive and knowledge-based economy in the world by 2010. Improving business competitiveness is also one of the basic objectives of Slovenian development strategy (Slovenian Government, 2010). As part of a "new start for the Lisbon Strategy", the Council of the European Union published a note in March 2005 on broad guidelines for economic policy and emphasised a special guideline (no. 14) on legislation quality, the systematic assessment of administrative costs and benefits, and the reduction of administration burdens on businesses (Council of the European Union, 2005, pp. 23–24). The objectives of the guideline were to create a more competitive business environment and to promote private entrepreneurship through better regulation. Four years previously (2001) the executive summary of the Mandelkern report (a plan for a better legal system compiled by public administration ministers) stated that "improving the quality of regulation is a public good in itself, enhancing the credibility of the governance process and contributing the welfare of citizens.« The project to reduce administrative burdens and bureaucratic procedures and the planned reduction in the administrative burden, primarily for business, is a key element in these efforts, as it saves businesses and individuals in the member states from excessive regulation and bureaucracy, and liberates

people's energy for entrepreneurship, innovation and citizen involvement (Mandelkern, 2001).

At the EU level activities are directed towards "cleaning-up" existing regulations and improving procedures for new regulations. The cleaning of old regulations has taken place within two projects. The first entailed the simplification of regulations, the second the reduction of administrative burdens (elimination of administrative burdens). The aim of both projects was to simplify and, above all, de-bureaucratise the legislative environment and contribute to cost reduction. Special emphasis is placed on small businesses, and particularly those at the micro-level within that group (Zatler, 2009).

Regulatory quality includes the development of better non-regulatory instruments and greater transparency (Klun & Slabe-Erker, 2009). The term "better regulations" includes a series of public policy measures aimed at strengthening institutional capabilities to ensure higher quality regulatory provision (Radaelli, 2007; Virant & Kovač, 2010; Virant, 2010). The summary of the Mandelkern report (2001) states that implementing the Action Plan and other measures significantly contributes to increasing the competitiveness of the European economy, citizen welfare, and government credibility. The OECD report (1997) presented "new methods" of regulation, such as cost efficiency, public participation, bottom-up approach, flexibility, dynamism, responsiveness, etc.

Regulation should never be an end in itself, but must always be a means of protecting the public interest or achieving public objectives. In recent decades the regulatory system in many countries has become more complex, with companies and individuals failing to understand the logic of many regulations. As stated, regulations frequently require numerous forms to be completed that are sometimes unnecessary, time-consuming and expensive. Every country has a need to create the best possible conditions for transactions between business and central government. The country must therefore create some kind of balance (SCM Network, 2010). In practice in Slovenia regulation contains considerable amounts of cross-referencing of other articles and regulations. For example, in the field of tax legislation the ignominious record-holder is the Income Tax Act (OGRS, no. 117/2006), which in just three paragraphs on averaging income includes references to 25 articles of the same act, many of which contain further references (cascading references).

The European Commission (2009a) published rules on writing regulations, which requires that:

- they are clear, understandable, simple, unambiguous
- they primarily use expressions that are also used in spoken language
- the terminology should be coherent, with the same terms in related legislation having the same meaning
- references to other regulations should be minimal, and cross-referencing should be avoided (article to article).

The most developed EU states launched projects to reduce administrative burdens and simplify the legislative environment well before the European Commission. The Netherlands developed a methodology for measuring administrative costs (SCM), and in 2005 this was adopted by the European Commission for work on reducing administrative costs. Important work took place in the UK and Denmark as well as the Netherlands. The adoption of the 25%-Reduction Action Plan at the EU level launched a wave of activities in other member states. Administrative costs were estimated at 16.4 billion euros per year in the Netherlands. That figure was 3.6% of GDP. In Denmark the total sum of administrative burden was estimated at approximately 4.5 billion euros, which was the same as 2.4% of GDP (SCM Network, 2010). In Slovenia the figure was 4.1% of GDP, which affected the economy's competitiveness. If the RAB project was implemented in full, the total saving for the economy would be worth 2 to 3.5% of Slovenia's GDP (Zatler, 2009). That is the main reason it is vital for governments to focus on reducing administrative costs for businesses and individuals. The economic perspective therefore emphasises efficiency and effectiveness with minimal funds (costs). Economically, the reduction of administrative burdens is vital for economic competitiveness, as it enables the use of funds for innovation, consolidates competitiveness and improves economic efficiency and effectiveness. Some empirical attempts have demonstrated the positive impact of regulatory quality on economic growth, measured by GDP per capita (Jalilian et al., 2007).

The Commission has also launched a pan-European project (less bureaucracy) to make businesses in the EU more competitive. From just 7 member states at the end of 2006, now all 27 have defined ambitious objectives to reduce burdens arising exclusively from national regulations.

Actions to reduce burdens at the national level are vital, as otherwise the common European objective cannot be achieved. Activities by the EU and individual member states are proceeding in various areas. On one hand therefore measures are being implemented to amend existing legislation, as part of a project to reduce administrative burdens and eliminate administrative barriers in individual priority areas, while on the other hand actions are taking place relating to the systematic measurement of administrative costs and verifying legislation during procedures to adopt it (European Commission, 2010). The Commission has already defined the possible financial outcome of reducing the burden. The measures approved and some already implemented (48 measures = 6%), would bring a reduction of 7.6 billion euros. The measures proposed by the Commission (18 measures = 25%), could lead to 30.7 billion euros in savings. The preparatory work for further reductions of administrative burdens could lead to the proposal of other 31 measures (2%), which would mean further savings of at least 2.1 billion euros. In total this would mean a reduction in administrative burden worth 40.4 billion euros of an estimated 123.8 billion euros. That would be a 33% reduction in the total estimated administrative burden of European legislation (European Commission, 2009b, p. 6).

3 Presentation of research

3.1 Presentation of questionnaire and sample

The research carried out in Slovenia is presented below. Abroad there has not yet been a similar research into the public profile of such measures, although some national reports mention that the public have been consulted or have been involved in procedures to reduce administrative burdens. The lack of similar research has been mentioned by working groups in various countries wanting to assess the impact of measures from this point of view (SCM Network, 2010).

The research in Slovenia included the private sector (businesses) and the public sector (civil servants). Questionnaires with the same content were used in order to determine any differences in understanding of the issue of administrative barriers and familiarity with measures in the field. The questionnaire comprised 13 interlinked questions. The first set of questions acquired basic data on the respondents (e.g. which part of the public sector there worked in or the size of business), followed

by a question on respondents' familiarity with measures to reduce administrative burdens and the importance of these measures, as well as the respondents' participation in such measures. This was followed by questions on perceptions of administrative burden and definition of the most burdensome areas.

Both target groups were surveyed by e-mail. The survey of civil servants used questionnaires sent via e-mail to the central address of all central government and municipal bodies, from where the questionnaire was forwarded to the e-mail addresses of all employees. A total of 306 questionnaires were sent out. A total of 197 questionnaires were returned but only 90 had all questions answered, therefore the number of responses differs from question to question.

The electronic survey of businesses was conducted in April 2010 using a web-based program to carry out the survey of a sample of 600 businesses in five size-based representative groups: large, medium, small and micro-businesses, plus sole traders. A total of 125 respondents replied, though only 82 of these questionnaires were completely valid. The largest group of businesses that completed the questionnaire was the third category, which employs between 10 and 50 (37%), i.e. small businesses, followed by category 2 (27%), with up to 9 employees, while the smallest group was category 5 (2%), businesses with over 250 employees. The structure of the final sample is therefore satisfactory given the structure of the overall population. The target person for the questionnaires was a general sector manager in large and medium-sized businesses and the director in small and micro-sized businesses and sole traders. If he was not available, the questionnaire could be completed by another appropriately-placed manager. Quota sampling was used so the sample was representative only within individual size groups, and also reflects the range of different economic activities and regional representativeness.

All results are given as either proportions (%) or mean response values. In the following case, respondents individually scored possibilities on a rank from 1 to 5, where 1 is always the lowest score (completely insignificant), and 5 is always the highest score (completely significant).

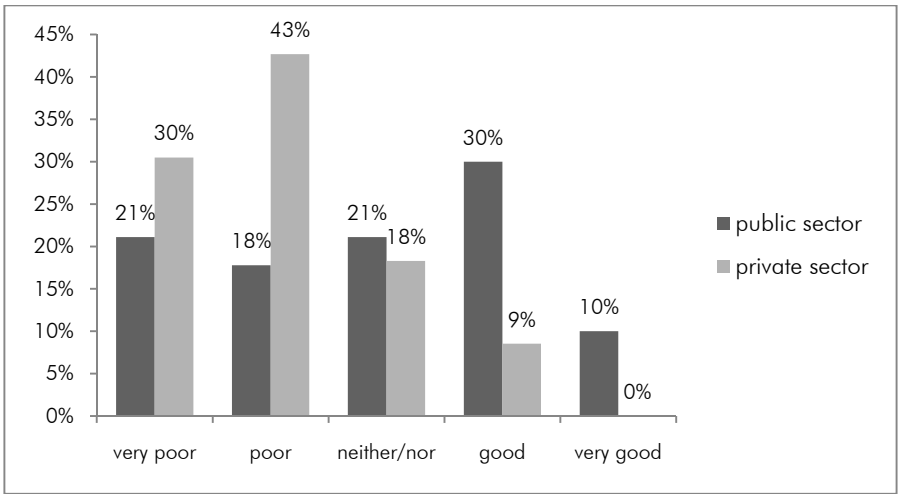
3.2 Research results

As stated in the introduction, the aim of the paper was to present research results assessing public and private sector familiarity with RAB measures and defining the areas of legislation that the sector deems causing the greatest administrative burden.

In response to the question of whether they had heard of the RAB project, only 38% of business respondents replied in the affirmative, while familiarity was higher in the public sector with 70% of responses in the affirmative. Only just over a third of private sector was therefore familiar with RAB measures, despite the fact that the majority of these measures were aimed at the private sector.

The next question was a control question linked to the first, asking whether respondents were familiar with the objectives and measures of the RAB project. Graph 1 indicates that even the private sector respondents who had heard of the project were not very familiar with it, as only 9% of business respondents gave their level of familiarity as good and not one gave their level of familiarity as very good. The more detailed question on familiarity with RAB objectives and measures was also poorer in the public sector, since only 40% assessed their level of familiarity as good or very good. Given that the project has been ongoing since Slovenia joined the EU, the results indicate that the respondents in both sectors had a poor level of familiarity with the objectives and measures of the RAB project. For one third of private sector respondents familiarity with the (essential) content of the project was assessed as very poor, with 21% of public sector respondents gave the same response.

Graph 1: Familiarity with RAB project objectives and measures



Source: survey

A poor level of familiarity with the objectives and measures of and the actual RAB projects as a whole is also seen in the low involvement of stakeholders in the project. In response to the question of whether respondents had submitted their own proposals for the reduction of administrative burdens, the majority responded in the negative. Proposals were only submitted by 3.7% of private sector respondents and 16.7% of public sector respondents.

The majority in the public and private sector (on average 63% of both groups) considered that the existing legislation represented a burden to their business or work. However, the response structure within the private sector indicates that this opinion is largely found in smaller businesses, since 38% of small and 29% of micro-businesses gave this opinion (responded very burdensome), while only 5% of large businesses gave the response "very burdensome". No business responded that the legislation was not a burden.

The research was also intended to verify whether the public and private sector had different levels of familiarity with RAB measures, particular those areas relating to reducing the administration costs of legislation. It is noteworthy that most respondents considered that costs had increased in the past three years. Despite this, some private sector respondents did report reductions in administrative costs, which means that some results had already been detected in practice (response

structure is given in Table 1). A more detailed analysis of the responses indicates that the reduction in administrative costs was only reported by micro and small-sized businesses and sole traders, while medium and large businesses did not give this response. Since most measures were actually aimed at small and medium-sized businesses these responses could have been anticipated. One can assess then, that some impacts of the RAB measures have already been noticed in the private sector, though to a small extent.

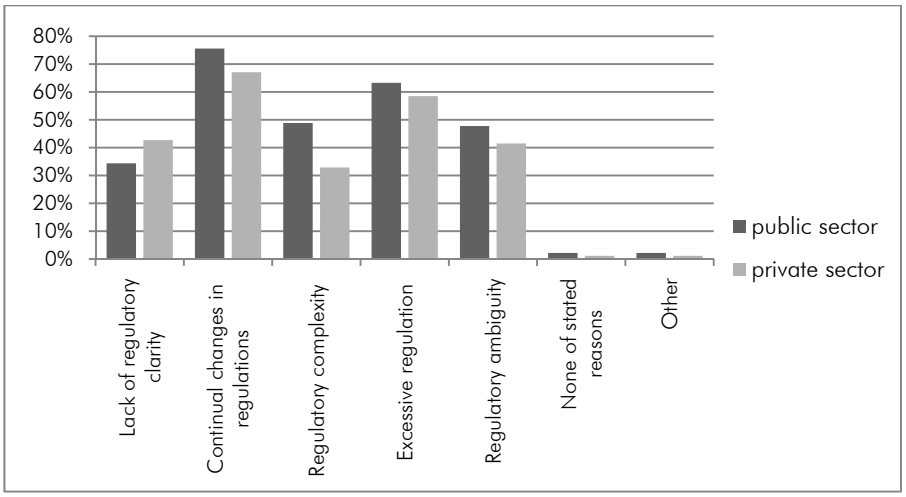
Table 1: Changes in administrative costs of regulations in past 3 years

Changes in costs	Private sector (%)	Public sector (%)
Major increase	8.5	11.1
Increase	64.6	51.1
Remained the same	11.0	18.9
Reduction	1.2	0
Major reduction	1.2	0
Don't know	13.4	18.9

Source: Survey

The reasons for the increase are significant with regard to administrative costs. Most respondents in both sectors consider that costs are increasing due to continual regulatory amendments (Graph 2). This view was given by 67.1% of private sector respondents and 75.6% of public sector respondents. Unnecessary burdens on business administration are therefore often closely linked to adapting to new regulatory arrangements. The second most significant reason for increased costs according to the respondents was the excessive amount of regulation. This view was given by 63.3% of private sector respondents and 58.5% of public sector respondents. The reasons offered next by rank were regulatory complexity and lack of clarity in regulations.

Graph 2: Reasons for increase in administrative costs



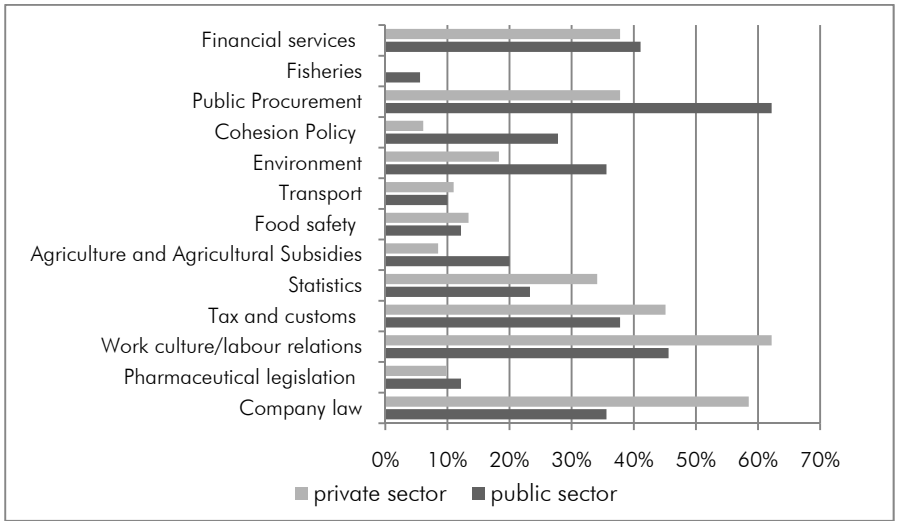
Source: Survey

Although RAB measures are transparently presented on the Ministry of Public Administration website, the research indicates that respondents' familiarity with them is relatively poor. More measures should be taken to increase their profile and hence improve awareness, primarily via appropriate private sector associations, better media promotion and progress reports. The greatest impact would be achieved if both sectors were far more involved in the project itself. The majority of respondents agreed with this, giving a high score to the statements that the interested parties should be directly included in projects addressing specific forms of regulation, and not just indirectly via self-initiative (i.e. sending proposals via the ministry website). The second highest scored proposal to improve the impact of the measures and hence also familiarity with them in both sectors was that the RAB project should be implemented in combined groups within individual "life-events".

The European Commission, and Slovenia likewise, have defined 13 priority regulatory areas as the most burdensome. The research was intended to investigate whether the two sectors perceive the administrative burden of individual areas of regulation differently and the area in which they want the most measures taken to ensure simplification (Graph 3). The most critical area according to the private sector was employment relations. That response was given by 62.2% of all private sector respondents. This has also been indicated by other research (see, for example, Klun and Slabe-Erker, 2008), therefore a systemic reduction of

administrative costs in line with the SCM model was launched in Slovenia first in the field of employment law, with the adoption of the first action plan. The programme was set to conclude by the end of 2010. The second ranking area for private sector respondents was company law and annual financial statements. This view was expressed by 58.5% of businesses. The public sector also gave a high ranking to employment law (45.6%), but identified the areas of public procurement as having the most burdensome legislation (62.2%).

Graph 3: Most burdensome areas



Source: Survey

The research results were as anticipated. The inflexibility of employment law is a well known problem in Slovenian legislation. The regulations in this field are very complex. The major procedures relating to employment, from advertising vacant positions, notifying appropriate agencies of employment, keeping relevant records, limited duration of fixed-term employment to high labour costs and minimum pay stipulations are all regulated by law in great detail. The restrictions are greater in the public sector given the many job specification systems, salary bands and lengthy recruitment procedures and other issues, particularly in central government. Competitive markets and inflexible regulations force the private sector to make use of restricted fixed-term employment, reorganisations linked exclusively due to staff turnover or artificial extensions of fixed-term employment contracts. All these measures lead to ineffective use of resources and reduce labour productivity. As expected,

public procurement regulation is among the most burdensome for the public sector, since a great deal of its work is linked to public procurements, which require complex procedural management and preparation of quality tender dossiers and documentation. One must also emphasise the fact that the survey was carried out during a period in which amended public procurement regulations were being put into practice and that may have influenced the scores given. Although the new legislation has simplified some procedures, it has also introduced new requirements, such as compulsory training (licensing) and contract signing only after the deadline for appeals expires.

The reduction of administrative burdens in the two most burdensome areas of regulation for both sectors is an attainable objective, a fact supported by reports into the first measurements of administrative costs, principally employment legislation (for more see Klun et al., 2008). This has not yet been extended to public procurement regulations.

4 Conclusion

Since 2001 Slovenia has been working to simplify procedures and produce better legislation, both domestic and the regulations that form part of the EU acquis communautaire. The Ministry of Public Administration's website lists and explains the simplification methods available as part of the reduction of administrative burden: (i) removal, reduction, integration or improvement of regulations, (ii) simplification of processes within regulations, (iii) exchange of data within public administration, (iv) development of ICT solutions and services, and (v) providing better instructions and information. It is clear that administrative burdens in European and national regulations have been uncritically permitted to accumulate over the years. If the awareness of those writing regulations has not been adequately developed, or if they are not at least subject to control mechanisms, then administrative burdens will unavoidably accumulate. These are usually the result of bureaucratic thinking by people preparing regulations, a lack of regulatory impact analysis, neglecting the importance of how feasibly regulations can be put in practice, and the tendency for people within bureaucracies to increase their power of their organisation. The only solution to prevent administrative burdens from arising and to eliminate old burdens is a serious political commitment. Politicians have to lead and direct the public administration, and without such guidance it is very unlikely that patterns

of thought and behaviour will change. Frequent measurement of administrative costs and assessment of information quality and regulatory quality along with appropriately comparable results in terms of time, area and internationally comparability are needed to ensure that the right measures are applied to achieve relevance, effectiveness and durability.

The research indicated that the familiarity of various stakeholders in the RAB project with RAB measures was still very poor, although results were starting to be noticed within the private sector. It is interesting that both sectors gave the same scores to reasons for administrative barriers occurring, while differently evaluating the most burdensome areas of regulation. The research results indicate that promotion of the RAB project must be more active, with greater participation of stakeholders in the project.

Urška Milavec has completed master's degree at the Faculty of Administration, University of Ljubljana in 2010.

Maja Klun, Ph.D. is associate professor at Faculty of Administration. Her main research fields are taxation, performance budgeting and performance measurement in public sector.

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1.01 Izvirni znanstveni članek

Analiza stanja e-poslovanja v slovenski javni upravi: Primer upravnih enot Republike Slovenije

UDK: 659.2:004:35(497.4)

Mitja Jelenič

Upravna enota Novo mesto

mitja.jelenic1@gov.si

Mirko Vintar

University of Ljubljana, Faculty of Administration

mirko.vintar@fu.uni-lj.si

IZVLEČEK

V Sloveniji smo bili v zadnjih letih priča pospešenemu razvoju e-uprave, kar nas je po meritvah, ki jih izvaja EU, pripeljalo v sam vrh njenih članic, hkrati pa dejanska uporaba e-storitev še zelo zaostaja za naraščajočo ponudbo. Prispevek predstavlja primerjalno analizo stanja na tem področju v Sloveniji na primeru upravnih enot Republike Slovenije na osnovi rezultatov empirične raziskave, ki je bila leta 2009 opravljena na področju e-poslovanja upravnih enot Republike Slovenje na Fakulteti za upravo, Inštitutu za informatizacijo uprave. Raziskava je bila usmerjena v analizo e-poslovanja po tipičnih področjih delovanja upravnih enot, kot so notranje zadeve, okolje in prostor, kmetijstvo, ki najbolj realno prikazujejo stanje in obseg tovrstnega poslovanja v Sloveniji, še posebno ko gre za poslovanje z občani. Poleg tega prispevek analizira tudi e-poslovanje upravnih enot v njihovem notranjem poslovanju ter poslovanju z drugimi upravnimi organi. V zaključnem delu je predstavljena primerjalna analiza rezultatov naše empirične raziskave z najnovejšimi rezultati evropske študije Capgemini Benchmark (Capgemini, 2009) in nekaterimi drugimi mednarodnimi študijami.

Ključne besede: e-uprava, javne e-storitve, uporaba javnih e-storitev, upravne enote

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Jelenič, M. & Vintar, M. (2011). Analiza stanja e-poslovanja v slovenski javni upravi: Primer upravnih enot Republike Slovenije. *Uprava*, IX(1), 43–62.

1 Uvod

Na področju uvajanja novih informacijsko komunikacijskih tehnologij v javno upravo je bilo v dobrem desetletju v Sloveniji narejenega veliko. Sprejeti so bili nujni zakoni in podzakonski predpisi, ki urejajo področje elektronskega poslovanja, vzpostavljena je bila potrebna informacijska infrastruktura, zaživel je tudi centralni državni portal e-uprava, ki nudi številne elektronske storitve javne uprave za različne uporabnike.

Prav razvoju elektronskih storitev za podjetja in državljane je bila na državni ravni po letu 2001 namenjena največja pozornost. Razvoju teh storitev je posebno pozornost namenila tudi EU, ki je začela v državah članicah in kandidatkah to področje sistematično spremljati s pomočjo meritev, ki jih je po njenem naročilu razvila in jih izvaja od leta 2001 dalje svetovalna organizacija Capgemini. Model meritev, gre za vzorec 20 storitev (8 za podjetja in 12 za občane), na katerih se ugotavlja razvitost tega področja v posamezni državi, ni idealen, in ga bo v prihodnje nujno povsem spremeniti, kar ugotavlja že tudi izvajalec meritev (Capgemini, 2009). Model je bil sicer v zadnjih letih dopolnjen že dvakrat (2007, 2009), še posebej močno prav v letu 2009, zato zadnji rezultati kažejo nekoliko bolj realno sliko, kot tisti izpred dveh let ali pa še starejši. Kljub temu pa se poraja cela vrsta dvomov o realnosti teh rezultatov nasploh (Bannister, 2007), še posebej pa tistih, ki se nanašajo na Slovenijo.

Slovenija se je namreč na rang lestvici cca 30 držav, v katerih se v zadnjih letih izvajajo te meritve, naglo vzpenjala. Če je bila denimo leta 2005 še na petnajstem mestu, se je leta 2007 po kriteriju "zrelosti on-line storitev" uvrstila že na zavidljivo drugo mesto (takoj za Avstrijo). Rezultat Slovenije v letu 2009 je bil nekoliko slabši (5. mesto), pa vendar Slovenijo še vedno uvršča v vrh držav EU. S temi meritvami ne bi bilo nič narobe, če bi jih jemali v njihovem vsebinskem kontekstu, torej na področju izbranih 20 storitev e-uprave. Ker pa se njihove rezultate zadnja leta vedno bolj posplošuje in z njimi poistoveti stanje na področju razvitosti e-uprave v Sloveniji nasploh in primerjalno z EU, postanejo ti rezultati problematični, lahko celo zavajajoči. Obstaja namreč cela vrsta drugih kazalnikov (glej: The Economist, 2007; UN E-Government Survey, 2008), ki kažejo, da stanje e-uprave v Sloveniji le ni tako rožnato.

Z namenom, da bi dobili realnejšo sliko stanja e-uprave v Sloveniji, še posebno z vidika dejanske uporabe e-storitev, smo v prvi polovici leta

2009 na Inštitutu za informatizacijo uprave zasnovali in izvedli empirično raziskavo stanja v upravnih enotah (UE) Republike Slovenije. UE so tisti del javne uprave, ki je v najbolj neposrednem stiku z državljani in preko katerih se opravi kar tri četrtine vseh javnih storitev za državljane in podjetja. Zato ocenjujemo, da je elektronsko poslovanje UE v Sloveniji (z izjemo davčne uprave) morda najboljši kazalec, v kolikšni meri je e-uprava dejansko že zaživela. Meritve Capgemini so usmerjene predvsem v evalvacijo ponudbe storitev v posameznih državah, v praksi pa nam več o dejanskem stanju in razvitosti e-uprave pove njihova dejanska uporaba. Prav nizka uporaba storitev e-uprave (Eurostat, 2007a, 2007b), še posebno tistih, ki so namenjene občanom, pa je po dosedanjih ugotovitvah ena največjih slabosti dosedanjega razvoja.

Namen prispevka je osvetliti in primerjalno analizirati razvitost e-uprave v Sloveniji skozi njihovo dejansko uporabo na nekaterih, za delovanje uprave, ključnih področjih in odgovoriti na vprašanje ali smo s stanjem na področju razvoja e-uprave lahko zadovoljni, še posebno v luči visokih uvrstitev na lestvicah EU. Pri tem bomo skušali soočiti rezultate mednarodnih raziskav z rezultati, ki smo jih dobili na osnovi lastne empirične raziskave izvedene v letu 2009 v UE Slovenije. V poglavjih 2 in 3 predstavljamo zasnovo in rezultate lastne raziskave, v poglavju 4 pa skušamo te rezultate ovrednotiti in jih umestiti v širši kontekst razvitosti e-uprave v slovenski javni upravi.

2 Metodološka zasnova empirične raziskave

Glavni namen empirične raziskave, na katero se bomo oprli v naši razpravi, je bil ugotoviti dejansko stanje na področju e-poslovanja UE, pri tem pa nas je zanimalo:

- e-poslovanje UE z njihovimi najpomembnejšimi uporabniki storitev, to je občani in podjetji (zunanji pogled),
- področja poslovanja UE, na katerih je e-poslovanje najbolj razvito,
- e-poslovanje UE z drugimi upravnimi organi (notranji pogled).

V opravljeni raziskavi na Inštitutu za informatizacijo uprave smo skušali ugotoviti dejansko pogostost prejemanja elektronskih vlog po posameznih delovnih področjih UE, podrobneje pa razčleniti, kako pogoste so posamezne vrste elektronskih vlog in kakšne so razlike med pogostostjo njihovega prejemanja. Eden od temeljnih pogojev za

doseganje najvišje stopnje razvitosti e-poslovanja (stopnja 4 – transakcija, po Capgemini lestvici, (Capgemini, 2009) je možnost elektronskega vročanja dokumentov. Normativni in tehnološki pogoji so že nekaj časa vzpostavljeni, zato smo skušali s pomočjo empirične raziskave ugotoviti, v kolikšni meri se to dejansko že izvaja v praksi poslovanja UE.

Razvitost e-uprave v Sloveniji pa se ne kaže samo skozi ponudbo in uporabo e-storitev navzven, občanom, podjetjem in drugim organizacijam, pač pa v enaki meri tudi skozi e-poslovanje med upravnimi organi. Zato smo z raziskavo skušali ugotoviti tudi razvitost tovrstnega poslovanja (notranji pogled). V zaključnem delu empirične raziskave smo skušali dobiti še vpogled v stanje na področju elektronske hrambe dokumentov, saj le-ta povzroča vedno večje probleme e-poslovanja upravnih organov.

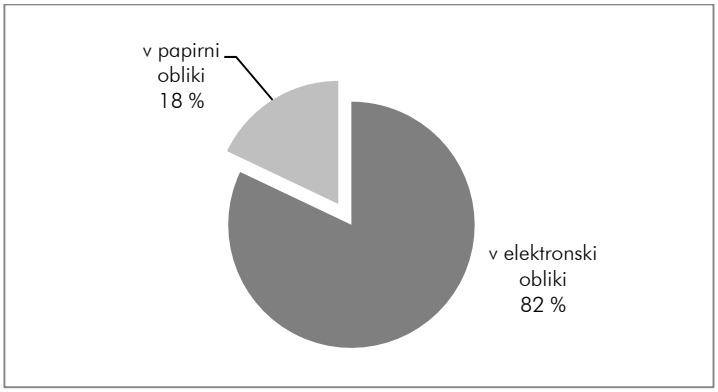
Zbiranje podatkov je temeljilo na anketnem vprašalniku, ki je bil poslan vsem 58 UE v Sloveniji na njihove uradne elektronske poštne naslove. Vprašalnik je bil osredotočen na osem ključnih vprašanj, znotraj le-teh pa so bila vprašanja razčlenjena po posameznih področjih delovanja UE. Anketa je bila oblikovana tako, da je bila primerna tako za izvedbo v elektronski obliki kakor tudi za klasično reševanje preko papirnatih vprašalnikov. Vprašanje v raziskavi, kako pogosto UE prejemajo posamezne elektronske vloge, je razčlenjeno na posamezna, po obsegu poslovanja najpomembnejša, delovna področja UE:

- notranje zadeve,
- okolje in prostor,
- kmetijstvo, gozdarstvo in prehrana,
- gospodarstvo,
- vojni veterani, žrtve vojnega nasilja in vojni invalidi,
- druga področja (prevladujejo zadeve s področja informacij javnega značaja).

Izpolnjeni vprašalnik je bilo mogoče vrniti po e-pošti na naslov pošiljatelja ali pa ga natisniti in poslati po klasični pošti. Anketiranje je potekalo v mesecu aprilu in maju 2009, na zaprosilo za izpolnitev ankete se je odzvalo skupno 39 UE oz. 67,24 %. S tem smo pridobili dovolj reprezentativen vzorec, da rezultate raziskave posplošimo in iz njih izpeljemo nekatere splošne značilnosti pri e-poslovanju UE. Od 39 UE jih je 82 % vrnilo izpolnjene ankete nazaj po elektronski pošti, 18 % pa se jih

je še vedno raje odločilo za klasično pošto (grafikon 1). Podatki, pridobljeni z anketo, so bili zajeti in obdelani s pomočjo računalniškega programa Excel.

Grafikon 1: Način odziva upravnih enot (N = 39)



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3 Rezultati raziskave

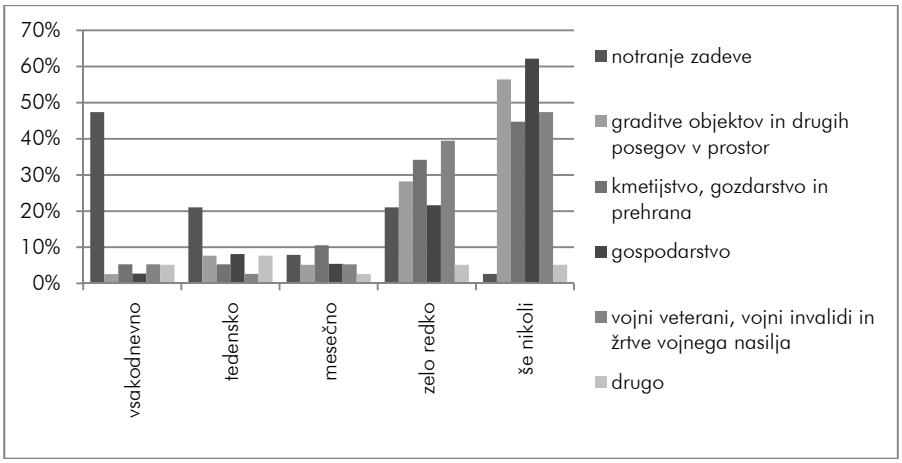
V prvem delu raziskave nas je zanimalo predvsem to, kako pogosto prejemajo UE elektronske vloge in katera so tista področja, kjer je teh vlog največ. Poleg tega pa smo skušali tudi raziskati, v kolikšni meri je v praksi že uveljavljeno tudi elektronsko vročanje. Na ta način dobimo dokaj jasno sliko, kako je dejansko razvito elektronsko poslovanje navzven, torej z občani in podjetji. Ta del raziskave podrobneje predstavljamo v poglavju 3.1.

3.1 Elektronsko poslovanje UE z občani in podjetji

Pogostost prejemanja različnih e-vlog je razvidna iz grafikona 2. Na področju notranjih zadev 47 % UE prejema e-vloge dnevno, 21 % tedensko, 8% mesečno, 21 % zelo redko, ena UE pa do zdaj še ni prejela nobene e-vloge. Na okoljskem področju ena (2,56 %) UE prejema e-vloge praktično vsak dan, tedensko jih prejema 8 % in mesečno 5 %, 28 % pa bolj poredko. Večina UE (56 %) do zdaj še ni prejela nobene takšne vloge. S kmetijskega oz. gozdarskega področja majhen odstotek (5 %) prejema e-vloge zelo pogosto, enak odstotek pa tudi tedensko. Mesečni prejem vlog je malo večji (11 %), večji pa je odstotek UE, ki prejema vloge zelo redko (34 %), še nekoliko več (44 %) jih pa takšnih vlog ni prejelo še nikoli. E-vloge v zvezi z gospodarstvom so zelo pogoste samo na eni (3 %) UE, jih pa nekaj več (8 %) prejema tedensko in 5 %

mesečno, 22 % zelo redko, daleč največ UE pa takih vlog sploh še ni prejelo (62 %). Na področju vojnih veteranov, žrtev vojnega nasilja in vojnih invalidov je zelo pogosto prejetih e-vlog v 5 %, le 3 % UE jih prejema tedensko, mesečno jih prejema 5 % UE, večina pa jih prejema zelo redko (39 %) oziroma jih sploh ne prejema (47 %). Osem UE (21 %) pa je tudi označilo, da e-vloge prejema tudi na drugih področjih svojega delovanja. Dve UE sta odgovorili, da ne prejemata nobenih drugih e-vlog, preostalih 29 UE pa ni odgovorilo na to vprašanje. Ena UE zelo redko prejema e-vloge v obliki pohval javnim uslužbencem in zahteve za dostop do informacij javnega značaja, tri UE prejemajo tedensko informacije javnega značaja, splošne informacije ter vloge o hrambi dokumentarnega gradiva oz. o arhivu. Ena UE je navedla, da zelo pogosto prejema e-vloge s področja službe za skupne zadeve.

Grafikon 2: Pogostost prejemanja e-vlog po področjih



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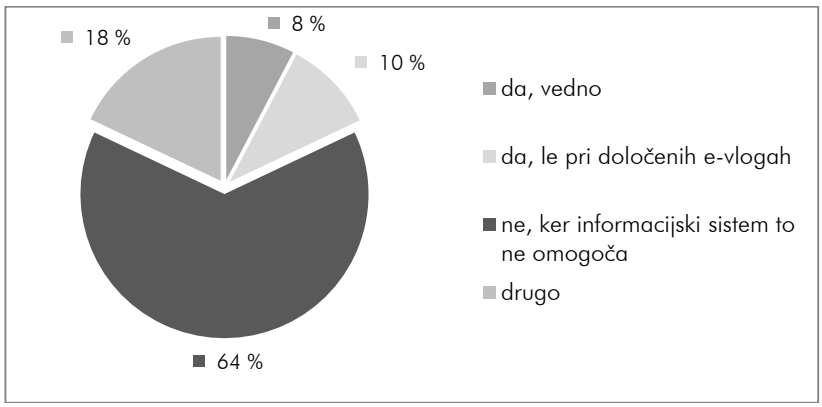
Le 8 % UE (grafikon 3) je odgovorilo, da izvajajo elektronsko vročanje v varne e-poštne predale. Pri tem je treba omeniti, da varen e-poštni predal ne pomeni navadnega naslova elektronske pošte, odprtega pri enem od številnih ponudnikov na internetnem trgu, ampak gre za varne predale, ki jih trenutno ponuja samo Pošta Slovenije. Vročanje le pri določenih vlogah izvaja 10 % UE. Na elektronski način ne vroča dokumentov 64 % UE, ker smatrajo, da informacijski sistem tega ne omogoča. Sem lahko prištejemo tudi tiste odgovore, ki so zapisani pod drugo, bilo jih je 18 %, obrazložitve pa so naslednje: e-uprava ne razpolaga s prevajalnikom za e-podpisane dokumente, ker stranke nimajo urejenega varnega poštnega e-predala; informacijski sistem tega še ne

omogoča in ni bilo še primera; ni na voljo ustreznih tehničnih rešitev. Ena UE ni navedla nobenega razloga.

Grafikon 3: Elektronsko vročanje dokumentov



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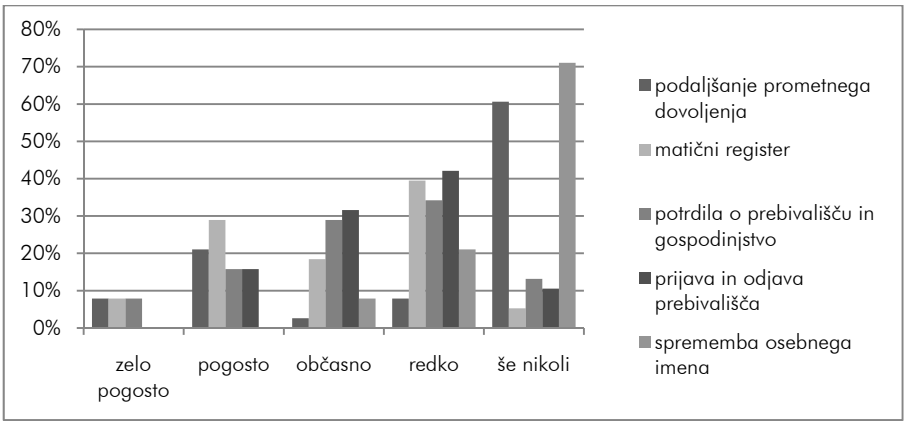
3.1.1 Notranje zadeve

Največ UE prejema e-vloge za podaljšanje prometnega dovoljenja pogosto (21 %), malo pa zelo pogosto (8 %) in občasno (3 %). Redko jih prejema 8 % UE, kar 61 % pa takih vlog še ni prejela. Izpiske in potrdila iz Matičnega registra zelo pogosto prejema 8 %, pogosto 29 %, občasno 18% in redko 39 % UE, samo 5 % UE pa takšnih vlog še ni prejelo. Pri potrdilih o prebivališču in gospodinjstvu je pogostost dokaj enakomerno razporejena: 8 % UE prejema vloge dnevno, 16 % pogosto, nekaj več jih prejema občasno (29 %), največ pa redko (34 %). Še nikoli pa ni imelo takšne vloge 13 % UE. Prijave in odjave stalnega prebivališča nobena UE na prejema vsakodnevno, 16 % jih prejema tedensko, nekaj več (32 %) mesečno, še več pa redko (42 %). Takšne vloge do sedaj še ni prejelo 11 % UE. Zelo redke pa so e-vloge za spremembo osebnega imena, saj nobena UE ne prejema takih vlog zelo pogosto ali pogosto. Tudi občasno prispejo na malo UE (8 %), nekaj več pa je tistih, ki so do sedaj prejeli že vsaj kakšno vlogo (21 %). Posledično je največ tistih, ki take vloge še niso prejeli, in sicer 71 % (glej grafikon 4).

Grafikon 4: Prejem e-vlog s področja notranjih zadev (N = 39)



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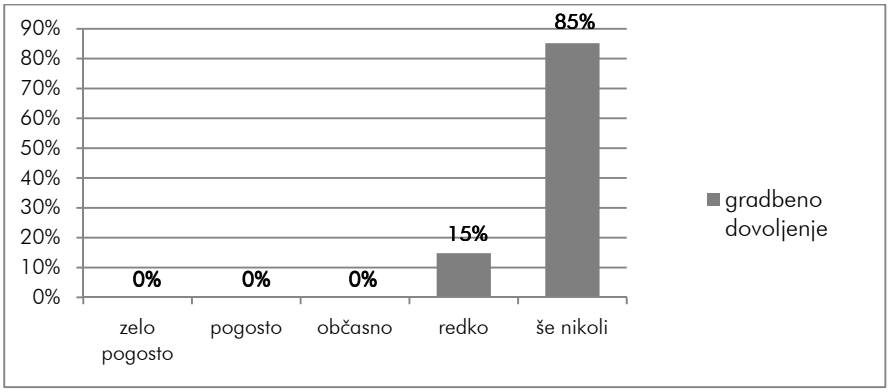
3.1.2 Okolje in prostor

E-vloga za izdajo gradbenega dovoljenja ni pogosta, saj jih dnevno ali tedensko ali pa mesečno ne prejema nobena UE. Do sedaj je takšno vlogo prejelo 15 % UE, medtem ko jih 85 % še ni imelo priložnosti obravnavati takšne vloge (grafikon 5).

Grafikon 5: Prejem e-vlog s področja okolja in prostora (N = 39)



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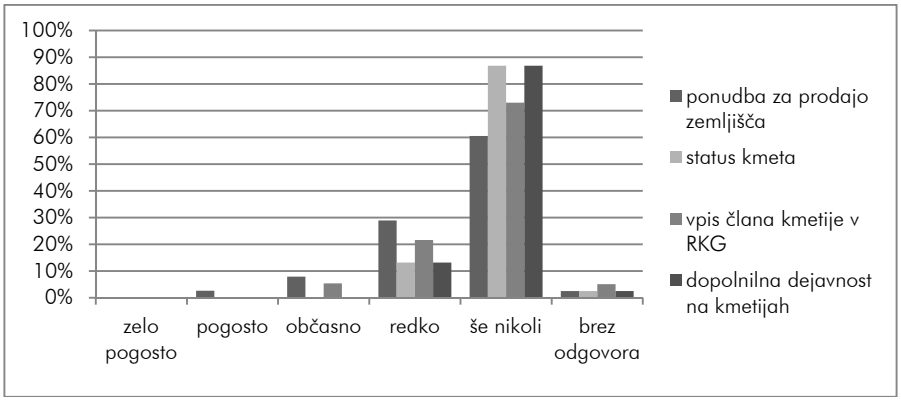
3.1.3 Kmetijstvo, gozdarstvo in prehrana

Rezultati ankete pokažejo (grafikon 6), da nobena UE ne prejema vlog s tega področja dnevno ali tedensko. Le ponudbe za prodajo zemljišča (3 %) in vloge za vpis člana v register kmetijskih gospodarstev (5 %) prispejo občasno, nekoliko več (29 %) pa je UE, ki redko prejemajo tovrstne ponudbe, še več pa je takih (6 1%), ki jih še nikoli niso prejeli.

Pogostost vlog za urejanje statusa kmeta je še manjša, le 13 %, povsem brez takih vlog pa je 87 % UE, enako je tudi pri dopolnilnih dejavnostih. Občasno prejme vlogo za vpis člana v RKG 22 % UE, ne prejema pa jih 73 %. 5 % UE pri tej točki ni navedlo odgovora, pri ostalih treh navedbah pa ni odgovorila po ena UE.

