

# REGULATORY REFORM OF THE PUBLIC PASSENGER TRANSPORT SYSTEM ACCORDING TO THE EUROPEAN UNION REGULATIONS

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*The author of this article studies the boundaries of competences of the European Union in the field of public passenger transport regulation. It has been established that the European Union is limited only to competition protection in the EU single market and that member states are fully competent to regulate public passenger transport in compliance with their sovereign rights and responsibilities for exercising the human right to mobility. In its nature public passenger transport is a “merit good” (mixed public-private good), a commodity that can be provided in an optimal way under the condition that the state establishes mechanisms for balancing economic goals with other social goals (social values) when regulating and implementing public passenger transport. Member states can accomplish this task only by disregarding the requirements imposed by the EU in legal and political reform acts when individual social goals can be achieved only by an intervention in the economic functions of competition. The author justifies a legitimate right to waive on the bases of the legal system.*

*Keywords: integration of public passenger transport, human right to mobility, reform of the system in the EU member state*

## 1. INTRODUCTION

The European Union (hereinafter: EU) has adopted several legal and political acts that directly or indirectly govern individual fields of public passenger transport (hereinafter: PPT). They either impose on the member states (herei-

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nafter: MSs) the obligation of restructuring the PPT system or prescribe goals that have to be achieved by reform. In this context the question about the delimitation of competences for PPT regulation is posed. The discussion will be focused on the study of the systemic question how far the EU competences reach in this field and what is the meaning of the EU provisions by which the EU interferes in various social relationships. In the discussion the author will test a thesis claiming that the EU member states are competent to regulate their systems in order to be able to provide full respect for the human right to mobility to their citizens (inhabitants) when reforming their PPT and to ensure accessibility of these services for its citizens (inhabitants), even if they do not fully follow the goals imposed on them by legal acts and policies of the EU.

The test of this thesis will start with a short presentation of the importance of the transport sector in the EU economic system and a theoretic determination of the nature of PPT as a component of the transport sector. The aim of the discussion about the regulation of PPT in the legal systems of member states will be to identify how the competences and care for the achievement of economic and other social goals in this field are systemically divided.

The assessment of adequacy of the systemic regulation of competences will be based on a study of the sources of EU competences in accordance with the EU primary acts and by means of the Charter of Fundamental Rights of the EU<sup>1</sup> (hereinafter: the Charter), and the obligations of the MSs when providing the protection of the human right (hereinafter: HR) to mobility and, on this basis, the protection of other rights assumed by the ratification of international conventions. In the context of the discussion about the nature of PPT economic and other social values that are promoted through PPT services will be presented and the providers of protection of these values will be identified.

The expert studies on the “external” externalities of transport or PPT that served as the basis for the adoption of the legal and political reform acts of the EU will be used to assess the usefulness of the results of the studies for the provision of protection of free competition in the EU single market. It should be also established if the MSs can participate in reforming the PPT systems and, consequently, in the pursuit of other, non-economic goals defined in accordance with the HR to mobility.

The legal theory does not include any discussions about the question raised. The answer to it is important for the justification of the right of the MSs

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<sup>1</sup> Charter of Fundamental Rights of the European Union, Official Journal of the European Union, 2010/C 83/02.

to an adequate deviation from the EU goals when this is justified on account of specific needs of the social (state) community or the protection of the HR to mobility and other HRs which it enables. The research results will serve as practical help to legislators in MSs for regulating the field of PPT and for an assessment of consistency of individual solutions with regulations and goals of the EU policies.

The descriptive method is used for the presentation of the EU legal sources on transport regulation, the current state of affairs in the area of transport and the impact of the existing situation of PPT on the economic and certain other fields of social life, which has led to system restructuring in MSs. The system theory of the social market state defines the nature of PPT in connection with the HR to mobility as the foundation on which the (European) social market states have to provide the supply of these services to their citizens (inhabitants). By means of the method of deduction the author discusses the jurisdiction of the EU and MSs to regulate PPT. An analytical approach is taken in the formulation of the conclusion.

