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## **ADMINISTRATIVE, COMMERCIAL AND FINANCIAL ASPECTS OF PUBLIC SERVICE**

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In this paper, the authors examine the problem of public services with special emphasis on issues of their administrative organization, financing and the issue of choice of legal form in which public services should perform its function. The importance and role of public services in the economy are discussed, and the different starting points in the legal regulation of public services in the European Union are described. Special attention is devoted to the legal problems of financing public services which are of particular importance for economic development. Finally, an overview is given of possible legal forms in which public services operate.

**Key words:** *Public services, European Union, Concessions, Joint venture contracts, Public financing.*

### **I. INTRODUCTION**

Public services of economic interest, by nature represent economic activities, activities that are of public interest, so that these operations are performed within a public service. Still, compared to common forms of economic - commercial operations, these public services of economic interest are somewhat different, because there is strong public interest for their continuous and proper operation. Because of the above reasons, their liberalization must take into consideration the special position these activities and operations have within society.

In consideration of the special position of public economic services, the Treaty on European Union states in article 16, that both the Union and the member states must take into consideration the provisions of article 73, 86 and 87, when establishing the services of general public interest<sup>1</sup>, which articles define

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<sup>1</sup> The EU strictly follows the syntagm of service of general interest, which includes non-economic and economic public services. In the legal terminology the term public service is distinguished from the term services of general interest.

the market competition and legal position of public services and their regime of operation in the context of setting up a common market and developing a new European legal system.

The problem in the operation of public services, by ensuring market competition on one side and the existence of public interest, is especially noticeable in article 86 of the Treaty. This article shows the changes in the understanding of the law of the European Union towards public services. The earlier understanding was, that the issue of regulation of public services is the legitimate right of each sovereign state. The Treaty on the European Union now introduces the idea of the necessity of the creation of a common European market, in which products and services will be offered even in those activities that are under a public service regime.

In the document discussing the problems of public services «*Services of general economic interest in Europe*», the European Commission instructs that a balance must be established between these two opposed demands. One demand relates to the establishment of a common, European market and the insurance of equality in market competition, including the field of economic public services. The other demand relates to the existing public interest and special public law provisions that must be considered when establishing economic public services.

In principle, economic public services in the EU member states are executed through concessions, trading companies completely or in their major part owned by the state, through a public company or other legal form of organization that functions more or less independently of the state.

## **II. TWO DIFFERENT APPROACHES TO PUBLIC SERVICES (SERVICES OF GENERAL ECONOMIC INTEREST) IN THE EUROPEAN UNION**

In the European Union we have two radically different traditions connected with the development of this field of the European law.

First there is the so called Anglo-Saxon law tradition with a liberal approach in regard of performance of public services, which enables a broad basis for the liberalization of public services like telecommunication, energy and postal services. Within this tradition human rights are mainly limited onto political and civil rights, like freedom of speech and the right to vote. In principle, it could be said that Britain doesn't have a strong tradition of protection of social rights and performance of certain activities and tasks through public services. Of course, there are always exceptions, like the national health service, which is a special form of public service insuring health care to a wide range of users.

Secondly, we have the continental European legal tradition of protection of public services through administrative laws. The representative of this tradition is France, which has fully developed this model through constitutional protection of the own public services and the establishment of basic principles for the

performance of public services: the principle of continuity, the principle of equality of all users, the principle of adaptability of the public services to the needs of their users and the principle of quality in performance of public service activities. This model left a major impact in other continental European countries as well, in particular in Italy and Belgium.

Both of the above approaches gave a strong impact onto the development of the legal approach of the European Union in regard of public services of general economic interest.

In practice we have two tendencies that emerged when the regulation of public services in the European Union law was tackled: the need to ensure a common, open market of the European Union through the protection of market competition and at the same time, the need to protect the existing social rights of the citizens and ensure social solidarity within the society.