Grafikon 6: Prejem e-vlog s področja kmetijstva, gozdarstva in prehrane (N = 39)



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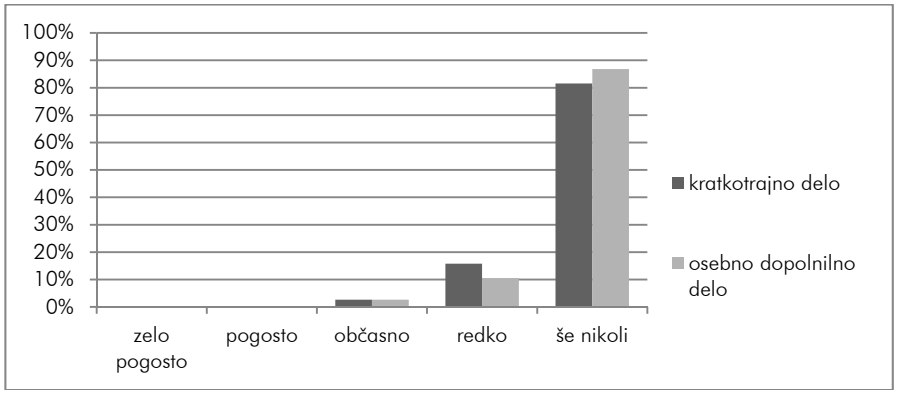
3.1.4 Gospodarstvo

Tudi na področju gospodarstva elektronske vloge niso zelo pogoste. Rezultati raziskave so pri elektronski prijavi kratkotrajnega dela, kot pri prijavi osebnega dopolnilnega dela zelo podobni. Kot je razvidno iz grafikona 7, več kot 80 % UE tovrstnih vlog še ni prejelo v elektronski obliki.

Grafikon 7: Prejem e-vlog s področja gospodarstva (N = 39)



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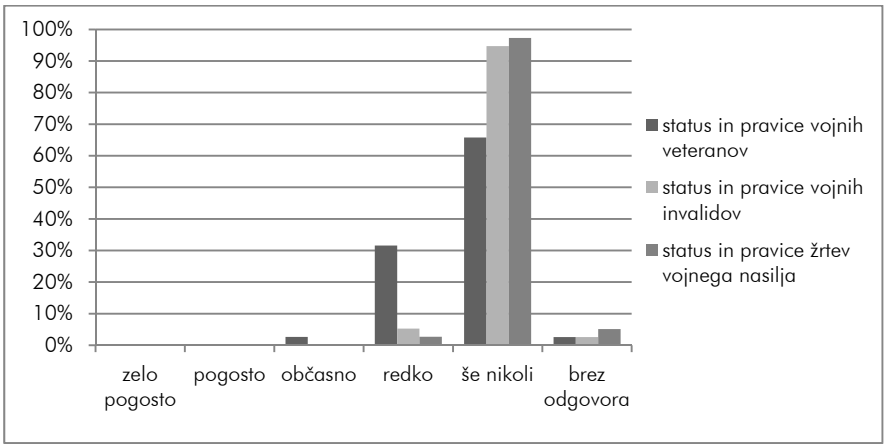
3.1.5 Vojni veterani, žrtve vojnega nasilja in vojni invalidi

Velike pogostosti sprejemanja tovrstnih vlog ni (grafikon 8). Pa vendar je že imela izkušnjo z vlogami za pridobitev statusa in pravic vojnih veteranov ena tretjina UE (3 % občasno in 32 % redko), dve tretjini (66 %) pa še ne. Pri žrtvah in invalidih pa je odstotek prejema vlog zelo majhen (3 % oz. 5 %), kar pomeni da 95 % UE na področju žrtev in 97 % UE na področju invalidov ni prejelo takih vlog.

Grafikon 8: Prejem posameznih e-vlog s področja VV, ŽVN, VI (N = 39)



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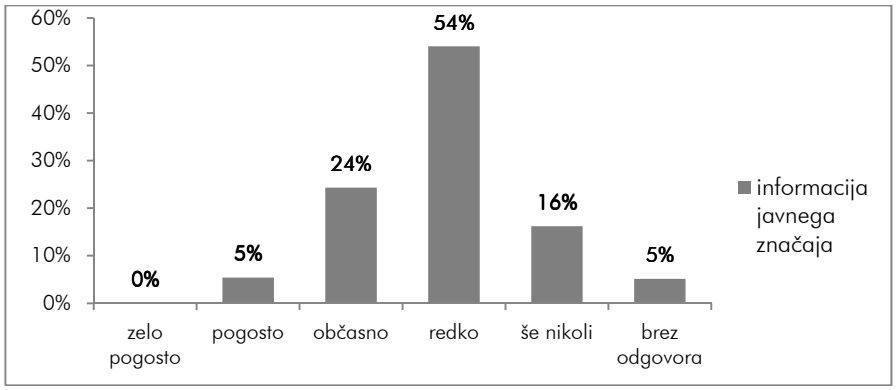
3.1.6 Druga področja

Pod druga področja je uvrščeno predvsem pridobivanje informacij javnega značaja (grafikon 9), to je pravica posameznika, ki se je občine vse bolj poslužujejo, in jo je možno uveljaviti tudi v obliki e-vloge. Rezultati kažejo, da ta e-storitev še ni zelo razširjena; pogosto te vloge že prejema 5 % UE, občasno pa 24 %. Več kot polovica (54 %) UE je že prejela zahtevo v e-obliki, obstajajo pa tudi UE, ki take vloge še niso prejele (16 %); 5 % UE na to vprašanje ni odgovorilo.

Grafikon 9: Prejem e-zahtev za informacijo javnega značaja (N = 39)



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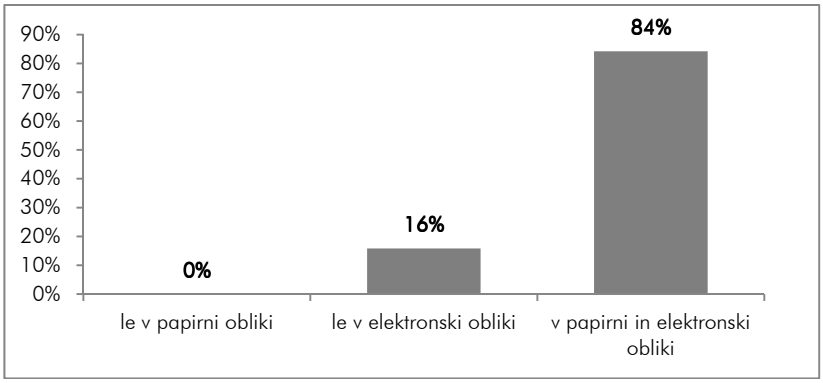
Pri vprašanju, na kakšen način in v kolikšni meri poslujejo UE z drugimi organi javne uprave, rezultati kažejo (grafikon 10), da je elektronsko poslovanje v notranjem poslovanju uprave bolj razvito kot pri poslovanju s strankami navzven. Že skoraj petina oz. 16 % UE posluje z drugimi organi izključno elektronsko, največ pa jih seveda še vedno uporablja obe obliki poslovanja z drugimi javnimi organi (84 %).

Grafikon 10: Način izmenjave podatkov z drugimi organi javne uprave (N = 39)



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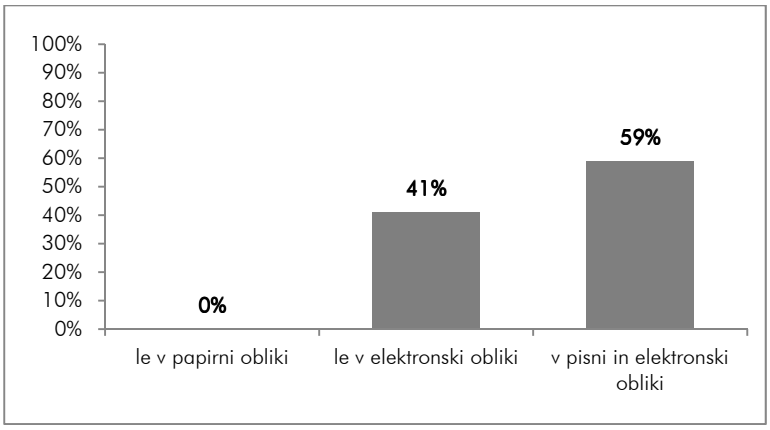
3.2 Elektronska izmenjava dokumentov in e-arhiviranje

Na prvo vprašanje, kako imajo UE urejeno izmenjavanje podatkov znotraj svojega organa, jih je 41 % odgovorilo, da poslujejo le v elektronski obliki, medtem ko tako papirno kot tudi elektronsko obliko uporablja 59 % UE (grafikon 11).

Grafikon 11: Izmenjava podatkov znotraj UE (N = 39)



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Pri vprašanju o načinu izmenjave podatkov s posameznimi organi javne uprave je bilo vključenih v raziskavo sedem različnih institucij oz. organov, s katerimi naj bi UE najbolj pogosto poslovale (glej grafikon 12). Rezultati raziskave kažejo, da je največji odstotek popolnega e-poslovanja (e-vlogi sledi e-odgovor) z ministrstvi (95 %), na elektronske vloge jih v papirni obliki odgovarja 28 %, prav toliko UE pa odgovarja elektronsko na papirne vloge. Še vedno velik pa je odstotek komuniciranja samo v papirni obliki (36 %).

Dvosmerno e-poslovanje z občinami se izvaja v manjšem obsegu (54 %) UE, če je vloga elektronska, odgovarja na papirju 23% UE, na papirno vlogo pa elektronsko odgovori 41 % UE. Občine so poleg inšpektoratov tisti organ, s katerim si največ UE dopisuje samo v papirni obliki (62 %), ena UE pa z njimi posluje na papirju ne glede na obliko vloge.

Z davčno upravo (DURS) zgolj v e-obliki posluje 69 % UE, 14 % jih na e-vlogo odgovori na papirju, 19 % pa na papirno vlogo odgovarja v elektronski obliki. Polovica (52 %) pa jih na papirno vlogo odgovori v papirni obliki.

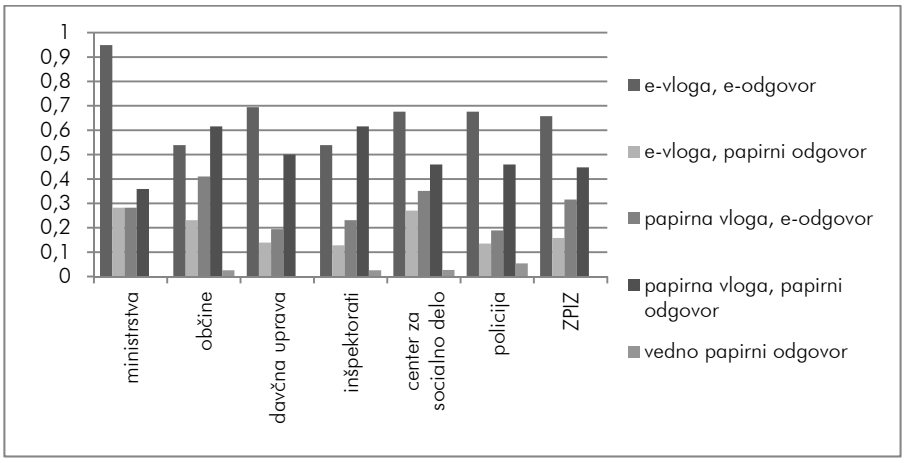
Tudi pri poslovanje UE z inšpektorati se ne moremo pohvaliti z zelo visokim odstotkom popolnega elektronskega sodelovanja (54 %), 13 % UE še vedno odgovori na e-vlogo v papirni obliki, 23 % jih odgovori na papirno vlogo v e-obliki, 62 % pa je še vedno papirnatega poslovanja v obe smeri.

UE s v komunikaciji s centri za socialno delo (CSD) v 68 % poslujejo elektronsko v obeh smereh, 27 % jih odgovarja na e-vloge v papirnati obliki, nekoliko več pa jih na papirno vlogo odgovori elektronsko (35 %), še vedno pa poteka skoraj polovica komunikacij (46 %) v papirni obliki, ena UE pa odgovarja na vse vloge izključno v papirni obliki.

Podobno je poslovanje UE s policijo, e-poslovanje v obeh smereh dosega 68 %, 14 % UE na e-vlogo vrne papirni odgovor, obratnih primerov pa je 19 %. 46 % UE na papirnato vlogo policije odgovarja prav tako s papirno obliko, 5 % UE pa na vloge ne glede na njihovo obliko odgovarja samo na papirju.

Poslovanje UE z Zavodom za pokojninsko in invalidsko zavarovanje (ZPIZ) v ničemer ne izstopa. Popolna elektronska izmenjava podatkov poteka v 66 % primerih, na e-vloge odgovarja na papirni način 16 % UE, na papirno obliko pa elektronsko pošilja odgovor 32 % UE, 45 % poslovanja pa je še na papirju v obeh smereh.

Grafikon 12: Način menjave podatkov z karakterističnimi organi javne uprave (N = 39)



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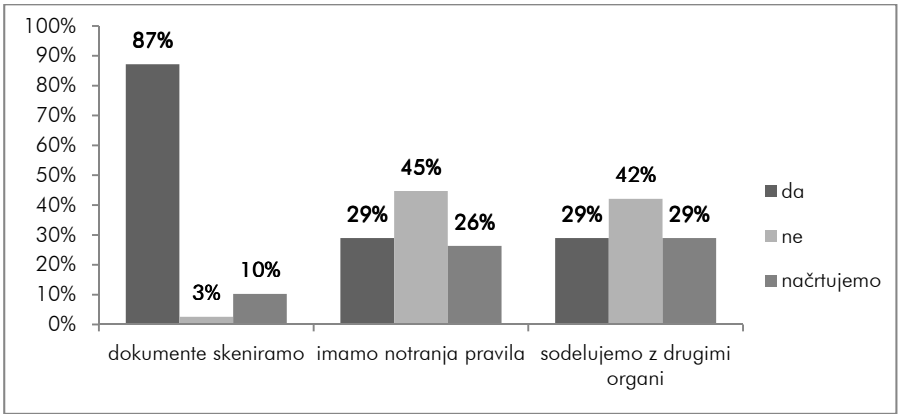
Ena točka vprašalnika se je nanašala tudi na področje elektronske hrambe dokumentov (grafikon 13). Spodbudno je, da 87 % UE skenira vhodne dokumente, 10 % pa jih to načrtuje. Pri vprašanju o notranjih pravilih, s katerimi bi po zakonu moralo biti urejeno notranje poslovanje organa, pa so odgovori bolj porazdeljeni: 29 % UE takšna pravila že ima, 45 % jih še nima, sprejem pravil pa pravkar načrtuje 26 % UE. Tudi na vprašanje o sodelovanju z drugimi organi na področju dolgoročne

elektronske hrambe dokumentov (ministrstva, arhivi, ...), so odgovori različni: 29 % UE že sodeluje z drugimi, 42 % jih ne sodeluje, skoraj tretjina (29 %) pa jih to načrtuje.

Grafikon 13: Aktivnosti na področju elektronske hrambe dokumentov (N = 39)



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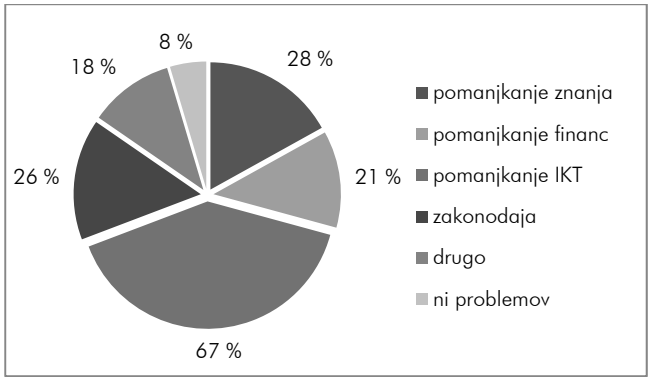
Grafikon 14: Problemi e-poslovanja (N = 39)



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Pri razvoju sodobnih sistemov in tehnologij se v upravi srečujejo z raznimi težavami in ovirami, zato je zanimiv tudi pogled UE na ovire pri uvajanju ali izvajanju e-poslovanja, ki jih zaznavajo same (grafikon 14). Mogočih je bilo več odgovorov, izstopal pa je odgovor, da je največji problem v pomanjkanju IKT (67 %). Drugi odgovori pa so bili manj izstopajoči. Da je pomanjkanje znanja eden ključnih problemov, meni 28 % javnih uslužbencev UE. V pomanjkanju financ vidi težavo 21% UE, v zakonodaji 26 %. Tri UE (8 %) so navedle, da ne vidijo nobenega problema pri uveljavljanju e-poslovanja, 15 % pa jih je poleg že

navedenih problemov navedlo, da ni drugih problemov, zato ti odgovori niso upoštevani pri obdelavi tega vprašanja. 18 % UE navaja tudi druge ovire, kot denimo: premajhna osveščenost strank glede e-poslovanja, prepočasno prilagajanje zaposlenih novi informacijski tehnologiji, vročanje ni možno preko varnega naslova, ker kljub sprejeti zakonodaji še ni ustrezne informacijske rešitve, itd.

4 Analiza rezultatov raziskave

Za celovito in zanesljivo oceno stanja na področju razvoja e-uprave v Sloveniji bi potrebovali veliko obsežnejšo empirično raziskavo, ki bi zajela vse ključne segmente javnega sektorja. Raziskava opravljena zgolj v UE ima zato omejeno vrednost in njenih rezultatov ni mogoče brez pridržkov posploševati. Kljub temu pa lahko iz primera UE izpeljemo pomembne zaključke, saj UE izvajajo okrog tri četrtine vseh upravnih postopkov na prvi stopnji in se prek njih odvija velik in pomemben del e-poslovanja z občani in podjetji. Iz dobljenih rezultatov lahko povzamemo naslednje pomembnejše ugotovitve:

- uporaba e-storitev UE za zunanje uporabnike (občani in podjetja) je vendarle šele v povojih, saj manj kot polovica UE prejema e-vloge dnevno. Večina e-vlog prejmejo na področju notranjih zadev, najbolj iskani storitvi sta podaljšanje prometnega dovoljenja in vpogledi v matični register;
- na vseh drugih področjih delovanja UE, kjer gre praviloma za bistveno bolj zapletene postopke, okolje in prostor, kmetijstvo, gospodarstvo itd. so trenutno e-vloge zelo redke, večina UE sploh še ni prejela takšne vloge;
- elektronsko vročanje dokumentov je še povsem na začetku, do sedaj je bilo tega le za vzorec. Več kot polovica UE tega ni še niti poizkusila, saj nima odprtega varnega poštnega predala pri Pošti Slovenije, ki je pogoj za takšno vročanje;
- veliko bolje je razvito e-poslovanje med organi uprave, med njimi izstopa poslovanje z ministrstvi, ki poteka že pretežno v elektronski obliki, pa tudi z drugimi, za poslovanje UE pomembnimi organi, kot so občine, DURS, inšpektorati, centri za socialno delo itd, večina UE posluje že elektronsko.

Pričakovan je bil visok odstotek e-poslovanja UE z ministrstvi, ne nazadnje UE opravljajo številne naloge z njihovih delovnih področij.

Ministrstvom je zato v interesu, da se takšno poslovanje hitro in sprotno posodablja, da se uvajajo sodobne IKT ter se tako olajša poslovanje vsem zaposlenim. Občine so del lokalne samouprave, znano je, da lokalna samouprava na področju e-poslovanja zaostaja za državno upravo, zato rezultat, ki ga je dala raziskava, ne preseneča. Precej izenačeni so rezultati, ki se nanašajo na policijo, centre za socialno delo, DURS in ZPIZ, zaostaja pa e-poslovanje UE z inšpektorati. Davčna uprava je pomemben poslovni partner UE, zato je pričakovati, da se bo stopnja medsebojnega elektronskega poslovanja v prihodnje dvigovala.

Zanimivi so tudi rezultati, ki se nanašajo na aktivnosti elektronske hrambe. Po eni strani je razveseljiv podatek, da velika večina UE (87 %) že skenira vse vhodne dokumente, kar pomeni, da bi lahko tudi notranje poslovanje UE potekalo skoraj v celoti v elektronski obliki, po drugi strani pa preseneča, da ima le dobra četrtina UE izdelana notranja pravila, ki dejansko urejajo ravnanje z takšnimi dokumenti.

Naj vse te ugotovitve povzamemo in jih soočimo z rezultati, ki jih Slovenija v zadnjih letih dosega po različnih mednarodnih meritvah in primerjavah. Neposredno rezultatov naše raziskave žal ne moremo primerjati z stanjem v drugih državah, ker teh podatkov ni na voljo ali so pa neprimerljivi. Večina mednarodnih organizacij oziroma institucij, ki se ukvarjajo z evalvacijo razvitosti e-uprave v posameznih državah, bodisi v svetovnem merilu (Združeni narodi, Svetovna banka, nekatere univerze itd) ali v EU neposredno uporabo storitev e-uprave ne meri, pač pa se osredotočajo predvsem na njihovo ponudbo. Edini podatki, na katere se lahko glede uporabe e-storitev opremo, so podatki Eurostata (Eurostat, 2008), po katerih je Slovenija glede uporabe javnih e-storitev okrog povprečja EU.

Lahko pa pridemo do nekaterih zaključkov posredno. V oči bode razlika med uvrstitvami Slovenije po meritvah Capgemini (Capgemini, 2007; Capgemini, 2009), meritvami nekaterih drugih mednarodnih organizacij, denimo Združenih narodov (UN E-Government Survey, 2008; The Economist, 2007) in nekaterimi našimi ugotovitvami. Na večini mednarodnih lestvic, ki se nanašajo na področje razvitosti e-uprave, se Slovenija uvršča okrog tridesetega mesta, ko gre za svetovne lestvice, oziroma okrog povprečja EU, ko gre za evropske lestvice. Le po lestvici Capgemini se uvrščamo v sam vrh (2. mesto v 2007, 5. mesto v 2009) držav članic EU. Presenetljiv je denimo podatek, da Slovenija po teh

meritvah dosega 95 % na meritvi 'popolne on-line dostopnosti' storitev. To bi pomenilo, da so vse storitve, ki se merijo, razvite na ravni četrte ali pete stopnje, na petstopenjski lestvici razvitosti storitev. Ob tem pa v naši raziskavi ugotavljamo, da več kot polovica UE sploh ni usposobljena za izvajanje storitev na tej stopnji, ker nima varnega poštnega predala, kar meče senco dvoma na ta podatek in s tem tudi na naše uvrstitve na teh meritvah.

Skratka, menimo, da je Slovenija po razvitosti e-uprave, če jo obravnavamo celovito, veliko bliže evropskemu povprečju kot pa njenemu vrhu, kar je bilo v zadnjih letih pogosto slišati.

5 Zaključek

Kako povečati uporabo teh storitev in nasploh pospešiti nadaljnji razvoj? Odgovor ni enostaven in je večplasten. Začeti je treba že s tem, da se čim večjemu številu državljanov omogoči dostop do interneta, ki je pogoj za pridobivanje informacij in opravljanje številnih elektronskih storitev. Po raziskavi Eurostata iz leta 2008 je namreč Slovenija glede uporabe interneta okrog povprečja Evropske unije, ko gre pa za premagovanje "digitalne ločnice" pa precej pod njim. E-uprava je do danes dobro zaživela in se razvila, pa vendar se kaže, da e-uprave in njenih možnosti ljudje ne poznajo dobro. E-storitve je treba predstaviti in ponuditi ljudem še bolj prijazno, pregledno in enostavno za uporabo. Opaziti je, da še sami uslužbenci v UE kakor tudi v drugih organih javne uprave ne poznajo dobro e-uprave ter njenih zmogljivosti, zato je težko pričakovati, da bodo napeljevali uporabnike k tem storitvam.

UE so, glede na svojo vlogo v odnosu do zunanjih uporabnikov storitev uprave, izjemno pomemben člen v razvoju e-uprave in e-poslovanja v Sloveniji. S svojimi storitvami in še bolj aktivnim sodelovanjem s številnimi drugimi organi javne uprave, predvsem pa tudi s svojim zgledom in z dosledno uporabo sodobnih tehnoloških rešitev lahko bistveno pripomorejo k razvoju in širjenju uporabe e-poslovanja na vseh področjih javne uprave.

Očitno pa je, da bo v Sloveniji potrebno storiti še zelo veliko, da bo e-uprava tudi v praksi, to je na operativni, storitveni ravni v resnici zaživela. Menimo, da je bilo doslej premalo storjeno predvsem na področju promocije e-uprave, ter razvoja storitev, ki bodo uporabnikom v resnici olajšale vse stike z upravo.

Mitja Jelenič je leta 2009 diplomiral na Fakulteti za upravo v Ljubljani. Zaposlen je kot svetovalec v Upravni enoti Novo mesto na področju, ki zajema tudi elektronsko poslovanje in uporabo sodobnih informacijskih tehnologij.

Prof. dr. Mirko Vintar je profesor za informacijske sisteme v upravi in e-upravo. Že več kot dvajset let se ukvarja z informatizacijo uprave in v zadnjih letih intenzivno tudi z razvojem e-uprave. Bil je/je vodja vrste domačih in mednarodnih raziskovalnih in razvojnih projektov s tega področja. Je član številnih domačih in mednarodnih znanstvenih in strokovnih teles, ki se ukvarjajo z raziskovanjem obravnavanega področja (EGPA, Study group on Informatization of Public Administration, IFIP- WG 8.5, NISPAcee- WG on E-government). V obdobju 1993–2002 je bil glavni in odgovorni urednik revije Uporabna informatika.

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1.01 Original scientific article

The State of E-Business in Slovenian Public Administration: The Case of Administrative Units

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Mitja Jelenič

Administrative Unit Novo mesto

mitja.jelenic1@gov.si

Mirko Vintar

University of Ljubljana, Faculty of Administration

mirko.vintar@fu.uni-lj.si

ABSTRACT

Over the last few years e-government in Slovenia has experienced very rapid development, with the latest EU surveys showing that Slovenia is among the most advanced member states in this field. However, the actual use of public e-services lags far behind the growing supply. This paper offers a comparative analysis of the current state of affairs in this field in Slovenia, focusing on the country's administrative units. That analysis is based on the results of empirical research into the administrative units' e-business, which was carried out in the first half of 2009 by the Institute for Public Administration Informatisation at the Faculty of Administration. The research looked at e-business in the most typical areas of the administrative units' work, such as internal affairs, the environment and physical planning, agriculture etc., which most accurately reveal the current state of e-business in Slovenia's public administration, particularly insofar as it relates to operations with citizens. The paper also examines the e-business of administrative units in their internal operations and in operations with other administrative bodies. The final part includes a comparison of the results of the empirical research with the latest results from the EU Capgemini Benchmark study (Capgemini, 2009), as well as a number of other international studies.

Key words: e-government, public e-services, use of public e-services, administrative units

JEL: Z00

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1 Introduction

Slovenia has made good progress in introducing new information and communications technologies in its public administration over the last 10 years. The necessary laws and implementing regulations governing electronic business have been adopted, the required computer infrastructure has been put in place and the national e-government portal, which provides many electronic public administration services for various users, has been set up.

At the national level the area which has been given most attention since 2001 has been the development of electronic services for businesses and citizens. The EU, too, has paid particular attention to the development of these services. In the member states and candidate countries it began to systematically monitor this area on the basis of measurements which it commissioned the consultancy company Capgemini to draw up, and which Capgemini has been conducting since 2001. The measurement model, based on a sample of 20 services (eight for businesses and 12 for citizens) to determine the level of development of this area in a particular country, is not ideal and, as the company itself has acknowledged (Capgemini, 2009), will need a thorough overhaul in future. The model has been twice updated in recent years (in 2007 and 2009), with the more recent upgrade being particularly wide-ranging, so the latest results provide a somewhat more realistic picture than those from two years ago and even earlier. Nevertheless, there are many doubts about the accuracy of these results (Bannister, 2007), and especially about those concerning Slovenia because the country has risen rapidly up the rankings of the 30 or so countries in which these surveys have been conducted in recent years. For example, whereas in 2005 it was still in 15th place in terms of "sophistication of online services", by 2007 it had leapt into an enviable second place (behind Austria). Slovenia's result was somewhat poorer in 2009, but its fifth place still means it is among the best performers in the EU. There is nothing wrong with these results if they are taken in the context they relate to, i.e. the 20 selected e-government services, but because in recent years the results of these measurements have been increasingly generalised and equated with the level of development of e-government in Slovenia, both in general and in comparison with other EU countries, they can be problematic, or even misleading, especially as there are a whole range of other indicators

(e.g. The Economist, 2007; UN E-Government Survey, 2008), which suggest that, in fact, the state of e-government in Slovenia is not so rosy.

In order to obtain a more realistic picture of the state of e-government in Slovenia, particularly from the point of view of the actual use of e-services, in the first half of 2009 the Institute for Public Administration Informatisation devised and implemented empirical research into the situation in Slovenia's administrative units, which are the area of public administration that has the most direct contact with citizens and which handles three-quarters of all public services for citizens and businesses. Consequently, we believe that the electronic operations of these administrative units (with the exception of the Tax Administration) are probably the best indicator of the extent to which e-government has actually taken off. The Capgemini measurements are mainly aimed at determining the offer of services in individual countries, but in practice it is the use of e-government services which tells us more about their actual level of development. And it is precisely the low level of use of e-government services (Eurostat, 2007a, 2007b), especially those aimed at citizens, which, according to the latest findings, is one of the biggest weaknesses.

This paper aims to examine and comparatively analyse the development of e-government in Slovenia on the basis of the actual use of e-services in certain key areas for the functioning of the administration, and to determine whether we can be happy with the state of development of e-government, particularly in the light of Slovenia's high position in the EU rankings. We will attempt to compare the results of international research with the results we obtained through our own empirical research conducted in the administrative units in Slovenia in 2009. Chapters 2 and 3 describe our own research and the results it produced, and in Chapter 4 we seek to evaluate those results and put them in the broader context of the state of e-government in the Slovenian public administration.

2 Methodological design of the empirical research

The main purpose of the empirical research on which this paper is based was to establish the actual state of e-government in the administrative units. We were primarily interested in:

- the administrative units' e-business with their most important service users, i.e. citizens and businesses (external aspects),

- the areas of the administrative units' operations in which e-business is most advanced,
- the administrative units' e-business with other administrative bodies (internal aspect).

In the research carried out at the Institute for Public Administration Informatisation we tried to determine the actual frequency with which electronic applications are received in each of the administrative units' areas of work, and then to analyse in detail the frequency of the individual types of electronic applications and the differences in the frequency with which they are received. One of the basic conditions for achieving the highest level of development of e-operations (stage 4 – transaction, according to the Capgemini model (Capgemini, 2009)) is the possibility of electronic delivery of documents. The regulatory and technological conditions have been in place for some time, so we attempted with the aid of empirical research to determine the extent to which this is actually being carried out in the administrative units' operations in practice.

The state of e-government in Slovenia is indicated not solely by the external supply and use of e-services by citizens, businesses and other organisations, but also by the use of e-business between administrative bodies. Therefore our research also sought to determine how far this internal aspect of e-business has been developed. In the final part of the empirical research we looked at the electronic storage of documents, which presents a growing problem for the e-business of administrative bodies.

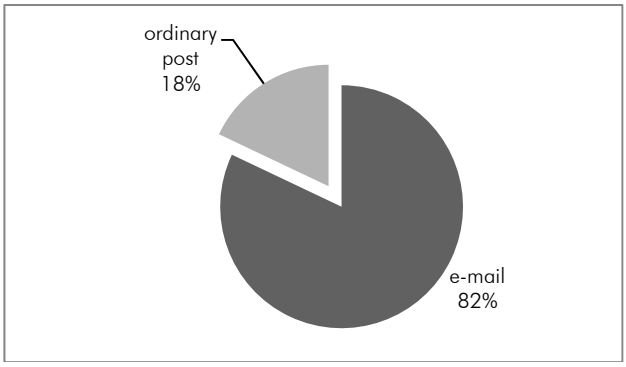
The data was collected using a questionnaire sent to the official e-mail addresses of all 58 administrative units in Slovenia. The questionnaire focused on eight key questions, with each question further broken down into the individual areas of the administrative units' operations. The questionnaire was designed to be completed either in electronic form or on paper. The question about how often the administrative units receive individual electronic applications was broken down into the most important areas of the administrative units' operations in terms of volume of business:

- internal affairs
- the environment and physical planning
- agriculture, forestry and food

- business
- war veterans, victims of war violence and war invalids
- other areas (mainly matters concerning public information).

The completed questionnaire could be returned by e-mail or printed and sent by post. The survey was carried out in April and May 2009. A total of 39 administrative units (67.24%) responded to the request to complete the questionnaire and so the sample was sufficiently representative for us to make generalisations on the basis of the research results and extrapolate certain general characteristics of the administrative units' e-business. Of the 39 administrative units, 82% returned the questionnaire by e-mail, while the other 18% still opted for ordinary post (Graph 1). The data obtained from the questionnaire were processed in Excel.

Graph 1: Response method (N = 39)



Source: Survey

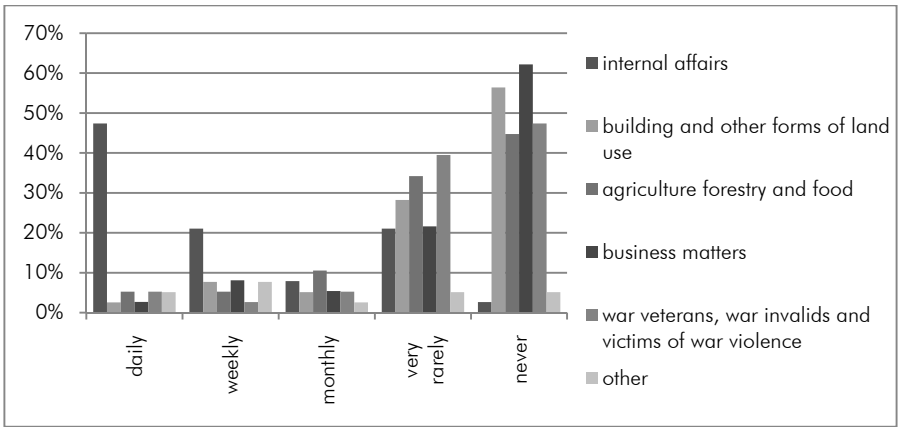
3 Research results

In the first part of the research we were mainly interested in how often the administrative units receive electronic applications and in what areas most electronic applications are received. We also sought to investigate the extent to which electronic delivery is established in practice. This gives us a relatively clear picture of the actual level of development of external e-business, i.e. with citizens and businesses. This part of the research is set out in detail in Chapter 3.1.

3.1 Administrative units' e-business with citizens and businesses

Graph 2 shows the frequency of receipt of various e-applications. For matters relating to internal affairs 47% of administrative units receive e-applications daily, 21% weekly, 8% monthly, 21% very rarely and one administrative unit has not yet received any such e-applications. On issues concerning the environment, one administrative unit (2.56%) receives e-applications practically every day, 8% receive them weekly, 5% monthly and 28% more rarely. Most administrative units (56%) have not yet received any e-applications in this area. For agricultural and forestry matters a small percentage (5%) of administrative units receive e-applications very frequently, and the same percentage receive them on a weekly basis. Slightly more (11%) receive applications on a monthly basis, but the percentage of administrative units that receive such applications very rarely is even higher (34%), while even more (44%) have never received such applications. E-applications concerning business matters are very frequent at only one administrative unit (3%), while somewhat more administrative units (8%) receive them weekly, 5% monthly and 22% receive them very rarely. By far the highest proportion (62%), however, have not yet received any such applications. E-applications concerning war veterans, victims of war violence and war invalids are very frequently received by 5% of administrative units, only 3% receive them weekly and 5% monthly, while most receive them either very rarely (39%) or not at all (47%). Eight administrative units (21%) also indicated that they receive e-applications in other areas of their work. Two administrative units replied that they did not receive any e-applications, while the other 29 administrative units did not reply to this question. One administrative unit very rarely receives electronic submissions in the form of praise for public officials and requests for access to public information. Three administrative units receive public information, general information and applications to store documentary or archive material on a weekly basis. One administrative unit replied that it very often receives e-applications relating to its joint services department.

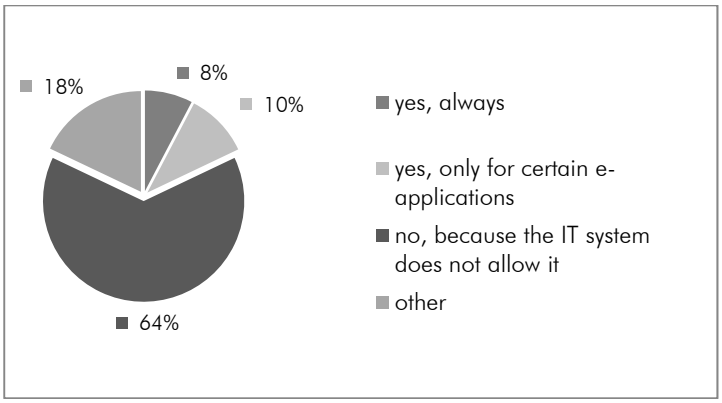
Graph 2: Frequency of receipt of e-applications by area



Source: Survey

Only 8% of administrative units (Graph 3) indicated that they deliver documents electronically to secure electronic mailboxes. It should be pointed out that a secure electronic mailbox does not mean an ordinary e-mail address supplied by an internet provider, but a secure mailbox which is currently only offered by the Slovenian Post Office. Some 10% of administrative units deliver electronically only in the case of certain documents, while 64% of administrative units do not deliver documents electronically because they do not believe the IT system allows it. The 18% of replies entered under "other" can also be included in this category. The explanations given were as follows: e-government does not have a conversion program for e-signed documents because clients do not have a secure electronic mailbox; the IT system does not yet allow this and there has not yet been such a case; no appropriate technical solutions are available. One administrative unit did not give any reason.

Graph 3: Electronic delivery of documents

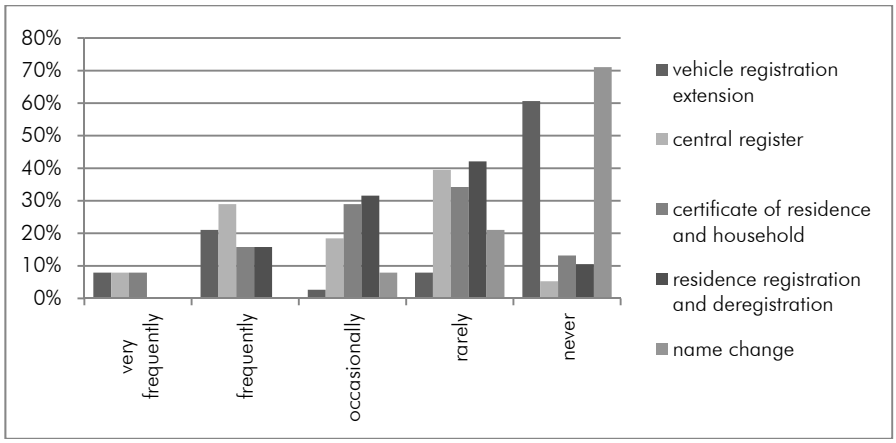


Source: Survey

3.1.1 Internal affairs

Of the administrative units which receive e-applications for extending a vehicle registration certificate, the largest number receive them frequently (21%), fewer receive them very frequently (8%) or occasionally (3%), and 8% of administrative units rarely receive them, while 61% have never received an e-application to extend a vehicle registration certificate. Requests for extracts and certificates from the Central Register are received very frequently by 8% of administrative units, frequently by 29%, occasionally by 18% and rarely by 39%, while 5% of administrative units have never received such applications. For residence certificates and household certificates the frequency is quite evenly distributed: 8% of administrative units receive applications daily and 16% frequently, while somewhat more (29%) receive them occasionally and the largest proportion (34%) rarely; 13% of administrative units have not received such applications. Applications to register or deregister permanent residence are not received on a daily basis by any administrative unit; 16% receive them weekly, 32% monthly and 42% rarely. The proportion of administrative units which have not yet received any such applications is 11%. E-applications to change a person's name are very rare. None of the administrative units receives such applications very frequently or even frequently. Even occasionally they are only received by a few administrative units (8%), while a larger proportion have so far received the occasional application (21%). So the largest proportion (71%) have not yet received any such applications (see Graph 4).

Graph 4: E-applications received for internal affairs (N = 39)

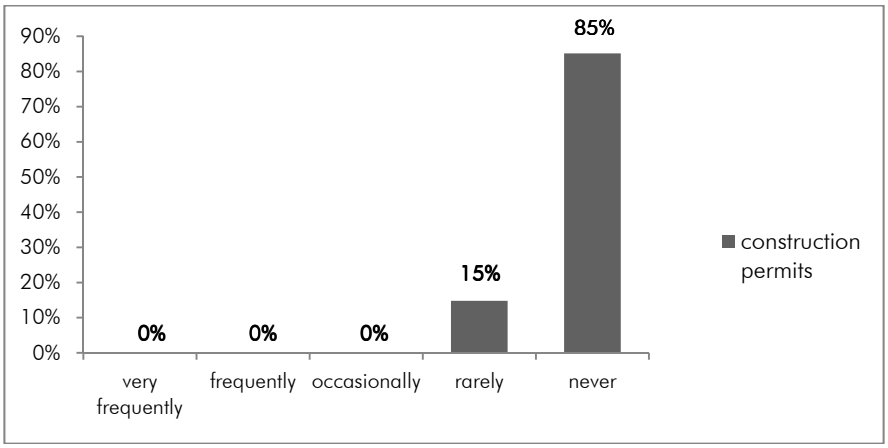


Source: Survey

3.1.2 Environment and physical planning

E-applications for construction permits are not frequent, with no administrative unit receiving them on a daily, weekly or even a monthly basis. So far 15% of administrative units have received such applications, while 85% have not yet had the opportunity to process them (see Graph 5).

Graph 5: E-applications received for environmental and physical planning matters (N = 39)



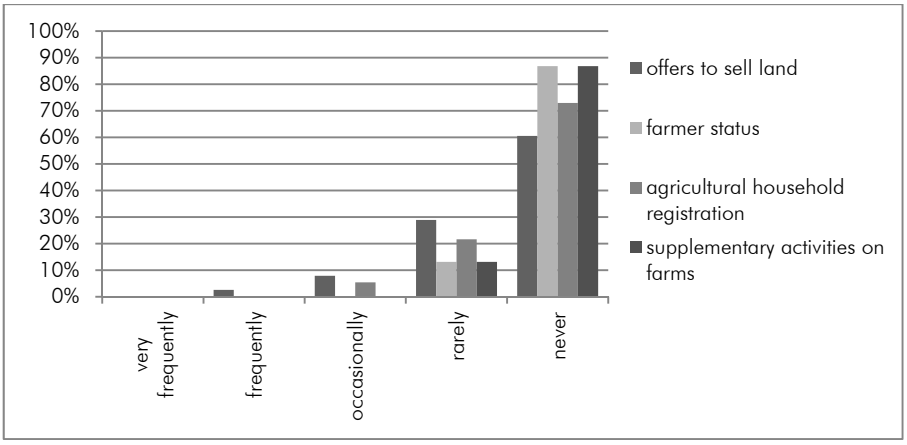
Source: Survey

3.1.3 Agriculture, forestry and food

The results of the survey show (Graph 6) that no administrative units receive applications in this field on a daily or weekly basis. Only offers to sell land (3%) and applications to enter a member in the register of agricultural households (5%) are received occasionally, while more administrative units (29%) receive such applications rarely and even more (61%) have never received them. Applications to register as a farmer are still infrequent – only 13% of administrative units have received them, while the other 87% have never received such applications electronically. The situation is the same with supplementary activities.

Applications to enter a member in the register of agricultural households are received occasionally by 22% of administrative units, but have never been received by 73%. Some 5% of administrative units did not respond on this point, and on the other three points in each case one administrative unit did not respond.

Graph 6: E-applications received for environmental and physical planning matters (N = 39)

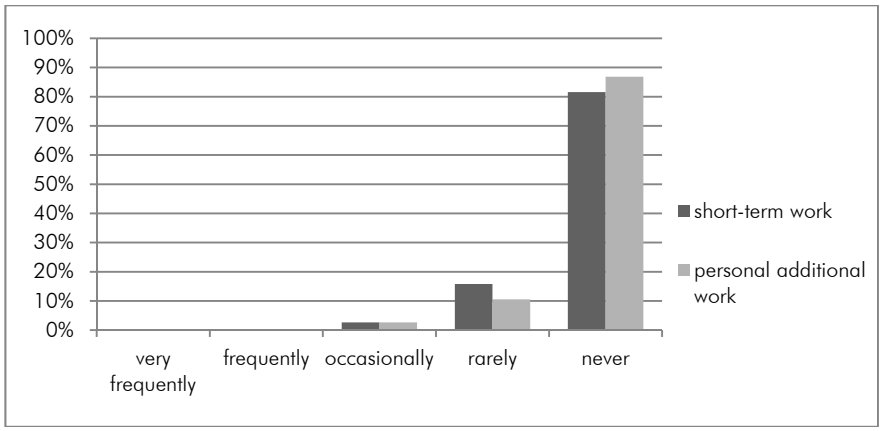


Source: Survey

3.1.4 Business

Similarly, for work and business matters electronic applications are not very frequent. The results of the research are very similar for the electronic notification of short-term work and for personal additional work. As Graph 7 shows, more than 80% of administrative units have not yet received such applications in electronic form.