## **2. TRANSPORT AS AN IMPORTANT PART OF THE EU ECONOMIC ACTIVITIES**

The EU transport sector employs approximately 11.2 million people, which corresponds to about 5.0 % of the total workforce. About 55 % of those work in land transport (road, rail and pipelines), 2 % in water transport (sea and inland waterways), 4 % in air transport, and 24 % in warehousing and supporting transport activities (such as cargo handling, storage and auxiliary activities), while the remaining 15 % are in postal and courier activities. With around € 548 billion in Gross Value Added (GVA) at basic prices, the transport and storage services sector, and the companies whose main activity is the provision of transport services (including postal and courier activities), accounted for about 4.8 % of the total GVA in the EU-28 in 2011. In 2012, private households in the EU-28 spent on average € 967 billion or roughly 13.0 % of their total consumption on transport-related items. Close to 26 % of this sum (around € 249 billion) was used to purchase vehicles, more than € 527 billion was spent on the operation of personal transport equipment (e.g. buying fuel for cars) and € 190 billion was spent on transport services (e.g. bus, train and plane tickets). Total goods transport activities in the EU-28 (not between the EU and the rest of the world) in 2012 are estimated to have amounted to

3,768 billion tkm. Road transport accounted for 44.9 % of this total, rail for 10.8 %, inland waterways for 4 % and oil pipelines for 3 %. Total passenger transport activities in the EU-28 in 2012 by any motorised means of transport are estimated to have amounted to 6,391 billion pkm or on average around 12,652 km per person (not between the EU and the rest of the world). Passenger cars accounted for 72.2 % of this total, powered two-wheelers for 2 %, buses & coaches for 8.2 %, railways for 6.5 % and tram and metro for 1.5 %.<sup>2</sup>

### 3. FREE MARKET COMPETITION AND PUBLIC PASSENGER TRANSPORT SERVICES AS A MERIT (MIXED) GOOD

#### 3.1. Regulation of PPT in the Legal Sources

PPT as an important part of the transport sector is the only economic public service (service of general economic interest)<sup>3</sup> expressly noted in EU legal sources. Article 106 (ex Article 86) of the Treaty on the Functioning of the EU (hereinafter: Treaty)<sup>4</sup> establishes a principle according to which the MSs grant special or exclusive rights to public entities. The Treaty stipulates, particularly in Article 14 (ex Article 16) and Article 93 (ex Article 73), that “[aid]s shall be compatible with this Treaty if they meet the needs for coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.” In the declaration on the services of general economic interest, the Nice European Council of December 2000 specifically stressed the importance of such services, considering, *inter alia*, that “there is a need here especially for clarification of the

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<sup>2</sup> *EU transport in figures – Statistical Pocketbook 2014*, Publications Office of the European Union, Luxembourg, 2014, p. 18, <http://ec.europa.eu/transport/facts-fundings/statistics/doc/2014/pocketbook2014.pdf> (1 March 2015).

<sup>3</sup> Note on terminology. Article 86 (2) of the EC Treaty refers to “services of general economic interest” and “revenue-producing monopolies”. The first phrase appears to mean a public service or a service of general interest which is of an economic nature, i.e. is provided by an undertaking — which is a precondition for any application of Article 86 at any rate. The second phrase is a rather inelegant English rendering of the French “monopole fiscal”, which besides wasting words rather fails to convey the idea that the revenues must be produced for the State and not for any odd private monopoly! (But a private franchisee can act as a fiscal monopoly if the revenues it produces are for the State.)

<sup>4</sup> Consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, 2012/C 326/01.

relationship between methods of funding services of general economic interest that is carried out in compliance with the State Aid rules. In particular, the compatibility of aid designed to offset the extra costs incurred in performing tasks of general economic interest should be recognised, in compliance with Article 101/2 (ex Article 86/2).” But contrary to practice in the other economic sectors, all aid to transport has to be notified in advance to the Commission. Economic entities, authorised to perform services of general economic interest viz. economic entities having the nature of a revenue-producing monopoly, act according to the rules contained in the Treaties, especially the rules concerning competition, if the application of such rules does not hinder, in legal or actual terms, the carrying out of special assignments and if trade development is not affected to such an extent that it would be contrary to the interest of the EU. The MSs shall neither enact nor maintain any measure in force contrary to the rules contained in the Treaties, in particular to the rules provided in Article 18 and Articles 101 to 109 of the Treaty. Activities of PPT are exercised under regulated competition.