The purpose of the right of free market competition can be defined as the need to insure a maximum economic efficiency, giving users the option of choice between various products and services.<sup>2</sup>

The British law on free market competition insists on free markets and protection of individual rights of every individual. A free and open market competition must be guaranteed and citizens will accomplish their rights only if they can freely choose among the various offers in such markets. The old British model of protection of market competition suffered from a lack in transparency and lack of clear criteria for balance between the protection of market competition and other criteria, that need to be taken into account when speaking of the functioning of markets. This relates in particular to those principles that assume the need to protect the social solidarity, which means to comply with the demand to insure certain products and services for the citizens, under acceptable conditions. The earlier model of market competition assumed that the free market is the best regulator. More recent laws of market competition in Britain, after the Competition Act was introduced in 1998, basically try to eliminate the direct influence of politics on the creation of public interest politics. Besides this, the understanding and perception of the role of the market in rendering such services and products is also shifting. Instead of insisting on an overall liberalization and de-regulation of the market, as it is the case today, now more and more awareness rises, that there is an imperfection in the market – a market failure and that the state must again take over the role of regulation, in order to protect the rights of citizens as users. In order to avoid negative experiences linked to state interventions, the direct influence of the state should be replaced by indirect influence through non-governmental organizations that would define the public interest.

The continental – European model assumes other premises. The emphasis here is not on the free market and individual citizen's rights, but on a more powerful role of the state in insuring the interests of the entire society.

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<sup>2</sup> Compare *Eisner, M. A., Antitrust and the Triumph of Economics: Institutions, Expertise and Policy Change*, University of North Carolina Press; Chapel Hill, 1991, p. 9.

For a long period of time, neither the European court of justice or the European Commission raised the question of the exclusive rights the member states have given their public services in both their content and scope, since it was considered that this question is under sole and exclusive responsibility of the EU member states.<sup>3</sup>

Thus, the situation is changing in the mid nineties. The provisions of the European law now become the subject of a common, unified approach to the issue of public services. The term “Public service of general economic interest” is introduced, which means that a unified standing point has been taken towards so called economic public services. This deepens gradually and crystallizes in the new documents issued by the European Commission.<sup>4</sup> The Commission tried to find a suitable solution for the obstructions of the creation of a common, internal market of public services in the EU.<sup>5</sup> It tried to establish a model where the techniques for the maintenance and financing of tasks and duties of services of general economic interest would be so comprehensively regulated, that the question of proper functioning of market competition could not be raised.

The Amsterdam rules created a new institutional context in which public services act. These rules introduce a new legal principle, based on which the Union and the member states warrant the execution of activities and services of general interest, without taking sides in the regulations relating to market competition and state support.<sup>6</sup>

This change in approach to the issue of public services is based on provisions of article 16 of the EU Treaty, referring to the provisions of article 73, 86 and 87 of the Treaty, in which market competition in the EU is regulated. The provision of article 16 states, that within the functioning of public services, the rules of market competition must be taken into account, which rules are contained in articles 73 and 87 of this Treaty, as well as the legal frame and terms of such functioning set up by article 86 of the Treaty.

Speaking of the functioning of public services, article 86 of the Treaty is rather interesting, because it defines the application of the rules of market competition on legal or natural persons who perform activities of special interest and accordingly are given special rights in the EU. Paragraph 1 of this article states that public companies and companies whom member states grant special or exclusive rights,

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<sup>3</sup> Compare *Marcou, G.*, Services publics locaux et droit communautaire, Annuaire 2003 des Collectivités locales, CNRS, Editions, 2003, p. 95. – 107.

<sup>4</sup> See Commission Communication on Services of General Interest in Europe, COM (96) 443, of 11. 09. 1996., Commission Communication on Services of General Interest in Europe COM (2000) 580, of 20. 09. 2000., Green Paper on Services of General Interest, COM (2003) 270, of 21. 05. 2003 and White Paper on Services of General Interest, COM (2004) 374, of 12. 05. 2004.

<sup>5</sup> These are economic or technical limitations caused by the difficulty in doubling parallel infrastructural networks, a dominant position held by operators awarded special or exclusive rights and the weak contractual position of users/consumers.