Graph 7: E-applications received for work and business matters (N = 39)

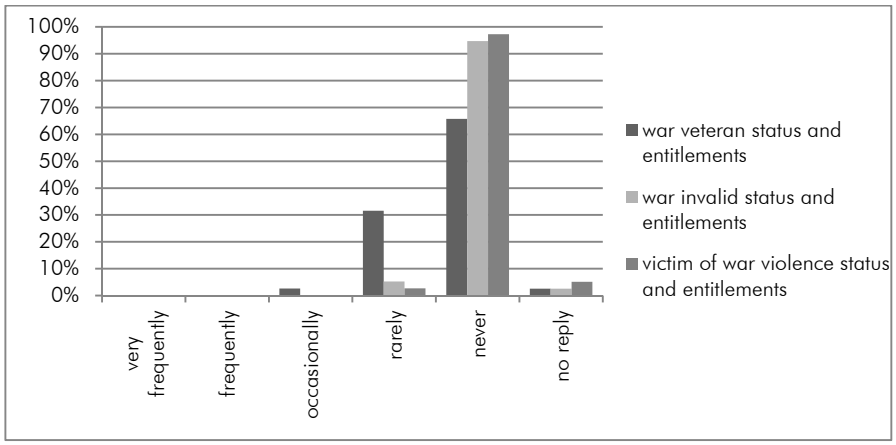


Source: Survey

3.1.5 War veterans, victims of war violence and war invalids

These types of application are not received with any great frequency (Graph 8). Nevertheless, a third of administrative units have already had experience dealing with war veteran status and entitlement applications (3% occasionally and 32% rarely), while two-thirds (66%) have not yet dealt with them. In the case of war victims and invalids, the percentage of administrative units that have received applications is very small (3% and 5% respectively), while 95% of administrative units have not received applications concerning war invalids.

Graph 8: E-applications received for matters relating to war veterans, victims of war violence and war invalids (N = 39)

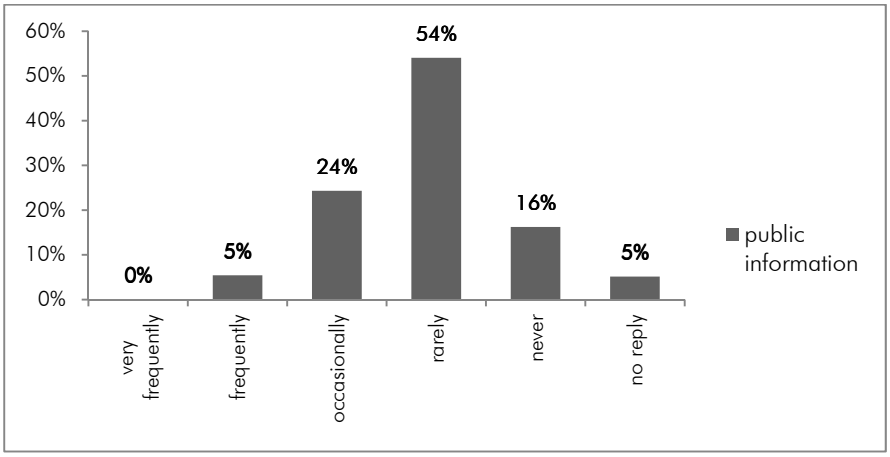


Source: Survey

3.1.6 Other areas

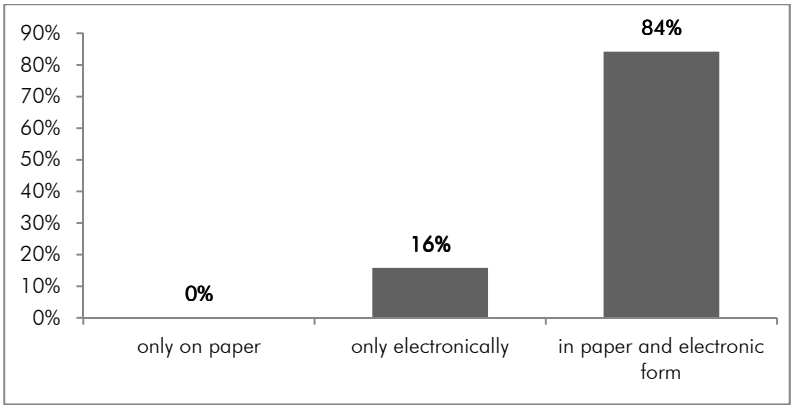
Other areas relate primarily to the provision of public information (Graph 9), which is an individual that right that citizens are increasingly making use of and which can be exercised in electronic form. The results show that this e-service is still not very widespread: 5% of administrative units receive such applications frequently and 24% occasionally. More than half (54%) have already received an application in electronic form, but there are also administrative units which have not yet received such applications (16%); 5% of administrative units did not answer this question.

Graph 9: E-requests received for public information (N = 39)



Source: Survey

Graph 10: Method of exchanging information with other public administration bodies (N = 39)



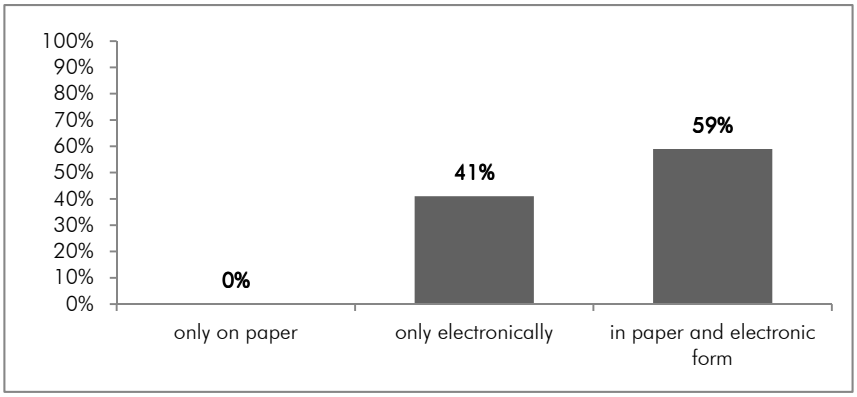
Source: Survey

In terms of how and to what extent the administrative units conduct business with other public administration bodies, the results show (Graph 10) that e-business for internal administrative operations is more developed than for operations with external clients. Almost a fifth (16%) of the administrative units conduct operations with other bodies exclusively by electronic means, but most (84%) still conduct this business both on paper and electronically.

3.2 Electronic document exchange and e-archiving

In answer to the first question, on how they organise the exchange of data internally, 41% of administrative units replied that it is organised exclusively in electronic form, while 59% use both paper and electronic forms (Graph 11).

Graph 11: Exchange of data within administrative units (N = 39)



Source: Survey

The question about exchanging data with public administration bodies covers the seven different institutions and bodies with which the administrative units deal most frequently (Graph 12). The results of the research show that the highest percentage of full e-business (e-application followed up with an e-reply) was with ministries (95%), while 28% responded to e-applications in paper form and the same proportion responded in electronic form to paper applications. The percentage of communication solely in paper form is still high (36%).

Administrative units conduct two-way e-business with municipalities to a lesser extent (54%): where the application is electronic, 23% of administrative units reply on paper, while 41% of administrative units reply to paper applications in electronic form. Municipalities (along with

inspectorates) are the bodies with which most administrative units (62%) communicate solely in paper form, while one administrative unit communicates with them on paper irrespective of the format of the application.

With the Tax Administration (DURS) a total of 69% of administrative units conduct business solely in e-form, while 14% reply to e-applications on paper and 19% reply to paper applications in electronic form. Half (52%) reply to paper applications in paper form.

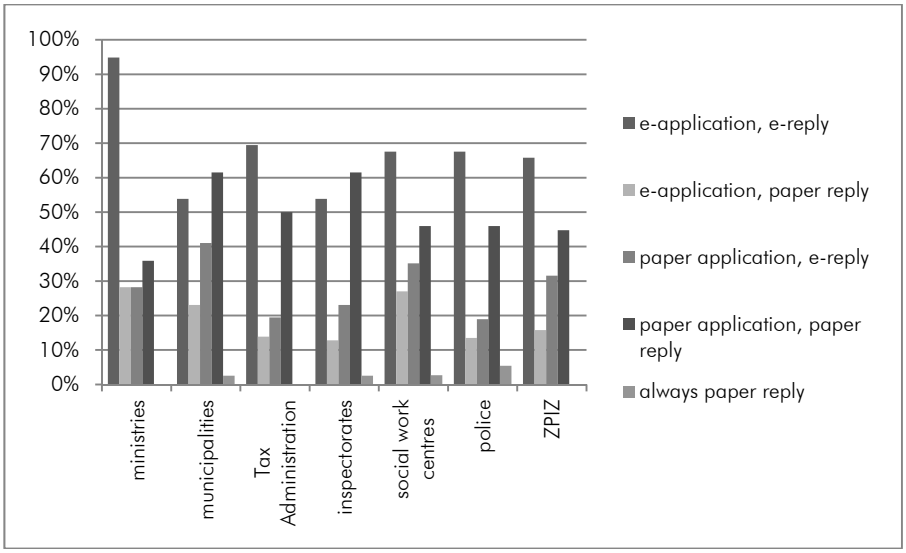
The administrative units' business with inspectorates is also not marked by a very high percentage of electronic operations (54%); 13% still reply to e-applications in paper form, 23% reply to paper applications in electronic form and 62% still conduct operations on paper in both directions.

The proportion of administrative units that communicate with social work centres electronically in both directions is 68%; 27% reply to e-applications on paper, somewhat more reply to paper applications electronically (35%), while almost half (46%) of communication is still carried out in paper form, and one administrative unit replies to all applications exclusively in paper form.

Operations with the police follow a similar pattern: 68% of administrative units conduct e-business in both directions, 14% send a paper reply in response to e-applications, while 19% send an electronic reply in response to a request on paper. Some 46% of administrative units respond to a paper application from the police in paper form, while 5% respond exclusively on paper irrespective of the format in which the application is received.

The administrative units' operations with the Pension and Disability Insurance Institute (ZPIZ) also follow exactly the same pattern. Full electronic data exchange takes place in 66% of cases, while 16% of administrative units respond to e-applications on paper and 32% send electronic answers to paper applications, while 45% conduct their operations on paper in both directions.

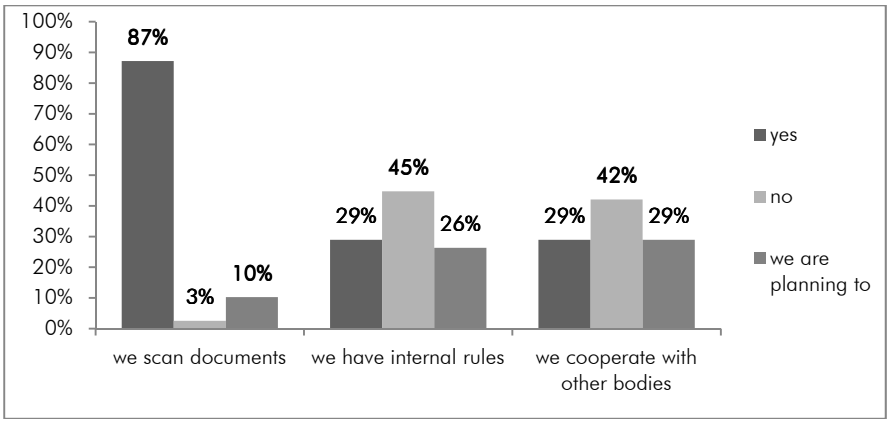
Graph 12: Method of exchanging data with selected public administration bodies (N = 39)



Source: Survey

One point in the questionnaire referred to the electronic storage of documents (Graph 13). It is encouraging to note that 87% of administrative units scan incoming documents, and 10% plan to do so. On the question of the internal rules under which, by law, the internal operations of the bodies concerned should be regulated, the answers were more divided: 29% of administrative units already have such rules; 45% do not and 26% are planning to adopt them. The answers to the question about cooperation with other bodies (ministries, archives, etc.) on long-term electronic storage of documents were also varied: 29% of administrative units are already cooperating with other bodies, 42% are not and almost a third (29%) are planning to do so.

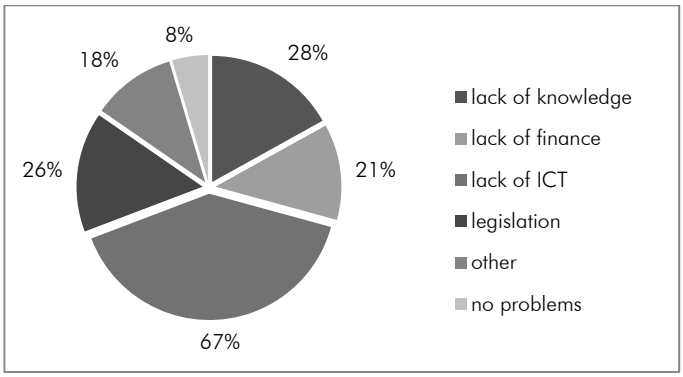
Graph 13: Electronic document storage (N = 39)



Source: Survey

Various difficulties and obstacles are encountered in the development of modern systems and technologies in administration, so it is interesting to obtain the administrative units' views on the obstacles they themselves face in introducing or implementing e-business (Graph 14). Several responses were possible, but the one that stood out was that the biggest problem is the lack of ICT (67%). Other responses were less prominent: 28% of public officials in administrative units believe that a lack of knowledge is one of the key problems; 21% of administrative units see difficulties in the lack of finance; 26% consider the problem to be legislation; three administrative units (8%) stated that they saw no problems in the implementation of e-business and 15% stated that they saw no problems other than those already mentioned, so these responses were not taken into account in processing this question. 18% of administrative units mentioned other obstacles, such as: too little awareness of e-business on the part of clients; employees adapting too slowly to the new information technology; impossibility of delivering to a secure address because in spite of the legislation adopted, an appropriate IT solution is not yet in place, etc.

Graph 14: Problems with e-business (N = 39)



Source: Survey

4 Analysis of the results of the research

A comprehensive and reliable assessment of the state of e-government in Slovenia would require much wider-ranging empirical research, encompassing all the key areas of the public sector. Therefore this research based solely on the administrative units is of limited value and the results produced cannot be generalised without reservations. Nevertheless, we can draw important conclusions from the example of the administrative units as they carry out around three-quarters of all first-instance administrative procedures, and a large and important part of the e-business of citizens and businesses is conducted through them. We can summarise the results obtained into the following findings:

- the administrative units' use of e-services for external users (citizens and businesses) is still in its infancy, as fewer than half of the administrative units receive e-applications daily. The majority of e-applications are received for matters relating to internal affairs, with the most frequently requested services being vehicle registration extensions and access to the central register,
- in all the other areas of the administrative units' operations, which generally involve more complicated procedures, the environment and physical planning, agriculture, business, etc., e-applications are still very rare, and most administrative units have never received an electronic application,
- electronic delivery of documents is still only just beginning. More than half of the administrative units have not even attempted it as

they do not have a secure mailbox with the Slovenian Post Office, which is a prerequisite for such delivery,

- e-business between administrative bodies is far more advanced, most notably with government ministries, with whom business is already mostly conducted electronically, and also most administrative units already operate electronically with other bodies that are important for their operations, such as municipalities, the Tax Administration, inspectorates and social work centres.

It was expected that the administrative units would have a high percentage of e-business with ministries, not least because they perform many tasks that involve the ministries' areas of work. It is therefore in the ministries' own interest for such operations to be modernised rapidly and on a regular basis and for modern ICT to be introduced so as to make the work easier for all employees. Municipalities are a part of local government. In terms of e-business it is known that local government lags behind the state administration, and so the results of the research are not surprising. The results for the police, social work centres, Tax Administration and the Pension and Disability Insurance Institute (ZPIZ) are more equal, but the administrative units' e-business with inspectorates is lagging behind. The Tax Administration is an important business partner of the administrative units and so we can expect electronic operations between them to increase in future.

The results for electronic storage activities are also interesting. On the one hand it is encouraging that a large majority (87%) of administrative units already scan all incoming documents, meaning that the administrative units' internal operations could be conducted almost entirely in electronic form, but on the other hand it is surprising that only just over a quarter of administrative units have internal rules that actually regulate the handling of such documents.

All these findings should be summarised and compared with the results that Slovenia has achieved in recent years in international measurements and comparisons. Unfortunately, we cannot compare directly the results of our research with the situation in other countries because the data is either unavailable or not comparable. Most international organisations and institutions which evaluate the level of development of e-government in individual countries, either on a global

level (United Nations, World Bank, certain universities, etc.) or within the EU, do not directly measure the use of e-government services, focusing instead on the supply of such services. The only data we can use to compare the use of e-services is that published by Eurostat (Eurostat, 2008), according to which Slovenia is somewhere around the average when it comes to the use of public e-services.

We can, however, draw some conclusions indirectly. The discrepancy between Slovenia's rankings under the Capgemini measurements (Capgemini, 2007; Capgemini, 2009), the measurements of certain other international organisations, such as the United Nations (UN E-Government Survey, 2008; The Economist, 2007) and our findings is striking. On most international rankings of e-government Slovenia comes around 30th place for world rankings and around average for European rankings. It is only on the Capgemini measurements that we are at the very top (2nd place in 2007; 5th place in 2009) among EU countries. It is surprising, for example, that according to these measurements Slovenia records a score of 95% for "fully online availability" of services. This would mean that all the services measured are developed to the fourth or fifth stage on the five-stage sophistication scale. But in our research we found that more than half of the administrative units are not even equipped to provide services at this level because they do not have a secure mailbox, which casts doubt on this data, and hence on our ranking according to these measurements.

In short, we believe that in terms of the level of development of its e-government, when viewed overall, Slovenia is a lot closer to the European average than to the top, as has often been heard in recent years.

5 Conclusion

How can the use of these services be increased and how, in general, can further development be accelerated? There is no simple answer. The issue needs to be looked at on a number of levels. To begin with, internet access, which is essential for obtaining information and performing many electronic services, needs to be provided to as many people as possible. According to Eurostat research carried out in 2008, Slovenia is around the EU average in terms of internet use, but well below average when it comes to bridging the "digital divide". E-government has so far made a good start, but it appears that the public are not very familiar with it and with the possibilities it offers. E-services need to be presented and offered

to people in a more friendly, transparent and easy-to-use manner. Officials working in the administrative units themselves, as well as in other public administration bodies, are not overly familiar with e-government and its capabilities, so it is hard to expect them to point users in the direction of these services.

In terms of their role in relation to external users of administrative services, the administrative units are a vital part of the development of e-government and e-business in Slovenia. Through their services and more active cooperation with many other public administration bodies, and particularly through their example and consistent use of modern technological solutions, the administrative units can help develop and expand the use of e-business in all areas of public administration.

It is clear that Slovenia still has very much to do for its e-government to really take off in practice at the operational, service-provision level. We believe that too little has been done so far, particularly in terms of promoting e-government and developing services that would genuinely facilitate users' contact with the administration.

Mitja Jelenič graduated from the Faculty of Administration, University of Ljubljana in 2009. He works as an advisor in the field of e-operations and the use of modern IT at the Administrative unit Novo mesto.

Prof. dr. Mirko Vintar is professor of Information systems in Public Administration and E-governemnt. For over 20 years his work has dealt with the informatisation of public administration, with a major focus on the development of e-government in recent years. He has been managing a series of national and international research and development projects in this field. He was/is a member of numerous national and international scientific and professionl committies and working groups involved in the research of this field (EGPA, Study Group on Informatisation of Public Administration, IFIP- WG 8.5, NISPAcee- WG on E-government). In 1993–2002 he was the chief editor of Journal Uporabna informatika (Applied Informatics).

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1.02 Pregledni znanstveni članek

Koliko prava potrebuje šolstvo?

UDK: 34:37

Miro Cerar
Univerza v Ljubljani, Pravna fakulteta
miro.cerar@pf.uni-lj.si

IZVLEČEK

Pravo je v svoji idealni podobi varuh svobode in avtonomije šolstva, šolstvo pa mora kot del svoje odgovornosti sprejeti tudi spoštljiv in odgovoren odnos do pravne države. Praksa v Sloveniji pretirano odstopa od takšnega ideala. Preobsežno in neustrezno pravno urejanje zmanjšuje šolsko svobodo in avtonomijo. Posledice v šolskem sistemu so delno ignoriranje predpisov in posledično njihova neučinkovitost, prekomerno pravno administriranje v šolah, povečani odpor učiteljev do prava, njihova demotiviranost ter zato slabša kakovost učnega procesa. Pravo je tu le del problema. Le-ta ima svoje korenine predvsem v splošni vrednostni dezorientiranosti družbe. Za vzpostavitev prave mere in načina pravnega urejanja šolskega sistema je zato treba najprej ozdraviti in učvrstiti moralne in zdravorazumske temelje družbe.

Ključne besede: svoboda in avtonomija šolstva, vzgoja, izobraževanje, avtonomija prava, merila pravnosti

JEL: K19

1 Relativna avtonomnost prava in šolstva

Področje prava je tako raznoliko, da je ob poglobljenem razmisleku prav presenetljivo, kako različne vsebine uvrščamo pod ta enotni (zbirni) pojem. Pravo področno in panožno ureja različna kazniva ravnanja (kazniva dejanja, prekrške, disciplinske prestopke), civilne delikte, sklepanje najrazličnejših vrst pogodb, pravne statuse posameznikov in najrazličnejših združenj, organizacij in državnih organov, upravne zadeve, lastninska razmerja, delovna razmerja, socialno varnost, avtorske pravice, pravice industrijske lastnine, zakonsko zvezo in družinska razmerja, dedovanje itd. Na eni strani ustava zagotavlja človekove pravice in postavlja temelje državne ureditve, na drugi strani pa zakoni in

podzakonski akti vse to na široko izpeljujejo in dograjujejo do filigranskih normativnih razsežnosti. Pravni akti urejajo razmerja, ki se nanašajo na rojstvo in smrt, delo, finance, bančništvo, promet, prehrano, transport, zavarovanje, zdravstvo, veterino, medije, računalništvo, prostor, gradnjo, ekologijo, šport, vode, gozdove, kmetijstvo, orožje, kemikalije, živali, krmo … Praktično vse, kar počnemo, je do neke mere urejeno s pravnimi akti.

Pravno urejeno mora biti seveda tudi področje šolstva, ki sodi med (naj)pomembnejša področja družbenega življenja. Če upoštevamo, koliko časa ljudje v sodobni, moderni družbi preživimo v okviru institucionaliziranih šolskih institucij ter ob tem pomislimo, kako sta naša vzgoja in znanje (so)pogojena s šolstvom v širšem pomenu tega pojma, potem se zavemo vse relevantnosti pravnega urejanja tega področja. Ker je šolstvo relativno avtonomno polje oziroma področje vzgoje in izobraževanja[1], mora biti pravo v razmerju do njega v pretežno urejevalni in spodbujevalni funkciji. To nikakor ne pomeni, da pravo v razmerju do šolstva nima tudi (so)opredelitvene[2], represivne[3] ter drugih funkcij[4], toda v tem razmerju mora prevlad(ov)ati tisti del prava, ki šolam in šolnikom

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1 Čeprav je seveda vzgojo in izobraževanje mogoče analitično obravnavati ločeno, gre v resnici za eksistenčno neločljivi pojavnosti. Kdor vzgaja, tudi izobražuje in kdor izobražuje, tudi vzgaja. Ne glede na različne možnosti ločenega in povezanega razumevanja obeh navedenih procesov učenja v širšem smislu, v nadaljevanju izhajam iz prepričanja, da je temeljno poslanstvo šolstva izobraževanje-in-vzgoja otrok in mladostnikov.

2 S (so)opredelitveno funkcijo prava v razmerju do šolstva označujem statusno in organizacijsko pravno normiranje temeljnih šolskih institucij (šola, učitelj, učenec, učni in vzgojni procesi, pravice in dolžnosti subjektov v šolstvu itd.). Pri udejanjanju te funkcije mora pravo nujno upoštevati mnoge pomembne esencialne in eksistencialne značilnosti, ki jih glede na naravo in način svojega obstoja in delovanja determinira področje šolstva s svojimi internimi, relativno avtonomnimi akterji in dejavniki. Preprosteje povedano: pravo se mora pri določanju in urejanju temeljnih šolskih institucij vseskozi delno prilagajati njihovi obliki in vsebini, delno pa to obliko in vsebino pravo determinira avtonomno – gre torej za dinamično interakcijo med področji prava in šolstva.

3 Z represivno funkcijo označujem prisilni vidik prava, ki se kaže v obveznosti pravnih norm, v predvidenih sankcijah za njihove kršitve ter v postopkih uveljavljanja sankcij oziroma dejanskega zagotavljanja prava.

4 Pravo ima na splošno urejevalno in represivno družbeno vlogo oziroma funkcijo. Ob tem uvršča teorija med temeljne funkcije sodobnega modernega prava predvsem še zagotovitev pravičnosti in varnosti pravnih subjektov, zagotovitev reda in miru, osebne svobode in svobode zasebne (lastninske) sfere posameznikov, socialne varnosti, družbene kooperacije (pogodbene, združevalne itd.) ter družbene integracije (pravo ima v sistemskem pomenu vlogo pomembnega družbenega podsistema) (Coing, 1993, str. 143, 145 in 156; Horn, 1996, str. 22–26).

omogoča ter jih vzpodbuja, da čim bolj nemoteno in uspešno opravljajo svoje temeljno izobraževalno in vzgojno poslanstvo.

Tu se srečata (ali "trčita" druga ob drugo) dve avtonomiji: šolska in pravna[5]. Obe avtonomiji sta zgolj relativni[6]. Pri tem je najpomembnejše, da temelji razmerje med njima vseskozi na dinamičnem vzpostavljanju prave mere. Toda v tem primeru prava mera ne pomeni nekakšne splošne enakovrednosti ali simetrije, kajti v nekaterih šolskih sferah zahteva prava mera več avtonomnega prostora za šolstvo in v drugih več za pravo. Pravno urejanje šolstva mora biti zato ne le zelo "mavrično", saj različna (pod)področja znotraj šolstva terjajo diferenciran pristop, pač pa zelo raznoliko tudi v svojem (kvantitativnem) obsegu. Nekatera področja delovanja šolstva namreč že po svoji naravi ne prenesejo veliko prava (npr. pedagoška dejavnost), druga pa so s pravnimi predpisi nujno neposredno pogojena (npr. zagotovitev protipotresne in protipožarne varnosti na šoli).

2 Pravo kot varuh svobode in avtonomije šolstva (!?)

Šolstvo in pravo se kot soodvisni avtonomni področji oziroma družbena (pod)sistema neposredno in posredno srečujeta še s številnimi drugimi relativno avtonomnimi družbenimi področji oziroma (pod)sistemi (npr. politika, kultura, znanost, religija, ekonomija, finance), kar močno

5 Takšno razmerje je v demokratični in pravni državi sicer na splošno značilno za vsa področja pravnega urejanja družbenih razmerij, kajti tako kot ohranja pravo svojo relativno avtonomijo nasproti področjem svojega urejanja (npr. nasproti politiki, ekonomiji, religiji, zdravstvu, šolstvu), ohranjajo tudi ta področja svojo relativno avtonomijo nasproti pravu.

6 O dejavnikih relativne avtonomnosti modernega prava (formaliziranost, abstraktnost, splošnost, sistematičnost, pravni jezik, profesionalizacija vlog nosilcev pravne dejavnosti) glej Cerar, 2001, str. 21–28; Glede šolske avtonomije velja najprej omeniti delitev na tri vrste avtonomije: 1) popolna avtonomija pomeni, da lahko šola sprejema odločitve povsem samostojno, čeprav v okvirih zakonskih in drugih splošnih predpisov, morebitni zunanji organi pa v nobenem primeru v te odločitve ne posegajo; 2) delna avtonomija pomeni, da šola sprejema odločitve v okviru vnaprej danih možnosti, ki jih določi višji organ šolske oblasti, ali pa mora za svoje odločitve pridobiti soglasje višjega organa šolske oblasti; 3) prenesena avtonomija se pojavi, ko lahko organi upravljanja države in/ali lokalne oblasti po lastnem preudarku sprejmejo odločitev, da prenesejo ali ne prenesejo pristojnosti odločanja na nekaterih področjih na šole (Šolska avtonomija, 2008, str. 17). K temu pa je treba dodati, da so vse navedene vrste avtonomije zgolj relativne, kajti tudi še tako "popolna" avtonomija šolstva je omejena v razmerju do drugih (avtonomnih) družbenih področij ter z dejstvom, da oblastni organi s predpisi določajo organizacijske, finančne, kadrovske, strokovne ter druge vidike obsega in vsebine šolske avtonomije.

poveča kompleksnost celotnega polja, v katerem sta pravo in šolstvo le dve izmed mnogih delno prekrivajočih se področij. Kakor mnogi drugi družbeni (pod)sistemi ne morejo uspešno delovati brez šolstva, tudi šolstvo ne more uspešno delovati brez njih, zato se je pomembno zavedati, da avtonomni vidiki prava ter potrebe in zahteve šolske sfere po specifičnem pravnem urejanju šolstva še zdaleč ne zajemajo celotnega obsega prava, ki ureja šolstvo. V šolstvo namreč vedno posegajo tudi pravni akti, ki urejajo druga, zgoraj omenjena, relativno avtonomna področja družbenega življenja[7].

Vzemimo za ponazoritev pravkar povedanega ter za izhodišče nadaljnjega razmisleka dve situaciji. Prvič, če pravo pretirano posega v šolsko avtonomijo, s tem ovira ali onemogoča strokovno svobodo in avtonomijo[8] učiteljev ter vodstev šol in tako slabi kakovost vzgojnega in izobraževalnega delovanja. Drugič, če je šolstvo močno pravno podnormirano, vodi to v šolstvu v nered, v zlorabo moči močnejših na račun šibkejših udeležencev v šolskem procesu ter nenazadnje v neuravnoteženo in nekakovostno izobraževanje. V enem ali drugem primeru običajno govorimo o "preveč" ali "premalo" prava. Toda s takšno diagnozo označujemo le najbolj površinske manifestacije te "družbene bolezni", ne pa njenih globljih gibal in še manj vzrokov. Ta problem je mogoče zaznati tudi na drugih družbenih področjih, kjer pogosto govorimo o hipertrofiji pravnih predpisov, o njihovi neučinkovitosti, o dvojnih pravnih merilih (npr. različno pravno obravnavanje pripadnikov višjih in nižjih družbenih slojev) itd. Takšno razmišljanje vodi pogosto v kritično presojanje (ali obsojanje) prava in pravnikov.

Toda pravo in pravniki so tu le del "velike slike". Zagotovo je treba tudi pravnikom in pravu pripisati precejšen del odgovornosti za poplavo pravnih predpisov in njihovo (pre)majhno učinkovitost. Vendar pa se je treba ob tem zavedati, da je pravo v pretežni meri le prenašalec (ali prinašalec) vrednostnih in drugih vsebin, ki jih ustvarijo drugi vrednostno-normativnimi svetovi (navade, morala, etika, običaji, religija, politika itd.).

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7 Npr. predpisi, ki urejajo delovna razmerja, varstvo pri delu, požarno varnost, varstvo zasebnosti, dostop do informacij javnega značaja, finančno poslovanje, upravni postopek, varnost v cestnem prometu, varstvo okolja …

8 V tem prispevku pojmujem svobodo predvsem kot intelektualno in drugačno odprtost in ustvarjalnost duha v šolskem procesu vzgoje in izobraževanja, z avtonomijo pa predvsem svobodno organiziranje in delovanje šolstva in šolnikov znotraj okvirov, ki jih določa državno ali lokalno (oblastno) pravo.

Te vsebine pravo najpogosteje le prenese in pretvori v svoj formalizirani normativni mehanizem ter jih izrazi v specifični obliki zakonov, pravilnikov, sodb, pogodb in drugih pravnih aktov.

Naj ponazorim. Kadar denimo pravo pri oblikovanju kaznivega dejanja izhaja iz prevladujoče moralne obsodbe kraje tujih stvari, ustvari kazenskopravni institut tatvine, ki ga izrazi v formalizirani jezikovni obliki, pri čemer mora biti tatvina kot kaznivo dejanje pravno opredeljena in uveljavljena v posebnem zakonodajnem postopku, njen normativni opis pa mora določno in jasno vsebovati vse znake tega kaznivega dejanja in zanj predvideno sankcijo. Če je zakonski člen o tatvini nespretno oblikovan, je za to primerno klicati na odgovornost pravnike, ki so ta člen oblikovali, ter politike, če so ga ti brez zadostnega predhodnega preverjanja nekritično sprejeli v zakonodajnem postopku. Toda jedro stvari, tj. obsojanje kraje oziroma tatvine, je v svoji zdravorazumski, moralni in etični zasnovi stvar celotne družbe in ne (le) pravnikov. Dokler družba tatvine moralno in zdravorazumsko načelno pretežno obsoja[9], toliko časa je tudi kazenska določba o tatvini v praksi pretežno učinkovita. Ko pa se moralna in zdravorazumska družbena zavest močneje popačita, tudi pravo ne more več učinkovito preprečevati tatvin. Ker smo ljudje zelo nepopolni, sta naša moralna, etična in drugačna zavest ter posledično družbena praksa vedno do neke mere popačeni oziroma izkrivljeni. Toda ko takšen odklon preseže neko kritično mejo, kar se je denimo na nekaterih področjih (npr. v gospodarstvu in politiki) že zgodilo v Sloveniji, pa tudi marsikje drugod v svetu, potem začne dotedanji vrednostni sistem propadati in postopno začne prevladovati njegov antipod. V takem vrednostno neobčutljivem okolju velike in škodljive kraje, ki jih zagrešijo politične, gospodarske in druge družbene elite z raznimi prilastitvenimi premoženjskimi manipulacijami, niso več dojete kot kraje oziroma tatvine, pač pa zgolj kot nekakšne "višje nujnosti" … Potem ko družbena elita z lastnim zgledom dovolj dolgo vsiljuje in dopušča takšno popačenje vrednostnega sistema in se seveda na ta račun bogati ter ohranja na oblasti, se popačenje postopno prenese na nižje ravni oziroma sloje družbe, kjer sprva nastopita vrednostna deziorentiranost ali apatija, nato pa se prične velik del ljudstva ravnati po omenjenih zgledih, kar pomeni, da večji del ljudi prikladno prevrednoti vrednote ter se prikloni in priključi tatovom.

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9 Morala in načela zdravega razuma pa se seveda izražajo in sooblikujejo tudi skozi dimenzije politike, religije, različnih poklicnih etik itd.

V zadnjih letih se soočamo s pravo poplavo predpisov, ki neposredno ali posredno urejajo področje šolstva[10] ter ga s svojo količino in vsebino utesnjujejo ali celo dušijo v njegovem temeljnem poslanstvu[11]. Seveda je

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10 Čeprav na tem področju podatki o zakonih in podzakonskih predpisih niso sistematično in pregledno evidentirani, je mogoče po nekaterih neformalnih ocenah strokovnjakov z Ministrstva za šolstvo in šport ugotoviti, da se število zakonov, ki se v celoti ali delno nanašajo (tudi) na področje šolstva, giblje okoli 100, število podzakonskih predpisov pa navedeno številko presega še najmanj za tretjino.

11 Takšno je tudi spoznanje Delovne skupine za preučitev pravne ureditve šolstva, ki od januarja 2009 deluje pri Ministrstvu za šolstvo in šport. Skupina je sestavljena interdisciplinarno, večina od njenih 11 članov je pravnikov. Po enoletnem delu je skupina kot okvirno napotilo za nadaljnje delo ministrstva ter vseh institucij s področja šolstva oblikovala memorandum z naslovom "Temeljne ugotovitve delovne skupine". Ta memorandum, ki ga zaradi njegove relevantnosti za temo tega prispevka povzemam v celoti, se glasi:

1. *Pravna ureditev šolstva je lahko v pomoč in spodbudo kakovostnemu delovanju šolstva le, če odraža jasno vizijo delovanja in razvoja celotne sfere šolstva, predvsem osnovnih in srednjih šol, glasbenega šolstva, pa tudi vrtcev in visokega šolstva. Takšna vizija oziroma izvedbena strategija se mora na temelju širše strokovne in javne razprave oblikovati kot temeljna predpostavka zakonskega in podzakonskega urejanja šolstva, pri čemer mora biti pravo (ustava, zakonodaja) že v fazi strokovne razprave o tej viziji vseskozi upoštevano kot eden njenih nujnih spremljajočih okvirov.*
2. *Pravna ureditev mora v večji meri omogočiti avtonomijo pedagoškega procesa. V prvi vrsti je treba zato s pravnimi predpisi dopustiti in spodbujati večjo avtonomijo ravnateljev in strokovno avtonomijo učiteljev ter v pravi meri širiti tudi vse druge vidike avtonomije šolstva. Takšen pristop pa ne sme voditi v neravnovesje, zato je treba hkrati ohraniti ustrezne mehanizme za zagotavljanje odgovornosti in obveznosti šol (ravnateljev, učiteljev) za svoje delovanje ter za ustrezno varstvo pravic otrok.*
3. *Pri pravnem urejanju pravic otrok (učencev, dijakov) je treba ustrezno urediti tudi njihove dolžnosti (obveznosti).*
4. *Šolstvo je preobremenjeno s pravnimi predpisi. Postopno je treba odpraviti tiste predpise, ki onemogočajo ali zavirajo kakovostno delovanje šolstva in njegovih akterjev. Pri tem je treba določiti tudi ravni potrebnega pravnega urejanja v smislu de/centralizacije posameznih področij (obvezne vsebine, kjer je potrebna enotna obravnava, naj ostanejo zakonska in pravilniška materija v domeni ministrstva, drugo naj se deregulira ali vsaj prepusti avtonomnemu urejanju posameznih šol).*
5. *Ugotovitev o preobremenjenosti s pravnimi predpisi ne sme voditi v aktivnosti, ki bi na splošno zmanjševale pomen prava za ureditev šolstva, kajti pravo je eden temeljnih mehanizmov za zagotavljanje ustreznih pogojev za šolsko dejavnost in upoštevanje pravic in dolžnosti vseh, ki so udeleženi v šolskih procesih. Še več, pravo je treba (ob predhodni odpravi administrativnih bremen) razumeti kot nujni sestavni del delovanja šolstva.*
6. *V t.i. krovnih predpisih na področju šolstva je treba zagotoviti večjo medsebojno usklajenost nekaterih pravnih konceptov oziroma institutov.*
7. *V prihodnje je treba v (spremenjeni) šolski zakonodaji vsa najpomembnejša oziroma temeljna vprašanja, ki zadevajo pravice in dolžnosti otrok (učencev, dijakov) urejati v zakonih in ne v pravilnikih in drugih podzakonskih aktih, pri čemer se zasleduje enotne pristope na vseh ravneh vzgoje in izobraževanja (npr. glede ocenjevanja, priznavanja, vzgojnih opominov in ukrepov, dela z otroki s posebnimi potrebami,*

precejšen del teh predpisov nujen oziroma neizogiben, kajti institucionalizirana vzgoja in izobraževanje potrebujeta za svoje delovanje ustrezno pravno urejenost. V tem smislu je pravna država[12] pomočnik in zaveznik šolstva in njegovih akterjev, saj vnaprej določa pravna pravila igre ter vzpostavlja pravice in dolžnosti udeležencev vzgojnih in izobraževalnih procesov ter subjektov, ki na te procese vplivajo "od zunaj". To lahko dodobra razumemo šele, če pogledamo v preteklost in vidimo, kako odsotnost pravne države neizogibno vodi v oblastno samovoljo (arbitrarnost), v zatiranje večine s strani manjšine, v pravno neenakost, nepredvidljivost ter nenazadnje v nesvobodo posameznikov, ki jim niso priznane temeljne in druge pravice. Toda tudi pravna država (vladavina prava), kot izjemno pomemben pravnocivilizacijski pojav[13], mora – tako kot vse drugo v človeški družbi – imeti svojo pravo mero. V zvezi s tem je sredi 19. stoletja Friedrich Julius Stahl zelo primerno in uravnoteženo zapisal: »Država mora biti pravna država. To je rešitev in resnica razvojne nuje novejše dobe. Ona bi morala na pravni način natančno določiti smeri in meje delovanja, pa tudi območje prostosti svojih državljanov. To bi morala tudi trdno zavarovati. Pri tem pa bi zaradi nravnih idej države

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šolske prehrane), če je to smiselno in niso potrebne drugačne ureditve za osnovno ali srednjo šolstvo ali drugo raven.

8. *Kjer je to mogoče in koristno, je treba s pravnimi predpisi uveljaviti ali spodbuditi tudi višjo stopnjo organizacijske poenotenosti ureditve na širšem področju šolstva (npr. možnost oblikovanja enotnih temeljnih principov "šolskega reda" v segmentu javnih služb, tj. za javne zavode in koncesionarje).*
9. *Pravna ureditev mora spodbujati šole k modernizaciji, oziroma zagotoviti pogoje in spodbude za nenehno prilagajanje učnih pristopov novim generacijam otrok in mladostnikov ter novim strokovnim spoznanjem.*
10. *Pravna ureditev šolstva mora pri urejanju reševanja interesnih konfliktov, ki se pojavljajo v vzgojno-izobraževalnem procesu, v možni in dopustni meri poenostaviti (upravno) pravne postopke, ter dati predvsem večji poudarek in možnosti t.i. alternativnim in dogovornim načinom reševanja sporov. Kjer je možno, se tudi nujna enotna ureditev v celi upravi prilagodi posebnostim področja šolstva.*

12 Za pravno državo je značilno, da v njej ustava, zakoni in drugi formalni pravni viri uveljavljajo načela enakopravnosti, pravne varnosti (predvidljivosti in zanesljivosti prava) ter v tem okviru še posebej vnaprejšnje določenosti pravnih kršitev in sankcij zanje. V pravni državi so pravice in dolžnosti pravnih subjektov določene z zakonom, najpomembnejše med njimi pa so kot temeljne (človekove) pravice opredeljene že v ustavi. Vnaprej so natančno urejeni postopki, v katerih pristojni državni organi ugotavljajo, ali je prišlo do pravne kršitve in kakšna sankcija naj ji sledi. Te in druge temeljne prvine pravne države so v teoriji in normativni praksi še podrobneje razčlenjene (Pavčnik, 2009, strani 32 in nasl.).

13 O tem več Simič, 2009, str. 13–26.

teh ne smela izvajati (prisiljevati) prek meja območja prava. To je pojem pravne države.«[14]

V pravilno razumljenem pojmu pravne države je bistvena in nadvse pomembna prvina svoboda državljanov oziroma posameznikov. Že Kant je dobo razsvetljenstva in z njo novega, racionalistično "razsvetljenega" prava determiniral s svojo znamenito, čeprav zgolj formalno definicijo prava, po kateri je pravo skupek pogojev, pod katerimi se lahko svobodna volja enega po nekem splošnem zakonu svobode združi s svobodno voljo drugega.[15] Tudi z vidika sodobnega uveljavljanja pravne države je treba reči, da te ni brez zadostne svobode posameznikov ter vseh tistih sfer družbe, ki za svoj obstoj, delovanje in razvoj neizogibno potrebujejo dovolj svobodnega prostora.[16] Ker sodi v takšno družbeno sfero nedvomno tudi šolstvo, je zanj še posebej neprimerno, če ga v pretirani meri in z napačnimi poudarki obremenimo s pravom. Če uporabimo citirano Stahlovo misel, lahko rečemo, da še posebej na področju šolstva država ne sme prekoračiti meja območja prava.[17] Ker je relativna svoboda nujni sestavni del katerekoli človeške in družbene avtonomije, tako tudi avtonomije šolstva, lahko slednje ustrezno deluje le, če mu pravo nameni dovolj svobode na področju pedagoškega, pa tudi drugega strokovnega ter organizacijskega delovanja. V nasprotnem primeru šolstvo ne more celovito in uspešno izvršiti svojega temeljnega poslanstva, saj otrok in mladostnikov ne more vzgojiti v dovolj mišljenjsko (intelektualno) in nasploh osebnostno svobodne in avtonomne posameznike.