The Article 106(2) (ex Article 86(2)) means “defence” against claims of infringement of competition law. Two ingredients are required for a successful justification through Article 106(2) of something that would otherwise be prohibited by the Treaty: first, a public service or fiscal monopoly purpose that the undertaking has been entrusted with and which is linked to a grant of special or exclusive rights by the State must be identified. Second, the agreement or conduct must only infringe the other provisions of the Treaty insofar as is necessary to meet this public service or fiscal monopoly purpose.<sup>5</sup>

### 3.2. Public Passenger Transport Services as Merit (Mixed) Goods in MSs

According to their nature PPT services are understood to be merit (mixed) goods which cannot be sufficiently and regularly provided under reasonable conditions of free competition in the market. With reference to the macro development model adequate supply of these goods is a condition for the growth of the private sector and the development of social community, while the micro model defines it as an indirect impact on the supply and demand,<sup>6</sup> and this is why the member state as a social market state is obliged to play

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<sup>5</sup> Cf. <http://www.reckon.co.uk/headlines-franckblog> (8 October 2012).

<sup>6</sup> Bailey, S. J., *Public sector economics: Theory, Policy and Practice*, 2nd ed., Palgrave, Basingstoke and New York, 2002, p. 44.

an active role in the production and dispersion of these goods. The nature of public interest and intensity of the state's interference in the production of these goods in a particular society can be determined by economic theories that are (have to be) faced with broader social, demographic, ecological and other sciences, which are reflected in real life as the result of historical processes and political compromises<sup>7</sup> and enable the exercise of different HRs. The efficiency of public interest measured by the ratio between costs and benefits should be estimated on realistic items, so that the efficiency of intangible benefits is ascertained with the involvement of "cost-benefit analysis".<sup>8</sup> The state can try to eliminate numerous negative externalities by the pursuit of public interest. An untroubled and customer attainable supply of PPT services as "merit goods" would not be possible (only) under the conditions of market competition and therefore it is necessary that PPT services are regularly supplied by a competent MS authority.<sup>9</sup> These authorities have to take into account their detailed demographic, town-planning, social, cultural, traditional and other social specificities and needs, and the co-financing of accessibility to these goods has to be regulated in compliance with their objective possibilities. Since PPT is a good where economic and social values are reflected, it is necessary to identify their relationship. Competition rules can thus be applied in the field of PPT only to the extent that the economic goals pursued by free competition do not prevail over the social goals of PPT. Regulated competition is unavoidable<sup>10</sup> for reaching the expected objectives<sup>11</sup> and for the creation of conditions for exercising HRs.

By acceding to the EU the MSs transferred to its competences all the rights that refer to the establishment of the free movement of goods, services, capital and persons and therefore – as it derives from the previous section – the EU's right in the field of PPT regulation is limited only to protection of competition in the single EU market and excludes regulation of the system.

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<sup>7</sup> *Ibid.*, p. 10.

<sup>8</sup> Musgrave, R.; Musgrave, P., *Public Finance in Theory and Practice*, 5th ed., McGraw-Hill Book Company, Singapore, 1989, p. 131.

<sup>9</sup> Cf. Weatherill, S., *Cases & Materials on EU Law*, 8th ed., Oxford University Press, Oxford and New York, 2008, p. 10.

<sup>10</sup> Möschel, W., *The Relationship between Competition Authorities and Sector Specific Regulations*, in: Tzouganatos, D. (ed.), *EU Competition Law and Policy: Development and Priorities*, Proceedings from Athens Conference, 2002, p. 19 *et seq.*

<sup>11</sup> Hrovatin, N. *et al.*, *Regulacija trgov po vstopu Slovenije v Evropsko unijo (Regulation of Markets after Slovenia's Accession to the EU)*, Ekonomska fakulteta, Raziskovalni center, Ljubljana, 2000, p. 7 (plus headlines).

## 4. REASONS FOR THE INTRODUCTION OF THE PPT REFORM BY THE EU

### 4.1. Results of the Studies into the Situation of Transport

Constant growth of transport in the EU across all means produced various negative consequences, which prompted studies, such as a study on European intercity passenger transport requirements.<sup>12</sup> According to the study<sup>13</sup>, the expansion of traffic causes congestions that have numerous harmful effects such as environmental pollution, the green-house effect, health problems, excessive noise, traffic accidents, time losses, difficulties in logistics, etc.<sup>14</sup> Urban road traffic, for example, accounts for 40 % of CO<sub>2</sub> emissions and 70 % of emissions of other pollutants. Noise pollution is a growing environmental concern. It is caused by a varied number of sources and is widely present not only in the busiest urban environments, it is also pervading once natural environments. It has adverse effects on the well-being of exposed human populations, on the health and distribution of wildlife on the land and in the sea, in the learning abilities of children in schools, and in the high economic price to be paid by the society.<sup>15</sup>

Research into external cost calculation focuses on the most important cost categories such as noise costs, air pollution costs, accident costs or climate change costs that primarily reduce the economic goals of traffic (PPT). In addition to the enumerated phenomena that have a negative impact on the economic and other social effects, increasing traffic also causes positive as well as negative effects on numerous other fields that are relevant for individual

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<sup>12</sup> Organisation for Economic Co-Operation and Development, *The Future of European Passenger Transport: Final Report on the OECD Study on European Intercity Passenger Transport Requirements*, Organisation for Economic Co-operation and Development, Paris, 1977, p. 5.