<sup>6</sup> See *Ross, M.*, Article 16 E. C. And Services of General Interest: from Derogation to Obligation?, European Law Review, 2000, p. 22. – 38.

may not be assessed by measures that limit or prevent market competition and the functioning of the common European market. Paragraph 2 of the same article defines an exception of the previous rule, in case when such companies are entrusted with services that are of general economic interest, i.e. services that are by their nature monopolies earning revenue. Such companies are also placed under the rules of market competition, but only for the part in which such rules do not prevent these companies in factual or legal sense, in the performance of their activities – services they are entrusted with. Furthermore, this paragraph states, that even when applying these exceptions, the development of trade may not be impacted in a way that is opposed to the interests of the Union. Par. 3 assumes an obligation of the Commission to insure the adequate application of the provisions of this article and if necessary, to enact directives or decisions member states must submit to.<sup>7</sup>

Besides in this article 86., public service is also mentioned in article 73, where the relationship of compatibility between state subventions that are needed for operation of public transportation on one side and the rules of market competition on the other hand is defined.

The above provisions were the basis and ground for the European court of justice to define through its practice the borders and limitations of the powers of the member states in organizing their public services. This also enabled the EU to define an own vision of services of general interest, independent from models applied in individual member states.<sup>8</sup>

New constitutional rules now introduce the task of definition of the principles of management of services of general interest in the European legal system, including all economic, financial and other terms and conditions targeting the harmonization and the establishment of a balanced frame for market competition, with simultaneous insurance of collective welfare, that is offered by services of general interest.<sup>9</sup>

In this perspective, the Green paper of the European Commission on services of general interest from 2003 opened a vivid discussion about adoption of general guidelines containing common principles and rules applicable to the various

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<sup>7</sup> This provision tries to balance the interest of the economic politics of member states in order to establish a unitary EU market and to protect the freedom of market competition. Here the importance of companies is recognized which perform activities of general economic interest, setting up a different criteria in regard of protection of market competition. Based on these criteria the regulations on protection of market competition are applied in such a scope in which those companies awarded for services of general economic interest are incapacitated in performing their tasks. In this context, the theory gives terms for the application of such criteria. First, the performance of services of general economic interest must be awarded to a certain company based on sovereignty act. Second, the provision is applied exclusively onto situations when companies are awarded to perform services of general interest or when it is a financial monopoly. Third, the general interest must be economic, not of a social or cultural nature. Compare *Šoljan, V.*, Zluporaba vladajućeg položaja u pravu tržišnog natjecanja Europske zajednice, Faculty of law Zagreb, Zagreb, 2001, p. 94. – 97.

<sup>8</sup> *Ibid.* This can be seen in many court verdicts. See also p. 97. – 100.

<sup>9</sup> Compare *Rodrigues, S.*, Vers une loi européenne des services publics, *Revue du marché commun* st de l' Union Européenne, No 471., Septembre 2003, p. 503.

public services. The White paper of the European Commission on public services of general interest reaffirms the idea from the previous document in regard to the need of responsibility between the EU and member states, in regard of the legislation and regulation of services of general interest.<sup>10</sup>

In line with this institutional evolution, in the period 2002 – 2004 a new regulatory frame is created for telecommunication operations. Afterwards, the new directives of the EU spread also onto other activities and services of general interest.

The growing europeization of the legal framework in regard of services of general interest shows tendencies that the new regulations lead to a liberalization of the market, they define the goals and methods of ensuring a quality public service and also define the frame of the nature, authority and procedures of national, regulatory bodies. The law of the Union is not limited only on searching for new, adequate legal changes in individual segments of national legislations of the member countries. A genuine European legal system is established for services of general economic interest, on grounds of the legal provisions regulating the common , internal EU market. This process is still present today and is far from its end.<sup>11</sup>

### III. PERFORMANCE OF THE SERVICES OF GENERAL ECONOMIC INTEREST AND LIMITATIONS

The harmonization within the EU directly impacted the existing limitations, especially the rules regarding entrance into the market. In the EU countries formerly the **exclusive rights system** prevailed, which was gradually replaced by the **authorization system**. The main characteristic of the new system is, that authorization cannot be subject of discretion evaluation, but it must be given under clearly defined and previously set terms that need to be complied with, in order for a subject to perform any of the services of general interest. With this provision, the volunteerism in deciding if one operator complies and meets the terms for the performance of activities of general economic interest has been significantly decreased. For instance in the field of telecommunications, almost all member states deserted the practice of awarding individual permissions, which assume the enactment of certain administrative decisions for approval/authorization of the performance of one of the telecommunication activities for each individual case.<sup>12</sup>

Based on this new regulatory framework that has been adopted in 2002, the former regime that was based on administrative decisions that were enacted

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<sup>10</sup> See White Paper on Services of General Interest, COM (2004), 374, mentioned in text.