Če si tu na kratko pogledamo pojem svobode v širšem družbenem kontekstu, vidimo, da je (bila) moderna demokratična država utemeljena v političnem liberalizmu in iz njega izvirajoči doktrini in praksi t.i. klasičnih (liberalnih) človekovih pravic, kar vse pretežno izhaja iz koncepta t.i. negativne svobode, (t.i. "svobode od", "*freedom from interference*"). To obliko svobode lapidarno izraža zahteva po pravici posameznika, da se ga pusti pri miru ("*the right to be left alone*"). Demokratična družba

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14 Nav. po Simič, ibid., str. 13.

15 Kant, 1967, str. 32.

16 Seveda se tu pojavi večni problem, kako razumeti pojem svobode – o tem strnjeno v nadaljevanju.

17 V nadaljevanju (t. 3) strnjeno obravnavam merila pravnosti, ki na splošno determinirajo oziroma zamejujejo področje prava.

ob tem uveljavlja tudi pozitivni koncept svobode, t.i. "svobodo za"[18], ki se kaže v prvi vrsti v posameznikovih temeljnih državljanskih oziroma političnih pravicah, torej v njegovi pravno zavarovani možnosti, da sodeluje v javnih zadevah. Za vrednostno pozitiven razvoj posameznika je nujna vsestranska in dinamična uravnoteženost med obema oblikama svobode, ki tako postopno prerašča v integralni pojem svobode, ki zajema v sebi vse svoje negativne in pozitivne aspekte. Le-ti na družbeni ravni implicirajo zavest posameznikov o nujnih samoomejitvah v korist svobode drugih. Svoboda (in pravice) vsakogar so namreč v demokratični družbi in pravni državi omejene z enako svobodo (in pravicami) drugih, kar pomeni, da se mora svobodni posameznik zavedati ne le svojih upravičenj, marveč tudi svojih dolžnosti do drugih in do družbe. Ob tem pa se je pomembno zavedati, da se ozaveščanje o teh in drugih vidikih svobode ter o možnostih in načinih njenega udejanjanja primarno zagotavlja z ustrezno vzgojo in izobraževanjem (doma, v šoli in drugod), ter seveda tudi z institucionalnimi ukrepi, med katerimi ima ključno vlogo pravo.

Iz povedanega sledita dve pomembni ugotovitvi. Prvič, integralni pojem svobode implicira tako upravičenost kot zavezanost (odgovornost). To pomeni, da lahko otroku in mladostniku pomagamo zrasti v mišljenjsko ter drugače svobodno in avtonomno osebnost le, če ga nenehno opozarjamo na nujnost uravnoteženosti pravic in dolžnosti. Mladega človeka je treba vzgojiti in izobraziti v duhu osebne odgovornosti, ki na eni strani terja poznavanje in izpolnjevanje svojih lastnih moralnih, etičnih in pravnih dolžnosti, na drugi strani pa poznavanje svojih temeljnih (človekovih) in drugih pravic ter ustreznih pravnih postopkov za njihovo uresničevanje.

Drugič, šolstvo ki samo ni (dovolj) svobodno, ker je s pravnimi predpisi pretirano ujeto v primež odvečnega administriranja, ne more ustvariti dovolj svobodnega duha za resnično kakovostno učenje. Takšno šolstvo mladim generacijam med pedagoškim procesom in ob njem nenehno sporoča, da je življenje predvsem ukvarjanje z zapisniki,

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18 Delitev na negativno in pozitivno svobodo je med prvimi pojasnjeval francoski liberalni mislec Benjamin Constant, ki je na začetku 19. stoletja zapisal, da je ideal antične svobode sodelovanje pri državni oblasti (pozitivna svoboda), ideal moderne svobode pa je osvobojenost od državne oblasti (negativna svoboda). Posameznik se v antiki emancipira predvsem s sodelovanjem v javnih (državnih) zadevah, v moderni dobi pa predvsem z neodvisnostjo v svojem zasebnem življenju (glej Tadić, 1988, str. 18 in nasl.).

pravnimi sredstvi, postopki, odločbami itd., ter da je zelo "nevarno"[19] živeti izven pravno-administrativnih okvirov. Takšen vpliv se na učence, učitelje, starše in druge pogosto pretaka nezavedno, saj pretiranega administriranja ne zmorejo ves čas zavestno reflektirati. Posledično se velik del tovrstne pretirane "pravno-administrativne mentalitete"[20] izraža pri (odraslih) državljanih v njihovem vsakdanjem življenju, saj se pogosto počutijo "izgubljene", oziroma se "ne znajdejo" v situacijah, za katere jim ta ali oni pravni akt vnaprej jasno ne določa, kako smejo ali morajo ravnati. Poleg tega se ob določenem sporu ali problemu (če se za hip osredotočim še na ta vidik) že primarno usmerjajo v pravne dimenzije njegovega reševanja, ne da bi poprej vložili energijo oziroma napor v poskus pomiritve ali uskladitve na temelju običajnih, moralnih, etičnih in podobnih izvenpravnih pristopov. S tem nikakor ne želim zmanjševati velikega pomena prava za sodobno moderno družbo. Toda tudi v pravni državi mora pravo, kot sredstvo reševanja konfliktov, pomeniti zadnjo instanco, izhod v skrajni sili, kajti če pravu v tem pogledu pripišemo prevelik pomen, slabimo tudi sámo pravno državo in demokracijo.[21]

Če torej šola zaradi pretirane in napačne pravne regulacije ni več dovolj svobodna v svojem pedagoškem poslanstvu ter v nekaterih drugih strokovnih in organizacijskih vidikih, potem to nesvobodo prenaša na vse, ki so udeleženi v šolskem procesu. Šola potem ne vzgaja svobodnih duhov, marveč ljudi, ki so pretežno replike teh ali onih šolskih načrtov, programov, obrazcev itd., česar si družba, ki želi biti demokratična, ustvarjalna in vsestransko uspešna, nikakor ne sme želeti. Ob tem pa se je, kot je bilo že pojasnjeno, treba zavedati, da je pretirana ali neustrezna pravna regulacija v veliki meri odraz splošne dezorientiranosti družbe na moralni, etični in zdravorazumski ravni, in le v omejeni meri tudi

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19 Čeprav se kot oče, državljan in pravnik nadvse zavzemam za varno šolo, kar implicira tudi zagotovitev varnosti pri različnih športnih dnevih in drugačnih šolskih izletih, šolah v naravi ipd., pa nasprotujem histeriji, ki jo – pretežno pa ameriškem (ZDA) vzorcu – sedaj postopno uvajamo že tudi pri nas, ko skušamo z formularji vseh vrst vedno bolj detajlno predvideti in zavarovati otroke za vse mogoče oblike nevarnosti in nesreč, s čimer pretirano strašimo starše in učitelje ter slednje pogosto demotiviramo, da bi se prostovoljno in z veseljem odločali za navedene vrste izletov in aktivnosti. Tudi tu izgubljamo pravo mero.

20 Naj ponovno poudarim, da je tu kritika usmerjena zgolj v pretirano vero v pravo in v njegovo uporabo. Prava mera prava in ustreznega administriranja je seveda za šolstvo nujna in koristna ter tudi osvobajajoča, saj mu zagotavlja avtonomijo in ustrezno svobodo poučevanja.

21 Glej Cerar, 2009, predvsem strani 94–96.

specifičnih oziroma relativno avtonomnih pravnih dejavnikov (vpliv sodstva, delovanje vseh vrst poklicnih pravnikov itd.). Zato je treba pomemben korak v prenovi vrednostne mentalitete narediti prav v šolah, v katerih je treba več pedagoškega prostora nameniti moralnoetičnim temam ter obravnavi emocionalne sfere, ob tem pa tudi učiti, kako se ustvarja in ohranja spoštljiv in korekten odnos do prava ter kako pomembna je uravnoteženost med lastnimi dolžnostmi (odgovornostmi) in pravicami. Hkrati je treba z nenehnimi izboljšavami pravne ureditve ter z določeno mero državne pravne deregulacije šolstvu zagotoviti več pedagoške in druge avtonomije. Pravo mora na ta način na področju šolstva postopno doseči pravo mero in s tem ustrezneje udejanjiti svojo temeljno vlogo, to je vlogo varuha svobode in avtonomije šolstva.

3 Merila pravnosti in pravno urejanje področja šolstva

Merila (kriteriji) pravnosti nam povedo, katere so značilnosti prava ter kaj je mogoče in primerno urejati s pravom. Pomagajo nam opredeliti tisto, kar Stahl (glej zgoraj) označuje kot območje prava. Temeljna merila pravnosti so predvsem naslednja:[22]

a) Normativnost. Pravo je normativni pojav, je najstvo (nem. *Sollen*), in se ne ravna po kavzalnih zakonitostih, kot jih poznata tehnika ali naravoslovje.

b) Učinkovitost. O pravu lahko smiselno govorimo le dotlej, dokler je sklop oziroma sistem pravnih norm kot celota pretežno družbeno učinkovit, kar pomeni, da se v pretežni oziroma relevantni meri uresničuje v družbeni praksi. V nasprotnem primeru ostanejo pravne norme le "mrtve črke na papirju" in jih zato ni mogoče priznavati kot dejansko oziroma delujoče pravo.

c) Konfliktnost. Pravne norme urejajo tista družbena razmerja, ki so potencialno ali aktualno konfliktna. Ena izmed bistvenih nalog prava je torej preprečevati ali odpravljati (že nastale) medosebne oziroma družbene konflikte. Tu ne gre le za to, da pravo na ta način preprečuje medčloveške spore, ki vodijo v psihično ali fizično nasilje in s tem preventivno zagotavlja relativen družbeni mir, pač pa to tudi pomeni, da je naloga prava zagotoviti ustrezno pravno varnost (predvidljivost in zanesljivost prava) in

22 Tu podajam le strnjeni opis teh meril. Širše glej Cerar, 2006, str. 41–48.

s tem družbeni red. Uspešno uresničevanje načela pravne varnosti vzpostavlja med državljani zaupanje v pravo, kar je morebiti celo najpomembnejša pravna dobrina, kajti tako kot je zaupanje na splošno temeljni kamen medčloveških odnosov, je zaupanje v pravo temeljni kamen pravne države.

d) **Možnost in nujnost pravnega urejanja**. Vsa družbena razmerja, tudi potencialno ali aktualno konfliktna, seveda niso takšne narave, da bi jih morali urejati s pravom. Prvič, pravne norme lahko urejajo le takšne pojave oziroma zaželeno ravnanje in vedenje ljudi, ki ga lahko oblastne institucije v zadostni (relevantni) meri nadzirajo in usmerjajo. Tako bi bile npr. nesmiselne pravne norme, ki bi zapovedovale, da mora učitelj vsakega učenca odlično naučiti vso snov, ali da mora vsak posameznik misliti le dobro o drugih. Takšna pravila bi bilo pač v pravni praksi nemogoče v zadostni meri uresničiti oziroma nadzirati potek njihovega uresničevanja. Drugič, pravne norme morajo urejati le tista družbena razmerja, za katera je poseg prava nujen. Če je neko medčloveško razmerje konfliktno, to še ne pomeni, da ga je treba nujno urediti s pravom. Tako npr. prelomljena obljuba, pozabljivost ali pretirana zgovornost v družbi lahko povzročijo napetosti oziroma konflikte med posamezniki, vendar pa to še ni vedno razlog, da bi morali takšna dejanja urediti in sankcionirati s pravom. Pogosto v takšnih primerih zadostujejo že moralne in običajne norme in njihove sankcije. Kadar pa npr. prelomljena obljuba nekemu posamezniku povzroči hujšo materialno ali duševno škodo, ali pa ko se iz pretirane zgovornosti porodi razžalitev določene osebe, takrat stopnja konfliktnosti pogosto ni več v celoti obvladljiva zgolj z moralnimi in običajnimi sredstvi, zato v takšnem primeru, vsaj kot dodatni mehanizem za preprečitev ali pomiritev konflikta, nastopi pravo. Merili možnosti in nujnosti pravnega urejanja sta seveda tesno povezani z zgoraj navedenim merilom učinkovitosti prava.

e) **Usmerjenost v zunanje vedenje posameznikov**. Pravne norme pretežno urejajo zunanje vedenje in ravnanje oziroma razmerja posameznikov. Le izjemoma mora pravo tu in tam le poseči tudi v človekov notranji svet, če je to nujno potrebno za njegovo svojo legitimnost in učinkovitost. Tako je npr. treba pri ugotavljanju

pravne odgovornosti posameznika praviloma ugotoviti njegovo resnično pogodbeno voljo (ne le tisto, ki je izražena v zapisu pogodbe), krivdo (npr. naklep za storitev kaznivega dejanja), prištevnost itd.

f) **Prisilnost in (državna) sankcija**. Pravne norme so prisilne narave, kar med drugim pomeni, da v končni instanci njihovo uresničevanje zagotavlja država s prisilnimi sredstvi, preko za to pristojnih državnih organov (npr. policija, inšpektorat, tožilstvo, sodišče). Vendar pa prisilnost pravnih norm ne pomeni nujno, da pravni naslovljenci vsako posamično pravno načelo ali pravilo tudi dejansko dojemajo kot prisilno. V primerih, ko so zakonske norme moralno, običajno ali drugače sprejemljive za večji del državljanov (npr. prepoved umora), pravni naslovljenci te norme večinoma že samodejno oziroma spontano spoštujejo, zato te norme učinkujejo kot prisilne praviloma le za tiste posameznike, ki jih kršijo. Po drugi strani pa je v pravu tudi veliko takšnih pravnih norm, ki jih sicer pravni naslovljenci moralno oziroma notranje (intimno) v večjem delu ne odobravajo (npr. nekatere davčne zapovedi), vendar se prav zaradi njihove prisilne narave večinoma ravnajo v skladu z njimi.

g) **Vrednote**. Če ne bi upoštevali vrednot, bi bilo pravo v skladu z vsemi do sedaj omenjenimi merili pravnosti zgolj oblika (forma), ki bi jo bilo mogoče napolniti s poljubno vsebino (materijo). Pravo kot sistem pravnih norm je zato prežeto z vrednotami kot so npr. družbeni mir, red, pravičnost, zakonitost in svoboda. Pri nekaterih pravnih normah je to razvidno že na prvi pogled (npr. prepoved mučenja ali dopustitev svobodnega političnega in drugačnega združevanja), saj gre v tem primeru za moralne, običajne, politične in druge vrednote, ki so bolj ali manj splošno zasidrane v družbeni zavesti, medtem ko so na drugem skrajnem polu tudi takšna pravna pravila, ki so zgolj sama po sebi na videz vrednostno nevtralna ali indiferentna (npr. določitev roka za pritožbo ali pa zapoved, da rdeča luč na semaforju pomeni "stop"). Seveda pa lahko tudi v slednjih primerih zaznamo prisotnost določenih vrednot, če takšna "pravno-tehnična" pravila povežemo z njihovim vrednostnim izhodiščem. Tako npr. določitev pritožbenega roka na eni strani varuje možnost posameznika, da ugovarja zoper odločitev državnega organa,

> s katero ne soglaša (gre torej za varstvo osebne integritete posameznika in njegove pravice do izražanja kritike), na drugi strani pa vzpostavlja nujni red v pravnem postopku, ki ne sme trajati v nedogled. To nas opozarja, da je pravo vrednostno prežeta celota, v kateri se posamezne vrednote z različno intenziteto členijo oziroma diferencirajo po njenih posameznih delih.

Če izhajamo iz navedenih meril pravnosti, lahko ugotovimo, da pravno urejanje šolstva v Sloveniji v marsičem zanemarja njihovo sporočilnost in pomen. Tako denimo precejšen del predpisov, ki se nanašajo na šolstvo, ne upošteva dovolj meril možnosti in nujnosti pravnega urejanja. To pomeni, da pravni predpisi urejajo preveč zadev, ali pa jih urejajo na pretirano zapleten način, zato jih v praksi vodstva šol in učitelji v določeni meri enostavno ne izvajajo[23], saj sicer ne bi uspeli opraviti svojega osnovnega dela (ki jim ga v veliki meri prav tako določajo predpisi[24]).

Prav tako se pogosto spregleda pravi pomen in sporočilnost merila konfliktnosti. Namesto, da bi pravodajalci z zakoni in podzakonskimi akti na področju šolstva urejali le tista razmerja, ki že povzročajo konflikte, ali pa jih resnično utegnejo povzročiti, se s pravnimi akti večkrat urejajo razmerja, ki so bila dotlej pretežno nekonfliktna in tudi ne kažejo resnejših znakov potencialne konfliktnosti. V pretirani ali navidezni skrbi za pravice otrok[25] ali za transparentnost dela šol se tako pogosto z umetnim vzpostavljanjem novih pravnih zahtev in razmerij[26] nepotrebno ustvarjajo možnosti za nastanek konfliktnih situacij, ki sicer ne bi niti nastale[27], ali pa

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23 Tako se npr. v šolah pogosto ignorirajo določbe zakonov, ki za določene primere nalagajo postopanje v skladu z zakonom o upravnem postopku. Ker v zvezi s tem najpogosteje ne prihaja do prijav in sporov, ostaja takšna nezakonita praksa pretežno neopažena.

24 Tako nastane začarani krog, na katerega pogosto opozarjajo šolniki. Vseh predpisov je enostavno preveč, da bi jih šole zmogle v celoti upoštevati in ob tem kakovostno opravljati vzgojno in izobraževalno delo.

25 Seveda se je treba ob tem zavedati, da so pravice otrok posebna dragotina, ki jo mora pravo ustrezno varovati v vseh pomembnih segmentih (o tem obširno Novak, 2004).

26 Temu nato sledi še določitev novih pristojnosti inšpektoratov ali ustanovitev kakega drugega organa, novi pravni postopki in sankcije itd.

27 Gre za situacijo, ki spominja na t.i. samoizpolnjujočo se prerokbo (*self-fulfilling prophecy*).

bi se pojavljale v zanemarljivi meri in bile ustrezno rešljive z izvenpravnimi mehanizmi.

Posebno vprašanje je področje vrednot. Kako uskladiti pravne vrednote z vrednotami, ki so ključne za šolstvo? Če to vprašanje povežemo z zgoraj omenjenimi merili možnosti in nujnosti pravnega urejanja ter merilom konfliktnosti, nas to ponovno vrača k že predstavljenim ugotovitvam o tem, da gre v tem pogledu za širši vrednostni problem, v katerem je pravo le "delni krivec" za krčenje šolske avtonomije, kajti pravo tu v precejšnji meri le odraža splošno družbeno moralo in mentaliteto, kar pomeni, da je le nekakšno "izvršilno sredstvo" politike kot vrhovnega koncentrata te morale in mentalitete. Če bi politika (ob)držala pravo v mejah njegovega območja, to je v okviru meril pravnosti, potem bi pravne vrednote kot so pravna varnost, pravičnost, zakonitost ali svoboda učinkovale na šolstvo pozitivno, saj bi vanj vstopale le toliko in na takšen način, da bi bili postavljeni nujni in koristni okviri za vzgojne in izobraževalne procese. Ker pa v (naši) vrednostno zmedeni družbi elite, ki vzpostavljajo in usmerjajo organizacijo in delovanje šolstva, te zmedenosti v resnici ne odpravljajo, marveč jo dejansko ignorirajo ali celo generirajo[28], se to odraža tudi v neustreznem pravnem urejanju šolstva in posledično v prikritih ali odkritih konfliktih med predstavniki šolske sfere in vsemi tistimi nosilci pravne dejavnosti (politiki, pravniki, uradniki itd.), ki imajo do pravnih predpisov izrazito legalistično oziroma apologetsko držo. S tem se le še povečuje znani razkorak med šolstvom in pravom, v katerem šolniki pravo pogosto doživljajo kot nedobrodošel vdor v svojo sfero, pravniki (točneje: nosilci pravne dejavnosti) pa pogosto podcenjujejo posebnosti šolskega področja in zmotno menijo, da se je mogoče z njim uspešno ukvarjati že zgolj na podlagi splošnih znanj o pravu.[29]

28 Seveda obstajajo tudi častne izjeme.
29 Heubert, 1999, str. 7.

4 Sklepne misli

Pravo in šolstvo sta nujno soodvisna.[30] Pravo je v svoji idealni konstrukciji oziroma podobi varuh svobode in avtonomije šolstva, šolstvo pa mora kot del svoje odgovornosti sprejeti tudi spoštljiv in odgovoren odnos do pravne države. Praksa v Sloveniji žal v preveliki meri odstopa od takšnega ideala. Pretirano in neustrezno pravno urejanje šolskega sistema zmanjšuje šolsko svobodo in avtonomijo, kar se na področju šolstva odraža v delnem ignoriranju predpisov in posledično v njihovi neučinkovitosti, v povečanem odporu šolnikov do prava kot takšnega, v prekomernem pravnem administriranju v šolah na račun pedagoških in drugih za otroke pomembnejših in koristnejših dejavnosti, v demotiviranosti učiteljev za vzgojo in izobraževanje ter posledično v slabši kakovosti učnega procesa.

Šolstvo potrebuje pravo mero prava, ki jo je nemogoče opredeliti empirično ali numerično. Tu je treba za ugotovitev realnega stanja vzpostaviti resničen dialog in odnos zaupanja med nosilci šolske dejavnosti na eni strani ter nosilci pravne dejavnosti na drugi. Obe strani si morata medsebojno prisluhniti in vzpostaviti odgovorno sodelovanje. Pravo se mora kolikor je mogoče prilagoditi zahtevam takšnega (avtonomnega) šolskega sistema, ki bo vzgojil in izobrazil mlade rodove v čim bolj svobodne (ustvarjalne in rado-vedne) duhove ter hkrati v družbeno odgovorne osebnosti, šolstvo pa mora seveda v polni meri upoštevati temeljna načela pravne države, ki seveda tudi šolstvu zapovedujejo spoštovanje človekovih in drugih zakonitih pravic, upoštevanje načel nediskriminacije, pravne enakosti, pravne varnosti, pravičnosti, sorazmernosti in zakonitosti.

K navedenemu dialogu in (nadaljnji) graditvi medsebojnega zaupanja med predstavniki šolske in pravne sfere je treba pristopati potrpežljivo in z dolgoročnimi vizijami. Treba se je vseskozi zavedati, da smo v pravu in šolstvu izhodišče in cilj naših (skupnih) prizadevanj vedno ljudje. Naivno bi bilo "krivdo" za zmanjševanje šolske avtonomije pripisovati pravu kot takšnemu, ali zgolj pravnikom, ki so v tem pogledu le del celotne zgodbe. Treba se je ozreti v vrednostni sistem družbe, ki preko neustreznega

30 Prim. Hehir & Gamm, 1999, str. 205–239, ki (v navezavi na vzgojo in izobraževanje otrok s posebnimi potrebami) opozarjata na nujnost zavzetega sodelovanja med šolsko in pravnoadministrativno sfero, pri čemer avtorja svoje predloge za nadaljnje izboljšave sistema umeščata v koncept, ki ga poimenujeta "a collaborative model of education reform".

delovanja družbenih elit ter ob večji ali manjši (vsekakor pa na splošno preveliki) pasivnosti in apatiji državljanov doživlja svojo postopno dekonstrukcijo. V takšni situaciji, ki vodi v splošno vrednostno dezorientacijo in posledično v škodljive družbene pojave (npr. v pretirani materializem in individualizem, objestnost, potrošništvo, pretirano tekmovalnost, pomanjkanje empatije itd.), je treba na splošno in še posebej v šolah nenehno obujati in krepiti temeljne moralne ter zdravorazumske principe in prakse. Le tako bodo namreč lahko v prihodnje tudi nosilci pravnega urejanja in drugih pravnih dejavnosti emocionalno in intelektualno dozoreli za vzpostavitev in dinamično ohranjanje prave mere prava. Seveda je to le ideal, ki se mu nikoli ne moremo dovolj približati. Vsekakor pa nas mora voditi stran od tistih sodobnih trendov, ki so ta ideal popačili in zabrisali do te mere, da se lahko zaradi njegove vedno večje neprepoznavnosti pravo na dolgi rok spremeni v golo in hipertrofirano normativno tehniko, šolstvo pa v robotizirano dejavnost, ki postopno in vztrajno mrtviči človeškega duha.

Dr. Miro Cerar je redni professor na Pravni fakulteti Univerze v Ljubljani, kjer redno predava teorijo in filozofijo prava ter primerjalno pravo. V letih 1991–1992 je bi sekretar ustavne komisije, ki je pripravila temeljne akte za osamosvojitev Slovenije in predlog nove Ustave Republike Slovenije (1991). Odtlej je tudi stalni zunanji svetovalec za ustavna vprašanja pri slovenskem parlamentu. V pomladnem semestru 2008 je bil gostujoči Fulbrightov profesor na Golden Gate University School of Law v San Franciscu, kjer je predaval primerjalno ustavno pravo. Od decembra 2010 dalje je predsednik Sodnega sveta Republike Slovenije.

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1.02 Review article

How Much Law Does the School System Need?

UDK: 34:37

Miro Cerar
University of Ljubljana, Faculty of Law
miro.cerar@pf.uni-lj.si

ABSTRACT

In its ideal form, the law is a guardian of the freedom and autonomy of the school system. On the other hand, the school system must, as part of its responsibility, establish a respectful and responsible attitude toward the rule of law. In Slovenia, practice deviates from such ideal to too great an extent. Excessive and inappropriate legal regulation reduces the freedom and autonomy of the school system. The consequences within this system are: partly ignored legal regulations, and the resulting ineffectiveness; excessive legal administration in schools; increased teachers' opposition to the law; a lack of teachers' motivation; and, as a consequence, worsened quality of the educational process. The law, however, is only a part of the problem. The latter has its roots mainly in a general disorientation of society with regard to its values. In order to establish the right measure and manner of the legal regulation of the school system, the moral and common sense basis of society must first be healed and strengthened.

Key words: freedom and autonomy of the school system, upbringing, education, autonomy of law, the criteria of law

JEL: K19

1 The relative autonomy of law and the school system

The field of law is so varied that, upon in-depth reflection, it is truly surprising that topics so very different are considered within this (collective) concept. For all fields the law regulates various criminal conduct (criminal offences, misdemeanours, disciplinary violations), civil delicts, the conclusion of a wide variety of contracts, the legal status of individuals and the many types of associations, organizations, and state authorities, administrative affairs, property ownership relations, employment

relationships, social security, copyright, industrial property rights, marriage and family relations, inheritance, etc. On one hand, the constitution ensures human rights and establishes the foundations of the organizations of the state, while on the other, laws and implementing regulations broadly extend and complete all of this to the micro-level of normative dimensions. Legal acts regulate relationships related to birth and death, work, finance, banking, traffic, food, transportation, insurance, health care, veterinary medicine, media, informatization, spatial planning, construction, ecology, sport, waters, forests, agriculture, arms, chemicals, animals, animal feed, etc. – practically everything we do is to some extent regulated by legal acts.

The field of education, which is one of the more, or even the most, important fields of social life, also must be regulated by law. If the amount of time people in contemporary, modern society spend within the framework of institutionalized educational institutions is considered, as well as how our education and knowledge are co-conditioned by education in the broad sense of this term, the full relevance of the legal regulation of this field can be realized. Since the school system is a relatively autonomous area dealing with the upbringing and education of children[1], in relation to it the law must have mainly regulative and incentive functions. This does not mean that in relation to the educational system the law does not also have (co-)defining[2], repressive[3], and other

1 Although it is possible to analytically deal with upbringing and education separately, the two are actually existentially inseparable phenomena. Whoever provides upbringing also provides education, and whoever provides education also provides upbringing. Regardless of the various possibilities of a separated or connected understanding of both of the mentioned processes of learning in a broader sense, I will proceed from the conviction that the fundamental mission of the school system is the education and upbringing of children and adolescents. In this text, at times only the word education is used, but it is intended to cover both terms.

2 By the (co)defining function of the law in relation to the school system, I refer to establishing the status and organization-related legal norms of the fundamental institutions of the school system (schools, teachers, pupils, the teaching and upbringing process, the rights and duties of subjects in the school system, etc.). In the realization of this function, the law must take into account many important essential and existential characteristics which the field of schooling determines according to its nature and the manner of its existence and functioning, by its internal, relatively autonomous actors and factors. Simply stated: in the process of determining and regulating the fundamental institutions of the school system, the law must throughout partially adapt to their form and content, while partially it defines the same form and content autonomously – this therefore entails a dynamic interaction between the fields of law and the school system.

functions[4], however in this relationship that part of the law must be the predominant which enables and encourages schools and teachers to uninterruptedly and successfully perform their fundamental mission related to education and upbringing.

At this point, two autonomies meet (or "collide"): that of the school and that of the law[5]. Both autonomies are only relative[6]. With regard to such, it is most important that the relationship between them is always based on dynamically establishing the right measure. However, in this case the right measure does not entail some general equality or symmetry, since in some areas of the school system the right measure requires more autonomous space for the school system, while in others more for the law.

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3 By the repressive function, I refer to the compulsory aspect of law which is demonstrated by the obligatory nature of legal norms, and envisaged sanctions for the violation of such, and in the procedures for implementing sanctions or for actually enforcing the law.

4 In general, the law has regulative and repressive social roles and functions. In addition to this, among the fundamental functions of contemporary modern law, theory classifies above all also ensuring justice and the safety of legal subjects, ensuring order and peace, personal freedom, and the freedom of the private (ownership) sphere of individuals, social security, social cooperation (contractual, associative, etc.) and social integration (in terms of the system, the law has the role of an important social subsystem) (Coing, 1993, pp. 143, 145, and 156; Horn, 1996, pp. 22–26).

5 In a democratic state based on the rule of law, however, such a relation is certainly, in general, characteristic of all fields of the legal regulation of social relations, since just as the law preserves its own relative autonomy in relation to the fields it regulates (e.g. in relation to politics, the economy, religion, health care, the school system), also these fields preserve their relative autonomy in relation to the law.

6 On the factors of the relative autonomy of modern law (i.e. having a formalized, abstract, general, and systematic nature, the legal language, the professionalization of the roles of actors in the legal field), see Cerar, 2001, pp. 21–28; with regard to the autonomy of the school system, what should first be mentioned is the categorization of three types of autonomy: 1) complete autonomy entails that schools make decisions completely independently, but within the framework of legal and other general regulations, and possible external authorities do not interfere with any decisions; 2) partial autonomy entails that schools make decisions within the framework of possibilities determined in advance by a higher body of the school authority or they must obtain the consent of such higher body for their decision; 3) transferred autonomy appears when the authorities of the state administration or local authorities can decide, upon due consideration, whether to transfer the competency to make decisions in a certain field to schools (Šolska avtonomija v Evropi, Politike in ukrepi, 2008, p. 17). It is necessary to add to this that all of the mentioned types of autonomy are only relative since even the most "complete" autonomy of the school system is limited in relation to other (autonomous) fields of society and by the fact that the organs of the authorities determine the organizational, financial, human resource, expert, and other aspects of the extent and content of school system autonomy by means of regulations.

The legal regulation of the school system therefore must not only be very "rainbow-like", since different (sub)fields within the school system demand a differentiated approach, but also very varied in its (quantitative) scope. Some fields of activity of the school system by their nature can not bear a great amount of law (e.g. teaching), while others are necessarily directly conditioned by legal regulations (e.g. ensuring earthquake and fire protection in schools).

2 Law as the guardian of the freedom and autonomy of the school system

The school system and the law as codependent autonomous fields and social (sub)systems directly and indirectly interact with numerous other relatively autonomous social fields or (sub)systems (e.g. politics, culture, science, religion, the economy, finance), which greatly increase the complexity of the entire field within which the law and the school system are only two out of many partially overlapping fields. Just like many social (sub)systems are not able to successfully function without the school system, also the school system can not function without them, therefore it is important to be aware that the autonomous aspects of the law and the needs and requirements of the sphere of the school system for specific legal regulation are far from representative of the entire scope of the law that regulates the school system. Namely, the school system is always affected by legal acts which regulate the other above-mentioned relatively autonomous fields of social life[7].

In order to illustrate the above mentioned and as a starting point for further consideration, let us examine two situations. Firstly, if the law excessively intervenes into the autonomy of the school system, it thus hinders or prevents the professional freedom and autonomy[8] of teachers and school management and thus worsens the quality of educational functioning. Secondly, if the school system is severely insufficiently regulated by norms, this leads to disorder, the abuse of power by

7 For example, regulations which regulate emploment relations, safety at work, fire safety, the protection of privacy, access to information of a public nature, financial operations, administrative procedures, traffic safety, environmental protection, etc.

8 In this article, by the term freedom I above all mean an intellectually and otherwise open and creative spirit in the schooling process of upbringing and education, and by the term autonomy, I above all mean the independent organization and functioning of the school system and educators within the frameworks determined by state or local law.

the stronger to the detriment of the weaker participants in the schooling process, and last but not least, to unbalanced and low quality education. In these situations we usually talk about an "excessive" or "insufficient" amount of law, respectively. However, such a diagnosis demarcates only the most superficial manifestations of this "social disease", and not its deeper forces and even less so causes. This problem can also be perceived in other social fields, with regard to which we often talk about a hypertrophy of legal regulations, of their ineffectiveness, of double legal measures (e.g. different legal treatment of the representatives of higher and lower social classes), etc. Such thinking often leads to a critical consideration (or condemnation) of the law and lawyers.

However, the law and lawyers are here only part of the "big picture". Certainly, lawyers and the law have to be ascribed a great deal of responsibility for the flood of legal regulations and their effectiveness. Nevertheless, with regard to such, one has to be aware that the law is to a large degree only a conduit (or bearer) of value-related and other content created by other value- and norm-related spheres (habits, morals, ethics, customs, religion, politics, etc.). The law most frequently only conveys such content and transforms it into its formalized normative mechanism and expresses it in the specific form of laws, rules, judgements, contracts, and other legal acts.

Let me illustrate this. When in the formulation of a criminal offence the starting point of the law is the prevailing moral condemnation of, for example, taking someone else's property, the law creates the criminal law institute of theft, which it expresses in a formalized linguistic form, with regard to which theft as a criminal offence must be legally defined and implemented in a special legislative procedure, and its normative description must definitively and clearly contain all characteristics of this criminal offence and the envisaged sanction for such. If an article of the law on theft is unskilfully formulated, the lawyers who formulated it should be held responsible, as should the politicians if they adopted it in the legislative procedure without sufficient prior review. The core of the matter, however, i.e. the condemnation of theft, is in its commonsensical, moral, and ethical basis a matter of the entire society and not (just) of lawyers. As long as the society morally and commonsensically in principle

largely condemns theft[9], also the criminal law provision on theft will to a large degree be effective in practice. When, however, the moral awareness and commonsensical awareness of society become more strongly distorted, the law is also no longer able to effectively prevent theft. Since people are very imperfect, their moral, ethical, and other awareness, and consequentially societal practice, are always to some degree distorted or bent out of shape. When such a deviation exceeds some critical limit, which in Slovenia and elsewhere in the world has already happened in some areas (e.g. in the economy and politics), the hitherto value system starts to disintegrate and gradually its antipode begins to prevail. In such an insensitive environment in terms of values, great and damaging thefts perpetrated by the political, economic, and other social elites by means of various appropriating manipulations are no longer perceived as thefts, but merely as some kind of "higher necessity". After the social elite, by its own example, has imposed and allowed such a distortion of the value system long enough, and in this way of course grown richer and remained in power, the distortion is gradually transferred onto lower levels, i.e. social classes, where at first disorientation or apathy in terms of values appear, and afterwards a large share of the people start acting in accordance with the mentioned examples, which entails that a larger share of the people conveniently re-evaluate their values, and bow to and join the thieves.

In recent years we have been facing a real flood of regulations which directly or indirectly regulate the field of the school system[10] and restrict or even suffocate it as regards its fundamental mission by their extensiveness and content[11]. A large portion of such regulations is certainly necessary

9 Morals and the principles of common sense are expressed and co-formulated also through the dimensions of politics, religion, various professional ethics, etc.

10 Although in this field data on laws and implementing regulations is not systematically and clearly recorded, it is possible to ascertain, according to some informal evaluations of experts from the Ministry of School and Sport, that the number of laws that entirely or partly address the field of the school system is approximately 100, while the number of implementing regulations exceeds this number by at least one third.

11 Such is also the conclusion of the Working Group for Analysing the Legal Regulation of the School System, which has been active within the Slovenian Ministry of Education and Sport since January 2009. The Group is composed of experts from different disciplines, with the majority of its 11 members being lawyers. After one year of functioning the Group formulated a memorandum entitled "The Fundamental Conclusions of the Working Group", which is intended to be a general guideline for the further work of the Ministry and all institutions in the field of schooling. I will quote the memorandum in its entirety due to its relevance to the theme of this article:

1. *The legal regulation of the school system can be of assistance and can foster its high quality functioning only if it reflects a clear vision of the functioning and development of the whole sphere of the school system, above all primary and secondary schools, as well as music schools, preschools, and higher education. Such a vision, i.e. an implementation strategy, should be formulated as the fundamental prerequisite of the regulation of the school system by laws and implementing regulations on the basis of a broader expert and public debate, with regard to which the law (the Constitution, legislation) has to be taken into account throughout as one of its necessary accompanying frameworks already in the phase of the expert discussion regarding such a vision.*
2. *Legal regulations must to a greater degree enable the autonomy of the teaching process. In order for such, it is primarily necessary to allow and foster greater autonomy of principals and the professional autonomy of teachers by means of legal regulations and to the appropriate degree also expand all other aspects of the autonomy of the school system. Such an approach, however, should not lead to imbalance, therefore it is at the same time necessary to preserve the appropriate mechanisms for ensuring the responsibility and obligations of schools (principals, teachers) for their functioning and for the appropriate protection of the rights of children.*
3. *With regard to the legal regulation of the rights of children (pupils and students at all levels of schooling), it is necessary to appropriately regulate their duties (obligations).*
4. *The school system is overburdened by legal regulations. It is necessary to gradually eliminate those regulations which make impossible or hinder the quality functioning of the school system and its implementers. With regard to this, the levels of the necessary legal regulation must be determined, in the sense of the de/centralization of individual fields (i.e. mandatory content which must be treated in a uniform manner should remain a legal and rule-based matter in the domain of the Ministry, while everything else should be deregulated or at least left to the autonomous regulation of individual schools).*
5. *The above-mentioned conclusion regarding the school system being overburdened by legal regulations should not lead to activities which would in general decrease the importance of law for the regulation of the school system, since law is one of the fundamental mechanisms for ensuring appropriate conditions for the activities of the school system and respecting the rights and duties of all who participate in schooling processes. Moreover, upon the prior elimination of administrative burdens, the law should be understood as a necessary component of the functioning of the school system.*
6. *In the so-called umbrella regulations in the field of schooling, a greater mutual harmonization of some legal concepts and institutes must be ensured.*
7. *In the future, in (amended) school legislation all the most important and fundamental issues related to the rights and duties of children (pupils and students at all levels of schooling) must be regulated by laws and not by other, lower order legal acts, with regard to which uniform approaches on all levels of education should be followed (e.g. regarding grading, awards, disciplinary warnings and measures, work with children with special needs, food provided at school), if such is reasonable and there is not a need to apply different regulations to primary, secondary, or other schooling levels.*
8. *Where it is possible and beneficial, it is necessary to implement or foster by legal regulations a higher level of organizational uniformity of regulation in the broader*

and inevitable since institutionalized education requires an appropriate legal order for its functioning. In this sense, a state based on the rule of law[12] is an aid and an ally of the school system and its actors since it determines in advance the legal rules of the game and establishes the rights and obligations of the participants in educational processes and of the subjects which influence such processes "from outside". This can be well understood only if we look into the past and see how the absence of a state based on the rule of law inevitably led to the arbitrary conduct of the authorities, to the oppression of the majority by a minority, to legal inequality, to unpredictability, and last but not least, to the lack of freedom of individuals who are not recognized fundamental and other rights. However, also a state based on the rule of law, as an extremely important phenomenon of a law-based civilization[13], must – just like everything else in human society – be of the right measure. In connection with such, in the mid 19th century Friedrich Julius Stahl wrote very appropriately and in a balanced manner the following: »A state must be a state based on the rule of law. That is a solution to and the truth of the developmental needs of the recent era. It should in a legal manner

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field of schooling (e.g. the possibility of formulating the uniform fundamental principles of the "school order" within the segment of public services, i.e. for public institutes and concession holders).

9. *Legal regulation must stimulate schools to modernize, that is, it must ensure conditions and initiatives for the continuous adaptation of teaching approaches to the new generations of children and adolescents and in accordance with new professional findings.*
10. *With regard to the regulation of resolving conflicts of interest which appear in the educational process, the legal regulation of the school system must, to the degree it is possible or allowable, simplify (administrative) legal procedures and above all place greater emphasis on and enable so-called alternative and consensual methods of resolving disputes. Where it is possible, also the obligatory uniform order of the entire administration has to be adapted to the peculiarities of the field of schooling.*

12 For a state based on the rule of law, it is characteristic that its constitution, laws, and other formal legal sources implement the principles of equality before the law, legal certainty (the predictability and reliability of the law), and in this framework especially the predetermined legal violations and sanctions for such. In a state based on the rule of law, the rights and duties of legal subjects are determined by law, the most important of which are the fundamental (human) rights determined in the constitution. The laws precisely determine in advance the procedures by which the competent state authorities ascertain whether a legal violation has been committed and what sanction should follow. These and other fundamental elements of a state based on the rule of law are in theory and normative practice differentiated in further detail (Pavčnik, 2009, pp. 32 et seq.).

13 For more on this, see Simič, 2009, pp. 13–26.

precisely determine the directions and limits of functioning, as well as the area of the freedom of its citizens. This it should fully protect. With regard to such, however, due to the moral ideas of the state, it should not implement (force) such beyond the limits of the territory of the law. This is the concept of the state based on the rule of law.«[14]

In the correctly understood concept of the state based on the rule of law, an essential and very important element is the freedom of citizens and individuals. It was Kant who characterized the Age of the Enlightenment and with it the new rationally "enlightened" law with his famous, although only formal definition of law, according to which law is a conglomerate of conditions under which the free will of an individual can, according to some general law of freedom, associate with the free will of another individual.[15] Also from the perspective of the contemporary establishment of the state based on the rule of law, it must be mentioned that such does not exist without the sufficient freedom of individuals and all those spheres of society which inevitably need enough free space for their existence, functioning, and development.[16] Since the school system without a doubt is part of such a social sphere, it is especially inappropriate for it to be burdened by the law to an excessive extent and with the wrong emphasis. If we apply the idea of the above-quoted Stahl, we can say that especially in the field of the system of schooling, the state must not overstep the limits of the sphere of law.[17] Since relative freedom is a necessary component of any human and social autonomy, also the autonomy of the school system, the latter system can appropriately function only if the law provides it enough freedom with regard to teaching and also other professional and organizational functioning. Otherwise, the school system can not carry out its fundamental mission in a comprehensive and successful manner since it can not educate children and adolescents so that they are sufficiently mentally (intellectually) free and autonomous individuals in terms of their personality.

If at this point we briefly address the concept of freedom in a broader social context, we can see that the modern democratic state is/was

14 Cited after Simič, ibid., p. 13.

15 Kant, 1967, p. 32.

16 Naturally, at this point the ever present problem of how to understand the concept of freedom arises, which we will discuss below.

17 Below (Sect. 3) I will concisely address the criteria of law which generally determine or limit the field of law.

founded on political liberalism and the doctrine and practice of the so-called classic (liberal) human rights, which all largely stem from the concept of so-called negative freedom (the so-called "freedom from interference"). This form of freedom is concisely expressed in the demand for "the right of an individual to be left alone". Along side this, democratic society has also established a positive concept of freedom, the so-called "freedom to" [18], which is demonstrated primarily in an individual's fundamental rights as a citizen, i.e. political rights, thus in his legally protected possibility to participate in public affairs. For the positive development of an individual in terms of values, a comprehensive and dynamic balance between both forms of freedom is necessary, which thus gradually grows into an integral concept of freedom, encompassing all of its negative and positive aspects. On the societal level, these imply the individual's awareness of necessary self-limitations for the benefit of the freedom of others. The freedom (and rights) of everyone in a democratic society and a state based on the rule of law are namely limited by the same freedom (and rights) of others, which entails that a free individual must be aware not only of his own entitlements, but also of his duties to others and to society. In addition to this, it is important to be aware that raising awareness of these and other aspects of freedom and of the possibilities and manners of its actualization is primarily ensured by means of appropriate upbringing and education (at home, at school, and elsewhere), and of course also by means of institutional measures, among which the law plays a crucial role.