<sup>13</sup> Maibach, M.; Schreyer, C.; Sutter, D.; van Essen, H. P.; Boon, B. H.; Smokers R.; Schrotten, A.; Doll, C.; Pawlowska, B.; Bak, M., *Handbook on estimation of external costs in the transport sector - Internalisation Measures and Policies for All External Costs of Transport (IMPACT) Version 1.1*, CE Delft, Delft, 2008, p. 11.

<sup>14</sup> It covers all environmental, accidents and congestion costs, whereas infrastructure costs are not included, because of their different nature and the mandate of the Eurovignette Directive, which also focuses on examining the environment, noise, congestion and health related costs.

<sup>15</sup> Nugent, C.; Blanes, N.; Fons, J.; Sáinz de la Maza, M.; Ramos, J. M.; Domingues, F., van Beek, A.; Houthuijs, D., *Noise in Europe 2014*, Publications Office of the European Union, Luxembourg, 2014, p. 7.

social communities. The studies on the external cost of those categories that were conducted in the EU remain largely neglected. These studies do not comprise any complex impact patterns and valuation for other environmental costs such as soil and water pollution, costs in sensitive areas, costs of up- and downstream processes and costs of energy dependency. MSs are competent for the regulation of the above fields; besides the economic and all other goals they also have to pursue, as well as the interests of their close social community.

#### **4.2. Legal and Political EU Sources of the PPT System Restructuring in MSs**

The results of studies on transport (PPT) served as the foundation for the formulation of transport policy in the White Paper “European transport policy for 2010: time to decide” (hereinafter: the White Paper)<sup>16</sup> and the Green Paper “Towards fair and efficient pricing in transport - policy options for internalizing the external costs of transport in the European Union” (hereinafter: the Green Paper).<sup>17</sup> Those political documents and the judgement of the Court of Justice of the European Communities in *Altmark*<sup>18</sup> were used as the basis for the adopted Regulation on public passenger transport services by rail and road<sup>19</sup> (hereinafter: the Regulation) and Directive coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors<sup>20</sup> (hereinafter: the Directive).

According to the Regulation as a new legal basis and in accordance with the principles of ease, flexibility, and subsidiarity in line with the White Paper, the MSs are obliged to establish an organisational structure and provide ways of PPT implementation for the objectives set in this field that are

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<sup>16</sup> White Paper “European transport policy for 2010: time to decide”, COM (2001) 370.

<sup>17</sup> Green Paper “Towards fair and efficient pricing in transport - policy options for internalizing the external costs of transport in the European Union”, COM (95) 691.

<sup>18</sup> *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH.*, Judgement C-280/00, 24.07.2003.

<sup>19</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70, Official Journal of the European Union, L 315/1.

<sup>20</sup> Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, Official Journal of the European Union, L 134/1.

to be reached by EU policy. The Green Paper “Towards a New Culture for Urban Mobility”<sup>21</sup> (hereinafter: Green Paper 1) defines the increasing use of PPT as one of its objectives, and sets forth accessibility, high quality, and use of modern technologies as a way to improve the current situation.<sup>22</sup> The establishment of suitable mobility is of vital importance for the reduction or prevention of stated occurrences, which can only be achieved by harmonized cooperation between local and regional authorities, as well as the MSs and the EU as a whole.<sup>23</sup> One of the most significant measures is the provision of so-called co-modality in accordance with which passengers travelling to a particular destination might enjoy a combined use of a standardised ticket in different means of transport (train, tram, underground railway, coach, bus, taxi, etc.). Another important action is encouraging the use of various personal means of transport, such as motorcycles, bicycles and walking.<sup>24</sup> Improved mobility would result in a reduction of growing negative occurrences, and at the same time in an increase of social welfare (also by a harmonisation of passenger and cargo transport).<sup>25</sup> According to the Commission, passenger rights in the field of accessibility of PPT are based on three cornerstones: non-discrimination, accurate, timely and accessible information, and immediate, proportionate assistance.<sup>26</sup> In accordance with the EU programme set out in the White Paper on services of general interest<sup>27</sup>, the following economic, social and ecological objectives in the field of PPT should be realized: a) revitalisation of railways as well as cargo and PPT within individual MSs and between them (introduction of competition between transport organisers); b) improvement of transport quality in road transport; c) acceleration of sea and land-and-water transports; d) establishment of connections, integration of different modes of transport; e)