<sup>11</sup> Compare *Albers, M.*, Energy Liberalisation and EC Competition Policy, *Fordham International Law Journal*, No. 25, 2005, p. 909.

<sup>12</sup> *Napolitano, G.*, Towards a European Legal Order for Services of General Economic Interest, *European Public Law*, vol. 11, No. 4, 2005, p. 570.

separately, for each case, has now been replaced with the system of **the general authorization**.<sup>13</sup>

It needs to be mentioned that there are opinions that raise questions about the withdrawal from some of the key moments of the directive.<sup>14</sup>

The case *Altmark* opened the issue of the possibilities of receiving state support in the performance of public services.<sup>15</sup> In the case *Altmark*, two bus operators entered into a dispute in regard of the terms under which German regional authorities awarded one of them a contract for public transportation services. The issue that was to be solved here was connected with four terms. In case these terms were met, financial aid was not considered support and must not be sent for notification to the European Commission. These terms are:

- First, the company that is awarded the subject contract must perform public transportation services in the city, which services must be clearly defined in advance;
- Second, the method of calculation of compensation must be clearly defined;
- Third, the amount of compensation may not exceed the amount that is necessary to cover the expenses and earn a reasonable profit;
- Fourth, when the contract is awarded outside a public tender proceeding, the amount of compensation must be defined under comparison with a cost analysis, that must exist in well managed bus service company.<sup>16</sup>

This verdict sets clear frames in which a certain economic activity is to be performed in a regime of a public service. Namely, from these terms one can conclude that public services are only those services –activities that serve the public and for which the method of calculation of compensation is defined in advance and may not exceed the amount necessary to cover the expenses under reasonable profit. All other activities and services, even if they are public services<sup>17</sup>, are not considered as such, but as a service of general economic interest and as such, these fall under the regulatory frame of the common European market.<sup>18</sup>

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<sup>13</sup> *Streel, A. – Queck, R. – Vernet, P.*, Le nouveau cadre réglementaire européen des réseaux et services de communications électroniques, Cahiers de droit européen, br. 3-4, 2002, p. 267.

<sup>14</sup> It must be stressed that entrepreneurs questioned the efficiency of the Directive because of a series of amendments adopted in the final version. The EU Commission planned to create new 600.000 working places after adoption of the earlier version, strengthen the economic growth and improve quality of choice for the citizen as users of services in the market.

<sup>15</sup> Case *Altmark*, C280/00, verdict of 24. 07. 2003.

<sup>16</sup> *Avanzata, T.*, The *Altmark* Case: The European Commission is satisfied with the Court of Justice's ruling, *Public Transport International*, No. 6, 2003, p. 2. – 3.

<sup>17</sup> This means services for which strong public interest exists.

<sup>18</sup> This issue is also regulated in the EC Regulation 1191/69/EC, supplemented by Regulation 1893/91/EC. It defines the terms under which, when complied, state supports are automatically considered valid. Regulation 1191/69/EC was enacted to protect railway companies from state authorities that obligated these companies to render their services of public transportation without accepting consequences for financial consequences of such decisions. The Regulation now defines the terms under which a state

#### IV. PUBLIC SERVICES – FINANCIAL ASPECTS

The German theory distinguishes the property/assets of the state and other legal public bodies, so they separate a) financial or fiscal assets, including those assets the public law body needs to earn some financial benefits (state owned companies, public services, forests, land, buildings etc.) and , b) administrative assets like assets that such public services as public law bodies need to perform their basic functions(business buildings, offices, stationary material, technical assets etc.) and c) public goods or goods for general usage, which means assets that are free for usage to everybody and based on the nature of such assets or intended usage (roads, shores, sea, lakes, air etc.).<sup>19</sup>