Two important conclusions follow from the above mentioned. Firstly, an integral concept of freedom implies both entitlement and obligation (responsibility). This entails that we can help a child or adolescent grow into a free and autonomous personality in terms of thinking and otherwise only if we constantly remind them of the necessity of balancing rights and duties. A young person has to be brought up and educated in a spirit of personal responsibility, which on one hand demands knowing and

18 Among the first thinkers who tried to explain the distinction between negative and positive freedom was the French liberal thinker Benjamin Constant, who at the beginning of the 19th Century wrote that the ideal of the Liberty of the Ancients was participation in the state authority (positive freedom) and the ideal of the Liberty of the Moderns is a state of liberation from the state authority (negative freedom). In ancient times individuals were emancipated primarily through their participation in public (state) affairs, while in the modern age they are emancipated primarily through independence as regards their private life (see Tadić, 1988, p. 18 et seq.).

fulfilling one's moral, ethical, and legal duties, and on the other, knowing one's fundamental (human) and other rights and appropriate legal procedures for their realization.

Secondly, the school system, which itself is not (sufficiently) independent, since it is excessively trapped in a vice of unnecessary bureaucracy, can not create enough independent spirit for truly high quality learning. Such a school system constantly conveys the message to young generations, during and along side the teaching process, that life primarily entails dealing with records, legal means, procedures, decisions, etc., and that it is very "dangerous" [19] to live outside the legal-administrative framework. Such influence is often transferred onto students, teachers, parents, and others subconsciously, since they are not able to constantly consciously reflect upon such bureaucracy. Consequently, a large share of such excessive "legal-administrative mentality"[20] is expressed with regard to (adult) citizens in terms of their everyday lives, since they often feel "lost" or do "not find their way" in situations for which some legal act does not clearly define how they are allowed or not allowed to act. In addition to this, in the event of a dispute or problem (if, for a moment, I may focus on this aspect) they already primarily focus on the legal dimensions of its resolution, without first investing their energies and efforts in attempting to reconcile or to find the middle ground on the basis of customary, moral, ethical, and similar extra-legal approaches. Having said that, I do not wish to diminish the great importance of law for modern society. However, also in a state based on the rule of law, the law as a means of resolving conflicts must be the last instance, an emergency exit, since if in this respect we ascribe

19 Although as a father, citizen, and lawyer I firmly support safe schools, which also implies ensuring safety with regard to various sport days, field trips, school excursions, nature schools, etc., I am opposed to the hysteria which – largely following the American (USA) example – is now gradually being implemented also in Slovenia. I am referring to different kinds of forms to be filled out whose aim is to catalogue in great detail all possible sorts of dangers and accidents, and to protect children from them, which excessively frighten parents and teachers and often demotivate the latter with regard to them voluntarily and happily deciding to participate in such trips and activities. Also here we are losing the right measure.

20 I should again emphasize that criticism here is directed only at exaggerated faith in the law and in its use. The right measure of the law and appropriate administration is of course necessary and beneficial for the school system as well as liberating, as it ensures the autonomy and appropriate freedom of teaching.

the law too great an importance, we also weaken the state based on the rule of law and democracy themselves.[21]

If due to excessive and incorrect legal regulation the school system is no longer sufficiently independent in its educational mission as well as with regard to some other professional and organizational aspects, it then transfers such non-freedom to all those participating in the process of schooling. In the event of such, the school system does not educate free minds, but people that are generally replicas of some sort of schooling plans, programmes, forms, etc., which a society which wishes to be democratic, creative, and comprehensively successful should by no means wish for. In addition to this, as has been explained above, it is necessary to be aware that excessive or inappropriate legal regulation is to a large degree a reflection of the general disorientation of society on moral, ethical, and commonsensical levels, and only to a limited degree is it also a reflection of specific and relatively autonomous legal factors (the influence of the judicial system, the activities of all kinds of professional lawyers, etc.). Therefore, it is in the school system itself where an important step in the transformation of the value-based mentality must be taken, by dedicating more educational time to moral-ethical topics and to the treatment of the emotional sphere, and at the same time also by teaching how to create and maintain a respectful and correct attitude to the law and how important the balance between one's own duties (responsibilities) and rights is. At the same time, the school system must be ensured more educational and other autonomy by constant improvements in the legal regulation and by a certain degree of state-based legal deregulation. In such a manner, the law must gradually achieve the right measure in the field of the school system and thus more appropriately realize its fundamental role, i.e. as the guardian of the freedom and autonomy of the school system.

3 The criteria of law and the legal regulation of the school system

The criteria of law tell us what the characteristics of the law are and what can be regulated appropriately by the law. They help us define what

[21] See Cerar, 2009, especially pp. 94–96.

Stahl (see above) has named the sphere of the law. The fundamental criteria of law are primarily the following:[22]

a) **Normativeness**. Law is a normative phenomenon, it is ought-ness (Ger. Sollen), and does not follow the laws of causality, such as are known in the technical and natural sciences.

b) **Effectiveness**. It is only sensible to talk about the law as long as the system of legal norms as a whole is predominantly socially effective, which means that it is to a predominant or relevant degree realized in social practice. Otherwise, legal norms remain mere words on paper and can not be ascribed the status of the real, i.e. functioning, law.

c) **Conflictual nature**. Legal norms regulate those social relationships which are potentially or actually conflictual. One of the fundamental tasks of law is thus to prevent or eliminate (already occurring) interpersonal and social conflicts. This concerns not only the fact that in this manner the law prevents disputes between people which can lead to psychological or physical violence, and by such it acts preventively to ensure relative social peace, but it also entails that the task of the law is to ensure appropriate legal certainty (the predictability and reliability of the law) and with such, social order. Successful realization of the principle of legal certainty establishes among citizens trust in the law, which might even be the most important legal good, since just like trust is in general a cornerstone of interpersonal relations, trust in the law is the cornerstone of a state based on the rule of law.

d) **Possibility and necessity of legal regulation**. All social relations, also those potentially or actually conflictual, are certainly not of such a nature that they should be regulated by law. Firstly, legal norms can regulate only such phenomena or the desired conduct and behaviour of people that the institutions of authority can control and direct to a sufficient (relevant) degree. This means that, e.g. such legal norms would not be reasonable which would require that teachers must ensure that every student knows all of the taught material perfectly or that every individual must only think well of others. In legal practice it would be impossible

22 Here I provide only a brief description of these measures. For more on this, see Cerar, 2006, pp. 41–48.

to sufficiently realize such rules or to control the course of their realization. Secondly, legal norms must regulate only those social relations for which the interference of the law is necessary. If a certain interpersonal relation is conflictual, this does not entail that it must necessarily be regulated by law. For example, breaking promises, forgetfulness, or excessive loquaciousness when in the company of other people can cause tension or conflicts between individuals, but this is not always a reason to regulate and punish such actions by law. Often in such situations moral and customary norms and the sanctions arising therefrom are sufficient. However, when, e.g. a broken promise causes an individual great material or psychological injury or when excessive loquaciousness leads to insulting a person, then the level of conflict is often no longer entirely manageable by resorting to only moral and customary means. Therefore, in the event of such, the law steps in – at least as an additional mechanism for preventing or settling the conflict. The criteria of the possibility and necessity of legal regulation are of course in close relation to the above-mentioned criterion of the effectiveness of the law.

e) **Orientation towards the external behaviour of individuals**. Legal norms largely regulate the external behaviour and conduct and relations of individuals. Only in exception must the law interfere with the internal world of the individual, when this is indispensable for its legitimacy and effectiveness. For example, in establishing the legal responsibility of an individual, as a general rule it is necessary to determine his true contractual will (not only his will expressed in the written contract), guilt (e.g. the intention to perpetrate a criminal act), sanity, etc.

f) **Compulsion and (state) sanctions**. Legal norms are of a compulsory nature, which also entails that in the final instance their realization is ensured by the state by means of compulsory measures carried out by state authorities competent for such (e.g. the police, inspectorates, state prosecutors, courts). However, the compulsory nature of legal norms does not necessarily entail that legal addressees actually perceive each individual legal principle or regulation as compulsory. In the event legal norms are morally, generally, and otherwise acceptable to the majority of citizens (e.g. the prohibition of murder), such norms are mostly

automatically or spontaneously respected by legal addressees, which is why they are compulsory as a general rule only for those individuals who violate them. On the other hand, the law also contains a great number of such legal norms which the legal addressees thereof to a large degree do not approve of morally or internally (e.g. some tax requirements), but they do, due to the compulsory nature of such norms, mostly act in accordance with them.

g) **Values**. If values are not taken into account, the law would be, in accordance with all the hitherto mentioned criteria of law, a mere form, which it would be possible to fill in with any selected content (matter). The law as a system of legal norms is therefore imbued with values such as social peace, order, justice, legality, and freedom. This is immediately evident with regard to some legal norms (e.g. the prohibition of torture or allowing free political and other kinds of association) since in the event of such, moral, customary, political, and other values are at issue, which are more or less generally well anchored in the social consciousness. At the other extreme there also exist legal rules which are in themselves seemingly neutral or indifferent with regard to values (e.g. determining a deadline for filing an appeal or the rule that a red light means "stop"). However, also in such cases it is certainly possible to perceive the presence of certain values when such "legal-technical" rules are related to their value-based starting point. Determining a deadline for filing an appeal, for example, on one hand protects the possibility of an individual to object to a decision of a state authority which he or she does not agree with (this concerns the protection of the personal integrity of the individual and his or her right to express criticism) and on the other hand establishes the necessary order in legal procedures, which cannot last forever. This alerts us to the fact that the law is an integral whole imbued with values in which individual values are differentiated with various intensities according to their individual parts.

If we take as our starting point the listed criteria of law, we can determine that the legal regulation of the school system in Slovenia in many aspects neglects their message and significance. For example, a considerable portion of the regulations regarding the school system

do not sufficiently take into account the criteria of the possibility and necessity of legal regulation. This entails that legal regulations regulate too many issues or regulate them in an excessively complicated manner, which is why, to some extent, school authorities and teachers simply do not implement them in practice[23], since if they did so they would not manage to carry out their basic work (which is, to a large degree, also determined by regulations[24]).

Furthermore, what is often overlooked is the real significance and message of the criterion of the conflictual nature of the law. Instead of the legislature regulating by laws and implementing regulations only those relations in the field of the school system that are already causing conflicts or really could cause such, legal acts often regulate relations which have been, up to that point, largely non-conflictual and which also do not demonstrate serious signs of potential conflict. Thus, excessive or only seeming concern for children's rights[25] or for the transparency of the work of schools often leads to the artificial establishment of new legal requirements and relations[26], which needlessly creates an opportunity for the occurrence of conflictual situations which otherwise would not even arise[27], or would only occur to a negligible degree and be resolvable by means of extra-legal mechanisms.

The field of values represents a special issue. How can legal values be harmonized with those values that are of key importance for the school system? If we connect this question to the above listed criteria regarding the possibility and the necessity of legal regulation and its conflictual nature, this brings us back to the already presented conclusion that in this respect a broader values-related problem is at issue, within which the law

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23 For example, schools often ignore those provisions in laws which require, in certain cases, one to act in accordance with the law on administrative procedures. Since complaints and disputes most often do not arise in connection with such, this unlawful practice remains largely unnoticed.

24 In such a manner, a vicious circle appears, which educators often call attention to. The regulations are simply too extensive for schools to be able to entirely follow them and at the same perform high quality educational work.

25 Of course, it is necessary to be aware that children's rights are a special treasure, which the law must appropriately protect in all important segments (for more on this topic, see Novak, 2004).

26 This is then followed by assigning new competencies to inspectorates or by establishing another authority, new legal procedures, sanctions, etc.

27 This is a situation reminiscent of a so-called self-fulfilling prophecy.

is only "partially to blame" for the decrease in the autonomy of the school system. With regard to this, the law to a large degree only reflects general social morals and mentality, which entails that it is only some kind of an "executive measure" of politics as the supreme concentration of such morals and mentality. If politics kept the law within the limits of its sphere, i.e. within the framework of the criteria of law, then legal values such as legal certainty, justice, legality, and freedom, would have a positive effect on the school system since they would enter into it only to such a degree and in such a manner that the necessary and beneficial frameworks for upbringing and educational processes would be established. However, due to the fact that in (our) society, which is confused in terms of values, the elites who establish and direct the organization and functioning of the school system, actually do not eliminate the confusion but practically ignore or even generate it[28], the legal regulation of the school system is inappropriate and consequently subdued or open conflicts arise between the representatives of the sphere of schooling and the performers of activities in the legal sphere (i.e. politicians, lawyers, bureaucrats, etc.), who have an extremely legalistic and apologetic stance towards legal regulations. This only contributes to the further growth of the well-known schism between the school system and the law, due to which educators often perceive the law as an unwelcome incursion into their own sphere, while lawyers (more precisely: performers of activities in the legal sphere) often underestimate the particularities of the field of schooling and are incorrectly of the opinion that it is possible to be active in the field of schooling merely on the basis of having a general knowledge of law (but with no specialist knowledge of the field of education).[29]

4 Concluding thoughts

The law and the school system are inevitably co-dependent.[30] The law is, in its ideal construction or form, a guardian of the freedom and autonomy of the school system, while the school system must, as part of its responsibility, adopt a respectful and responsible attitude towards

28 Of course, also honourable exceptions exist.

29 Heubert 1999, p. 7

30 Cf. Hehir & Gamm, 1999, pp. 205–239, who (in relation to the upbringing and education of children with special needs) call attention to the necessity of dedicated cooperation between the sphere of schooling and the legal-administrative sphere, with regard to which the authors suggest that further improvements in the system can be found in the concept they refer to as the "collaborative model of education reform".

the state as a state based on the rule of law. Sadly, practice in Slovenia deviates too much from such an ideal. Excessive and inappropriate legal regulation of the school system decreases the freedom and autonomy of such, which is reflected in partial neglect of the regulations in the sphere of the school system and consequently as the ineffectiveness of such regulations, as the increased aversion of educators to law, as excessive legal bureaucracy at the expense of teaching and other activities that are more important and beneficial to children, as a lack of motivation to educate on the part of teachers, and thus a lower quality educational process.

The school system needs the right measure of law, which can not be defined empirically or numerically. In order to ascertain the actual situation, a true dialogue and relationship based on trust must be established between educators, on one hand, and the performers of activities in the legal sphere, on the other. Both sides must listen to each other and establish responsible cooperation. The law must, as much as possible, adapt to the requirements of such an autonomous school system which will raise and educate young generations to be as independent in spirit (creative and having a love of knowledge) as possible and at the same time socially responsible persons, while the school system must, of course, fully follow the basic principles of a state based on the rule of law, which also demands that the school system respect human and other legal rights and follow the principles of non-discrimination, legal equality, legal certainty, justice, proportionality, and legality.

The mentioned dialogue and (further) building of mutual trust between the representatives of the sphere of the school system and those of the legal sphere must be approached with patience and farsighted vision. One must be aware throughout that in the law as well as in the school system the starting point and the final objective of our (common) efforts are always human beings. It would be naive to place the "blame" for the decrease in the autonomy of the school system on law as such or just on lawyers, who are in this respect only a part of the whole story. It is necessary to look at the value system of the society, which, due to the inappropriate functioning of the social elites and the lesser or greater (but in general, excessive) passivity and apathy of the citizens, undergoes a gradual deconstruction. In such a situation, which leads to a general disorientation in terms of values and consequently to damaging social phenomena (e.g. excessive materialism and individualism, demonstrating

a lack of respect or appreciation, consumerism, excessive competitiveness, lack of empathy, etc.), it is necessary, generally and especially in schools, to keep reminding people about and reinforcing the fundamental moral and commonsensical principles and practices. It is only in such a manner that in the future the performers of activities in the legal sphere will also be emotionally and intellectually mature enough to establish and dynamically maintain the right measure of law. Of course, this is only an ideal which we can never come close enough to. However, it must lead us away from those contemporary trends which have distorted this ideal and have blurred it to such a degree that, due to its increased unrecognizability, the law can, in the long run, turn into a mere and hypertrophied normative technique, and the school system into a robotized activity, which gradually but persistently deadens the human spirit.

Miro Cerar, Ph.D. is professor at the Law School of the University of Ljubljana, where he teaches Theory and Philosophy of Law and Comparative Law. In 1991–1992 he worked as Secretary of the Constitutional Commission that prepared the basic independence acts and the draft of the new Constitution of the Republic of Slovenia (1991). Since then he has been a permanent external consultant on constitutional matters to the Slovene parliament. In spring semester 2008 he was a visiting Fulbright professor at the Golden Gate University School of Law, San Francisco, where he lectured on Comparative Constitutional Law. Since December 2010 he has been the President of the Judicial Council of the Republic of Slovenia.

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1.02 Pregledni znanstveni članek

Kompetence za ekonomsko diplomacijo in mednarodno poslovanje; konvergenca ali divergenca?[1]

UDK: 338.2:339.5/.7

Marjan Svetličič

Univerza v Ljubljani, Fakulteta za družbene vede

marjansvetlicic@siol.net

IZVLEČEK

Članek ugotavlja ali so kompetence, ki jih potrebuje sodobni ekonomski diplomat, podobne ali različne od tistih, ki jih potrebuje mednarodni poslovnež, ter ali so se ekonomski diplomati z obstoječimi kompetencami sposobni soočati z izzivi tektonsko spreminjajočega se okolja. Priče smo obojestranski konvergenci potrebnih kompetenc; ekonomski diplomati prevzemajo vse več vrlin mednarodnih poslovnežev, ti pa morajo biti vse boljši diplomati. Posebna pozornost je namenjena zvezi med notranjimi in mednarodnimi ekonomskimi odnosi, globalni naravnanosti, vlogi varnosti ter dolgoročnega planiranja ter toleranci do napak. Ugotavlja se, da so kompetence ekonomskih diplomatov malih držav razlikujejo od tistih iz velikih držav in da sta med ključnimi kompetencami radovednost in pripravljenost na spremembe. Da bi zadovoljili potrebe, bi morali tudi spremeniti izobraževanje tako ekonomskih diplomatov kot mednarodnih poslovnežev.

Ključne besede: ekonomska diplomacija, mednarodno poslovanje, kompetence, mehka znanja

JEL: A11, D03, F21, F59, H77, M16

1 Uvod

Beremo: Angela Merkel odpira vrata nemškim podjetjem na Kitajskem. Kitajski predsednik svoje poti po svetu uravnava predvsem

1 Članek je del raziskave "Kako izboljšati učinkovitost slovenske gospodarske diplomacije", ki jo financira ARRS (V5-1039) in sofinancira Ministrstvo za zunanje zadeve RS.

sledeč ekonomskim interesom. Slovenski predsednik in premier v zadnjem času načrtujeta svoje obiske skladno z ekonomskimi interesi slovenskega gospodarstva. Meddržavne obiske spremljajo močne gospodarske delegacije, vse bolj v tiste države, ki smo nanje po osamosvojitvi popolnoma pozabili. Omeniti neuvrščene ali arabske države, v katerih so imela naša podjetja velik ugled, je bilo skoraj tako, kot če bi omenili komunizem. Škoda, kajti velja, da je ponovno osvajanje trgov zelo drago in da bi moral biti osnovni aksiom gospodarske politike poskusiti zadržati vsak trg, četudi je trenutno manj zanimiv, samo zato, da ne bi kasneje preplačeval vstopnine, če že imaš "abonmajsko" ceno iz poprejšnjih obdobij. Odkrivamo, da (politične) emocije stanejo.

Ekonomska diplomacija (ED) [2] postaja vse pomembnejša. Zakaj poprejšnji nasprotniki vmešavanja politike v gospodarstvo postajajo keynezijanci? Je vzrok temu kriza ali pa gre za kaj več? Kriza je gotovo naplavila cel niz novih problemov in hkrati državo kot njihovo rešiteljico. Toda ni le kriza tisto, ki je vrnilo državo na ekonomski parket. To so tudi tektonske spremembe v svetu, ko se centri gospodarske moči selijo na Vzhod (več v Svetličič & Sicherl, 2006). S tem oddaljenejši, manj poznani trgi postajajo osrednji. In podjetja, zlasti manjša, potrebujejo pomoč države v odkrivanju, spoznavanju in prodiranju na te trge. Vse to pa je mogoče uspešno le, če i) država s svojo politiko pravočasno spozna pomen teh trgov in tektonskih sprememb ter če ii) so podjetja s svojimi kadri sposobna prodreti na te trge. Ker gre za drugačne trge, oddaljenejše, tako fizično kot kulturno, so potrebne drugačne kompetence kot za sodelovanje s svojimi "starimi" znanci na bližnjih trgih.

Problem, ki ga želi ta članek poskusiti razrešiti, je ali ED razpolaga z ustreznimi kompetencami za soočanje z novimi izzivi in ali podjetja potrebujejo nova, drugačna znanja za soočanje z novimi izzivi. In drugič ali so te kompetence podobne, so za ED potrebne drugačne kot za mednarodno poslovanje (MP)? Ali gre za konvergenco ali divergenco potrebnih kompetenc in kakšne kompetence omogočajo uspeh v današnjih turbulentnih in nestabilnih pogojih na svetovnem trgu? Poglavje dve opredeli splošni koncept kompetenc, poglavje tri pa primerja

2 ED opredeljujemo kot bilateralno, regionalno ali multilateralno uveljavljanje gospodarskih interesov predvsem od diplomatov, pa tudi od drugih državnih in nedržavnih akterjev s ciljem maksimiranja nacionalnih interesov oz. dvigovanja blaginje prebivalcev. V malih državah ni smiselno ločevati različnih ED (na primer ekonomske, gospodarske, poslovne, podjetniške ali v celo intra podjetniške; glej Udovič, 2009, slika 16).

kompetence, potrebne za ED in MP. Poglavje štiri je posvečeno izbranim vidikom delovanja ED in menedžerjev, kot so zveza med notranjimi in zunanjimi odnosi, pomen globalne naravnanosti, pomen analize tveganj in tolerance do napak ter posebnosti malih držav. Peto poglavje analizira konvergenco kompetenc, šesto pa posebnosti malih držav. Zaključek povzame poglavitne ugotovitve in daje nekaj predlogov za politiko.

2 O kompetencah

Kompetence so sposobnosti učinkovito opravljati določene naloge. Perrenoud (1997) razume kompetence posameznika kot aktivacijo, uporabo in povezanost znanja, sposobnosti, motivov, samopodobe in vrednot, ki mu v kompleksnih, raznovrstnih in nepredvidljivih situacijah omogočajo uspešno opravljanje vlog, nalog in reševanje problemov. Vsebujejo tako trdo znanje kot veščine (mehko znanje) in ustrezno motiviranost za njihovo udejanjanje (Weinert, 2001). Trdo znanje se pogosto enači s formalno izobrazbo, saj je to znanje, ki se ga da kodificirati in pridobiti v šoli. Mehka pa so tista relacijska[3] neoprijemljiva znanja, ki jih je težko kvantificirati, kodificirati in skladiščiti ter prenašati, saj se nanašajo bolj na osebnostne značilnosti ali poteze ter vključujejo presoje in izkušnje. Skrivajo se npr. v odgovorih na vprašanja, kako in s kom se je treba dogovarjati, kako strokovno znanje izražati ter p(r)odati na enostaven in razumljiv način. Vedeti kako se nanaša na sposobnost izvajanja določenih nalog, vedeti kdo pa na to, kdo ima znanja o "*kaj in zakaj*" (trda znanja). Mehka znanja so osebna, skrita (tacitna), neformalizirana znanja, ponotranjene veščine, ki se jih pridobi z izkušnjami in z vajo. Izkušnje pa nekaj pomenijo le, če se udejanjajo na ustrezni strokovni podlagi. Veščine se nanašajo na procedure, spretnosti in inkulturirano znanje, vezano na kontekst (povzeto po Svetličič & Kajnč, 2009).

3 Splošna primerjava kompetenc ekonomske diplomacije in mednarodnega poslovanja

Teoretično je mogoče ED primerjati z odnosi znotraj transnacionalnih podjetij (TP)[4]. Pri njih gre za odnos med centralo in afiliacijami v tujini, pri

3 Ta so pogojena z določenim okoljem in določeno situacijo ter postajajo v negotovem okolju vse bolj pomembna.

4 Pri tem sledimo M. Casson-u, ki razvija splošno teorijo internalizacije, v kateri uporabi poslovno teorijo internalizacije na primeru držav, ki so lahko analogija firmi. Ko gre za

ED pa praviloma za odnos med ministrstvom za zunanje zadeve, vlado, oz. drugimi ministrstvi in ekonomskim diplomatom (več v Svetličič, 2011). Čeprav so tudi odnosi znotraj mreže TP zapleteni, so ti med ekonomskim diplomatom in njegovo centralo še zapletenejši. Ekonomski diplomat pogosto nima tako jasnih navodil kot afiliacije. Njegovih delodajalcev je več, s pogosto nejasnimi in tudi nasprotujočimi se cilji/navodili. Medtem ko se danes organizacija TP spreminja stran od premočne hierarhije k decentralizaciji (mrežna ali projektna organizacija, z več avtonomije v afiliacijah, z distributivnim vodenjem na osnovi enostavnih in fleksibilnih pravil[5]), je državna uprava še vedno zelo hierarhično organizirana, funkcionalno ali regionalno oddelčno organizirana. To duši tako potrebno iniciativnost in nujno fleksibilnost ekonomskih diplomatov. Čeprav je diplomacija bistveno starejša dejavnost kot MP, pa je slednje bolj dinamično in se hitreje odziva na spremenjeno zunanje okolje. Zato bi bila močnejša konvergenca tudi pri organizaciji zelo zaželena, saj se ED lahko marsikaj nauči iz organizacije in delovanja TP (povzeto po Svetličič, 2011).

Že ta primerjava navaja na ugotovitev, da so določene kompetence v obeh primerih lahko podobne, da pa so gotovo tudi pomembne razlike, tako ko gre za trda kot mehka[6] znanja/kompetence. Trdo znanje je potrebno ne pa zadostno za uspešno izvajanje nalog in enih in drugih. Pri ED pridobivajo pomen mehka znanja, saj naj bi ekonomski diplomati delovali bolj na področju vedeti kako in kdo, oziroma vključuje presoje, ki pa so lažje na temelju bogatih izkušenj. Uspešneje jih uveljavljajo ljudje s karizmo, ki znajo prepričati, ki imajo mehko moč[7]. Fukujama (2008) celo govori o tem, da svet danes vodijo šibke države, ker običajni instrumenti moči (kot je vojaška moč) ne delujejo prav dobro. Za takšen novi svet

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imperialno državo s kolonijami, je pa to analogno TP, saj ima donose s svojimi kolonijami tako kot centrala TP s svojimi afiliacijami (glej Casson et al., 2006).

5 Glej Nohria, 2006, str. 23.

6 To so: komunikacijske in pogajalske spretnosti, sposobnost mreženja, lobiranja, znanje jezikov medkulturnega komuniciranja in ter seveda uporaba in hitrost udejanjanja znanja. Na vse to v veliki meri vplivajo tudi prevladujoče vrednote v družbi (Svetličič & Kajnč, 2009).

7 Nye (2003) »sposobnost vplivanja na vedenje drugih, da dobimo rezultate, ki jih želimo,« opredeljuje kot mehko moč.

je potreben nov nabor veščin (Fukujama, 2008, str. 40) hitrega vnaprejšnjega prilagajanja nepredvidljivim spremembam.

Na področju ED raziskovalci zaznavajo brisanje razlik med diplomati in strokovnjaki ter porast menedžerskih nalog, ki jih opravljajo diplomati, še zlasti tisti iz manjših držav. Opravljanje strokovnih in menedžerskih nalog pa zahteva drugačna znanja in s tem tudi drugačno izobraževanje (Jazbec, 2008).

Pri MP imajo mehka znanja drugačno pojavno obliko in težo. Nanašajo se na neoprijemljive vire, kot so tehnologija, informacije, menedžerske, trženjske in podjetniške veščine, organizacijske sisteme, motivacijske strukture (Dunning & Lundan, 2008, str. 96). Ker gre pri MP za delovanje v medkulturnem okolju, morajo imeti kadri, ki se s tem spopadajo, specifične kompetence. Beamish & Killing (2001, str. 178–195) med takšne kompetence uvrščata: sposobnost razvijanja in uporabe strateških veščin, upravljanja sprememb in kulturnih raznolikosti, delovanje v fleksibilni organizacijskih strukturah in timih, sposobnost odprtega komuniciranja ter učenja in prenosa znanja v organizaciji. Zlasti pomembne kompetence so mednarodna usmerjenost, mednarodne marketinške sposobnosti, mednarodna inovativnost in mednarodna trženjska usmeritev (glej Knight & Kim, 2009). Raziskave, ki se nanašajo na vodstvene kadre v podjetjih, kažejo, da imajo vodilni najšibkejše kompetence prav na področju medkulturne občutljivosti, uvajanja sprememb in voditeljstva. Zato tudi ne preseneča, da je večji problem od samega začrtovanja strategij, kako njihove cilje udejanjati (Hrebiniak, 2005), in prav to je naloga tako menedžerjev kot ekonomskih diplomatov.

Fragmentirana, integrirana mednarodna proizvodnja, največ v režiji TP nalaga nove izzive. Tudi ekonomski diplomati se morajo zavedati teh sprememb in v svojem delu večjo težo dajati zahtevnejšim oblikam mednarodnega poslovanja, saj sodobne komunikacije omogočajo hitre in lahko dostopne informacije o tradicionalnih oblikah MP. Manjka pa ocena zanesljivosti teh, sicer dostopnih informacij, njihove kakovosti. In to je naloga ekonomskih diplomatov. Pri slednjih tradicionalni marketing izgublja pomen, pridobivajo pa drugi načini uveljavljanja vmesnih proizvodov brez blagovnih znamk. Med mednarodnimi poslovneži ter ekonomskimi diplomati obstoja niz podobnosti, ampak tudi razlik (tabela 1).

Tabela 1: Primerjava med nalogami menedžerjev in ekonomskih diplomatov

Naloge menedžerjev	Naloge ekonomskih diplomatov
dobri rezultati	zadovoljiti stranke (vse bolj podjetja), doseganje ciljev
sodelovanje	znotraj ministrstva(tev), s podjetji, z inštituti, doseči povratni tok informacij iz prestolnice
določanje prioritet	ne le kot jih določajo nalogodajalci ampak vse bolj samoiniciativno glede na mesto službovanja
upravljanje	upravljati celotno raznovrstno mrežo nalogodajalcev in strank, potreba po manjši hierarhiji od običajne v upravi
izvrševanje	učinkovitost (glede na sredstva) in uspešnost (efektivnost) glede na cilje, metode
timsko delo in razvoj kadrov	stalno prenašati svoja znanja v prestolnico in drugim sodelavcem ter strankam
razreševanje konfliktov	med javnimi in privatnimi interesi ter znotraj njih
zaupanje in odgovornost	vzpostaviti večje zaupanje v pomen ED

Vir: lastna tabela in Praček, 2010.

V obeh primerih gre za zadovoljevanje strank in potrebo po učinkovitem sodelovanju za doseganje ciljev. Vendar so naloge ekonomskih diplomatov celo zapletenejše, saj morajo usklajevati med različnimi interesi/ustanovami/strankami in biti bolj samoiniciativni.

Spremenjene razmere v globalni ekonomiji s fantastičnimi možnostmi dostopa do različnih informacij in znanj terjajo ne le različne funkcije ED pač pa tudi različna znanja/kompetence. Trda znanja so vse bolj dostopna širokemu krogu. Predvsem je pomembno znati oceniti pomen in zanesljivost informacije in kako do nje priti čim prej, po možnosti pred drugimi, in jo še hitreje sporočiti dalje. Gre za ozadje informacije (kdo, zakaj, kako, kdaj) ker tako se omogoči njihovim uporabnikom, da izkoristijo priložnost[8], ki se pojavi na trgu. Dosedanje napake ED so bile posredovanje sicer dostopnih podatkov na internetu, pa še to

8 Porter (1990) v svojem diamantu konkurenčnih prednosti poudarja dva dejavnika, ki sta v tem kontekstu pomembna. Prvič vlado, ki pomembno vpliva na konkurenčne prednosti in (ED je sestavni del redne dejavnosti vlad) ter priložnosti. Le-te lahko en ekonomski diplomat najde, drugi pa ne in tako omogoči ali onemogoči izkoristiti poslovno priložnost. Hitrost postaja ključ uspeha zato tudi pri ED.

z velikanskim zamikom namesto, da bi se ukvarjali z interpretacijo pomena teh informacij za konkretne situacije. Nujen je premik od posredovanja informacij k njihovi evalvaciji[9] vrednosti, realnosti in možnih posledic in predvsem zagotoviti njihovo pravočasno posredovanje.[10]

Mehka znanja, ki naredijo razliko med ljudmi, ki znajo, in tistimi, ki znajo znanje uporabiti in uveljaviti, ki so sposobni uspešne artikulacije svojih znanj, postajajo pomembnejša. Churchill je že zdavnaj zatrdil, da ni pomembno, koliko znaš, temveč kako znaš to izraziti. Kar 40 % angleških delojemalcev je v anketi na primer zatrdilo, da najbolj cenijo komunikacijske spretnosti, 39 % delovno etiko, 32 % osebnostne značilnosti, medtem ko so formalni pismenosti pripisali le 26 %, računanju 22 % in formalni izobrazbi 25 % (glej Svetličič 2007, str. 233). Vse to ne pomeni nič, če ne znaš tujih jezikov in nisi sposoben uspešne medkulturne komunikacije. V času globalizacije poslovanja in vseh drugih čezmejnih stikov je to znanje neposredna konkurenčna prednost, posebno v stikih s kulturami, ki veliko dajo na svojo identiteto. Vsaj skromno znanje jezika domačinov je pogosto lahko vstopnica za poslovanje ali vsaj zelo učinkovit katalizator le-tega in s tem krepitve konkurenčnih prednosti.

Tradicionalne kompetence ne zagotavljajo spopadanja z novimi postkriznimi izzivi[11] selitve razvojnih impulzov v Azijo, medkulturnega poslovanja, triangularne diplomacije (države in transnacionalna podjetja), vse večje vloge mednarodnih in nevladnih organizacij do nadzorovanja in urejanja globalizacije, zlasti finančnih pretokov in soočanje z novimi problemi klimatskih sprememb, pomanjkanja vode, energije in surovin

9 Ekonomski diplomat bi moral biti sposoben pravočasno opozoriti ustrezna ministrstva, združenja in podjetja na primer o tem, da je na zasedanju WTO bil sprejet sklep, da bo mednarodni tekstilni sporazum prenehal veljati čez 10 let ali da je prišlo kasneje do podaljšanja tega roka. Na ta način bi se poskušalo pomagati podjetjem, da bi se na to ustrezno in pravočasno pripravila, ne pa da so to z velikim začudenjem "odkrila" šele mesec dni preden je prišlo do tega. Da ne bo pomote, to se ne nanaša le na slovenska podjetja pač pa za večino evropskih, saj je v Evropi takrat zavladala panika v bojazni, da bo poplava Kitajskega tekstila uničila evropsko tekstilno industrijo. Podobno velja za priprave ustreznih direktiv v EU ali četudi neobveznih standardov v OECD ali drugih mednarodnih organizacijah.

10 Justinekova raziskava je pokazala, da so bila slovenska podjetja najbolj nezadovoljna s hitrostjo odziva ekonomskih diplomatov in kakovostjo posredovanih informacij. Njegov eksperiment pa da mnoga povpraševanja podjetij ostanejo brez odgovora (Justinek, 2010, str. 7 in 144–148).

11 Na primer obvladovanje tveganj, sposobnost napovedovanja … (glej več v Svetličič, 2011).

itd.[12] Analiza slovenskega predsedovanja Svetu EU je jasno pokazala, da so bile najbolj deficitarne prav mehke veščine (še najbolj znanje angleščine, zatem retorika, sklepanje poznanstev pa tudi timsko delo). (glej Svetličič in Kajnč, 2009).

Primerjava med zasebnimi in javnimi organizacijami je pokazala, da morajo biti javni uslužbenci bolj vešči v vzdrževanju dobrega sodelovanja s politiko obeh držav. To velja tudi za ekonomske diplomate, saj je njihova naloga ne le *ex post* obveščati domovino in relevantne akterje v njej o sprejetih novih zakonih in drugih ukrepih, ki jih sprejmejo lokalne vlade, pač pa to storiti še v fazi priprave takšnih zakonov/ukrepov. To pa je mogoče le z vzdrževanjem dobrih formalnih in neformalnih stikov z lokalnimi akterji in je lažje tistim, ki so vešči tudi neformalnega komuniciranja.

4 Primerjava kompetenc po posameznih vidikih

Splošna primerjava podobnosti in razlik med ED in MP tudi izhajajoč iz podobnosti in razlik med javnimi in zasebnim sektorjem (glej Svetličič, 2011) je izpostavila razlike in podobnosti, konvergentne in divergentne tendence zlasti na naslednjih vsebinskih področjih:

a) zveza med notranjimi in zunanjimi ekonomskimi odnosi,
b) globalno mišljenje, globalna naravnanost,
c) tveganja in varnostna kultura,
d) dolgoročno planiranje oz. priprava scenarijev.

4.1 Zveza med notranjimi in zunanjimi ekonomskimi odnosi

Prva stična točka med ED in MP je povezanost notranjih in zunanjih (ekonomskih) odnosov. MP je praviloma posledica evolutivnega razvoja podjetja, ki postopno širi svojo dejavnost iz notranjega na zunanje trge. Prav tako je ED zelo odvisna od domače politike in razmer. Prioritete ED določa vladajoča elita. Ekonomski diplomati naj bi bili sicer izbrani po strokovnih kriterijih, toda praktično so vedno prisotni tudi politični kriteriji, tistih, ki jih izbirajo. Tudi primerjava med profitnimi in neprofitnimi organizacijami je jasno pokazala, da je pri neprofitnih mnogo pomembnejša kompetenca vzdrževanje dobrih odnosov s politiko. Torej

[12] Največ tujih neposrednih investicij (TNI) se v prihodnjih letih na primer predvideva na področju surovin in bistveno manj na področju predelovalne industrije.

je zveza med notranjimi in zunanjimi odnosi močnejša kot pa pri MP. Trganje te zveze povzroča probleme. Veliko neskladje med notranjim in zunanjim ovira uspešno ED tako kot MP, če ni organske povezave med rastjo podjetja doma in v tujini. Zato je za ekonomskega diplomata izjemno pomembno razviti dobre odnose ne le z gospodarstvom pač pa tudi s političnimi akterji na obeh straneh meje. Podobno pa je za mednarodnega poslovneža obvladati osnovne diplomatske tehnike, saj se v tujini sooča tudi z uradniki lokalne vlade, sindikati, civilno družbo in mediji.

4.2 Globalno mišljenje, globalna naravnanost

Tako gospodarstveniki kot ekonomski diplomati morajo biti, če želijo biti uspešni, globalno naravnani. Morajo razviti globalno mišljenje, ki bo preprečilo, da bi vgrajeni filtri zavračali pomembne informacije, ki prihajajo s sveta, pač pa da spreminjajo svoj mišljenjski vzorec s pomočjo diferenciacije in integracije. Bistveno je kombinirati hitrost in ustrezno reakcijo (glej Gupta & Govindarajan, 2002, str. 200 in 203). Globalna miselnost je osnovna značilnost in predpostavka uspešnega MP in ED, zlasti v primeru malih držav. Takšna miselnost omogoča odprtost do novih idej in predlogov do iskanja "modrih oceanov" [13]. Pogoj za to je interdisciplinarnost, saj se brez nje ne more razviti globalne miselnosti. Čeprav je potrebna pri obeh poklicih, ima interdisciplinarnost večjo težo, ko gre za ED. Zato mora ekonomski diplomat imeti vedno pred sabo ne le enega trga, pač pa vsaj celo regijo, v kateri je, in vedno izhajati iz položaja morebitnih tekmecev v regiji in globalnem gospodarstvu. V te namene pa mora imeti znanja tako iz makroekonomije in politične analitične sposobnosti kot iz mikroekonomije in komunikacijske veščine, da pride do ustreznih informacij iz teh področij.

Nujnost globalne naravnanosti še bolj velja seveda za mednarodnega poslovneža, saj se je izkazalo, da je konkurenčnost danes zaradi njihove globalne optimizacije dejavnosti bolj pogojena z multinacionalnostjo kot pa z lastnino (Bellak, 2004; Castelani & Zanfei, 2006). Zanjo pa potrebujemo veliko več in drugačnega znanja.

13 Po Kim-u in Mauborgne-ju (2005) so to nove priložnosti na trgu, kjer ni konkurence, v bistvu kreiranja novih tržnih niš, za razliko od tam, kjer konkurenca je ("rdeči oceani").

Sedanja kriza je še posebej izpostavila nujnost globalne naravnanosti in to navkljub vse večji sinhronizaciji ekonomskih ciklov med državami/regijami. Države, ki so tesnejše vpete v mednarodne tokove, so bile sicer močneje prizadete, toda tiste, ki so pravočasno zaznale, da se dinamika rasti seli v hitro rastoča gospodarstva, so bolje prebrodila krizo. Prva naloga ekonomskih diplomatov je zato ne le zaznati tektonske spremembe v svetu pač pa na njih proaktivno opozarjati podjetja in jim pomagati premagovati tradicionalno vpetost na bližnje trge. Druga pa, otresti se tradicionalnega dojemanja diplomacije kot "visoko leteče salonske" dejavnosti, ki si ne sme mazati rok s pritlehnimi z gospodarskimi interesi. Z besedami Kuniča (2005, str. 9–14) problem gospodarske diplomacije je tudi v miselnosti diplomatov, ki ekonomijo razumejo kot "nizko politiko", medtem ko sebe razumejo kot del "visoke politike".

4.3 Tveganja in varnostna kultura

Čeprav analize tveganj niso nove, se je danes zaradi vse večje nepredvidljivosti in negotovosti globalnega okolja njihov pomen bistveno okrepil. Ne nazadnje tudi zato, ker obstaja močna povezanost med zaupanjem in MEO: močnejše zaupanje, več trgovine in TNI. Zato je ključnega pomena, da ED okrepi informiranje o partnerskih državah in s tem medsebojno zaupanje, ker z boljšim informiranjem nezaupanje pada in s tem padajo ovire za medsebojno sodelovanje (glej Guiso et al., 2005, str. 25). Tudi struktura in relativna teža posameznih tveganj se je spremenila. Tradicionalnim ekonomskim in političnim tveganjem je treba dodati geopolitična, okoljska, družbena in tehnološka tveganja (glej World Economic Forum, 2010). Ekonomski diplomati so dolžni poslovneže opozarjati na takšna tveganja. Tudi zato, ker že bežen pogled na njihove analize pokaže, da so bile pogosto točne, da so dobro predvidele tveganja (glej tabelo 5 v World Economic Forum, 2010).

Internetizacija oz. informatizacija vsega poslovanja izpostavlja ranljivost sistema (prekinjanje dostopa, sesutja baz, nevarnost dostopa nepoklicanih uporabnikov). *The Economist* zato upravičeno govori o možni "vojni pete domene" (3. 7. 2010, str. 22–24), saj je digitalna infrastruktura postala "strateški nacionalni vir". Predsednik Obama je navedel podatek, da so ZDA zaradi virtualne vojne izgubila leta 2009 1.000 milijard dolarjev. Zaradi nevarnosti vdora hekerjev ali internetnih teroristov so tako ZDA kot VB vzpostavile leta 2010 posebne enote, ki skrbijo za varnost teh sistemov. V času ko je okoli 140 milijard

elektronskih sporočil neželenih in je virtualno vohunstvo, po Jim Lewisu (Centre for Strategic Studies, Washington) »postalo največja polomija po izgubi nuklearnih tajnih podatkov«, je to še kako potrebno.