<sup>21</sup> Green Paper – Towards a New Culture for Urban Mobility, COM (2007) 551 final.

<sup>22</sup> Commission Staff Working Paper – Impact Assessment, SEC (2007) 635/2; Green Paper – Towards a New Culture for Urban Mobility.

<sup>23</sup> Cf. Greening Transport: new Commission package to drive the market towards sustainability, IP/08/1119.

<sup>24</sup> Green Paper – Towards a New Culture for Urban Mobility.

<sup>25</sup> Greening Transport – Communication from the Commission to the European Parliament and the Council, COM (2008) 433 final. Cf. Rail noise abatement measures addressing the existing fleet - Communication from the Commission to the European Parliament and the Council, COM (2008) 432 final.

<sup>26</sup> Pavliha, M., *Enlightenment of the European Attitude Towards Passenger Rights*: “in dubio pro consumatore”, *European Transport Law*, vol. 48, 2013, p. 230.

<sup>27</sup> White Paper on services of general interest, COM (2004) 374 final; Green Paper – Towards a New Culture for Urban Mobility.

establishment of basing points for calculations of infrastructure use – integration of externalities should encourage use of environmentally friendly means of transport; f) exercising of the EU citizens' right to transport services of high quality; g) establishment and development of high quality urban transport services (modernisation and better use of public transport – assurance of sustainable development and reduction of CO<sub>2</sub> emissions – the Kyoto Protocol); and h) establishment of regulated competition in the field of PPT.

The goals set in the Green Paper are regulated in Article 8 of the Directive. In line with this Article the implementation of public passenger transport services should guarantee opening up to competition through the public procurement system so that an individual MS with regulated competition will regulate deviations from the competition rules if this is urgently necessary for the achievement of goals from Articles 24 (ex Article 11), 28 (ex Article 14), 41 (ex Article 28), 49 (ex Article 49) and from Article 97 of the Treaty. The principle of ease is demonstrated in the waiver of complicated procedures of awarding contracts in the field of PPT, in making agreements with holders of activity, and in the introduction of indirect contract awarding.<sup>28</sup> The operation of these services may be organised in various legal and organisational ways, by public enterprises, in co-operation with the private sector (public-private partnerships) or by the transmission of service performance to a private sector (White Paper 1). MSs should ensure that the participation of a body governed by public law as a tenderer in the procedure for the award of contract does not cause any distortion of competition in relation to private tenderers.

The division of tasks and powers between the EU and the MSs leads to a shared responsibility of the EU and the public authorities in the MSs, but a detailed definition of services to be provided and the delivery of those services remain the responsibility of the MSs. The relevant MS public authorities are also responsible for market regulation and for ensuring that operators accomplish the public service missions entrusted to them. The MSs are competent for defining the services of public importance, and for organising the financing (co-financing) and supervision of performance of these services.<sup>29</sup> Article 8 of the Regulation states that deregulated PPT markets in which there are no exclusive rights should be allowed to maintain their characteristics and a way of functioning in so far as these are compatible with the Treaty requirements.

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<sup>28</sup> Regulation (EC) No 1370/2007, Articles 11, 25; 22; 26, 41, 46; 58; 65, 75, 80, 85.

<sup>29</sup> De Ceuster, G. *et al.*, *ASSESS Final Report*, DG TREN, European Commission, Brussels, 2005, p. 8.

The abstracts of the Regulation and Directive, the White Paper and the Green Paper as the programme acts suggest that the goals of the PPT reform determined in the programme acts include economic as well as broad social goals, while the Regulation and Directive as the legally binding acts in the field of PPT are limited to the protection of goals of free competition in the single EU market.