Public services are an important instrument of financing public needs in the field of economic infrastructure. Today such objects and goods of economic infrastructure are mainly: production facilities for production, transfer and distribution of electricity, objects against negative impacts of water, objects for management of navigation routes on waters and objects for water supply of regional importance, roads and objects on roads, railway tracks with connected objects and installations, main pipelines, surfaces and traffic roads in sea and river ports, inter-city and local telephone-telegraph connections, airfields and other surfaces in airports, buildings and plants for public transportation, objects for water distribution, gas distribution, heating and city streets and other public traffic surfaces in city (municipal of city infrastructure).<sup>20</sup>

In theory and in practice questions are asked – Why is the economic infrastructure kept within public financing ? The main reasons are:

1. The public sector must act in all fields where the rendered services basically do not bring any profit, but such services must be performed for political and economic reasons;
2. The abuse of a monopolistic chair over the economic infrastructure is prevented, because the pressure can be felt in regional monopoly, since it is almost impossible to replace these products and services with others;

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authority body can intervene in order to achieve such level of public transportation that is considered sufficient. In this sense, *two possibilities* to achieve such goal are offered. *First* is the way under which contracts on services of public transportation are executed between administrative bodies and the carrier of services. In such contracts the administrative bodies ensure adequate services taking into account social and ecological aspects. These contracts also can ensure privileged prices for certain categories of passengers. The Regulation defines the elements such contract must contain (nature of services, price etc.). The *second* possibility is that services of city or regional public transportation may be forced for execution by a administrative body, but only in accordance with the Regulation. The Regulation also defines the duty to perform public transportation services as a duty the carrier – taking into consideration his economic interest – would not accept or would not accept in the same scope. As for costs of services of public transportation, the amount must comply with the costs of the carrier, decreased for the revenue earned from the public transportation services. After the verdict in the Altmark case, it is considered that carriers are entitled to demand a reasonable profit for their services. See Čanaki, Z., Pregled usluga javnog željezničkog prijevoza u Europskoj Uniji, *Željezničar*, No. 725, March 2006, p. 39.

<sup>19</sup> See more on this in *Witern, A.*, Grundriss des Verwaltungsrechts, Köln, 1975, p. 233.

<sup>20</sup> So Jelčić, *Bo. et al*, Hrvatski fiskalni sustav, National Gazette , Zagreb, 2004, p. 377.

3. The development of economic infrastructure must primarily be viewed as an accomplishment of development goals of the entire economy, not through issues of local, internal profitability;
4. Technical – technological properties of economic infrastructure show that the revenue achieved in their operations cannot be used as a good measure for the efficiency of operations.<sup>21</sup>

Financing sources of public services are:

1. Sales prices of products and services;
2. Fees (municipal fees and contributions);
3. Coverage of lacking revenue from the national or regional and local budgets (units of self-management);
4. Loans;
5. Assets invested by the founders;
6. Assets by domestic and foreign investors;
7. Other sources (like concessions);

In the Republic of Croatia it is typical for the water economy system, but not only in this country, not to earn any income on a market basis. No products are produced, nor are there any services or public authorities in the management of waters that would possibly earn an equivalent price from persons who are users in the water economy system. Users can not waive the effects that are accomplished in defence against floods and other forms of protection against the negative impact of water and protection of waters against pollution or the useful effects of water-economy services that are undertaken in the interest of all natural and legal persons. These activities are a basis for normal life and work of all persons and enable them to perform various activities.

Therefore the asset /funds for financing the water economy can only be insured through budgets or fees and contributions paid by users in the water economy system. The same financing sources are applied in many other countries, in various proportions, together with funding from state, regional and local budgets, along with assets earned from autonomous parafiscal sources.