Bolj ko svet postaja ranljiv in nepredvidljiv, bolj ko je pomembno neoprijemljivo, skrito znanje, pomembnejša postaja varnostna kultura. Po eni strani kot obramba lastnih interesov in po drugi strani kot dejavnost proaktivne krepitve konkurenčnih prednosti. V neizprosnem konkurenčnem boju se podjetja/države vse bolj poslužujejo tudi nelegalnih poti pridobivanja informacij/znanja, zato je skrb za varovanje znanja vse pomembnejša in se pridružuje pomenu pridobivanja novega znanja[14]. Ekonomski diplomati bi morali bolj sistematično opozarjati poslovneže o teh razsežnostih mednarodnega poslovanja, obenem pa paziti, da sami ne razkrivajo informacij o podjetjih, ki jih ta ne želijo razkriti[15]. Ekonomski diplomat mora torej dobro vedeti, kdaj si prizadevati za objavo česa, da ne bi odkril niš, za katere podjetja želijo, da ostanejo skrite. To pa je mogoče le, če je v stalnih in tesnih stikih s poslovneži.

Zato poslovno obveščevalna dejavnost (zbiranje, organiziranje in uporaba poslovnih informacij), vohunstvo o konkurenci (podatki o tekmecih in trgih in izobraževanje) in industrijsko vohunstvo (zbiranje podatkov o proizvodnji) ter skrbno preverjanje dobrega gospodarja in socialne poizvedbe (o kadrih)[16] pridobivajo na pomenu. Trg poslovno obveščevalne dejavnosti se ocenjuje na vrednost dveh milijard dolarjev letno (Peruško, 2004, str. 2). Ta vidik je še posebno pomemben v Sloveniji, kjer so »poslovne poizvedbe premalo priznane in vrednotene ter zato podcenjene« (glej Gjerek, 2009, str. 10, ter 120–132).

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14 Predsednik Bush je na primer leta 1992 posebej izpostavil pomen gospodarskega področja v kontekstu nacionalne varnosti. Clinton je nato ustanovil Nacionalno Ekonomski svet in uvedel neposredno poročanje CIE tudi finančnemu, gospodarskemu in zunanje ekonomskem področju dela. Ustanovil je Odbor za pospeševanje in koordinacijo trgovine in Podporni center. Njune naloge pri nastopanju na tujih trgih so koordinacija dela med podjetji in obveščevalno skupnostjo.

15 Posebno to velja v primeru *skritih zmagovalcev*, kajti ena od njihovih značilnosti je, da praviloma ne želijo razkrivati podatkov o svojem vodilnem položaju na trgih, ker ne želijo, da bi konkurenti poznali skrivnost njihovega uspeha (glej Simon, 2010, str. 14).

16 Za razliko od vohunstva gre pri poizvedbah za dejavnosti iskanja, obdelave in difuzije informacij iz javno dostopnih virov in le v manjši meri za tajne operacije (Gjerek, 2009, str. 9).

4.4 Dolgoročno planiranje/scenariji

Tradicionalni načini planiranja postajajo v negotovih, turbulentnih časih, polnih diskontinuitet in nihanj, preživeti. Ustrezneje je torej pripravljati dolgoročne scenarije in predvideti možne alternativne reakcije v primeru uresničevanja enega ali drugega. Skratka, potrebna je večja prilagodljivost, ki pa zahteva bistveno več znanja in kompetenc. Zato Bryan in Hoffman predlagata firmam, naj:

- opustijo načrte predvideti prihodnost,
- okrepijo svojo sposobnost menedžerskega prilagajanja procesov in sposobnosti v pogojih negotovosti in opustijo zacementirane koledarje in plane. Lotijo naj se raje permanentnega pregledovanja makroekonomskih kazalnikov v realnem času, okrepijo kontingenčno planiranje in prilagodljivost v opcijah (Bryan & Hoffman, 2009, str. 3). Menedžerji bi morali ovrednotiti poslovanje ali vsak mesec (43 %) ali vsako četrtletje (35 %) ali celo vsak teden (7 %) (Dye et al., 2009, str. 6).

Podobno velja tudi za ED, ki bi tudi morala biti fleksibilnejša, morala bi znati predvidevati in stalno kritično ocenjevati svoje strategije[17]. Kunič (2005, str. 9–14) ugotavlja, da so politiki pri aplikaciji potreb gospodarstva prepočasni, saj morajo vsako zadevo uskladiti, medtem ko gospodarstveniki delujejo po načelu *hic Rodos*, *hic salta* in običajno nimajo časa za dolgotrajna usklajevanja. Počasnost se je pokazala tudi kot značilna razlika med vodenjem v javnih in neprofitnih organizacijah. Višjo odzivnost pa je mogoče doseči le, če si vnaprej pripravljen tudi na nepredvidljivo. Funkcija scenarija prihodnjega razvoja je prav pripraviti se na različne scenarije, tudi na nezaželen razvoj dogodkov. Zato so potrebne *pre mortem* analize potencialnih problemov ter odločanje na osnovi intuicije, ne le na osnovi robustnih, ocen/predvidevanj. Ta metoda je s spodbujanjem kreativnega mišljenja, kot metodi pridobivanja več različnih mnenj (več v Svetličič, 2011) zato primerna tako za poslovneže kot ED. Obojim bi morala *pre mortem* analiza postati del miselnega vzorca.

17 Več v Svetličič, 2011.

5 Konvergenca kompetenc

Transformirani MEO in intenzivno vključevanje novih akterjev v mednarodne odnose (MO) zahtevajo nove kompetence tako poslovnežev kot ekonomskih diplomatov, da bi bili sposobni reševati odnose v trikotniku med državami, med državami in podjetji ter med podjetji samimi. Saner in Yiu sta s primerjavo izobrazbe, pomena kompetenc ter potrebnih kompetenc za postmodernega diplomata implicitno ugotovila, da so meje med ED in MP vse bolj zabrisane, da obstaja precejšnja konvergenca med potrebnimi kompetencami za ED in MP (Saner & Yiu 2003, str. 22). Iz njunega pregleda potrebnih kompetenc jasno izhaja, koliko kompetenc MP je potrebnih za "postmoderno ED".

Tabela 2: Ključne kompetence za ekonomsko diplomacijo

Poslovna šola/izobrazba	Izobrazba na diplomatskih akademijah	Kompetence so posebej primerne za	Kompetence za postmoderno diplomatsko okolje
Splošni menedžment	Zgodovina diplomacije	•♦ •♦	- Poznavanje diplomatskih prijemov - Zmožnost vplivanja na diplomatski proces
Strateški menedžment	Sklepanje sporazumov	•♦ ♣•♦	- Poznavanje ključnih mednarodnih poslovno-pravnih standardov - Možnosti vplivanja na oblikovanje zakonov pri ključnih mednarodnih organizacijah (WTO, ILO, UNEP, WIPO, OECD).
Menedžersko računovodstvo	Mednarodno pravo	•♦ ♣•	- Poznavanje delovanja mednarodnega prava in arbitraže - Poznavanje učinka 'poročanja podjetij deležnikom'
Finančni menedžment	Mednarodna ekonomija	♣• •♦	- Poznavanje zgodovine in logike ne-ameriških teorij in praks - Poznavanje vpliva mednarodnih finančnih inštitucij (IMF, WB, Pariški klub, Londonski klub, US FRB, BIS)
Kadrovski menedžment	Mednarodne in nadnacionalne organizacije	•♦ ♣•♦	- Poznavanje strukture in procesov odločanja v nadnacionalnih organizacijah (UN, EU, NAFTA, ASEAN etc) - Možnosti vplivanja teh organizacij na neposredne ali posredne načine

Se nadaljuje na naslednji strani

Marketing	Regionalne in državne študije	•♦ •	- Poznavanje medsebojnega vplivanja med ekonomijo, politiko in kulturo po regijah ali državah - Sposobnost proaktivno promovirati možnosti v regiji za poslovno diplomacijo
Mednarodni menedžment	Teorije mednarodnih odnosov in sodobne zgodovine	♣•♦	- Poznavanje procesa odločanja v ključnih državah (domače ali tuje) - Sposobnost priprave analize političnega rizika glede na ključne deležnike v investicijskih projektih
Operativni menedžment	Upravljanje z delegacijami, ambasadami in konzulati	♣•♦ ♣	- Poznavanje mehanizmov kriznega menedžmenta in ustrezne vloge diplomacije in /vlade - Sposobnost intervenirati v imenu podjetja
Informacijski menedžment	Sodelovanje z mediji	♣•♦ ♣	- Obvladovanje javnega nastopanja in medijev (pomembnih govorov, TV intervjujev, novinarskih konferenc) - Upravljanje informacijskega sistema ekonomske diplomacije, ki podpira strateško planiranje glede na menedžment deležnikov
Organizacija in spremembe	Pogajalske veščine (bilateralne, multilateralne in plurilateralne)	♣•♦	- Obvladovanje mednarodnih pogajanj in vplivanje na pogajanja (bilateralna, multilateralna, plurilateralna)
Kvantitativne metode	Diplomatsko obnašanje, protokol, sodobna zgodovina	•♦ ♣♦	- Obvladovanje diplomatske prakse in protokola - Obvladovanje analitičnih orodij npr. analize deležnikov, njihovega zadovoljstva, planiranje scenarijev itd.

Kompetence so posebej primerne za:
♣ ekonomske in komercialne diplomate
• poslovne diplomate
♦ transnacionalne nevladne diplomate

Vir: prilagojeno po Saner, Yiu & Sondergaard (2000)

Vidimo, da so v petih od 21 vrst kompetenc potrebnih za postmoderno diplomacijo (zadnji stolpec v tabeli 2) potrebne vse vrste kompetenc. Razen pri eni pa sta potrebni dve vrsti. Najpogosteje se pojavljajo enake kompetence v primerih poslovne in transnacionalne diplomacije[18]. Med 21 vrstami kompetenc je samo 8 takih, ki bi jih lahko

18 Ekonomska in komercialna diplomacija se ukvarja z vprašanji ekonomske politike v MO in z uveljavljanjem komercialnih interesov svoje države. Poslovna z odnosi znotraj multinacionalnih podjetij in njihovim okoljem, transnacionalna diplomacija pa s čezmernim lobiranjem, tudi z nevladnimi organizacijami (Saner & Yiu, 2003).

ožje definirali kot specifično diplomatske. Vse druge so bolj poslovne. Očitno se potrebne kompetence za ED bolj približujejo tistim potrebnim za MP kot obratno. Tako v primeru MP kot ED se je treba osredotočati. Uspeh je odvisen od osredotočanja na ključne konkurenčne prednosti/kompetence države/podjetja. To velja posebej za male države, ki lahko s specializacijo na področja svojih primerjalnih prednosti krepijo svojo uspešnost z delovanjem ED (glej Baillie, 1999). Podjetja pa se morajo v zaostrenih pogojih osredotočati na svoje ključne sposobnosti in tako specializirati na izvajanje tistih nalog, pri katerih so najboljše, boljše od drugih.

Tako ED kot MP vse bolj uporabljajo podobne vire informacij le da z drugačnih zornih kotov. Oboji morajo veliko več pozornosti posvečati informacijam o mogočem prihodnjem razvoju, o poslovnih tveganjih (zlasti finančnih), o razvoju konkurence ter medkulturnih razlikah. Pri zadnjih naši poslovneži po lastnih ocenah delajo največ napak. Pri ED je to poznavanje še pomembnejše, saj gre za še občutljivejše odnose s politiko države pri izvajanju funkcije javne diplomacije. Primerjava med profitnimi in neprofitnimi organizacijami je tudi pokazala, da so pri neprofitnih pomembnejše kompetence obvladovanja medkulturnih razlik (glej Praček, 2010).

Pri tem ne smemo pozabiti, da so medkulturne razlike tudi v domačih skupinah in se je treba nanje ustrezno pripravljati in odzivati, saj njihovo nepoznavanje lahko preprečuje prenos znanja v medkulturnih skupinah. Vedeti namreč moramo, da je "tuje" znanje sprejeto le, če je "tuja" oseba čustveno sprejeta (sicer so: čudaki, nadležneži, ali celo pomenijo grožnjo). Za uspešno premagovanje medkulturnih razlik je nujno krepiti (uvodne) neformalne stike. Ti so pri ED še pomembnejši kot pri poslovnežih.

Različne uteži, ki jih imajo kompetence za uspešno mednarodno poslovanje ali za uspešno ED, izhajajo iz spremenjene vloge, pogojev in načinov MP ter spremenjene vloge dejavnikov konkurenčnosti. Temu primerno se spreminjajo tudi kriteriji izbora, pri katerih tradicionalni kriteriji, na primer izobrazba, postajajo samo potrebni, ne pa zadostni pogoj za izbor. Pridobivajo pomen kompetence kot so medosebne spretnosti, vodenje timov, sposobnost intelektualnega vodenja, sposobnost spodbujanja drugih, komunikacijske in pogajalske veščine, interdisciplinarna znanja in sposobnost vplivanja ter ne nazadnje izkušnje na različnih kontinentih.

6 Posebnosti malih držav

Za male države ima ED relativno večjo težo kot za velike. Prvič to izhaja iz nujnosti večje vpetosti v mednarodne ekonomske odnose (MEO) malih držav in seveda bistveno intenzivnejše internacionalizacije dejavnosti njihovih podjetij. Celo diplomati velikih držav si dajejo kot visoko prioriteto pospeševanje ekonomskih stikov[19]. Druga specifičnost je, da se male države pri prodiranju na svetovni trg, ob porastu pomena ekonomij obsega in sinergij ter mednarodnega urejanja MEO, srečujejo po eni strani z manj ovir (liberalizacija mednarodne trgovine) po drugi strani pa z več ovirami (konsolidacija trgov, oligopolizacija svetovnega trga, pravila WTO in drugih MO omejujejo njihove strategije in ekonomske politike). Tretjič pa na večji pomen ED malih držav vpliva sprememba v konfiguraciji pogajalskih moči malih držav in njihovih firm. Po eni strani gre za dostop do proizvodnih dejavnikov, po drugi pa za nadzor nad profiti in rentami, ki izhajajo iz MP. Pogajalska moč držav temelji na nadzoru na teritorijem in delovno silo, podjetja pa razpolagajo s tehnologijo, kapitalom oziroma imajo do njih boljši dostop (glej Stopford & Strange, 1991, str. 215). Grosse in Behrman (1992) trdita, da so viri držav/vlad: velikost trga in razpoložljivi proizvodni dejavniki, viri podjetij pa sposobnost kreirati vrednost (torej tehnologija, izdelki, znanje, trg) in zaposlitev.

Glede na majhnost, upoštevaje trde dejavnike moči, imajo tako posledično male države bistveno šibkejšo pogajalsko pozicijo kot velike. Male države se tudi manj uspešno poslužujejo trdih, agresivnejših pogajalskih taktik saj nimajo možnosti takšna trda stališča (grožnje) podpreti z uspešnimi ukrepi. Ti lahko izzovejo tudi povračilne ukrepe močnejših držav. Takšne agresivnejše taktike niso najbolj kredibilne, kadar jih uporabijo šibke države, ne le ko gre za mednarodno areno pač pa tudi za notranje politične razmere. Posebno če pred tem ne izkoristijo možnosti poiskati zaveznike in podrobno pojasniti svoja stališča. Argumenti sami po sebi v kriznih situacijah niso uspešni, če jih ne spremljajo ustrezna pojasnila, ustrezno prepričevanje. Poleg tega imajo male države šibkejše alternative, ki poleg razpolaganja z viri moči krepi pogajalsko pozicijo (glej Dur & Gemma, 2010, str. 564, 565). Pomembno moč daje malim

19 Na primer ambasador zelo velike države v eni od tranzicijskih držav mi je že leta 1994 na vprašanje čemu bi dal prednost, če bi imel na izbiro sestanek, ki bi omogočil večji posel svoji firmi ali sestanek na temo bolj splošne politične narave, narave globalnih mednarodnih odnosov, jasno povedal, da bi dal prednost ekonomskim interesom.

državam sposobnost ustvarjanja koalicij, saj z njimi lahko kompenzirajo siceršnje šibke pogajalske vire[20]. Prav zato je pogajalska moč malih držav pogojena z močjo njihovih firm. Posledično je za njih ED bistveno večjega pomena.

Ne samo večja teža ED, tudi funkcije in področja dela ED malih države se razlikujejo. Diplomati malih držav se morajo več ukvarjati s tem, kar smo imenovali mikro ED, morajo skrbeti tudi za posamezne interese firm. Pri tem se lahko ekonomski diplomati malih držav lahko učijo tudi iz izkušenj "skritih zmagovalcev" (Simon, 2010). Skrivnost njihovega uspeha bi lahko strnili v naslednje značilnosti:

a) osredotočanje, specializacija na svoje ključne prednosti in ozke niše,
b) globalna naravnanost od vsega začetka (podobni so rojenim multinacionalkam),
c) osredotočanje na stranke, uporabnike,
d) hitro odzivanje, izkoriščanje prednosti prvega, fleksibilnost,
e) visok pomen mehkih dejavnikov (kultura/pripadnost podjetju, odnos do zaposlenih, lojalnost),
f) ambiciozni cilj biti vodilen na svojem področju,
g) skrivnostnost, delovanje izza medijskih luči,
h) stabilni menedžment, ki se pogosto ne spreminja niti 20 let,
i) razvoj majhnih korakov (tudi pri inovacijah) in ne revolucionaren razvoj.

Podobnost z veliko bolj splošnimi usmeritvami, ki jih daje teorija malih držav, je očitna. Tudi ta predlaga osredotočanje na nekaj ključnih prednosti, specializacijo, izogibanje konfliktov, fleksibilnost in hitro reaktivnost (glej Bailie, 1999; Bunse, 2009; Thorhallsson, 2000 in 2006). Thorhallson jasno navaja, da lahko majhne države svojo nemoč bistveno vplivati na odločanje v EU kompenzirajo z dobrimi odnosi z uradniki Komisije.

20 Slovenija je tu zelo šibka, saj je med najmanj zaželenimi partnerji za sklepanje koalicij v EU (glej Naurin & Lindahl, 2008).

7 Zaključek

Zaradi tektonskih sprememb v svetu in vse večje prepletenosti in soodvisnosti mednarodnih odnosov in mednarodnega ekonomskega sodelovanja prihaja do vse večje konvergence potrebnih kompetenc za uspešno mednarodno poslovanje in ekonomsko diplomacijo. Podobno velja tudi za menedžment javnih in zasebnih organizacij. Zdi se da ekonomski diplomati prevzemajo vse več kompetenc, ki delajo mednarodne poslovneže uspešne. Obenem pa morajo poslovneži v vse zapletenejšem globalnem okolju postajati vse bolj vsestransko izobraženi, vse bolj interdisciplinarni in uporabljati vse več mehkih metod, ki so značilne za diplomate. Posebno zaradi vse večjega pomena sodelovanja na novih, azijskih trgih, kjer ni mogoče biti uspešen brez poznavanja medkulturnih razlik. Zato je, vzporedno s porastom pomena neoprijemljivega znanja v družbi znanja, bistveno porastel pomen mehkih veščin, ki vse bolj odločilno vplivajo na uspeh diplomatov in poslovnežev.

Navkljub konvergenci kompetenc, potrebnih za uspešno MP in ED, pa vseeno obstajajo razlike. Najprej je tu različna povezanost med notranjimi in mednarodnimi ekonomskimi odnosi. Ta je pri ED bistveno pomembnejša, saj se z multinacionalizacijo poslovanja podjetij pri poslovanju vse bolj briše. Globalni vzorec mišljenja je postal za mednarodne poslovneže vzorec preživetja, medtem ko se ekonomski diplomati tega začenjajo zavedati pozneje, z odpiranjem novih oddaljenejših trgov. Na teh novih trgih potrebujejo poslovneži več pomoči diplomatov, saj se podajajo v neznane vode, v katerih je treba več inovativnosti in fleksibilnosti.

Z naraščajočo nestanovitnostjo mednarodnih odnosov in poslovanja se dviga pomen obvladovanja tveganj in krepitev varnostne kulture. Le-ta je dobila v diplomaciji že zdavnaj domovinsko pravico, postaja pa vse pomembnejša tudi pri mednarodnem poslovanju, saj se krepijo tudi nelegalni načini krepitve konkurenčnosti. Z nepredvidljivostjo in nestanovitnostjo razmer na globalnih trgih se krepi tudi pomen proaktivnega delovanja, dolgoročnih scenarijev, zato da bi se ekonomski diplomati in mednarodni poslovneži vnaprej pripravili na morebitne spremembe. Eden od načinov takega vnaprejšnjega soočanja so *pre mortem* analize.

Ekonomska diplomacija malih držav, ki so življenjsko odvisne od mednarodnega sodelovanja, ima svoje posebnosti. Ekonomski diplomati

morajo obvladati več veščin, saj se ne morejo specializirati kot se lahko v velikih državah. Ne nazadnje se lahko učijo od aktivnosti uspeha skritih zmagovalcev, ki jim s specializacijo, hitro odzivnostjo ter ambicioznimi cilji uspe osvajati in ohranjati vodilni položaj na globalnem trgu v izbranih nišah.

Osnovni pogoj za uspešno ekonomsko diplomacijo in mednarodno poslovanje je ustrezno izobraževanje, saj stari načini pridobivanja, predvsem trdega znanja, izgubljajo pomen. Potrebno je bolj holistično, interdisciplinarno izobraževanje diplomatov z bogatim naborom mehkih veščin, zlasti o medkulturnih odnosih in pogajanjih in te nove kriterije bi morali upoštevati tudi pri izbiranju kadrov za ekonomsko diplomacijo.

Dr. Marjan Svetličič je profesor na FDV, Univerze v Ljubljani (bil tudi njen dekan) in predstojnik Centra za mednarodne odnose. Leta 2002 imenovan za ambasadorja znanosti R. Slovenije. Je Fellow European Academy of International Business (EIBA, bil njen predsednik in podpredsednik), član Sveta TEPSA (Trans Europaen Policy Studies Association) in FP7 Advisory Group for International Scientific Cooperation. Opravlja funkcijo podpredsednika COST projekta The Emergence of Southern Multinationals. Je član uredniških odborov mnogih mednarodnih revij in konzultant mednarodnih organizacij. Bibliografija obsega preko 300 del, od tega veliko objavljenih v tujini.

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1.02 Review article

Competences for Economic Diplomacy and International Business; Convergence or Divergence?[1]

UDK: 338.2:339.5/.7

Marjan Svetličič

Univerza of Ljubljana, Faculty of Social Sciences

marjansvetlicic@siol.net

ABSTRACT

The article discusses whether competences needed for effective contemporary economic diplomacy are different from or similar to those needed by international businessmen, and whether economic diplomats are capable of responding to the challenges of tectonic changes in the world with the competences they now possess. It concludes that a convergence of competences between economic diplomats and international businessmen is taking place; diplomats are increasingly using competences of international managers, and international manages increasingly need diplomatic skills. Special attention is given to: relations between internal and international economic relations, the need for global mindsets, the business intelligence role of economic diplomats and long-term planning. Competences of economic diplomats from small countries are different from those of their large-country counterparts. One basic competence is flexibility, the readiness to change and to adjust to changes. To adjust to changes, there is also a need for reforms in training of economic diplomats and international businessmen.

Key words: economic diplomacy, international business, competences, soft knowledge

JEL: A11, D03, F21, F59, H77, M16

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1 Introduction

German Chancellor Angela Merkel has recently been reported to be opening doors for German firms in China, and Chinese President Hu Jintao is now organising his visits abroad around economic interests. The Slovenian president and prime minister have also planned their recent visits abroad around the interests of the Slovenian economy. They have been accompanied by strong business delegations, particularly in countries that Slovenian policy has neglected since independence. For a time, talking about the non-aligned or Arab countries in which Slovenian firms had a strong reputation was treated the same way as mentioning communism. This was unfortunate, since gaining new markets is known to be much more costly than retaining old markets. Therefore, the major task of economic policy should be to retain position in existing markets, although this activity may be slowing in them, to avoid paying expensive one-off "entrance fees" and instead to pay "subscriptions" available from previous cooperation. It is clear that (ideological) emotions are costly.

Economic diplomacy (ED)[2] is becoming more and more important. Why are those who were originally against government intervention in business now becoming Keynesians? Is the crisis the reason for this or is something more at stake? The crisis has certainly brought about many new problems, and placed governments in the position of rescuer. But it is not only the crisis that has contributed to the return of the state on the economic playground. There are also tectonic changes in the world, demonstrated by the shifting of the centre of gravity of economic power to the East (see Svetličič & Sicherl, 2006). In this way, more distant and less known markets are becoming central. Consequently, firms, particularly small and medium-sized enterprises (SMEs), need help from the government in discovering and entering such markets. This is, however, possible only if: i) governments realise the importance of such new markets in time and ii) firms are, with their staff and expertise, able to enter such markets. Since we are talking about markets that are more distant and substantially different (physically and culturally) than those that

2 ED is defined as bilateral, regional or multilateral realisation of economic interests predominantly by diplomats, but also other civil servants and/or non-state actors in order to maximise national interests or maximise welfare of the population of the home country. It is not advisable to distinguish between different kinds of economic diplomacies (economic, commercial, business, or even intra business; see more in Udovič, 2009, figure 16) in small countries.

are already familiar, different competences are needed from those involved in working with "old friends" on close markets.

The article addresses the dilemma of whether those involved in ED possess the competences to face new challenges and of whether firms also need new and different knowledge. It also considers whether the competences required for ED and for international business (IB) are similar or are substantially different. Can we talk about convergence or divergence of competences, and which skills are necessary for successful realisation of interests in the turbulent and unpredictable global environment? Chapter two addresses the general concept of competences required for ED and IB. Chapter three compares competences required in ED and IB. Chapter four is devoted to selected issues of ED and IB, such as links between internal and international relations, the importance of global mindsets and risk assessments. Chapter five deals with competence convergence and chapter six with specific characteristics of ED for small states. The final chapter summarises major conclusions and provides some policy suggestions.

2 About competences

Competences are abilities to effectively perform certain tasks. Perrenoud (1997) understands the competences of an individual as the activation, use and interconnection of knowledge, skills, motives, self-image and values as a whole, which enable the individual to successfully perform tasks and resolve problems in complex, diverse and unforeseeable situations. A competence is a body of patterns that an individual has to master to do his/her work efficiently and effectively, and the ability to implement such skills in (multicultural) teams required to face differences. This integrative ability, involving holistic assimilation of several related, subsidiary skills in complex and changeable unpredictable situations, can be regarded as central to successful implementation of tasks and resolving problems. It implies hard knowledge and skills (soft knowledge), along with appropriate motivation for their implementation (Weiert, 2001). Hard knowledge is usually equated with formal education because it refers to knowledge that can be codified and obtained at school. On the other hand, soft knowledge is intangible, relational[3] knowledge, which is difficult to quantify, codify, store and transmit,

3 It depends on existing environment, specific circumstances, and is becoming, in the ever more unpredictable global environment, more and more important.

because it relates more to personal characteristics and includes judgment and experience. It is hidden within the answers to questions such as how and with whom to negotiate, and how expertise is articulated and presented in a simple and comprehensible manner. To know "how" relates to the ability to implement certain tasks, to know "who", on the other hand, relates to who possesses knowledge of *what* and *why* (hard knowledge). Soft knowledge is tacit – made up of internalised skills acquired with experience and practice (Svetličič & Kajnč, 2010, p. 86).

3 General comparison of competences of economic diplomacy and international business

Theoretically, it is possible to compare ED with relations within transnational companies (TNCs)[4]. In the case of TNCs, it relates to the relations between headquarters and affiliates, while in the case of ED it relates to relations between ministries of foreign affairs (government or other ministries) and economic diplomats (for further discussion see Svetličič, 2011). Although relations within network of TNCs are very complex, those between economic diplomats and their "bosses" are even more so. Economic diplomats lack the clear instructions that expatriate managers receive from their bosses. They have many more bosses with frequently contradicting objectives/instructions. There is also a difference in terms of hierarchy. Ministries are still very hierarchical, while the tendency in TNCs is away from too strict a hierarchy and more towards decentralisation (network or project organisation with more autonomy of affiliations, and distributive governance on the basis of simple and flexible rules[5]). Hierarchical organisation usually suffocates the initiative and flexibility required by economic diplomats. Although ED is substantially older than IB, IB is today much more dynamic and responds more quickly to a changing international environment. Therefore stronger convergence of ED with the organisation of IB would seem appropriate (Svetličič, 2011).

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4 This is based on the general theory of internalisation, in which the business theory of internalisation is implemented in the case of states, as an analogy to firms. Imperial states with colonies can be seen as analogous to TNCs with affiliations abroad, having similar relations with colonies as headquarter of TNCs have with their affiliates. (see Casson et al., 2006).

5 See Nohria, 2006, p. 23.

This comparison indicates similarities of competences, but also important differences when it comes to hard and soft skills/competences[6]. Hard knowledge is necessary but not sufficient for effective work of economic diplomats and (expatriate) managers. Soft knowledge is gaining in importance in the case of economic diplomats since they are supposed to possess critical know-how and "know-who", and this implies judgments that are easier to make based on rich experience. Those with charisma and curiosity can be much more successful in such activities – those possessing skills in persuasion[7]. Fukuyama (2008) even talks of the world today being driven by weak states, because the usual instruments of power (especially hard military power) do not work. For such a new world, a new arsenal of competences is required (Fukuyama, 2008, p. 40), including rapid and *ex ante* response to unpredictable changes.

Differences among the tasks of economic diplomats and international managers are withering away, particularly for small countries. Executing managerial and expert tasks demands, according to Jazbec (2009), different knowledge, and consequently also different training.

In the case of IB, soft competences have a different source and weight. They refer to intangible assets, such as technological, information-based, managerial, marketing and entrepreneurial skills, organisational systems, and incentive structures (Dunning & Lundan, 2008, p. 96). Because TNCs operate in a multicultural environment, managers have to have specific cross-cultural competences. Beamish & Killing (2001, pp. 178–195) include the following among these competences: the ability to develop and implement strategic skills, change and cultural-diversity management, functioning in a flexible organisational structure and teams, the ability to communicate openly, as well as to learn and transmit knowledge within an organisation. Of particular importance are international orientation, international marketing skills, international innovativeness and international marketing orientation (Knight & Kim, 2009). Research with regard to managers in companies indicates that leading managers show weakest competences precisely in the fields of intercultural sensitivity, introducing changes and leadership. Therefore it is

6 These are: communication skills (rhetoric, conversational, lobbying and networking, cross-cultural) – including use of (foreign) language, leadership, negotiating skills, as well as capacity to apply such knowledge swiftly. The prevailing values in society have an important influence on these skills (see Svetličič and Kajnč, 2009).

7 Nye (2004) defines »the ability to influence the behaviour of others to achieve the outcomes one wants« as soft power.

not surprising that implementation is more challenging than strategy (Hrebiniak, 2005), and precisely these are the tasks of economic diplomats and managers of IB.

Fragmented, integrated international production, mostly directed by TNCs, presents new challenges. Economic diplomat must take them on board and put more emphasis on complex forms of IB (such as foreign direct investment – FDI), since modern communication techniques provide easy and fast access to information on more traditional types of international economic cooperation. What is missing is assessment of the reliability of otherwise accessible information, about its quality and practical importance for the home economy or firms. This is the task of economic diplomats. Traditional marketing is for them less important when intermediate products, without brand names, have assumed almost 50% of international trade and much more than 50% for most small countries.

Table 1: Comparison between tasks of managers and economic diplomats

General international managers' tasks	Economic diplomats' specific tasks
Good results	Satisfaction of customers (more and more firms, achieving results)
Cooperation	Within ministries, with firms and institutes, etc. Achieving reverse flow of information from the capital
Setting priorities	Not only set by "bosses" but also as self initiative based on the place of operation
Governance	Governing the whole network of managers and customers. Hierarchy, which usually dominates in civil service, should be reduced
Execution	Efficiency (related to rational use of resources) and effectiveness regarding objectives and methods
Team work, human-resource development	Permanent transfer of knowledge to the capital and on other colleges and customers
Conflict management	Between public and private interest and within them
Trust and responsibility	Establishing trust and confidence in the role of ED

Source: own table and Praček, 2010.

Comparison between the tasks of economic diplomats and international businessmen demonstrate many similarities, but also some differences (Table 1).

In both cases, actors have to satisfy customers and to cooperate effectively in realisation of objectives. The role of economic diplomats is even more complicated due to complicated accommodation of interests between different interests/institutions/customers. They also have to have good initiative, because they are usually alone in the host country without as clear instructions as managers get from headquarters.

Changed circumstances in the global economy with fantastic opportunities to access information and knowledge demand not only different functions but also different knowledge/skills. Hard knowledge is more accessible to everyone. The priority is therefore to asses the importance and reliability of information, how to get it as quickly as possible, possibly before others, and communicate it to customers as quickly as possible. What is important is the background of information (who, why, how and when) and how to enable customers to utilise such opportunities[8] as they appear on the market. Major failures of ED so far have been in providing information that is otherwise accessible on the Internet or other public sources, and even this with substantial delays, instead of providing interpretation of the relevance of such information for specific users. A shift from simple provision of information to evaluation[9] of relevance, reality and possible impact, and above all, a shift to timely delivery to customers, is essential.[10]

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8 Porter (1990) indicates in his diamond of competitive advantages two factors important in this respect: government, which can influence competitiveness, and opportunity, which economic diplomats can identify or not. Speed becomes the key for success also for ED.

9 Economic diplomat should be capable of alerting the appropriate ministries, business and other associations, firms. For example, in the inaugural WTO conference, it was decided that the Multi Fiber Agreement (MFA) is going to an end in 10 years, and that deadline was later extended. By using this information firms could get better prepared and avoid being "surprised" only a month before the expiration of the MFA (as actually happened in Slovenia, but also in Europe in general). The textile industry panicked when it was realised that Chinese and other producers could flood European and other markets with their products. Similarly relevant is information about the preparation of EU directives or even non-binding standards of the OECD or other international organisations.

10 Justinek's analysis has clearly demonstrated that Slovenian firms are most dissatisfied with the speed of response of Slovenian economic diplomats. His experiment has even demonstrated that many requests by firms have not received a response at all (Justinek, 2010, pp. 7 and 144–148).

Soft knowledge is making the difference between those who know and those who are able to apply such knowledge, who are able to articulate their knowledge. Churchill long ago claimed that it is not important what one knows but how one is able to articulate this knowledge. In a survey, as many as 40% of English employers claimed that communication skills are considered most important, followed by work ethics (39%), and personal characteristics (32%), while formal education received less attention (25%) (see Svetličič, 2007, p. 233). All these are of little importance if one does not speak foreign languages or posses cross-cultural communication skills. In times of globalisation this knowledge is an important competitive advantage, particularly in relations with cultures which give high importance to their identity. At least modest knowledge of local languages is an important catalyst for business success, enhancing other, more robust, competitive advantages.

Traditional competences are also not sufficient for successful facing the crisis and post-crisis challenges[11] and the shifting of the drive of development to Asia. This implies increasing shares of cross-cultural business, triangular diplomacy (states, TNCs, even NGOs), of international, regional and non-governmental organisations as well as the governance of globalisation, particularly financial transfers, contemporary climate challenges, water, energy or raw-materials scarcity, etc. [12] Evaluation of the Slovenian EU presidency in 2008 has clearly demonstrated that the most deficient skills were soft skills (knowledge of English, rhetoric, building acquaintances and team work) (see Svetličič & Kajnč, 2009).

Comparison between public and private organisations has demonstrated that civil servants must be better in maintaining good relations and partnerships with the political institutions/politicians and civil servants of the two countries involved. This also applies to economic diplomats since their task is not only to inform relevant actors at home *ex post* of any relevant changes of laws and regulations or other measures taken by the local governments, but to do this when such legislation/measures are in the preparatory stage. This is, however, possible only on the basis of very close formal and informal contacts with

11 For example, risk management or forecasting (see Svetličič, 2011).

12 Most FDI is expected in the future in raw materials and much less in manufacturing.

local partners. Diplomats skilful in all forms of informal communications are better equipped to perform such tasks.

4 Comparison of competences in selected fields

General comparison of similarities and differences between ED and IB, and also of comparison between the public and private sector (see Svetličič, 2011) has revealed differences and similarities, and convergence and divergence between ED and IB, particularly in the following domains:

a) Connections between internal and external international economic relations
b) Global mindsets and global orientation
c) Security culture and risks
d) Long-term planning or preparation of scenarios.

4.1 Connections between internal and international economic relations

The first similarity between ED and IB is the close connection between internal and external (economic) relations. IB is usually the result of the evolution of the development of a company, gradually expanding its activities from internal to international markets. ED diplomacy is also highly dependant on internal development, on domestic polity. Its priorities are determined by the governing elite. Economic diplomats are supposed to be selected based on their expertise, but in practice, the political criteria of those who make the selection always play a certain role. Comparison between profit and non-profit organisations has also demonstrated that maintaining good political relations is much more important in the case of public organisations. Obviously the link between internal and international economic relations is much stronger in the case of ED. The weakening of such links can create problems. A significant gap between the internal and the external can pose a substantial barrier to effective ED and/or IB. Therefore, an economic diplomat has to develop very good relations not only with economic actors but also with political actors in both countries concerned. An international businessmen, however, must be skilful in diplomatic techniques, to develop good relations with local authorities, trade unions, civil society and the media.

4.2 Global mindsets and global orientation

Both economic diplomats and international managers are required to be globally oriented if they wish to be successful. They must have global mindsets, which prevent the inbuilt internal filters from rejecting or sidelining important information coming from the world, but must also be able to change their mindsets with integrating and differentiating. It is crucial to combine speed with an appropriate reaction (see Gupta & Govindarjan, 2002, pp. 200 and 203). A global mindset is a basic characteristic and stepping stone to successful IB and ED, particularly in the case of small states. It enables openness to new ideas and proposals, to "blue oceans".[13] One precondition for such a role is interdisciplinarity. Without such an approach, global mindsets cannot develop. Although it is necessary in both professions, a multidisciplinary approach is relatively more important in ED. An economic diplomat has to consider all the time not just one market but also the whole region in which he or she operates, taking into account possible competitors in the region and even globally. Therefore, knowledge of macroeconomics and microeconomics, political analytical capabilities, and communication skills, to gain necessary information, are essential.

A global orientation, however, is more important for international businessmen. Multinationality has, because of the need for global optimisation of activities, proved to be a more important factor in competitiveness than local or foreign ownership (Bellak, 2004; Castelani & Zanfrei, 2006). Although there is no linear relationship between internationalisation and performance, some claim that there is a positive relationship, and others, that there is a negative relationship between the two (see In Hyeock Lee, 2010: 1). More and different knowledge is therefore needed for such global activities.

The present economic crisis has clearly demonstrated the importance of global orientation in spite of a strong trend towards synchronisation of economic cycles between states and regions. Countries more integrated in the global economy have suffered more, but those that have identified crises ahead in a timely manner and have responded to the shifting centre of the dynamics of the global economy to emerging economies have

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13 According to Kim and Mauborgne (2005), these are new opportunities on the markets with no existing competitors; in essence creating new niches and not competing where there are many competitors ("red oceans").

performed much better during the crisis. The task of economic diplomats is not only to trace such tectonic changes, but also to proactively warn firms about them, and help them transcend the traditional orientation to close, regional markets. Tradition may also be a barrier to economic ED. It holds to the traditional understanding of diplomacy as a high-flying salon activity, which is not supposed to "dirty its hands" with microeconomic interests. In Kunič's words (2005, p. 9–14), the »problem of economic diplomacy is also the mindset of diplomats considering the economy as *low politics*, while diplomacy as *high politics*.«

4.3 Risks and security culture

Although risk management is not new, its importance has substantially increased in the face of the increasing uncertainty and unpredictability of the global economic environment, not least due to the very strong link between trust and international economic cooperation: more trust, more trade and FDI. It is therefore crucial that ED contributes to better information flow among economic partner countries to enhance mutual trust. Better information contributes to lessening of mistrust, and consequently barriers to business fade away (see Guiso et al., 2005, p. 25). The structure and relative weight of specific groups of risks has also changed. To traditional economic and political risks, we must add geopolitical, environmental, societal and technological risks (see World Economic Forum, 2010). Economic diplomats must alert businessmen to such risks. Not least since, at first glance, analysis of this type has often proved right, and has anticipated such risks (see table 5 in World Economic Forum, 2010).

Internationalisation and informatisation of business has enhanced the vulnerability of the whole system (interruption of access, database crashes, unauthorised user access). The Economist therefore rightly talk about "war in the fifth domain" (3 July, 2010, pp. 22–24), since digital infrastructure has become a "strategic national asset". President Obama has quoted a figure of $1 trillion lost in 2009 to cyber crime, which would represent a bigger underworld than the drugs trade, though such figures are disputed. Because of the threat of hackers and virus-writers, both the US and the UK set up dedicated cyber-security bodies in 2010 (in the US, Cyber Command) and China is talking about "winning cyber wars by the mid-21st century". At a time when around 140 trillion electronic mails are spam and when cyber-espionage »is the biggest intelligence disaster since the loss of nuclear secrets in late 1940s« (Jim Lewis of the Centre for Strategic

and International Studies, Washington; see The Economist, July 3rd 2010, pp. 22 and 23), this is really necessary.

Security culture is clearly increasingly important but is nevertheless still marginalised in firms. It can be an instrument of defending one's own interests and for proactively enhancing competitive advantages. In fierce competitive battles, firms and states do not always shy away from also using illegal methods to gain information/knowledge. Therefore, concern over protecting knowledge is becoming more and more important, and almost as important as acquisition of new knowledge [14]. Economic diplomats should more systematically alert businessmen to these security dimensions, but at the same time be careful not to disclose information about firms that they would not like disclosed[15]. Economic diplomats have to know clearly when and what to disclose and know not to reveal what firms would not like to be revealed. This is only possible if they nurture permanently close links with them.

Therefore economic intelligence (collecting, organising and applying commercial information), competitive intelligence (data on competitors and markets and education) and industrial intelligence (data on production), due diligence, and social intelligence about human capital[16] all gained in importance. The market for economic intelligence is estimated at 2 trillion dollars annually (Peruško, 2004, p. 2). Such aspects are particularly important for Slovenia, »where business intelligence is not recognised and valued and therefore underestimated« (Gjerek, 2009, pp. 10 and 10–132).

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14 President George H.W. Bush therefore in 1992 highlighted the importance of economics in the context of national security. President Clinton then set up the National Economic Council and introduced direct reporting of the CIA also to the financial, economic and international economic areas of government. He also set up the Board for the Promotion and Coordination of Trade and Advocacy centre. Their task was to assist and facilitate cooperation between firms and the security community. (Gjerek, 2009, p. 29).

15 This is especially important in the case of "hidden champions" because one of their competitive advantages/characteristics is that they do not disclose information about their leading market position, since they do not want competitors to enter such niches or to learn secrets of their success (See Simon, 2010, p. 14).

16 It is about legal searching, evaluating and diffusion of information from publicly available sources (marginally also by secret operations) not, as with espionage, applying clandestine methods and illegal sources. (Gjerek, 2009, pp. 9, 22, 53, 62)

4.4 Long-term planning or preparation of scenarios.

Traditional annual or longer-term planning methods are becoming, in turbulent and uncertain times, and due to discontinuities and fluctuations, outlived. It is therefore better to prepare long-term scenarios for possible alternative developments and possible reactions to such alternatives. Flexibility and adaptability are becoming the rule. These demand much greater knowledge and a wider range of competences. Therefore Bryan and Hoffman suggest that firms:

- drop the pretence that they can predict the future,
- adapt their managerial processes and capabilities with a view to making better decisions under uncertainty, e.g. by abandoning a fixed calendar and planning schedules. This change requires a shift to monitoring macroeconomic data in real time, rather like the "just-in-time" approach in manufacturing, and will enhance contingency planning and flexibility in strategic activity (Bryan & Hoffman, 2009, p. 3). Managers are supposed to make evaluations each month (43% of responses), each quarter (35%) and, some even claimed, each week (7%) (Dye et al., 2009, p. 6).

Similar practices can also be applied in ED, which must become more flexible, and more able to predict and permanently evaluate strategies[17]. Kunič (2005, pp. 9–14) claims that politicians are to slow in application of the needs of the business. One reason is that they are required to accommodate different interest groups, while businessmen operate in a more immediate, "no nonsense" manner, with no time for extended coordination. Slowness is characteristic of public, non-profit organisations. Greater flexibility can be achieved only if one is prepared in advance for the unpredictable. The function of scenario preparation is to prepare for (undesired) events. *Pre-mortem* analysis is one instrument by which one can evaluate potential problems *ex ante*. The other is decision-making that is intuitive, and not based only on robust assessments/forecasts. The precondition for effective application of such methods is to stimulate creative thinking as an instrument to gather as much opinion as possible and not merely to discuss proposals offered in advance by leaders (more in Svetličič, 2011). Economic diplomats and international businessmen are supposed to be keen to apply such

17 More in Svetličič, 2011.

techniques. *Pre-mortem* analysis and stimulation of creative thinking should become a part of their mindsets.