## **5. DELIMITATION OF COMPETENCES BETWEEN THE EU AND MSs IN THE FIELD OF PPT REGULATION**

### **5.1. Delimitation According to the Originality of the EU Legal System**

Free competition in the social market state is primarily based on HRs such as the right to freedom, right to property, right to equality, right to association, and the right to choice since HRs denote the baseline for man's individual and collective (social) nature, and therefore they are one of the basic assumptions for understanding contemporary (democratic) economic, political, and legal systems and processes. The contents of the majority of HRs are conditioned by philosophy, morality, culture, political tradition, the degree of social development and traditional values in a particular social community in time and place. Overall implementation of the majority of these rights can be ensured only at the national level, while only the most neutral ones (e.g. economic freedoms) can be implemented at the transnational level; others can be implemented only in a certain scope, while these rights can be fully implemented only at the level of national states to which the legal entities belong or where they are exercising their rights. It follows that market participants may exercise their right to free economic initiative, deduced from the human right to freedom and dignity, in the EU as a transnational formation, by being able to efficiently perform the economic functions of competition in the EU single market, while national states are obliged to provide for the realisation of this freedom in national markets. Following the implementation of the social market model in the EU, the EU gradually undertook the protection in the extent necessary to establish individual social functions of competition in the single market (e.g. right to economic freedom as a part of the HR to freedom, right to equality – equal conditions for penetration in the market, prohibition of discrimination – preventive control over the mergers of economic operators). Thus the EU as a transnational formation is, pursuant to the ECHR, obliged to ensure the protection of those HRs and to such an extent that is indispensable

for optimum realisation of economic functions of competition in the EU single market, while the MS are completely responsible for the comprehensive implementation of HRs at the national level. MS are responsible for the protection of those HRs which they accepted by the ratification of international conventions and have not transferred them to the EU so as to consistently ensure their full protection at the national level in accordance with their nature.

Such a statement is in accordance with the Charter of Fundamental Rights of the European Union, which stipulates in paragraph 5 of the Preamble that “[t]his Charter reaffirms, with due regard for the powers and tasks of the Community and the EU and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the MS, the Treaty, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR)<sup>30</sup>, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.” Of particular importance are the following articles: Article 6 of the Charter that guarantees the right to liberty and security to everyone, Article 36 of the Charter in which the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community (EU), in order to promote the social and territorial cohesion of the EU, Article 45 according to which every citizen of the Union has the right to move and reside freely within the territory of the MSs, and Article 51 of the Chapter saying that the provisions of this Charter are addressed to the institutions and bodies of the EU with due regard for the principle of subsidiarity and to the MS only when they are implementing the EU law.

The HRs pointed out in this section and numerous other ones in the field of PPT are exercised through public (social) interests (goals), which is justified by the argument that MSs can be exclusively competent for the regulation of PPT because of the possibility of their complete implementation, and it is, therefore, necessary to interpret the goals of the reform of the PPT systems in the EU acts as the protection of free competition in the single EU market.

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<sup>30</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) and the Protocols.

## 5.2. Delimitation According to the Competences of Protection of the Human Right to Movement in Scope of PPT

The Court of Justice of the European Communities (hereinafter: the Court of Justice) initially rejected the reference of clients to HRs in the proceedings. When the then founders of the “three communities”<sup>31</sup> took over the model of the social market state, they were gradually followed by other communities and the Court of Justice. Their point of view is explicitly expressed in *Stauder v. Ulm - Sozialamt* no. 29/69. This case was followed by numerous decisions that expanded the content and meaning of HRs for the operation of the EC (EU). In the field of formal regulation the practice of the Court of Justice was reflected in the Single European Act (1986), whose preamble included a reference to the HRs in the constitutions and acts of the MSs, in the ECHR and in the European Social Charter. The Maastricht Treaty<sup>32</sup> sets out in provision F (2) that the EU respects the fundamental rights provided by the ECHR within the meaning of the general principles of Union law arising from the common constitutional traditions of the MS. The Treaty states in the Preamble that HRs are universal inviolable and inalienable values and that MSs confirm their attachment to the principles of liberty, democracy, rule of law and respect for human rights and fundamental freedoms. In line with Article 2 of the Treaty EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the MSs in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. HRs served as a relevant basis for the emergence of a social market state<sup>33</sup>, as the MSs’ intrinsic model. Within the scope of competences obtained by MSs the EU is also obliged to follow the conventions of the United Nations for the protection of HRs. The first one is the Charter of The United Nations which does not directly regulate individual HRs, but determines the respect of HRs as their foundation. The act of the United Nations which explicitly regulates HRs is the Universal Declaration of Human Rights (1948) that contains the catalogue of HRs. However, the inter-

<sup>31</sup> Korže, B., *System argumentation for direct binding of EU bodies by the European convention on human rights and freedoms to the extent of their competences*, Proceedings of the 7th International Conference “Economic Integration, Competition and Cooperation”, University of Rijeka, Opatija, 2009, p. 445.