The funding sources of water economy are: a) state budget – from the state budget services and activities of the characteristics of public services in water economy management are funded, including construction works and maintenance of objects, either for regulation of the waters or protection against the waters. This includes the costs of setting up the Water economy basis of Croatia, implementation of the Croatian defence plan against floods; setting up and management of a water economy IT-system, issuing of water economy related acts. The funds for financing activities of management of local waters are covered from water fees ,

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<sup>21</sup> *Nikolić, N.*, Počela javnog financiranja, Faculty of Economics Split, Split, 1999, p. 188.

b) water fees are considered public revenues and may only be used for specifically defined usages based on the Law on financing the water economy. The fees are para-fiscal assets, which like taxes, are paid based on mandatory law provisions and which funds are used for financing of public needs, c) budgets of regional and local units of self management finance investments into the construction of regulation and protective buildings on local waters, all in accordance with the plan for management of local waters. Technical- and economic maintenance of such water related objects is financed from the water fee and if these funds are not sufficient, the balance is covered from the regional and local budgets of the units of self management. The overall amount will depend on where the buildings on the waters are located, what benefit is achieved and also how much water fee will be collected subsequently. Non-realistic planning, underestimated rates of water fee and unsuccessful collection of this water fee in part or the entire flow of subject waterways, will directly impact the scope of funds that will be collected, so that the balance must be covered from the national budget, d) other sources – persons who have interest in achieving a higher level of protection of own assets and property, but plan to achieve other useful benefits, may finance certain works in the water economy by themselves and with personal assets and funds – this can be done either on their private land or on land that is managed by Croatian Waters (Hrvatske vode). These can be different works, like the construction of dams, repairs or super structuring existing dams, works on prevention of erosion and strong water flows, construction of canals for discharge of excessive water to a recipient, works on watering systems and similar. For this purpose a contract must be executed with Hrvatske vode, including provisions of financing and obligations in regard of maintenance of such objects. If these works are performed under a concession relationship, the rights and duties are defined in the concession contract.<sup>22</sup>

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<sup>22</sup> The term broadcasting by public services. A very important part of the audio-visual EU legislation is the Directive “TV without borders (TWF)”, which establishes the terms for broadcasting of TV programs within the EU common market. The Directive was drafted in 1989, updated in 1997. In December 2005 the European Commission proposed significant changes to take into consideration – among other – the effect of multi-channel digital broadcast and introduction of new electronic media. The Directive demands from member states to coordinate their national legislations to ensure that there is no obstructions for free distribution of TV programs in the unitary EU market; that TV channels, when practicable, reserve at least half of their broadcast time for movies and programs shot in Europe, to enable warranties for protection of some important goals of public interest – like cultural diversity; that governments undertake actions to warrant the general public access to main events that thus, cannot only be limited onto payment for the TV channel. This provision mainly relates to sports events like Olympics or World championship in football; that governments undertake measures to protect minors against violent or pornographic content, by placing such content into late hours of the evening/night and/or limit the access through adequate technical devices; that parties that were unfoundedly criticized in a TV show are given a chance to respond and that the maximum time for commercials is complied with (measured in minutes or days).

The proposed changes, submitted to the European Parliament and Council of Ministers of the EU for approval, uphold the basic principles of the directive, but now also try to widen their application to include media services like video on demand or services via internet or cell phones, to enable a greater flexibility in defining the time of commercials on TV, enable indirect marketing through placement of products – when TV companies can charge such presentation of products/labels in the program. This is permitted in the USA, but still illegal in Europe.

## V. PUBLIC SERVICES AND LEGAL FORMS OF THEIR PARTICIPATION IN ECONOMIC TRADE

As earlier mentioned in this work, public services may take an active role in economic (commercial) trade. Possible doubts in regard of such participation emerge from the circumstances that public law bodies may act from the position of public power/authority (lat. *iure imperii*) and as persons of private law (lat. *iure gestionis*). In this sense public service, if performing economic activities and services, must waive a part of their authority. Acting in line with this, the public services, if performing economic activities, must waive a part of their rights and such services must be placed under the same legal regime as private persons are, without any possibility of calling for immunity. Without this, a participation of public law and private – law persons in the same society would be impossible, because these would be placed under different legal regimes, which may not be allowed. In order to choose the proper legal form of acting, the nature of person using a certain legal form must not be decisive, but the nature of the services performed<sup>23</sup>. So, if a company member is a public law body, the position of such member towards other members must be under the same rules as for all those other members of the company<sup>24</sup>. Trading companies in which the state is a member should not have a privileged position in the market only because of this participation of the state, so the state, acting as public law power shouldn't for instance, by enacting certain rules and regulations, create assumptions for legal or material privileges of such companies. This provision is contained in the constitutional provision where it says, that the state must enable all entrepreneurs an equal legal position in the market (article 49, par. 2 Constitution of Croatia).