5 Convergence of competences

The transformed world of international economic relations and the intensive participation of new actors in international relations (IR) demand new competences in economic diplomats and international managers if they wish to cope with relations in the triangle among states, firms, and firms among themselves. Comparing training, and the importance of competences and qualifications required by post-modern diplomats, Saner and Yiu determined that the borders between them have almost blurred, and that there is a strong convergence between the competences required for ED and IB (Saner & Yiu, 2003, p. 22). On the basis of comparative evaluation of the two sets of competences, they clearly show which of the competences of international management are needed for ED.

Table 2: Key Competence Requirements for Economic Diplomacy

Business School Education	Education at Diplomatic Academies	Competences of Particular relevance for:	Competences for post-modern diplomatic environment
General Management	History of diplomacy	•♦ •♦	- Knowledge of diplomatic instruments - Capacities in influencing the diplomatic process
Strategic Management	Treaty-making	•♦ ♣•♦	- Knowledge of key international business-related legal standards - Capacities in influencing standards setting at key international organisations (WTO, ILO, UNEP, WIPO, OECD).
Managerial Accounting	International law	•♦ ♣•	- Knowledge of functioning of international law and arbitration - Knowledge of impact of "Corporate Reporting to Stakeholders"
Financial Management	International economics	♣• •♦	- Knowledge of history and logic of non-US economic theories and practices - Knowledge of influence of international financial institutions (IMF, World Bank, Paris Club, London Club, US FRB, BIS)

Continues on the next page

Human Resource Management	International and supranational organisations	●♦ ♣●♦	- Knowledge of structure and decision-making processes of supranational organisations (UN, EU, NAFTA, ASEAN, etc) - Capacity to influence supranational organisations through direct or indirect means
Marketing	Regional and country studies	●♦ ●	- Knowledge of interplay between economics, politics and culture by region or country - Capacity to promote proactive perspective in region regarding business diplomacy
International Management	Theory of international relations and contemporary history	♣●♦ ♣●	- Knowledge of decision-making processes of key countries (domestic and foreign) - Capacity to conduct political risk analysis regarding key stakeholders of investment projects
Operations Management	Managing delegations, embassies and consulates	●♦	- Knowledge of mechanisms of international crisis-management and corresponding roles of diplomacy and government - Capacity to intervene on behalf of company
Information management	Interactions with media	♣●♦ ♣	- Mastering public speaking and media (keynote speeches, TV interviews, press conferences, etc) - Managing Business Diplomacy Information System, which supports strategic planning regarding stakeholder management
Organisation Behaviour and Change	Negotiation skills (bilateral, multilateral, plurilateral)	♣●♦	- Managing and influencing international negotiations (bilateral, multilateral, plurilateral)
Quantitative Methods	Diplomatic behaviour and protocol contemporary history	●♦ ♣♦	- Mastering diplomatic practices and protocol - Mastering analytic tools, e.g. stakeholder analysis, scorecards on stakeholder satisfaction, scenario planning, etc.

Competences of particular relevance for:
♣ Economic and Commercial Diplomats
● Business Diplomats
♦ Transnational NGO Diplomats

Source: adapted from Saner, Yiu & Sondergaard (2000)

In 5 of 21 areas of competences for the post-modern diplomatic environment (last column), all competences are required. With the exception of one area, at least two competences are needed, irrespective of basic education. Most frequently, the same competences are required for both business and transnational diplomacy[18]. Among the 21 types, only 8 can be defined as specifically diplomatic. All others are more business oriented. Competences for ED are clearly converging with those needed for successful IB rather than the reverse. Success in both cases depends on focusing on core competences. This is particularly true for small countries, which by specialising in fields of their competitive advantages (see Baillie, 1999) can improve their results with the help of ED. As firms must focus on their core competences, the core tasks in which their performance is relatively best placed, economic diplomats also have to focus on major interests – the competitive advantages of their home countries/firms.

ED and IB use similar sources of information, although from different perspectives. Both must give more attention to future developments, to risk management (particularly financial risks), to developments among competitors and multicultural differences. Our analysis has demonstrated that Slovenian managers are weaker in the areas of mastering cross-cultural differences than in areas of products or processes, and that their knowledge about other cultures is rather weak. Mastering cross-cultural differences is even more important for economic diplomats because the sensitivity of the public and of politics to this is much higher. Comparison between non-profit and profit organisations has also demonstrated that public organisations require better cross-cultural competences.

6 Special characteristics of economic diplomacy in small countries

Economic diplomacy has relatively higher importance for small countries than for large states, firstly because they have to be much more intensively integrated in the global economy, and their firms much more internationalised. However, even diplomats from large countries give high

18 Economic and commercial diplomacy deal with economic policy in international organisations and with the implementation of commercial interests of own country. Corporate diplomacy deals with relations within TNCs and their environment, while transnational with overseas lobbying also with relations with NGOs (Saner & Yiu, 2003).

priority to promotion of the economic interests of their countries.[19] Secondly, a specific characteristic of small countries is that they are faced, when penetrating global markets today, with the increasing importance of economies of scale and scope, and international regulation of international economic relations, with fewer barriers (liberalisation of international trade). However, other barriers (consolidation and oligopolisation of global markets, more rules in the WTO and other international organisations) are limiting their strategies and policies. The configuration of the negotiating powers of small states and their firms also enhances the importance of ED for these countries. The negotiating power of states is based on control of territories/markets and production capital (which are naturally more limited in small countries), while that of firms is based on their possession of technology, products, capital, customers/markets of their products and jobs created by their activity (see Grosse & Behrman, 1992; Stopford & Strange, 1991, p. 215). Through ED, small countries can help in gaining access to production factors in other countries and winning control over profits and rents stemming from international production.

Consequently, taking into account hard negotiating factors, small countries have weaker negotiating powers than large countries. Small countries can also only apply hard/aggressive negotiation tactics less successfully because they can not transform them into effective implementation measures. They may also fear retaliation if applying hard bargaining (see Dur & Gemma, 2010, pp. 564–565). However, small countries can compensate for their weak bargaining powers by creating coalitions[20]. Consequently ED is much more relevant to these countries.

The functions of ED for small states are also different. Diplomats of small countries have to deal much more with "micro" ED, and have to take care of the interests of even individual firms. In such activities, they can learn from hidden champions (Simon, 2010). The secret of their success, although there is no formula to fit all circumstances, can be summarised in nine points:

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19 Ambassador of one very large country in response to my question to which meeting he would give priority; i) one in which he would be supposed to promote the business interest of companies or ii) one that has some political issues to be discussed, clearly gave priority to economic interests.

20 Slovenia has weak capacity for this since it was among the least-desired partners for coalition creation in the EU (see Naurin & Lindahl, 2008).

a) Focusing, specialising on core competences in narrow niches,
b) Global orientation from the outset (they resemble global firms),
c) Customer focus,
d) Fast response, utilisation of first movers' advantages and flexibility,
e) High importance of soft skills (culture, employee orientation and loyalty),
f) Ambitious objectives to achieve leading positions in their core products/services,
g) Operation under the media horizon,
h) Stability; management not changing in 20 years or more,
i) Small steps, not revolutionary development (also in innovations).

The similarity with the more general conclusions from small-states theory is obvious. This theory also emphasises focusing on critical advantages, specialisation, avoidance of conflicts, flexibility and fast reactivity (see Baillie, 1999; Bunse, 2009; Thorhallsson, 2000 and 2006). Thorhallsson argues that small countries can compensate for their weaknesses in influencing decisions in the EU by good relations with the EU Commission administration.

7 Conclusions

Tectonic changes and ever-stronger interdependence between IR and international economic cooperation has led to convergence of competences required for IB and ED. A similar convergence is also taking place in the management of public and private organisations. Nevertheless, it seems that economic diplomats are adopting more of the competences that make international businessmen successful. At the same time, international managers must be trained more across disciplines, and equipped with strong soft skills that should provide advantages for diplomats to cope successfully with the complex global environment. This is particularly relevant in view of the need to strengthen economic cooperation with emerging countries, where one cannot be successful without possessing strong cross-cultural skills, for example.

The importance of soft skills for IB and ED has also increased in parallel to the increasing importance of tacit knowledge in knowledge societies.

Despite of the strong convergences of competences needed for successful ED and IB, there are also differences. Links between internal and international economic relations are much more important in the case of ED. Such relations are quite blurred in IB, parallel to the internationalisation of operations of national firms. Global orientation and global mindsets have become a necessity for survival in IB, while economic diplomats are only now starting to realise this requirement, together with the areas of expanding trade and FDI in emerging markets, where businessmen need more assistance, and where greater innovativeness and flexibility is required.

With the growing instabilities and vulnerabilities of IR and business, risk management and a culture of security are increasingly important. Security has always had high importance in diplomacy, but now is also becoming highly relevant in IB. Illegal ways of enhancing competitiveness are today more frequently applied. The importance of proactive strategies and/or long-term scenarios so that economic diplomats and managers can prepare in time for possible changes is also increasing. One such way to enhance such *ex ante* readiness is *pre-mortem* analysis, while another is promotion of creative thinking, rather than position-taking.

The economic diplomacy of small countries, which depend so strongly on international economic cooperation, has specific characteristics. Economic diplomats must master more skills and must posses more knowledge, because they are not in a position to specialise on only one among several functions of broadly defined economic diplomacy, as is the case in large countries. They can learn from hidden champions, which are able to become and stay competitive thanks to the development of special skills, and thanks to their specialisation on core competences in selected niches.

One basic precondition for successful ED and IB is appropriate training, because traditional approaches concentrating mostly on hard knowledge are losing importance. More holistic and interdisciplinary education and training, encompassing also the necessary soft knowledge and skills, particularly on cross-cultural communication skills and negotiations is necessary. Different criteria for the selection of economic diplomats are also needed, taking into consideration these soft skills.

Comparison of public job tenders in Slovenia with those published in The Economist have clearly indicated that international experience, ability to work in a multicultural environment, and personal soft skills (communications, negotiations, etc.) are included as job requirements in those published in The Economist and not in those published in the Slovenian media.[21]

Marjan Svetličič, Ph.D. is professor at the Faculty of Social Sciences, University of Ljubljana (was also its Dean) and Head of the Centre of International Relations. In 2002 he was awarded the title Ambassador of Science of the R. of Slovenia. He is Fellow of the European Academy of International Business (EIBA; before its president and vice president) and a member of TEPSA (Trans European Policy Studies Association) board, vice chair of COST project The Emergence of Southern Multinationals, a member of FP7 Advisory Group for International Scientific Cooperation. Also a member of many editorial boards of scientific journals and a consultant to international organizations. He has authored more than 300 articles and books, many published abroad.

21 *The Economist* and *Delo* were evaluated for the period 2005–2009 (see Purg, 2010).

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1.04 Strokovni članek

Zloraba podjemne pogodbe – pogodbe o delu

UDK: 349.22:331.106

Nikolaj Abrahamsberg

Fakulteta za upravo, Univerza v Ljubljani

niko.abrahamsberg@fu.uni-lj.si

IZVLEČEK

Avtor v prispevku opisuje razvoj podjemne pogodbe. Ugotavlja, da danes pri nas pogodbo zlorabljamo za zaposlovanje, kar ni dopustno. Glede na doseženo stopnjo razvoja delovno pravne zakonodaje ne moremo dopustiti dveh oblik zaposlovanja. Civilno pravna pogodba, to je podjemna pogodba oziroma pogodba o delu ne more biti pravna podlaga za zaposlovanje. Podjemna pogodba je namenjena podjemnikom (podjetnikom, gospodarskim družbam) za urejanje razmerij, pravic in obveznosti med podjemnikom in naročnikom nekega dela oziroma storitve. Enako kot pri gradbenih, prevoznih in drugih pogodbah, katerih vsebina je izvedba dela oziroma storitve. Fizična oseba kot izvajalec ne more skleniti podjemne pogodbe, če nima statusa podjetnika. Redke izjeme dovoljuje Zakon o preprečevanju dela in zaposlovanja na črno.

Ključne besede: podjemna pogodba, pogodba o delu, pogodba o zaposlitvi, podjemnik

JEL: K12

1 Uvod

V tej razpravi želimo pojasniti razlike med pogodbami, katerih vsebina je opravljanje določenega dela in se v praksi mnogokrat napačno uporabljajo.

V času gospodarskih kriz se mnoga vprašanja izostrijo in zahtevajo ustrezno rešitev. V praksi se srečujemo z mnogimi oblikami dela, ki so s posameznih vidikov ureditve sporne. Na eni strani imamo množico izjem, ki onemogočajo jasnost in preglednost ureditve, na drugi strani poskušamo stvari poenotiti ter poenostaviti in tako zahtevamo enako

obdavčitev vseh vrst dela (pogodbeno delo, študentsko delo, delo upokojencev, avtorsko delo itd).

Prevelike obremenitve rednega dela zaposlenih s prispevki in davki silijo tako delodajalce kot tudi delavce v iskanje cenejših in fleksibilnejših oblik zaposlovanja. Tako sta nam na področju dela zelo "koristili" avtorska pogodba, ki smo jo uporabljali tudi takrat, ko ni šlo za avtorsko delo, in podjemna pogodba. O zlorabi podjemne pogodbe govorimo takrat, ko delodajalec namesto sklenitve delovnega razmerja uporabi civilnopravno pogodbo in se s tem izogne zavezujočim določbam delovnopravne zakonodaje. Delodajalec se pojavlja kot naročnik dela oziroma storitve, čeprav sam v resnici ni uporabnik izdelka oziroma storitve, ampak je uporabnik oziroma dejanski naročnik tretja oseba.

Fleksibilnosti zaposlovanja ne moremo reševati tako, da iščemo izhode v civilnopravnih pogodbah. Tako je bila napaka, da smo iz zakona o delovnih razmerjih izločili oblike zaposlovanja za občasna oziroma začasna dela. Napako popravljamo z novim Zakonom o malem delu, čeprav le za kategorije brezposelnih, študentov in upokojencev. Primerneje bi bilo to sistemsko urediti v Zakonu o delovnih razmerjih in za vse oblike začasnega oziroma občasnega dela in za vse potencialne delojemalce.

Zlorabe obeh pogodb, tako avtorske pogodbe kot podjemne pogodbe (pogodbe o delu) ni primerno odpravljati z davčnimi instrumenti, ampak je treba sankcionirati nezakonito sklepanje teh pogodb. Sicer pa mora biti avtorsko delo nižje obdavčeno, če želimo spodbujati inovativnost in gospodarski razvoj in tudi kulturni dvig naroda. Po drugi strani je nedopustno obdavčiti delo glede na tip pogodbe, v našem primeru podjemnih pogodb (pogodb o delu), ker s tem postavljamo pogodbenike v neenakopraven, neustaven položaj. Po tej logiki bi morali obdavčiti delo po vseh pogodbah, katerih vsebina je opravljanje nekega dela (gradbene pogodbe, prevozne pogodbe itd.). Vprašati se moramo, ali je temelj za obdavčitev neka vrsta civilnopravne pogodbe ali plačilo za opravljeno delo v delovnem razmerju.

Ker Obligacijski zakonik ne zahteva obličnosti za podjemne pogodbe, bi morali jasno definirati pogodbene stranke, da bi se izognili sivi ekonomiji. Neznano in neugotovljivo je število podjemnih pogodb, ki jih sklepajo fizične osebe, ki nimajo ustreznega statusa, to je statusa podjetnika. Po drugi strani pa ugotavljamo, da moramo po drugih

predpisih prijaviti sklenitev pogodbe o delu na Zavodu za zaposlovanje. V preteklem letu je bilo prijavljenih preko 25.000 pogodb o delu. Očitno pa tu ne gre za podjemne pogodbe, ki jih ni treba registrirati, ampak za pogodbe o delu iz prejšnjega razveljavljenega Zakona o delovnih razmerjih. Vse navedeno kaže na nejasnosti in neustrezno ureditev področja.

Ni naš namen razpravljati o dajatvah in davkih, vendar menimo, da bi morala biti izplačila posamezniku za opravljeno delo enako obremenjena. Z našega vidika obravnave to tudi pomeni, da je lahko temelj izplačila za opravljeno delo, ki ga nekdo opravi v imenu in za račun drugega, le pogodba o zaposlitvi, kakršna koli že: za nedoločen, določen, krajši ali daljši čas.

Posameznik, ki ni zaposlen (ni v delovnem razmerju) lahko opravlja delo, le če izpolnjuje določene pogoje, sicer dela na črno.

Namen našega proučevanja je pokazati na nejasnost in neustreznost poimenovanja podjemne pogodbe z podrejenim pojmom pogodba o delu in posledično zlorabo podjemne pogodbe za sklepanje delovnih razmerij za občasna in začasna dela, ki jih je v preteklosti urejal stari razveljavljeni Zakon o delovnih razmerjih (1990). Nato opozoriti na pogodbene stranke, vsebino podjemne pogodbe in obliko pogodbe.

2 Izvor in neustrezno poimenovanje pogodbe

Izvirni greh neustrezne uporabe "pogodbe o delu" verjetno tiči že v samem Obligacijskem zakoniku (Ur. l. RS, št. 83/2001), ki neustrezno poimenuje oziroma enači pojma pogodba o delu in podjemna pogodba. XI. poglavje zakonika nosi naslov "Podjemna pogodba" in v oklepaju "pogodba o delu", kar nas pripelje do zaključka, da gre za dve imeni za isto pogodbo. Zgodovinsko gledano gre v resnici za dva različna tipa pogodb, ki imata isti izvor v rimski *locatio conductio*.

Z navedbo v oklepaju je zakonodajalec želel pojasniti pojem "podjem", ki v slovenskem jeziku ni pogosto v rabi. Vedeti moramo, da je beseda podjem izpeljana iz besede podjeten. V slovenskem pravopisu (Pravopis, 1950, str. 535) so iz besede "podjeten" izpeljane besede: podjetništvo, podjetje, podjetnik, podjem in podjemnik. Sinonim za "podjemno pogodbo" bi torej lahko bila "podjetniška pogodba" in ne pogodba o delu. Tako tudi Korošec za podjemno pogodbo uporablja pojem "delovršna ali podjetniška pogodba" (Korošec, 1948, str. 84) Ker

Obligacijski zakonik obravnava mnogo podjetniških pogodb, ki so se razvile iz *locatio conductio operis* (pogodb, ki jih sklepajo podjetniki), je z navedbo v oklepaju "pogodba o delu" želel le poudariti posebnost in razliko do drugih tovrstnih pogodb. Vendar v svoji interpretativnosti zakonodajalec bolj zavaja kot pojasnjuje.

Če bi želeli ostati pri pojmu delo, bi se pogodba morala poimenovati pogodba o izvršitvi (izvedbi) dela ali tudi delovršna pogodba, ne pa pogodba o delu. Zanimiva je tudi Cigojeva razlaga imena in utemeljitev pojma podjemniška pogodba: »V naše pravo je namesto izraza, ki ga uporablja ZOR (pogodba o delu), oziroma za slovensko uho okornega izraza delovršna pogodba, ki so ga prej uporabljali zlasti v praksi, doktrina vpeljala izraz podjetniška pogodba, glede na to, da se z njo zaveže stranka, ki jo ODZ imenuje podjetnika. To ustreza tudi imenu, ki ga ima ta pogodba v nekaterih drugih pravnih redih (*contrat de entreprise* francoskega prava). Vendar ima podjetje danes že prizvok institucije organiziranega trajnega gospodarskega delovanja. Podjemniški posel pa je lahko sklenjen samo za posamezen primer in ni pogoj tega posla, da bi bil podjemnik poklicni izvrševalec takšnih poslov. Gre torej za posamezen podjem. Spričo tega se mi zdi izraz podjemniška pogodba preciznejši« (Cigoj, 1998, str. 105).

"Pogodba o delu" oziroma pravilno podjemna pogodba je pogodba civilnega prava, s katero se podjemnik zavezuje opraviti določen podjem, to je opraviti določen posel, izdelati ali popraviti kakšno stvar, opraviti kakšno telesno ali umsko delo za naročnika (619. čl. OZ). Tu gre za najbolj splošno podjetniško (gospodarsko) pogodbo, katere predmet je neko delo, ki ga podjemnik opravi za uporabnika, naročnika dela oziroma storitve. Cigoj podjemniško pogodbo uvršča med pogodbe o storitvah. Poleg nje med pogodbe o storitvah uvršča še naročilo oziroma mandatno pogodbo in shranjevalno pogodbo (Cigoj, 1998, str. 102).

Obligacijski zakonik poleg podjemne pogodbe pozna še vrsto posebnih pogodb, katerih predmet je določeno delo, podjem. Tako je na primer gradbena pogodba posebna podjemna pogodba, s katero se podjemnik zavezuje opraviti gradbena dela. Obligacijski zakonik v 649. členu to izrecno poudari: »Gradbena pogodba je podjemna pogodba …« Čeprav zakon v drugih primerih posebej ne poudarja njihov podjemni (podjetniški) namen, pa v teoriji med posebne podjemniške pogodbe poleg gradbene pogodbe uvrščajo še druge

pogodbe, ki so se razvile iz pogodbe "*locatio conductio operis*". Tako Brank kot posebno vrsto pogodbe o delu šteje gradbeno in prevozno pogodbo (Brank, 1998, str. 129). Cigoj pa poleg teh še pogodbo o prenosu pisem in obvestil, založniško pogodbo in pogodbo o dajanju nasvetov (Cigoj, 1998, str.117–142).

Kot ugotavlja Podgoršek, ureja zakon podjemno pogodbo v ožjem smislu. Iz te osnovne pogodbe so se v gospodarskem prometu razvile in osamosvojile pogodbe, ki imajo poleg pravnih značilnosti osnovne podjemniške pogodbe tudi nekatere samosvoje poteze. Tako Obligacijski zakonik (ZOR) ureja na primer gradbeno pogodbo, prevozne pogodbe, Zakon o avtorskih in drugih pravicah pa avtorsko pogodbo. In dalje ugotavlja, da v določenih primerih meja med osnovno in osamosvojenimi pogodbami ni očitna, tudi kadar ima predmet določene pogodbe posebnosti katere izmed naštetih osamosvojenih pogodb, gre lahko za podjemniško pogodbo v ožjem smislu. Navaja tudi primer iz sodne prakse, ko je sodišče v sporu med dvema gradbenima podjetjema štelo enostavna in manjša dela, izravnavo stropov in zidov, za predmet pogodbe o delu in ne za gradbeno pogodbo (Podgoršek, 1993, str. 189).

Da bi bolje razumeli in razlikovali podjemno pogodbo (pogodbo o delu) od drugih pogodb, je koristno pogledati njen zgodovinski izvor in razvoj. Podjemna pogodba ima svoj izvor v *locatio conductio* rimskega prava. Iz *locatio conductio* so se razvile naslednje pogodbe: najemna in zakupna pogodba – *locatio conductio rei*; službena ali pogodba o delu – *locatio conductio operorum* in delovršna ali podjetniška pogodba – *locatio conductio operis* (Korošec, 1948, str. 78).

Korošec pogodbo o delu pravilno enači s službeno pogodbo, torej drugače kot je pojem uporabljen danes. Pogodba o delu, *locatio conductio operorum*, službena pogodba je torej pogodba, s katero delavec prepusti delodajalcu v določenem obsegu uporabljanje svoje delovne sile, zato pa od njega dobi plačilo v denarju. Dalje tudi ugotavlja, da se službena pogodba v rimskem sužnjeposestniškem gospodarstvu ni mogla razvijati, je pa pridobila večji pomen v novem veku. Vprašanja, ki so z njo v zvezi, pa daleč presegajo okvir zasebnega prava in spadajo v delovno pravo (Korošec, 1948, str. 83).

Kyovsky ugotavlja, da tudi gospodarski liberalizem 19. stoletja ni čutil potrebe, da bi s posebnimi predpisi urejal delovna razmerja, temveč se je posluževal pravnega instituta rimskega prava, in sicer *locotio conductio*

operorum. Ta liberalistična misel, izposojena iz rimskega prava, je prišla do izraza v Napoleonovem civilnem kodeksu in drugih zakonikih takratnega obdobja. Buržoazni pravni red je napravil majhno koncesijo s tem, da je na mesto romanistične službene pogodbe uvedel posebno novo obliko delovne pogodbe izven obligacijskega prava (Kyovsky, 1978, str. 179–180).

Ni namen te razprave analizirati razvoj *locatio conductio operorum*, rimske pogodbo o delu oziroma službene pogodbe, čeprav so v delovnopravni teoriji zanimive razprave o naravi te pogodbe. Po drugi strani pa ta pogodba, kot ugotavlja Cvetko, ni nikjer definirana (Cvetko, 2008, str. 67). Tuji pravni sistemi pogodbo o zaposlitvi urejajo ali v okviru delovnopravne zakonodaje (Francija, Rusija) ali pa kar v civilnih zakonikih (Italija, Švica, Nemčija, Avstrija).

Zanimiva je ureditev v italijanskem civilnem zakoniku, kjer je podjemna pogodba (*Contratto di opera* – 2222 čl. CC) tako kot tudi pogodba o zaposlitvi (*Contratto di lavoro* – 2097 čl. CC) urejena v peti knjigi, ki obravnava delo v različnih organizacijskih oblikah medtem ko je podjemna pogodba obravnavana v tretjem poglavju, ki govori o samostojnem delu. Vidimo, da za razliko od našega obligacijskega zakonika podjemna pogodba ni urejena v četrti knjigi obligacij, kjer so urejene pogodbe: gradbena pogodba, prevozna pogodba in druge, ampak v peti knjigi o delu. To kaže na drugačno sistemsko civilistično umestitev podjemne pogodbe, *contratto di opera*.

Pri nas je ta materija iz civilnega prava prešla v novo pravno panogo delovnega prava. Zato je bila pogodba o delu (ne podjemna pogodba), poleg pogodbe o zaposlitvi po Zakonu o delovnih razmerjih (Ur. l. RS, št. 14/1990) institut delovnega prava. Pogodba o delu se je uporabljala za začasna in občasna dela in je bilo delo glede na to časovno omejeno. Pogodba se je sklepala za začasna in občasna dela, ki so lahko trajala največ 60 dni v koledarskem letu oz. največ 8 ur na teden.

Delovna razmerja se urejajo s pogodbo o zaposlitvi. Vendar ker je Zakon o delovnih razmerjih v 4. členu preozko opredelil delovno razmerje, zlasti z omejitvijo, da se delo opravlja nepretrgoma, je vrsta del: zaposlitev za začasna dela, zaposlitev za občasna dela, ostala izven delovnopravne ureditve. Zato je praksa razumela, da se lahko razmerja, ki niso urejena z delovnopravno zakonodajo, urejajo s civilnopravnimi instituti in dalje izpeljala, da se lahko zaposluje tudi po civilnopravni

podjemni pogodbi (pogodbi o delu). Menimo, da to ni sprejemljivo in da moramo vse oblike zaposlovanja urejati v okviru delovnopravne ureditve. Tudi aktualne razprave o fleksibilnosti delovnega razmerja kažejo na to, da moramo na novo in drugače urediti vse vrste zaposlitve oziroma dela, zlasti to velja za razna krajša, občasna, začasna dela. Poskus v tej smeri je novi Zakon o malem delu.

Gospodarska družba oziroma podjetnik imata sicer možnost, da izvedbo določenih del prepustita drugi osebi, podjemniku, čeprav bi ta dela lahko opravili tudi pri njiju zaposleni delavci. Vendar gre tu za povsem različni pravni situaciji, različen pravni status izvajalca del in povsem različne pravne podlage oziroma različni pogodbi. Zato moramo razumeti, da sta "pogodba o delu" (*locatio operorum*), pravilno pogodba o zaposlitvi po delovnem pravu in "pogodba o delu", pravilno podjemna pogodba (*locatio operis*) po civilnem pravu dve povsem različni pogodbi, namenjeni urejanju različnih pravnih razmerij. Razlikujeta se po predmetu, obliki, vsebini pogodbe, po pogodbenih strankah in različnih pravnih posledicah sklenitve ene ali druge pogodbe.

Jasnost pojmov je temelj učinkovitega pravnega reda in pravne varnosti. Vidimo, da je pojem "delo" večpomenski in pravno nejasen. Delo opravlja tako delavec, kot tudi podjemnik, vendar gre za povsem različna pravna razmerja. Zato danes poimenovanje neke civilne pogodbe, "pogodba o delu", ki zgodovinsko in po izvoru in glede na njen razvoj sodi v delovno pravo, ni ustrezno. Ustvarja pojmovno nejasnost, nas zavaja in napeljuje na zaključek, da lahko razmerja pri delu urejamo tako po pravilih delovnega prava kot civilnega prava. Tudi v hrvaški teoriji, ki izhaja iz naše skupne pretekle ureditve v Jugoslaviji, opozarjajo na jasno razlikovanje med pogodbama. V hrvaški pravni terminologiji uporabljajo pojem "*ugovor o djelu*" za *locatio conductio operis* – pri nas podjemna pogodba in "*ugovor o radu*" za *locatio conducio operorum* – pri nas pogodba o zaposlitvi (Vizner, 1971, str. 501).

V naši praksi se množično pojavljajo " pogodbe o delu", ki po vsebini niso podjemne pogodbe. V teh primerih gre za prikrito delovno razmerje, kot ugotavlja Šetinc Tekavc, in bi morala ta razmerja biti predmet delovnopravne ureditve (Šetinc Tekavc, 2004, str. 14).

V nadaljevanju bomo zaradi jasnosti opustili pojem pogodba o delu in bomo uporabljali pojem podjemna pogodba za civilnopravna razmerja in pogodba o zaposlitvi za delovnopravna razmerja.

3 Predmet pogodbe

Predmet oziroma vsebina podjemne pogodbe je izvedba, izvršitev dela in ne samo delo. Delo lahko izvršijo podjemnik osebno ali pa pri njem zaposleni delavci. Bistven je delovni učinek, delovni rezultat in ne čas, količina dela. Plačan je rezultat dela in ne čas dela. Pri pogodbi o zaposlitvi pa gre za osebno delo delojemalca – delavca in dela ne more opravljati druga oseba. Plačano je njegovo delo po urah ali količinah, normah.

Pomemben je namen sklenitve pogodbe. Pri podjemni pogodbi naročnik pričakuje, da bo zanj in ne za nekoga drugega opravljena neka storitev. Kot poudarja zakon (619. čl. OZ), gre pri podjemni pogodbi za posel, kot je na primer izdelava stvari – sešiti obleko; popraviti stvar – zamenjati motor v pralnem stroju; telesno delo – varovanje prostorov; umsko delo – raziskovanje, analiza ravnanja potrošnikov na trgu, itd.

Pri podjemni pogodbi izvajalec delo opravlja v svojem imenu, za svoj račun in svoj riziko. Pri njem zaposleni delavec ni v pravnem razmerju z naročnikom dela. Do naročnika dela je le izjemoma lahko odškodninsko odgovoren, če je škodo povzročil namenoma (2. odst. 147. čl. OZ), sicer pa naročniku dela praviloma odgovarja delodajalec, v tem primeru podjemnik (1. odst. 147. čl. OZ).

Kadar se izvajalec z nekom dogovarja, da bo ta namesto njega, ali v njegovem imenu opravil določeno delo, gre za dogovor o zaposlitvi in ne za podjem. Lahko pride sicer tudi do dogovora, da bo pri poslu sodeloval drug podizvajalec (subkontraktor). Vendar gre v obeh primerih za novo pravno razmerje, novo pogodbo in nove pogodbene stranke. Naročnik posla iz podjemne pogodbe v teh drugih pogodbah ni udeležen.

Poglejmo aktualen primer sklepanja podjemnih pogodb v zdravstvu. Kdaj gre na področju zdravstva za podjemno pogodbo?

Če zdravstvena organizacija ali zasebni zdravnik – koncesionar (podjemnik) sklene z bolnikom, pacientom (naročnikom) dogovor o operaciji slepiča, je to podjemna pogodba.

Zdravstvena organizacija ali zasebni zdravnik (podjemnik) sta v pravnem razmerju s pacientom, bolnikom. Zdravnik, ki v zdravstveni organizaciji opravlja delo, ni v pravnem razmerju s pacientom. Zato tudi pacient ne more imeti odškodninskih zahtevkov zaradi nestrokovno opravljenega dela do njega, ampak odškodnino uveljavlja od zdravstvene

organizacije oziroma koncesionarja. Temelj za uveljavljanje odškodninskih zahtevkov naročnika, pacienta je podjemna pogodba.

Če se zdravnik (delavec) dogovori, da bo opravljal zdravstvene storitve (operacije slepičev) v zdravstveni organizaciji ali pri zasebniku, koncesionarju (delodajalcu), je to pogodba o zaposlitvi. V tem primeru zdravnik (delavec) ni v pravnem razmerju z bolnikom, ampak ima pravno razmerje z zdravstveno organizacijo oziroma koncesionarjem.

Na primer, ko se zdravstvena organizacija ali koncesionar dogovarjata z zdravnikom, ki je zaposlen na Univerzitetnem kliničnem centru, da bo v svojem prostem času pri njih oziroma za njih opravljal določeno delo - zdravstvene storitve, gre za dogovor o zaposlitvi. Torej bi morali skleniti pogodbo o zaposlitvi s krajšim delovnim časom (64. čl. Zakona o delovnih razmerjih, Ur. l. RS, št. 42/2002) in ne podjemne pogodbe (pogodbe o delu).

Civilnopravne podjemne pogodbe (pogodbe o delu), ki jih pogosto srečamo v zdravstvu, torej po svoji vsebini niso podjemne pogodbe. Še huje, praksa je za svoje ravnanje našla podporo tudi v podzakonskem aktu, v Uredbi o merilih za sklepanje podjemnih pogodb ali drugih pogodb civilnega prava za opravljanje zdravstvenih storitev v mreži javne zdravstvene službe. Ta uredba je seveda v nasprotju z Obligacijskim zakonikom in Zakonom o delovnih razmerjih.

Seveda taki primeri niso le v zdravstvu ampak tudi zelo pogosto v izobraževalni dejavnosti, zlasti visokem šolstvu, v raziskovalni dejavnosti, v kulturi in drugje.

V zvezi s pogodbami o zaposlitvi s krajšim delovnim časom velja opozoriti na omejitve, ki jih določa 146. člen ZDR. Delavec, ki že dela poln delovni čas, sme skleniti pogodbo o zaposlitvi le s soglasjem delodajalca pri katerem dela polni delovni čas in če gre za deficitarne poklice ali za opravljanje vzgojno-izobraževalnih, kulturno umetniških in raziskovalnih del. Delavec lahko opravlja tako delo največ osem ur na teden. Teh omejitev pa ni, če gre za delavca, ki dela krajši delovni čas in sme skleniti več takšnih razmerij, da bi tako dosegel polni delovni čas (1.odst. 65. čl. ZDR). Soglasje delodajalca v tem drugem primeru ni potrebno. Lahko pa gre za omejitve, ki so vezane na lojalnost delavca do svojega delodajalca in s tem povezano konkurenčno klavzulo. To velja tudi v primeru podjemne pogodbe.

Pogodba o zaposlitvi za polni ali krajši delovni čas se lahko sklepa tudi za določen čas in tako bi lahko rešili tudi primere občasnih in začasnih del. Utemeljeno bi lahko ugovarjali, da v primerih občasnih in začasnih del niso podani vsi elemente delovnega razmerja, ki jih določa 4. člen ZDR. Res je, pri teh delih praviloma ni mogoče ugotoviti nepretrganosti dela in tudi ne vključenosti v organiziran delovni proces. V tem vidimo pomanjkljivost oziroma togost definicije delovnega razmerja, ki bi jo veljalo spremeniti.

Zato Šetinc Tekavc ugotavlja, da v primeru, ko elementi delovnega razmerja niso podani kumulativno, zainteresiranima strankama ni treba skleniti pogodbe o zaposlitvi kot ugodnejše oblike za delavca, ampak sta stranki prosti, da skleneta za opravljanje določenega dela civilnopravno pogodbo, torej lahko tudi podjemno pogodbo (Šetinc Tekavc, 2004, str. 14). Podjemna pogodba da, vendar le, če so izpolnjeni statusnopravni pogoji izvajalca del, sklenitelja pogodbe (podjemnika). "Delavec" teh pogojev praviloma ne izpolnjuje, o čemer kasneje.

Skleniti neko inominatno civilno pogodbo o zaposlitvi, o delu, pa menimo, ni dopustno. Urejanje delovnih razmerij je pri nas, kot v nekaterih drugih tujih ureditvah, izvzeto iz civilnega prava in proste volje pogodbenih strank. Tako Ustava v 66. členu zagotavlja zakonsko varstvo dela. Urejanje delovnih razmerij je zato vezano na obvezujoče določbe zakona. Kot ugotavlja Vodovnik, država to varstvo zagotavlja na različne načine, zlasti pa tako, da je z zavezujočimi (kogentnimi) predpisi omejila prostost strank pri sklepanju pogodbe o zaposlitvi (Vodovnik, 2006, str. 21). Tako ni mogoče "dela" urejati ali delovnopravno ali civilnopravno po prosti volji pogodbenih strank. Glede na že doseženo stopnjo delovnopravnega varstva delavcev, bi to pomenilo korak nazaj v urejanju delovnih razmerij. Vsa delovna razmerja morajo ostati v domeni delovnega prava.

4 Oblika pogodbe in pogodbene stranke

Podjemna pogodba je konsenzualna, brezoblična pogodba. Pogodba je sklenjena, ko se izjavi pogodbenih strank ujemata. Drugače je pri pogodbi o zaposlitvi, kjer je oblika predpisana. Pogodba o zaposlitvi se sklene v pisni obliki (1. odst. 15. čl. ZDR), čeprav neizpolnitev te zahteve ne vpliva na obstoj in veljavnost pogodbe o zaposlitvi (4. odst.15. čl. ZDR). Težko si sicer predstavljamo obstoj in veljavnost pogodbe, ki je ni. Lahko si predstavljamo obstoj delovnega razmerja,

čeprav pisna pogodba ni bila sklenjena, obstoj in vsebino pogodbenega razmerja pa bo treba šele dokazati. Glede na našo sedanjo nezakonito prakso sklepanja podjemnih pogodb (pogodb o delu) bo delodajalec imel izgovor, da je sklenil pogodbo o delu, ki je lahko ustna, ker če bi z delavcem želel skleniti delovno razmerje, bi sklenil pisno pogodbo o zaposlitvi.

Kot navaja Šetinc Tekavc »V našem pravu nikjer ni predvidena registracija ali potrditev pogodbe o delu (podjemne pogodbe), še posebej zato, ker gre za neformalno pogodbo, ki je lahko sklenjena tudi ustno.« (Šetinc Tekavc 2004, str. 14). Očitno veljavna praksa prijave pogodbe o delu Zavodu za zaposlovanje kaže na neko drugo pogodbo o delu, ki je dejansko pogodba o zaposlitvi za občasno oziroma začasno delo in ne podjemna pogodba civilnega prava.

Drugo pomembno vprašanje je, kdo so lahko pogodbene stranke. Ko jih zakonodajalec poimenuje: pri pogodbi o zaposlitvi delodajalec in delavec oziroma pri podjemni pogodbi podjemnik in naročnik, jim s tem daje tudi ustrezno vsebinsko razliko. Zato ni mogoče enostavno teh pojmov enačiti, kot na primer Rajšter Vranovič podjemnika enači z delavcem in naročnika z delodajalcem (Rajšter Vranovič, 2003, str. 13).

Tako se zastavi vprašanje ali lahko delodajalec s svojim delavcem, s katerim ima sklenjeno pogodbo o zaposlitvi, sklene še podjemno pogodbo. Na primer s šoferjem, ki dela polni delovni čas, sklene delodajalec še podjemno pogodbo o servisiranju službenih vozil v njegovem prostem času v soboto in nedeljo. Podobni primeri v praksi niso redki. In drugo vprašanje, ali je lahko vsaka fizična ali pravna oseba podjemnik.

Z delovnopravnega vidika smo s sklenitvijo takšne podjemne pogodbe obšli z zakonom zajamčeno pravico delavca, v konkretnem primeru pravico do tedenskega počitka. Ker gre za pravico delavca bi lahko rekli, da se ji delavec lahko odpove in po tej logiki bi se delavec lahko "prostovoljno" odpovedal vsaki pravici, ki je delovno pravno varovana. Delodajalec pa se je v tem primeru izognil prispevkom, ki se plačujejo iz delovnega razmerja. To seveda ni dopustno.

Odgovor na drugo vprašanje je pomembnejši. V našem pravnem sistemu imamo statusno pravne oblike predpisane. Kdor želi opravljati neko pridobitno dejavnost, se mora ustrezno statusno organizirati. Zakon o gospodarskih družbah ponuja obliko samostojnega podjetnika ali

katero od oblik gospodarskih družb. Kdor opravlja delo in ni organiziran v eni od predpisanih statusnih oblik, dela na črno. Če posameznik opravlja dejavnost oziroma delo in ni vpisan ali priglašen kot to zahteva Zakon o preprečevanju dela in zaposlovanja na črno ali drugi zakon (4. al. 1. odst. 3. čl. ZPDZC, Ur. l. RS, št. 12/2007), dela na črno. Delo na črno je prepovedano (2. odst. 3. čl. ZPDZC).

Obravnavani zakon našteva tudi izjeme, ko določenih del ne štejemo za delo na črno, to so: medsebojna sosedska pomoč, delo v lastni režiji, nujno delo, humanitarno delo in osebno delo (1. odst. 7. čl. ZPDZC). Prav tako ne gre za zaposlovanje na črno, če gre za kratkotrajno oziroma malo delo (2. odst. 7. čl. ZPDZC). Po veljavnem zakonu moramo osebno dopolnilno delo in kratkotrajno delo prijaviti upravni enoti (12. čl. in 12a. čl. ZPDZC). Ko gre za malo delo, mora delodajalec skleniti pogodbo o mali zaposlitvi (12b. čl. ZPDZC) in ne mogoče podjemno pogodbo.

Obravnavani primer šoferja – mehanika ne moremo uvrstiti pod noben primer obravnavanih izjem po Zakonu o preprečevanju dela in zaposlovanja na črno. Torej v soboto in nedeljo dela na črno. Ostane sicer možnost, da bi takšno delo opravljal, če ima status podjetnika in je vpisan v poslovni register.

Tako smo pri temeljnem vprašanju, kdo so pogodbene stranke pri podjemni pogodbi. Iz definicije podjemne pogodbe izhaja, da sta to podjemnik in naročnik. Naročnik je lahko katerakoli fizična ali pravna oseba, ki je naročila določen posel in se zavezala, da bo opravljeno delo plačala. Naročnik je dolžan prevzeti delo, ki je bilo izvršeno po določilih pogodbe in pravilih posla (641. čl. OZ).

Druga pogodbena stranka pa ni kdorkoli. Obligacijski zakon drugo pogodbeno stranko konkretizira. Pri podjemni pogodbi je to podjemnik, pri gradbeni pogodbi izvajalec, pri prevozni pogodbi prevoznik, pri skladiščni pogodbi skladiščnik, itd. Če se zatečemo k besedni razlagi pojma podjemnik, bomo ugotovili, da Slovar slovenskega knjižnega jezika (Slovar, 1994, str. 869) te besede ne pozna več, pozna pa prevoznika, izvajalca, skladiščnika. Podjemnika naj bi torej nadomestila beseda podjetnik glede nato, da sta se besedi podjem in tudi podjemnik razvili iz pojma "podjeten" Zato ne bi bilo nič narobe, če bi tudi zakonodajalec uporabil pojem podjetnik. Pod splošnim pojmom podjetnik oziroma podjetje razumemo v ekonomskem smislu vsakogar, ki opravlja pridobitno

dejavnost na trgu torej tako samostojnega podjetnika kot tudi vse oblike gospodarskih družb.

Na današnji stopnji razvoja in urejenosti pravno organizacijskih oblik v katerih izvajamo dejavnost, ne moremo pristati na liberalistične poglede z začetkov kapitalizma, ko je lahko vsakdo opravljal pridobitno dejavnost. Če so že v srednjem veku imeli jasna pravila o statusu obrtnikov in trgovcev in obveznost vpisa v stanovske registre kot pogoj za opravljanje dejavnosti, je danes v urejeni pravni državi to še toliko bolj pomembno.