<sup>32</sup> The Treaty on European Union, Official Journal of the European Communities, 92/C 191/01.

<sup>33</sup> Korže, *op. cit.* in fn. 31, p. 406.

national acts from the field of HRs protection, in particular the ECHR, are a direct part of EU law only in the section and scope referring to the sovereign rights of the MSs transferred to EU bodies.

The HR to freedom of movement which includes the right to mobility, is of relatively independent significance, but it is also of essential significance for exercising the HR to work, education, clean environment, economic, cultural, and social development of individuals and the social community, etc. The General Assembly of the United Nations defined the right to freedom of movement as a civilizational achievement in Article 13 of the Universal Declaration of Human Rights<sup>34</sup>, and the Council of Europe referring to this Declaration incorporated it as a general principle in Article 2 of Protocol No. 4 to the ECHR.<sup>35</sup> By ratifying the Convention, the signatory states committed themselves to enacting the right to mobility in their national legal systems, so that they could limit its enactment only as an exception when such a restriction is crucial to ensure state security or public safety, maintain and restore public order, prevent criminal activities, prevent the commission of offences, protect health or morals, or protect the rights and freedoms of other subjects.

PPT is of crucial significance for the enactment of the right of citizens and other inhabitants to mobility, and therefore every social market state (welfare state) is obliged to provide its inhabitants with adequate access to PPT services. Mobility enables the maintenance and sustainability of numerous private and public interests and therefore the state is obliged to define it as a merit (mixed) good, and become actively involved in the organization and control over its implementation. In this relation the state has to regulate the right of access to PPT services in a manner that the equality of all citizens is observed. When determining the contents, volume and structure of PPT services and the share of public funds to co-finance them, a welfare state should, on the one hand, start from a defined system concept and from the content of individual political, economic and social rights and fundamental freedoms<sup>36</sup>, and on the

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<sup>34</sup> Adopted and declared by the General Assembly of the United Nations on 10 December 1948 with Resolution No 217 A (III).

<sup>35</sup> The Convention and the Protocols have been amended in accordance with the revisions of Protocol No 11, which was drawn up and presented for signature to the Council of Europe Member States in Strasbourg on 11 May 1994, and entered in force on 1 November 1998.

<sup>36</sup> Korže, B., *Sistemske podlage za opredelitev obsega javnih dobrin v tržno socialni državi (Systemic Foundations for Determining the Volume of Public Services in Market-Social State)*, XIX. Dnevi slovenske uprave, Ljubljana, 2012, p. 462.

other, from its economic capabilities while taking into consideration the encouraging impact on economic growth and overall social development. In the organisation of PPT the state is obliged to pursue various social externalities and it is its task to ensure accessibility for individual categories of users in a differential manner if needed and to adequately modify the “cost-benefit analysis”, following EU economics so far as it is not to the detriment of its social interests. The MSs are obliged to supplement the protection of the HR to mobility so that PPT will be organisationally and functionally in line with specific social circumstances. If HRs are conditioned by philosophy, morals, culture, political tradition, the level of social development and the tradition of values of a certain community in time and place, the standards and values are relative when defining the content of an individual HR.<sup>37</sup> This is why a complete exercise of the majority of HRs can only be ensured at a national level, while at the international level it is possible to exercise only those rights that are most neutral in relation to the stated characteristics of individual communities.

It can be concluded that the EU is competent for exercising individual HRs only within the scope and to the extent obtained by the MS. When exercising these rights in the field of PPT the EU is limited only to the protection of free competition as a human right to economic freedoms. MSs are competent for full and complete protection of the HR to mobility and the rights stemming from it. Therefore, MSs should also provide their exercise within the scope of special PPT, i.e. as economic public services.