The performance of public services may be assigned to third legal persons based on the concession system. Such assigned public service is a public service that is managed by a private person, natural or legal, at own costs and risk and based on special authority given by the public authority. Such public authority authorizes the concessionaire to manage a specific public service, but that doesn't mean that the public service is transformed into a private enterprise, nor does the concessionaire become a public servant. The concessionaire only gets the subjective right to

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The dedication to promotion of broadcasting public services is strengthened by the protocol of the Amsterdam Treaty from 1999. This only validates the importance that governments give public broadcasting because of the role it has in support of democratic, social and cultural needs of each society and in the preservation of the plurality against the trends of modern media concentration. Within the protocol each member state is free to define the structure of its own public broadcasting service (PBS) and organize the goals and tasks in such a way that the public interest is served. The state may also support the PBS systems financially, under the condition that the funds are used for execution of a goal in public interest/interest of public service and that it does not prevent normal commercial operations or distort the market competition between TV broadcasters. See more at : <http://www.delhrv.ec.europa.eu/?lang=hr&content=967>., visited 14. 05. 2012.

<sup>23</sup> *Barbić, J.*, Pravo društava, Opći dio, Second, changed and supplemented volume, Informator, Zagreb, 2006, p. 120.

<sup>24</sup> *Petrović, S.*, Osnove prava društava, Fifth, changed and supplemented volume, Faculty of law, University of Zagreb, 2008, p. 2.

perform the service and the right to charge for the services rendered from the users. The duties of the concessionaire are in particular the obligation to perform the services over a long-term period, properly and in accordance with the goal that is projected in the awarding of concession for such services.

In order to define the scope of mutual rights and duties, often separate contracts are executed. The supervision and control over usage and utilization of the awarded concession and the services performed under it is usually done by the state administration and it sometimes can have very broad authorities: introduce changes in the concessional service, even the right to cancel and terminate the concession. In legal definitions a concession over a public service is considered as a special form of execution of such service and in particular as an administrative contract. The circumstance that a concession over a public service is by nature an administrative contract results in the application of general rules that are valid for any administrative contract, including the concession contract. This of course impacts the legal nature of such concession contracts.

Finally we must mention the cases when, with the intention to achieve the goals of individual public services in the most efficient and comprehensive way, the state acts together with domestic or international investors. In such cases Joint venture contracts are executed.

This legal relationship can be established only on contractual level, whereas an association is established without legal personality, in its nature a partnership. Still, in many of these cases, for the purpose of easier management of such projects, a trading company is founded, usually one of the companies of capital and rarely a private company.

The main reason for the establishment of legal persons is the possibility of limitation of the responsibilities of the members for their duties. One of the properties of legal persons is that they are liable towards third persons with their entire assets and property, which means with all the assets invested by the partners in such companies. On the other hand, the founders of the legal person are not liable with their other private assets for the liabilities of such legal person that they founded. This means that the members- founders know in advance that their other assets and property, that was not invested in the joint venture, will remain intact in case of a failure of this joint venture. They know from the beginning that they can't lose more than they invested in a joint venture. Their liability is limited onto the duty to invest what they initially promised. All losses a joint venture might face and which loss is above the invested assets, will be the losses of the legal person, a member /founder is not held liable for. In other words, the creditors of such legal person founded on law on mutual investment will not be able to charge the founders of this legal person for their claims.