Da bi lahko opravljali dejavnost, moramo izpolnjevati splošne in posebne pogoje. Pod splošnimi pogoji razumemo ustrezno statusno obliko organiziranja in dolžnost vpisa v ustrezni register. V skladu z načelom *numerus clausus* nam pravni red ponuja mogoče oblike organiziranja. Zakon o gospodarskih družbah nam ponuja statusno pravne oblike samostojnega podjetnika, osebne in kapitalske družbe in gospodarska interesna združenja. Posebni zakoni urejajo položaj samostojnih intelektualnih poklicev. Zastareli Zakon o zavodih in več posebnih zakonov urejajo obliko izvajanja nepridobitnih dejavnosti.

Podjetnik lahko prične opravljati dejavnost, ko je pri AJPES vpisan v Poslovni register Slovenije (1. odst. 74. čl. ZGD). Gospodarska družba lahko začne opravljati dejavnost, ko je vpisana v sodni register (6. odst. 6. čl. ZGD).

Glede na povedano lahko torej zaključimo, da je podjemnik kot pogodbena stranka lahko le oseba, ki izpolnjuje statusne pogoje, sicer gre za opravljanje dela na črno.

Za izvajanje dejavnosti so pomembni tudi posebni pogoji, ki za naročnika pomenijo zagotovilo, da izvajalec, podjetnik, gospodarska družba izpolnjuje osnovne pogoje za izvajanje določene dejavnosti. To so tehnični, sanitarni, higienski, kadrovski in drugi pogoji, ki se glede na vrsto dejavnosti razlikujejo. Neizpolnjevanje teh pogojev pomeni kršitev in v skrajnem primeru tudi prepoved opravljanja dejavnosti. V nekaterih izjemnih primerih se izpolnjevanje teh pogojev preverja celo pred pričetkom opravljanja dejavnosti. V teh primerih pristojni državni organ pred pričetkom opravljanja dejavnosti izda ugotovitveno odločbo o izpolnjevanju pogojev.

Sedanja zakonodajna praksa, ki zaradi odpravljanja "administrativnih ovir" opušča oziroma minimalizira posebne pogoje, po našem mnenju

ni pravilna in je škodljiva za uporabnike oziroma potrošnike. Strinjamo se, da praviloma administrativno preverjanje posebnih pogojev pred ustanovitvijo ni potrebno, kar pa ne pomeni, da posebnih pogojev ne bi določili. Nespoštovanje teh pogojev mora biti sankcionirano.

5 Sklep

V skrbi za pravno državo in učinkovit pravni red je temeljno, da so nam pravni pojmi, pravni instituti in pravna razmerja jasni.

Vsak pravni pojem naj bi imel enak in enoznačen pomen v vsakem zakonu ali podzakonskem aktu. Zato sedanje prepisovanje oziroma zgledovanje po evropski nomotehniki pojasnjevanja pomena pojmov v evropskih pravnih aktih za nacionalni pravni red ni sprejemljivo. V Evropski uniji je tak nomotehnični pristop razumljiv in nujen zaradi različnih pravnih redov članic. V nacionalni zakonodaji pa to ni sprejemljivo, ni potrebno in je nevarno, ker ustvarjamo negotovost in nejasnost pojmov, če je pojem v enem zakonu opredeljen tako, v drugem pa drugače. Na primer pojem "podjetje" ima v naših zakonih nedopustno različen pomen, ali povezavo družb v Zakonu o gospodarskih družba imenujemo "koncern" v Zakonu o bančništvu pa "bančna skupina", namesto bančni koncern, itd. Pojem, ki je definiran v ustavi ali v splošnem predpisu (*lex generalis*) mora biti enako in dosledno uporabljen v vseh posebnih predpisih (*lex specialis*) in drugih podzakonskih aktih. Tako se gradi pravni jezik in zagotavlja pravna jasnost in posledično varnost.

Zato v našem primeru ni nobene potrebe, da bi za neko pogodbo uporabili dva različna pojma oziroma imeni. Zato bi bilo korektno, da v Obligacijskem zakoniku opustimo ime "pogodba o delu" in ostanemo samo pri enem pojmu to je pri "podjemni pogodbi". In še posebej glede na opisani zgodovinski razvoj te pogodbe.

Dalje menimo, da je razvoj delovnih razmerij na taki stopnji, da je pravilno vse oblike zaposlovanja urejati znotraj delovno pravne ureditve. Jasno je treba tudi povedati, da zaposlovanje na podlagi civilnopravnih razmerij, civilnih pogodb ni dopustno. Tako ni dopustno zlorabljati podjemne pogodbe za urejanje razmerij pri zaposlovanju delavcev za občasna oziroma začasna dela. Kot smo ugotovili, število teh pogodb ni majhno in kar je najslabše, sistem jih dopušča. Zato je treba dodelati delovno zakonodajo, ki mora opredeliti vse možne oblike zaposlitev in opustiti sedanjo togo ureditev. Sporni Zakon o malem delu poskuša

praznino, ki je nastala zaradi neurejenosti zaposlovanja za občasna in začasna dela urediti, vendar nesistemsko in le za določene skupine oseb.

Redke izjeme, ko ni treba skleniti pogodbe o zaposlitvi oziroma ni treba biti organiziran kot podjetnik ali gospodarska družba, da bi lahko sklenili podjemno pogodbo, določa Zakon o preprečevanju zaposlovanja in dela na črno.

Dalje menimo, da je v urejenem gospodarstvu nujno spoštovati pravila in pogoje opravljanja dejavnosti. Prvi pogoj opravljanja dejavnosti je ustrezna statusna organiziranost, to pomeni, da moramo biti organizirani kot podjetnik ali kot gospodarska družba in zaradi pravne varnosti moramo biti vpisani v ustrezni register (poslovni register, sodni register, register svobodnih poklicev). Dopuščanje dela na črno in zatiskanje oči pred tem množičnim pojavom z izgovorom, da blažimo socialne stiske, ni dopustno in je nepošteno do tistih, ki svoje obveznosti spoštujejo.

Mag. Nikolaj Abrahamsberg je magisterij s področja delovnega, socialnega in statusnega prava in naziv magistra pravnih znanosti pridobil na Pravni fakulteti Univerze v Ljubljani. Izpopolnjeval se je na univerzah v Trstu, Trentu in Liverpoolu. Bil je dekan in prodekan Višje upravne šole oziroma Visoke upravne šole. Predaval je na Fakulteti za upravo v Ljubljani, Fakulteti za management v Kopru in na Turistici v Portorožu. Predaval je statusno pravo na Fakulteti za upravo v Ljubljani, gospodarsko pravo na Fakulteti za management v Kopru in pravne predpise v turizmu na Turistici v Portorožu. Predaval je tudi delovno pravo na Višji upravni šoli v Ljubljani.

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SUMMARY

THE ABUSE OF "WORK CONTRACT"

Key words: work contract, service contract, employment contract, contractor

In the article, the author describes development of work contract (service contract) that has evolved from the Roman "*locatio conductio operis*" and compares it with the employment contract, which has evolved from the Roman "*locatio conductio operorum*". The author points out the inappropriate use of term *locatio conductio operis* in the Slovene Civil Code, which uses two different terms for this contract: "work contract" (meaning service contract) and "contract of work" (meaning employment contract). This misuse of legal terms diminishes the fundamental difference between the two types of contract that belong to different fields of law. The "contract of work" (employment contract) belongs to labour law; in fact this contract has been regulated in Labour Relations Act until 2002, whilst the "work contract" (service contract) falls within the civil law of the contract. Since the Labour Relations Act defined the elements of the employment contract ("contract of work") too narrowly and did not cover occasional and temporary jobs, the practice used the contract work improperly.

The author argues that, starting from highly developed labour legislation in Slovenia, we can not allow two forms of employment. The civil "work contract" (in sense of *locatio conductio operis*) can not be the legal basis for employment relationship. Work contract is intended for entrepreneurs, companies and other persons who are in business in their own account. Service contract (in Slovene legislation improperly called contract of work or work contract) is aimed to regulate the relationships (rights and obligations) between those entrepreneurs, companies and other persons and the "buyers" of their service and is, in this sense, very similar to the transport contract, contract of construction or any other contract, the content of which is the performance of a particular work or service. An individual person is unable to conclude a service contract, unless she/he is an entrepreneur, and exceptions from this rule are rarely permitted. The controversial proposal of Act on small work (still in the procedure) is trying to fill the described gap regarding the occasional and

temporary work, but just for certain groups of people and in a non-systematic and improper way.

Service contract is the most common contract in civil law, by which one contractor is bound to carry out a certain job, like build or repair something or perform a certain physical or mental work for the other contractor. Other civil law contracts like transport contract, contract of construction and some others emerged (developed) from service contract. The subject of all these contracts is performance of a certain job, but not an employment relationship. This job can be performed by an entrepreneur himself or by workers employed by him. The relationship between the service provider and the buyer of the service, which is regulated by service contract, is very different from the relationship between the provider of the service and his employees, which is regulated in the employment contract. Those employees are in no legal relationship with the buyer of the service.

An important difference between the contract work and the employment contract is in the formalities that are prescribed for the latter. The employment contract must be concluded in written form, while no formalities are required for the work contract. However, in practice there is still a requirement to notify the work contracts to the State Employment office, even if this was regulated in the repealed Labour Relations Act (1990). In the last nine months of 2010, there were more than 20.000 notifications of such work.

Regarding the service contract and other business contracts like construction contract, transport contract and similar, the important question is who are the contracting parties. It is undisputed that the buyer of the service can be any legal or natural person. On the other hand, the contractor that provides the service can not be anyone. A business activity can be carried out only by persons that meet general and specific requirements. Under general requirements we understand the proper form of a conducting a business and the duty of registration in the business register. In accordance with the principle of *numerus clausus*, the law offers a variety of possible forms of organization. The Companies Act regulates: private entrepreneur, private companies, joint stock companies and economic interest groups. Specific laws are provided for conduction of independent intellectual professions. All of the mentioned can start performing their business after registering in the business register. From

the legal point of view, it is clear that the persons who are not organised in one of the mentioned forms, are performing an undeclared work (some exceptions are provided in the Act on prohibition on undeclared work and in the Proposal of Act on small work).

In conclusion the author points out the importance of clarity and precision of legal concepts. He therefore proposes that the "contract of work" (meaning employment contract) should be abolished (cancelled) from the Civil Code, and only the "contract work" (meaning service contract) is to be regulated within the Civil Code. The duality of descriptions of the same contract creates only unnecessary confusion and misinterpretation.

In the end the author argues that regarding the level of development of working relationships in Slovenia, it is only suitable and correct to regulate all forms of employment contract within the labour law. It has to be clearly stated that employment relationships should not be concluded by other civil law contracts (like service contract). The supplementing labour legislation should define all possible forms of employment and abandon the current rigid regulations.

Surges of Development and Techno-Economic Paradigms. A Review Essay of the Festschrift for Carlota Perez.

Walter Scherrer

University of Salzburg

walter.scherrer@sbg.ac.at

REVIEW OF

Techno-Economic Paradigms. Essays in Honour of Carlota Perez, edited by Wolfgang Drechsler, Rainer Kattel and Erik S. Reinert. London and New York 2009, Anthem Press, ISBN-13: 978 1 84331 785 2.

Introduction

Although it might be difficult to agree on a precise definition of what mainstream economics is, it is perhaps easier to agree that mainstream economics did not succeed in explaining ex ante the financial meltdown in 2008 and the subsequent disturbances in the global economy. Yet outside this mainstream, there have been writers – not many, but Carlota Perez among them – who envisaged clearly why, how, and under what circumstances economic tensions would unfold into a fundamental break in economic history. In her major work *Technological Revolutions and Financial Capital – The Dynamics of Bubbles and Golden Ages* (Perez, 2002), Perez developed a model founded on elements from Kondratieff-type cycle theories and neo-Schumpeterian or evolutionary research on innovation and technological trajectories. At the core of her model is the concept of great surges of socio-economic development, which reflect different techno-economic paradigms (TEP). To mark the 70th birthday of Carlota Perez, three of her colleagues from Tallinn University of Technology – a stronghold of the TEP model – edited *Festschrift Techno-Economic Paradigms*, bringing together important writers and fellow contributors, mostly to the areas of Neo-Schumpeterian evolutionary

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economics and cycle theory, to acknowledge her outstanding contribution to these fields.

The next section of the paper will give a brief overview of Perez's model of TEP and surges of development. Selected topics that are dealt with in the Festschrift will then be discussed, in particular the role of financial markets within the dynamics of development surges, and the roles of government and public administration in coping with a change of TEP. The paper concludes with an overview of possible future development surges and of how to prepare for associated TEPs, with a section highlighting the significance of the Perez model for a distinct development strategy for Latin America.

Carlota Perez's model of development surges in a nutshell

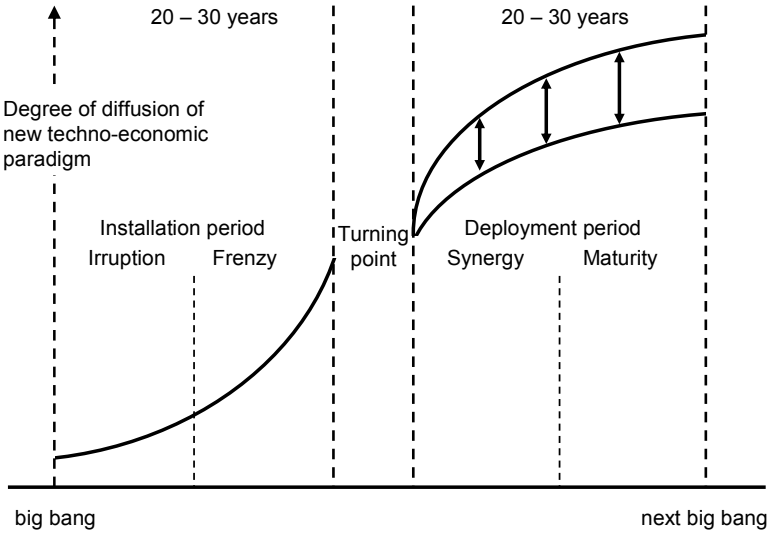
The emergence of new combinations of new technologies, new modes of organisation of economic relations, and new infrastructure provides huge incentives for entrepreneurs; such technological revolutions have occurred every 40 to 60 years and have generated **surges of development**. Five such technological revolutions and interrelated surges have taken place since the coming of the industrial society in the late 18th century, and each of these revolutions has been »accompanied by a set of 'best practice' principles, in the form of a **techno-economic paradigm**, which breaks the existing organisational habits in technology, the economy, management and social institutions« (Perez, 2002, p. 7). In one of his last original contributions, "Schumpeter's Business Cycles and Techno-Economic Paradigms", the late Christopher Freeman emphasises this feature of Perez's model showing that the concept of a TEP is much wider than clusters of innovations or even technology systems. The TEP concept refers to »a combination of interrelated product and process, technical, organisational and managerial innovations, opening up an unusually wide range of new investment and profit opportunities« (Freeman in Festschrift for Carlota Perez [FCP], p. 136). The key factors or key inputs of each TEP are characterised by clearly perceived and rapidly falling relative cost, an almost unlimited availability of supply over long periods, and a clear potential for use or incorporation of new key factors in many products and processes throughout the economic system.

At the beginning of the *installation phase* of each TEP (see Figure 1) is a technological "big bang", such as Henry Ford's Model T in 1908, as the start of mass production, or Intel's first microprocessor in 1971 as the

start of modern information technology. In the installation phase's first part ("irruption"), the new sets of technologies start from a small industrial base, but soon spread far beyond the confines of the industries where they originally emerged and provide a set of interrelated technologies and organisational principles that allow a step change in potential productivity in practically all economic activities (Perez, 2002, p. 8). In the *frenzy phase*, both the wealth-creating potential of the new paradigm and the exhaustion of the prevailing old paradigm become apparent. Financial capital now takes over and the impact of the great surge of development becomes more and more visible. This is the time of exuberance when entrepreneurs and investors try to find the best opportunities created by the new technology – this process of modernisation of the economy is based on Schumpeterian creative destruction. The enormous financial success of some key actors – Henry Ford or Bill Gates – attracts more and more capital to ventures based on the new TEP. Stock markets boom, and even people with modest salaries turn into »hopeful 'investors'« (Perez, 2002, p. 3), before the emergent bubble is finally set to burst.

In the *deployment phase* of a TEP, its potential has already become apparent and it can become fully realised. Infrastructure has already been established, and large parts of the population have the physical equipment, knowledge and skills required to utilise the new technologies. In the *synergy phase*, which is the first part of deployment of the now dominant TEP, all conditions are favourable to production and to the full flourishing of the new paradigm (Perez, 2002, p. 47). With the quick money already having been made (and some of it lost) during the frenzy period, investors now turn to the real economy, rendering a "golden age" for a technology which impacts on all parts of society. Although many signs of success and prosperity are still around, every TEP finally reaches a *maturity phase* in which its potential to further increase productivity is exhausted and its attractiveness dwindles for at least parts of the population. While those who have reaped the full benefit of the "golden age" still praise its virtues, those whose belief in the paradigm's promises has been disappointed are dissatisfied with the system and the implications of the prevailing technological paradigm. The time is now favourable for political and ideological confrontation to come to the fore (Perez, 2002, p. 55).

Figure 1: The phases of a "surge of development"



Source: based on Perez 2002, p.74

The installation and the deployment phases are separated by a "*turning point*", which is actually not a point in time but a period of variable length in which a new balance between individual and social interests within capitalism must be found. The burst of the frenzy's bubble will be followed by a deep recession or even depression, and it becomes increasingly apparent that the existing regulatory and social model restrains the exploitation of the full economic potential of the TEP that is taking the lead in economy and society. Here a difference to Schumpeter's model of long waves comes to the fore (Freeman in FCP, p. 141f): what for Schumpeter is the downsizing and depression of the long wave is in Perez's model, the turbulent period of introducing a new paradigm that is forcing its way with the help of finance. This is the time of re-regulation of the economy and of adjusting the institutional framework to the requirements of the now dominant TEP. Richard Nelson emphasises this aspect in his contribution "Technology, Institutions and Economic Development" (Nelson in FCP, 269ff), by pointing out that »the employment of 'physical' technologies requires the use of complementary 'social' technologies, and the latter, in turn, require a set of supporting institutions.« Thus, institutional and regulatory decisions have a strong impact on the degree of diffusion and on the scope of use of the no

longer new technology, and, even more significantly, on the degree to which a society can benefit from the TEP during the synergy and maturity phases.

The space between the two upward-sloping curves in the right part of the diagram reflects the range of possible outcomes from different regulatory regimes, and the arrows mark the potential impact of policy-making on finding the – more or less – appropriate set of institutions to accommodate the prevailing TEP. This illustrates that the Perez model is not deterministic, but merely indicates that all TEPs – whether steam or railways, steel or mass production – go through similar long-term cycles. This repetitiveness is the very logic of capitalism (Perez, 2002, p. 166).

But there is no guarantee that, after the turning point, a *golden age* will set in automatically and that the benefits of the new paradigm will be spread equally across all nations. While a turning point and the need to accommodate to the new paradigm opens a chance for economically lagging nations to start a catch-up process, those countries that do not succeed in designing a proper institutional framework may find themselves at least relatively stagnating in a *gilded age*. The situation is complicated as institutions that work well in one social-political-economic context cannot necessarily be transferred and adapted to the conditions of another (Nelson in FCP, p. 283). So the development path a country adopts depends on decisions in society.

Techno-economic paradigms and the financial markets

The inevitable cyclical behaviour of the economy – which is a major feature of the Perez model – is not only due to changes in the techno-economic sphere but also to changes in the financial economy. This aspect is highlighted in Jan Kregel's contribution "Financial experimentation, technological paradigm revolutions and financial crises" (Kregel in FCP, p. 203ff). Financial capital commands technological and economic development in the installation phase of a great surge that leads to the build-up of a bubble. Inflation of assets' paper values relative to real values inhibits development as financial capital becomes increasingly geared towards short-term gains from financial speculation. »The full deployment of the installed paradigm thus requires the elimination of the excessive financial layering through a financial collapse, and increased regulation of the financial system through more rigorous government control in a way that does not prevent the full deployment

of the new technology led by production capital reaping the full economic and social potential of the now prevailing paradigm.« (Kregel in FCP, p. 203). But a financial crisis is not only followed by a new set of financial market regulations as in Perez's model, but also by a shift from excessive risk-taking to excessively risk-averse behaviour in the aftermath of a crisis. In Hyman Minsky's terminology, this means that agents turn back from speculative and Ponzi finance to hedge finance: only the safest projects obtain financing.

Thus in Perez's model, the driving force of a surge of development is a new TEP in the production sector of the economy, while Kregel – based on Minsky – emphasises the importance of innovation in the financial sector. The recent surge, driven by the information- and communication technology (ICT) paradigm has a distinctive feature as the ICT paradigm itself has become a powerful tool of financial innovation; but are financial and techno-economic innovation coincidental or systematic? In a review of the two TEPs that have taken place in the 20th century (mass production and ICT), Kregel shows that the major activity of banks is no longer to provide direct financing for businesses and households but instead to create financial assets that are sold to a subsidiary, which in turn sells them in the capital market to non-bank financial institutions or to the general public (Kregel in FCP, p. 219).

Kregel concludes that the emergence of a new paradigm of creation of liquidity through structured lending vehicles and its interaction with the introduction of new ICT was the important determinant of the development of financial markets during the installation phase of the prevailing TEP. Therefore it seems that Perez's model of techno-economic innovation and Minsky's idea of the crucial role of financial innovation are complementary.

Role of the state and public management in the prevailing ICT-based techno-economic paradigm

A change of TEP has widespread implications for public policy that reach far beyond regulating the financial system and implications for managing public-sector activities. As creative destruction and innovations release a dynamic that entails strong path dependencies and barriers to entry for competitors, Rainer Kattel claims in his contribution "Small states, innovation and techno-economic paradigms" (Kattel in FCP, p. 190ff) that a public-sector-led process of "creative destruction management"

is necessary. The public sector should be given a prominent role, particularly in supporting the creation of new knowledge, companies, and jobs, and in alleviating destructive effects. While the ICT revolution may have caused the "death of distance", this revolution has also led to a "rebirth of size" as a key factor for geopolitical units to take into account for innovation and economic policies. This tendency has been reinforced by the international policy environment (the "Washington Consensus") and the increase in financial fragility. As country size is once more a key determinant for company-level innovations, innovation policies should be geared towards the creation of local networks that should be scaled up into wider markets (Kattel in FCP, p. 199).

The role of public policy in innovation is further specified by Claude Rochet and Bengt Åke Lundvall. In Rochet's essay "Carlota Perez's contribution to the research programme in Public Management: Understanding and managing the process of creative destruction in public institutions and organisations" (Rochet in FCP, p. 389), innovation policy works at three levels: At the macroeconomic level, a policy is required that sustains and funds a political strategy to lead the way in innovation, at the meso-economic level, technological clusters should be organised that enable firms to innovate and encourage cooperation, and at the microeconomic level, a business intelligence policy is required that may help individual firms to successfully compete in the "innovation game". Upgrading the competencies of the low-skilled workers and delegating responsibility to them is considered an important component of innovation strategies with an impact on all three levels in Lundvall's essay "Why the new economy is a learning economy" (Lundvall in FCP, p. 221ff), because innovation is not only science-based but also thrives in firms that combine science-based learning with experience-based learning.

Such a policy could be more than merely innovation policy, forming the core of a macroeconomic strategy, too. Investment in skills plus public programmes that stimulate firms to engage in organisational change and market-oriented innovation could be the roots of a new kind of Keynesianism. This would stimulate the economy in a situation when traditional economic-policy strategies, such as monetary policy, are ineffective, and at the same time it would facilitate full exploitation of the productivity potential of ICT in the deployment phase of the prevailing TEP. In his essay "Governance in and of techno-economic paradigm shifts: Considerations for and from the nanotechnology surge", Wolfgang

Drechsler (in FCP, p. 95ff) suggests that »the regard in which the state and its power are held, the attitude towards the state and its power … is indeed a matter of the period, not the paradigm. In the installation period, there is 'state distance' … while the deployment period is denoted by state closeness.«

What does this mean for public management? While in the prevailing surge of development, there has been a time lag between the evolution of the state and change in the industrial sector because the production methods of firms engaged in information technology have been affected first, while another and more problematical reason for the time lag has been institutional inertia (Rochet in FCP, p. 375). Perez's model, which is rooted in evolutionary economics and cycle theories, focuses on the **need for institutional change** and for re-designing the organisation of the economy to cope with the challenges of a new TEP. The efficiency of government activities has not been explicitly targeted in this model, and nor has it been neglected; efficiency would be reached if the society succeeds in creating the appropriate institutional setting for public policy (which seems to be particularly difficult in highly developed countries as institutional inertia there is likely to be fostered by strong vested interests; Rochet in FCP, p. 377).

This is in stark contrast to many of the ideas of New Public Management (NPM), which has been a leading concept of mainstream economics being applied to the public sector. The state's inevitable problems in coping with the challenges of a new TEP have been considered *ceteris paribus* (i.e. when the organisational structure is not adapted) as a fundamental inability of the state to deal with these problems. This has become a pretext for eliminating the state in the »bureaucratic euthanasia of the state« (Rochet in FCP, p. 374). Consequently, the application of NPM has aimed explicitly at raising the efficiency of the public sector (i.e. the administration) by introducing market mechanisms to its operation. NPM thus is an expression of "state distance", which, according to Drechsler, might have been appropriate in the installation phase of the prevailing TEP, but which is no longer appropriate at the beginning of the deployment phase. It fits into this context that, in the current situation, Rochet calls for applying a mix of three disciplines to combine the evolution of institutions and the evolution of organisations (Rochet in FCP, p. 389): public-policy evaluation to analyse the link between outputs and outcomes of government policies,

organisational efficiency to develop organisational learning so that public organisations can cope with their changing missions, and management control to achieve best-value policy results.

For public management, this implies that **effectiveness** must once more be given top priority, as opposed to efficiency of government activities. In the prevailing TEP, it also means that the application of ICT is much more than a mere instrument for cutting costs and improving efficiency: The transformational potential of ICT must be utilised by turning it into an endogenous lever of innovation, which makes things possible that otherwise would not have been. One of the main failures of the NPM mainstream, Rochet (in FCP, p. 390) claims, »is its policy of outsourcing IT to the private sector, which has deprived the public sector of the strategic capabilities to manage IT…« In addition, ICT makes it possible to produce an overall design for processes and to align this with strategic objectives (e.g. in a balanced scorecard), thus enabling organisations to become efficient.

What's next – preparing for the next techno-economic paradigm

While it is undisputed that ICT has been the key technology in the context of the prevailing TEP, it is not yet clear which will be the key technologies of the next surge of development – technologies that, according to Perez's model, should be well known in their fundamental characteristics in the deployment phase of the prevailing (ICT) paradigm. From a careful study of economic stages, "Production-based economic theory and the stages of economic development: From Tacitus to Carlota Perez", Erik S. Reinert concludes that future TEPs are likely to be more research-intensive and more patentable than previous TEPs (Reinert in FCP, p. 369). Perez herself (2010) has recently argued that, motivated by increased interest and concern about the ecological environment, future key technologies will comprise a mix of biotechnology, nanotechnology, bioelectronics, new materials, and new energy sources, and that all these technologies can be related to process industries based on natural resources.

The case for nanotechnology being a candidate for the key technology of the next surge is made by Drechsler. Although other highly dynamic technology fields exists, and although in the past prominent candidates have failed to succeed (e.g. nuclear power in the 1960s and

1970s), he finds several reasons in favour of nanotechnology. The idea of nanotechnology as the key technology is realistic and possible from today's point of view, and nanotechnology has the potential to radically change and transform the *Lebenswelt* of mankind, and not just the economy. It presents a logical continuation of TEPs as it promises to solve problems of the mass-production surge related to materials and energy (which have not been solved by the ICT paradigm), and also promises to solve some of the problems of the ICT surge itself (Drechsler in FCP, p. 97). If nanotechnology will become the key technology of the next surge, it is still highly speculative to ponder the question of how to prepare now for an era which will only begin in 20 to 30 years.

A few insights, nevertheless, might be derived from some of the attributes of nanotechnology. In contrast to the ICT paradigm, nanotechnology will bring »a return to the physical, for what is central here is substance, material, things, everything that belongs to the 'real world', including the human body« (Drechsler in FCP, p. 98). This implies a higher degree of necessity of gathering at specific places, and consequently a physical clustering of production and life can be expected. More insights about the role of the state are derived directly from Perez's model: During the period of preparation of a new TEP, the state ought to reduce the risk that the nation and its economy miss out on progress, and to prepare appropriately for the new paradigm. The state's task now would be to make major investments in the nanotechnology sector, which should not be motivated by the urge to become lucrative, or rather, only lucrative in the long run and subject to a high risk level. Thus a long-term perspective is required, as well as state actors (civil servants in particular) with sufficient competence, and a research and policy climate that tolerates mistakes at this very stage of basic research activities (Drechsler in FCP, p. 101f).

Applying the concept of techno-economic paradigms: The case of Latin America

More concrete aspects of applying the TEP and development-surge concept to future techno-economic development are discussed in the context of Latin America in several essays that reflect Carlota Perez's work on policy advice. José Cassiolato, Carlos Pagola and Helena Maria Lastres (in FCP, p. 51ff) discuss the similarities between Perez's model and the Latin American Structuralist Approach (LASA) in their essay "Technical

change and structural inequalities: Converging approaches to problems of underdevelopment". The basic ideas of the LASA approach are the central role of technical change for explaining development, and specific knowledge and policies towards structural change, and the proposition that "underdeveloped" countries are significantly different from advanced ones and thus cannot follow the same development path (Cassiolato et al. in FCP, p. 52). Perez has enriched the LASA approach by explicitly considering the financial dimension of development.

In a recent paper, Carlota Perez (2010) came up with a summary of a **dual development strategy for Latin America**, based on STI-type policies (Science-Technology-Innovation) in resource-based processing industries by specialising on high-value-added products. As an implication of the increasing globalisation during the implementation phase of the ICT-paradigm, and as an answer to the related hypersegmentation of markets, value chains, and technologies, a top-down strategy should promote the competitiveness of these Latin American industries in the world market. At the same time, a bottom-up strategy should be pursued, through which economic activities at the local level should be promoted. Gabriela Dutrénit and Alexandre Vera-Cruz (in FCP, p. 105ff) agree in their contribution "Innovation policy and incentives structure: Learning from the Mexican case" that this strategy is very suggestive because it builds on Latin American factor endowments as it positions these endowments strategically as potential strengths of the region in the possible new TEP. Drawing on experience from Mexico, they demonstrate that breaking inertias and acquiring a long-term vision, generating consensus between the main agents, and risk-taking in local and national governments are key conditions for success. It has been particularly problematic that Latin American governments have been very sceptical towards STI as a way to solve labour market and poverty problems (Dutrénit & Vera-Cruz in FCP, p. 122).

Based on Perez's model of development surges, Michael Hobdayin FCP, 145ff) shows in his paper "Asian innovation experiences and Latin American visions: Exploiting shifts in techno-economic paradigms", that Latin American countries should not try to copy the development strategies of Asian countries. The dual development strategy aims at gradually transforming the economy to producing high-value-added-goods in natural-resource-based industries for which demand in the world markets will continue to grow because of strong economic growth in many Asian

countries. Latin America countries should therefore adopt existing ICT and the related TEP, which is approaching the deployment phase now, to develop capabilities in these resource-based processing industries, and should try to gain a foothold in the industries and technologies that will be the key factors in the next surge of development. Thus, rather than calling on these countries to compete with Asia, Perez's model would call for complementary strategies to exploit international demands and imbalances in technology, trade, and investments of this kind (Hobday in FCP, p. 166).

Conclusion

As a whole, this volume is most remarkable: The 20 papers in the book highlight many features, possible applications, and give a comprehensive overview of the significance of Carlota Perez's model for understanding long-term techno-economic development and for formulating related strategies. The recent disturbances in the financial markets and in the world economy should have made it clear how relevant both Perez's model and its discussion in the volume are for finding answers to key questions of economic policy. In contrast to other books commemorating a birthday of this kind (which are usually compilations of papers more or less (un-)related with each other), every essay in this volume is focused on the TEP topic, which makes this Festschrift an outstanding collection.

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Pravo in menedžment kot zaveznika pri delovanju javne uprave – Poročilo s Trans European Dialogue, 2011

Polona Kovač

Univerza v Ljubljani, Fakulteta za upravo

Polona.kovac@fu.uni-lj.si

Trans European Dialogue (TED, Dunaj, 9.–11. februar 2011)

V februarju 2011 sta dve ključni evropski združenji na področju javne uprave, tj. *European Group on Public Administration* (EGPA) in *Network of Institutes and Schools of Public Administration in Central and Eastern Europe* (NISPACee), skupaj z lokalnim organizatorjem, avstrijskim Uradom predsednika Vlade (Kanzleramt), organizirali že četrto konferenco v seriji *Trans European Dialogue*, TED4. TED združuje akademike in strokovnjake iz prakse pri znanstveni razpravi in razvoju javne uprave od leta 2008, konferenca pa se izvaja vsako leto drugod na izbrano aktualno temo; do sedaj je bila v Talinu, Helsinkih in lansko leto v Ljubljani.

TED je bil letos posvečen problematiki vloge, povezovanja in izključevanja javnega oz. upravnega prava na eni strani in fleksibilnega menedžmenta na drugi strani. Stalno naraščajoče upravno pravo je namreč razmeroma togo, saj je njegova funkcija zagotavljanje omejitev zlorabe oblasti in vnaprejšnje predvidljivosti razmerij med upravo in naslovniki, kar je za delovanje v dinamičnem družbenem okolju po

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ocenah menedžerjev v javni upravi čedalje pogosteje preveč tradicionalno videnje, ki otežuje doseganje učinkovitosti in uspešnosti. Program srečanja je bil oblikovan z izmenjavo izkušenj in poznavanjem smernic razvoja, v mešanem programsko-organizacijskem odboru, ki smo ga sestavljali predstavniki vseh treh organizatorjev: prof. dr. Philip Langbroek z Univerze v Utrechtu, prof. dr. Dacian Dragos z Univerze Babes-Bolyai Bukarešta, doc. dr. Polona Kovač z Univerze v Ljubljani, Marton Gellen z Univerze Corvinus iz Budimpešte in prof. dr. Renate Meyer z Gospodarske univerze (Wirtschaftsuniversität) z Dunaja. Skupaj se je dogodka udeležilo dobrih štirideset vabljenih strokovnjakov iz skoraj dvajsetih evropskih držav, dialogi pa so se odvijali v prekrasnem dvorcu Laudon.

Metodologija dela je temeljila na kratkih predstavitvah vabljenih eminentnih strokovnjakov na področju, čemur so sledile živahne razprave. Uvodničarji so bili:

- avstrijska ministrica za ženske in javne uslužbence, Gabriele Heinisch-Hosek;
- prof. dr. Jean Bernard Auby (s Science-Po, Pariz) s temo o medsebojnem vplivu sprememb v družbi in javni upravi (denimo prek novega javnega menedžmenta) na demokratičnost delovanja oblasti;
- prof. dr. Stavros Zouridis z Univerze v Tilburgu je poudaril koncept vladavine prava v luči izzivov sodobnega vladanja, zlasti glede na diskrecijska pooblastila uprave;
- prof. dr. Ivan Koprić s Pravne fakultete v Zagrebu se je osredotočil na pomen zakonodaje o upravnih postopkih in upravnem sporu ter o pomenu tehnične podpore kot vmesnika med zakonitostjo v pravni tradiciji in političnim pritiskom na racionalizacijo uprave;
- sodnik madžarskega vrhovnega sodišča dr. Andras Patyi je predstavil primere uspešnosti in učinkovitosti v sodni upravi s poudarkom na možnostih in omejitvah alternativnega reševanja upravnih sporov;
- nizozemski ombudsman dr. Alex Brenninkmeijer pa je podal poudarke o menedžmentu v javni upravi z vidika državljana, pri čemer je razvil pomen participacije kot nasprotja kafkovskega delovanja in pravičnosti kot mediatorja med zakonitostjo in učinkovitostjo, kar vodi tudi v večjo učinkovitost upravnih

procesov, dokazljivo s kazalniki (npr. krajši postopki, manj vloženih tožb na sodišče, višja stopnja zadovoljstva).

Za nadaljnje razprave je bilo pogosto kar premalo časa, saj so udeleženci izhajali iz različnih okolij in imeli nasprotujoče si poglede na predstavljene pojave. Večina pa se je strinjala, da sta pravo in menedžment dva konca iste palice, zato morajo pravniki in menedžerji stalno sodelovati, da bi lahko govorili o dobrem vladanju (*good governance*). Prevladalo je stališče, da so danes vir demokratičnosti v družbi ne le demos kot tak in nosilci oblasti legitimni prek volitev, pač pa je to uprava, ki deluje izrazito profesionalizirano, zlasti prek neodvisnih regulatornih in izvršilnih agencij. Z eksternalizacijo, delegiranjem nalog in privatizacijo se tako razvijajo nove oblike demokratične odgovornosti.

Pravo in menedžment morata delovati z roko v roki, pri čemer naj pravo odraža prevladujoče vrednote v družbi, menedžment pa prek stikov z uporabniki znotraj povratne regulatorne zanke zagotavlja informacijo nosilcem javnega upravljanja, kdaj in v čem je smiselno predpise spremeniti. Razmerje med zakonitostjo in učinkovitostjo naj temelji na načelu sorazmernosti, upoštevaje institucionalno ali instrumentalno raven upravljanja z manj togosti na bolj strateškem nivoju in z večjo določnostjo razmerij pri konkretnem odločanju.

Naj povzamemo tri posebej obravnavane rezultate s TED4, ki bodo nedvomno predmet prihodnjih znanstvenih raziskav. Prvič, usmerjenost k oddajanju del zmanjšuje pravno varstvo strank javne uprave, kar morajo nadomestiti sodišča in drugi neodvisni organi (npr. ombudsmani) s presojo ne le zakonitosti, temveč tudi smotrnosti upravnih odločitev. Drugič, legitimnost odločanja naj temelji na primernosti in sorazmernosti, upoštevaje predvsem kavtele poštenega postopka. Tretjič, pravniki in menedžerji v javni upravi se morajo naučiti razumeti koncepte drug drugega, pri tem pa imata posebno vlogo usposabljanje javnih uslužbencev in ustrezna tehnična opremljenost javne uprave.

Izbrani prispevki udeležencev bodo kot tradicionalno za TED zbrani v posebni izdaji *NISPACee Journal*, ki bo ugledala luč sveta predvidoma decembra 2011, strokovnjaki z vse Evrope pa se bodo zopet zbrali na TED5 v Budimpešti na temo agencijizacije.

Navodila avtorjem

V reviji Uprava objavljamo izvirne članke, ki obravnavajo teoretična in praktična vprašanja razvoja in delovanja javne uprave.

Znanstvene članke objavljamo v slovenskem in v angleškem jeziku, izjemoma v nemškem ali francoskem jeziku. Druge članke objavljamo v slovenskem, angleškem, nemškem ali francoskem jeziku, z daljšim povzetkom v angleškem oziroma slovenskem jeziku.

Uredniški postopek:

Uredništvo lahko še pred recenzijo zavrne objavo članka, če njegova vsebina ne ustreza najavljeni temi, če je bil podoben članek v reviji že objavljen, ali če članek ne ustreza kriterijem za objavo v reviji. O tem uredništvo pisno obvesti avtorja. Pred sprejemom članka v recenzijo mora avtor podpisati Izjavo o avtorstvu, s katero avtor prenese materialne avtorske pravice na izdajatelja revije in dovoli objavo članka na spletu.

Članek naj bo lektoriran, v uredništvu se opravlja samo korektura. Izjemoma se po dogovoru z avtorjem besedilo tudi lektorira.

Vsi članki se recenzirajo in razvrstijo.[1] Med recenziranjem avtorji in recenzenti niso imenovani. Članki pod 1.01, 1.02 morajo za objavo prejeti dve pozitivni recenziji, od tega eno od tujega recenzenta. Če recenzenti razvrstijo članek različno, o končni razvrstitvi odloči uredniški odbor.

Članek, ki ga je avtor poslal v slovenskem jeziku in sta ga recenzenta razvrstila po 1.01, 1.02, mora avtor nato poslati še v prevodu v angleški jezik.

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1 Članke razvrščamo po tipologiji COBISS:

1.01 Izvirni znanstveni članek – prva objava originalnih raziskovalnih rezultatov v takšni obliki, da se raziskava lahko ponovi, ugotovitve pa preverijo.

1.02 Pregledni znanstveni članek – pregled najnovejših del o določenem predmetnem področju, del posameznega raziskovalca ali skupine raziskovalcev z namenom povzemati, analizirati, ovrednotiti ali sintetizirati informacije, ki so že bile objavljene. Prinaša nove sinteze, ki vključujejo tudi rezultate lastnega raziskovanja avtorja.

1.04 Strokovni članek – predstavitev že znanega, s poudarkom na uporabnosti rezultatov izvirnih raziskav in širjenju znanja.

1.08 Objavljeni znanstveni prispevek na konferenci – predavanje, referat, načeloma organiziran kot znanstveni članek.

Oblikovanje članka:

Naslovu prispevka naj sledi: polno ime avtorja/avtorjev, naziv institucije/institucij in elektronski naslov/naslovi. Članek mora vsebovati še:

- izvleček, ki naj v 8 do 10 vrsticah opiše vsebino prispevka in dosežene rezultate raziskave;
- ključne besede: 1–5 ključnih besed; ter
- kodo iz klasifikacije po Journal of Economic Literature – JEL (http://www.aeaweb.org/journal/jel_classsystem. html).

Članek, ki je bil razvrščen po 1.04 ali 1.08, naj vsebuje tudi povzetek v angleškem jeziku v obsegu 3 strani. V povzetku prevedite naslov in ključne besede ter predstavite vsebino članka (opredelitev problema in ugotovitve). Prevod povzetka članka tujih avtorjev v slovenski jezik zagotovi uredništvo.

Članek naj bo napisan v urejevalniku besedil Word (*.doc, *.docx) v enojnem razmiku, brez posebnih ali poudarjenih črk. Ne uporabljajte zamika pri odstavkih. Razdelki od Uvoda do Sklepnih ugotovitev naj bodo naslovljeni in oštevilčeni z arabskimi številkami.

Slike in tabele, ki jih omenjate v članku, vključite v besedilo. Opremite jih z naslovom in oštevilčite z arabskimi številkami. Revijo tiskamo v črno-beli tehniki, zato barvne slike ali grafikoni kot original niso primerni. Če v članku uporabljate slike ali tabele drugih avtorjev, navedite sklic pod sliko, tabelo ali kot sprotno opombo. Enačbe oštevilčite v oklepajih desno od enačbe.

Članek naj obsega največ 30.000 znakov. V besedilu se sklicujte na navedeno literaturo na način: (Novak, 1999, str. 456).

Na koncu članka navedite literaturo po abecednem redu avtorjev in vire, po naslednjem vzorcu:

Članek v reviji:

- Gilber, G., & Pierre, P. (1996). Incentives and optimal size of local jurisdictions. *European Economic Review* (40), 19–41.

Knjiga:

- Katzenbach, J., & Smith, D. (1993). *The wisdom of teams*. Cambridge, MA: Harvard Business School Press.

Knjiga z urednikom:

- Keene, E. (Ur.). (1988). *Natural Language*. Cambridge: University of Cambridge Press.

Prispevek na konferenci:

- Bugarič, B. (2002). Od hierarhične k participativni (odprti) javni upravi. *IX. dnevi slovenske uprave. Portorož* (str. 23–29). Ljubljana: Visoka upravna šola.

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- Richmond, J. (2005). Customer expectations in the world of electronic banking: a case study of the Bank of Britain. *Ph. D.* . Chelmsford: Anglia Ruskin University.

Kadar ima publikacija več kot pet avtorjev, navedite samo prvega avtorja, npr. Novak et al. Če navajate dve deli ali več del istega avtorja, letnico označite, npr. 2005a, 2005b … Priporočamo, da uporabite samodejni zapis literature, ki ga omogoča Word 2007 (zapis APA).

Članku dodajte kratek življenjepis avtorja/avtorjev (do 8 vrstic).

Ko je članek dokončno urejen in pripravljen za tisk, ga prejme avtor v dokončni pregled in potrditev.

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V imenu Uredniškega odbora se zahvaljujem recenzentom, ki so v letu 2010 sodelovali pri recenziji člankov v reviji Uprava.

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dr. Stanka Setnikar Cankar, red. prof.

On behalf of the Editorial Board, I would like to take this opportunity to thank the following referees for the time and effort they have devoted to the review process in the year 2010.

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