## 6. CONCLUSION

Legal and programme acts on the basis of which the EU imposed the obligation of PPT restructuring on the MSs determined various reform goals. In this relation a question is posed as to whether the EU is still within the range of its competences or if it is already encroaching upon the competences of MSs. The discussion suggests that special provisions of the EU legal acts that regulate PPT as an economic public service (in general economic interest) provide an additional defence against the claims of infringement of EU competition law. According to those principles, MSs shall, by regulating PPT, neither enact nor maintain any measure in force contrary to the EU competition rules. Econo-

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<sup>37</sup> Winston, M. E., *The Philosophy of Human Rights*, Wadsworth Publishing, Belmont, 1989, p. 540.

mic entities, authorised by the MSs to perform services of general economic interest viz. economic entities having the nature of a revenue-producing monopoly, act according to the rules contained in the Treaties, especially the rules concerning competition, if the application of such rules does not hinder, in legal or actual terms, the carrying out of special assignments and if they are not affected to such an extent that it would be contrary to the interest of the EU. The concern of the EU is assurance that MSs do not pay PPT services operators more than necessary with public funds. EU studies into the externalities of the current situation in traffic, which were essential for the EU reform acts, have been made on these legal starting points; they mostly focus on the externalities which directly or indirectly cause costs and decrease economic effects of competition, whereas other external cost categories remain largely neglected.

The care of the EU for the protection of free competition in the single market is its legitimate right granted by MSs by delegating it their sovereign rights. EU legal and political acts point out individual broad goals of PPT, but they are only of a general character, and they actually regulate only those fields that are relevant for the protection of economic goals of competition in the EU single market. The EU right to competition protection in the EU single market has to be understood to end where the right of citizens (inhabitants) of MS to mobility begins in its total scope and in its complete diversity and not only in the meaning of reduction in PPT production cost. The system analysis and the study of the PPT nature as the human right to mobility suggest that by the accession to the EU MSs did not transfer the competences for PPT regulation to its bodies, but rather fully retained it. When regulating PPT as a “merit good” MSs have substantial freedom, limited by the prohibition of arbitrariness. Within the scope of their legislative competences MSs have to establish the protection of free competition in their national markets and simultaneously provide conditions for the achievement of all other specific social goals such as the protection of nature and landscape, prevention of soil and water pollution, reduction of costs of up- and downstream processes and costs of energy dependency in the manner to provide to their citizens (inhabitants) the HR to mobility and other derived HRs.

Delimitation of competences between the EU and the MSs in the field of PPT regulation is founded on system regulation and non-conflict in the formal aspect. The danger of conflicts appears at the level of implementation. For the optimal regulation of PPT it is necessary that a balance be established between

the economic goals of the competition, whose protection is a task of the EU, and other social goals, whose protection lies within the competences of the MSs. This can be achieved by the enforcement of broad social goals that interfere with economic goals by a short-term reduction in their effects, but enable and support these goals in the long term.

The regulation in force and the reform measures of the EU in the field of PPT regulation need to be explained in accordance with the summarised findings that MSs are entitled to disregard the EU requirements without being accused of infringing EU law, if the disregard is justified by the pursuit of their national social goals when organising and implementing PPT in terms of the HR to mobility.

## Sažetak

Branko Korže\*

### REGULATORNA REFORMA JAVNOG PUTNIČKOG PROMETA PREMA PRAVNOM UREĐENJU EUROPSKE UNIJE

*Autor ovog članka proučava granice nadležnosti Europske unije na području uređenja javnog putničkog prijevoza. Utvrđuje da je Unija pritom ograničena samo na zaštitu konkurencije na jedinstvenom tržištu Europske unije te da su za uređenje javnog putničkog prijevoza u cijelosti nadležne države članice, sukladno svojim suverenim pravima i odgovornostima za ostvarivanje ljudskih prava državljana na mobilnost. Javni putnički prijevoz po svojoj je naravi "merit good" (mješovito, javno-privatno dobro), tj. dobro koje je moguće na optimalan način osigurati pod uvjetom da država pri uređenju i provođenju javnog putničkog prometa uspostavi mehanizme za usklađivanje ekonomskih ciljeva s drugim društvenim ciljevima (društvenim vrijednostima). Države članice taj svoj zadatak mogu ispuniti samo tako da, u slučaju kada se pojedini društveni ciljevi mogu osigurati samo zahvatom u ekonomske funkcije konkurencije, odustanu od zahtjeva koje im je u svojim pravnim i političkim reformnim aktima postavila Europska unija. Autor podržava legitimno pravo na odustajanje na sustavnim temeljima.*

*Ključne riječi: integracija javnog putničkog prijevoza, ljudsko pravo na mobilnost, reforma sistema u zemlji članici EU-a*

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