When the contracting parties decide not to establish a legal person, then the national legislations must legally qualify such relationship in accordance with the rules of such legislation. In such cases the national legislation may qualify such association in such a form, that every member of the partnership is at the same

time authorized to represent each other member of the partnership and all partners in such association are unlimitedly and solidary liable for the liabilities of such association/partnership, even for the liabilities of the other members, when these acts as real or pretence members of such association. Failing to establish a legal person, the contracting parties in a joint venture may completely lose control over the scope of own responsibility and liability – risk and leave the determination of such liabilities to third persons – debtors and courts. Such a situation would be opposed to the principles of modern enterprise, especially international business activities. Another important reason for the establishment of a separate legal person is the intention of the founders to separate the activities of a joint venture from other, own business activities. If a joint venture is done through an existing legal person of the founder, these activities could not be separated from those of the joint venture. In such a case the limitations and borders of liability, principles and distribution of costs, the principles of control rights and management of joint venture could not be distinguished.

Another important reason in favour of the establishment of a separate legal person is the need of determination of management and control over this common business activity. In the new legal person, the management structure and control is limited on the joint venture, if nothing because the activities of the new legal person are also limited on the joint venture goals and tasks. In such a legal form the liability for management and control can be easier divided in proportion with the individual stake invested into such legal person <sup>25</sup>.

Because of all the above, joint ventures are mostly incorporated, i.e. managed through special, separate legal persons founded for purpose only.

From the legal point of view, between a joint venture contract and subsequently established legal person, no special structural legal connection is established, even there is a mandatory relationship binding the founders and members of the company. The joint venture contract is used *exclusively* as the basis for founding a trading company.

## VI. CONCLUSION

Public services of economic interest, by nature represent economic activities, activities that are of public interest, so that these operations are performed within a public service.

In the document discussing the problems of public services “*Services of general economic interest in Europe*”, the European Commission instructs that a balance must be established between these two opposed demands. One demand relates to the establishment of a common, European market and the insurance of equality in market competition, including the field of economic public services. The other demand relates to the existing public interest and special public law provisions

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<sup>25</sup> Vukmir, B., Ugovor o zajedničkim ulaganjima, Informator, Zagreb, 1994, p. 38.

that must be considered when establishing economical public services.

In principle, economic public services in the EU member states are executed through concessions, trading companies completely or in their major part owned by the state, through a public company or other legal form of organization that functions more or less independently of the state.

The main reasons for the fact that economic infrastructure are kept within public financing are: The public sector must act in all fields where the rendered services basically do not bring any profit, but such services must be performed for political and economic reasons; The abuse of a monopolistic chair over the economic infrastructure is prevented, because the pressure can be felt in regional monopoly, since it is almost impossible to replace these products and services with others; The development of economic infrastructure must primarily be viewed as accomplishment of development goals of the entire economy, not through issues of local, internal profitability; Technical – technological properties of economic infrastructure show that the revenue achieved in their operations cannot be used as good measure for the efficiency of operations.

Financing sources of public services are sales prices of products and services, fees (municipal fees and contributions), coverage of lacking revenue from the national or regional and local budgets (units of self-management), loans, assets invested by founders, assets by domestic and foreign investors and other sources like concessions.

Public services may take an active role in economic (commercial) trade. Possible doubts in regard of such participation emerge from the circumstances that public law bodies may act from the position of public power/authority and as persons of private law. In this sense public service, if performing economic activities and services, must waive a part of their authority.

If a company member is a public law body, the position of such member towards other members must be under the same rules as for all those other members of the company. Further on, the performance of public services may be assigned to third legal persons based on the concession system. Finally we must mention the cases when the State acts together with domestic or international investors. In such cases Joint venture contracts are executed.

## UPRAVNI, KOMERCIJALNI I FINANCIJSKI ASPEKTI JAVNE SLUŽBE

U radu autori istražuju problem javnih službi s naglaskom na pitanja administrativne organizacije, financiranja i izbora pravnog oblika u kojemu bi javne službe ostvarivale svoju funkciju. Raspravlja se o važnosti i ulozi javnih službi za ekonomiju, te se opisuju različita polazišta pravne regulacije javnih službi u EU. Posebna je pažnja posvećena pravnim problemima financiranja javnih službi koje su od posebne važnosti za ekonomski razvitak. Konačno, daje se i pregled mogućih pravnih oblika preko kojih djeluju te službe.

**Ključne riječi:** *javne službe, upravni, komercijalni i financijski aspekti, Europska unija, Republika Hrvatska*

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