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**THE LEGAL STATUS OF THE CROATIAN SEAPORTS OF RIJEKA
AND SPLIT WITH PARTICULAR REFERENCE TO THE PORTS
OF KOPER AND TRIESTE**

**PRAVNI STATUS HRVATSKIH MORSKIH LUKA RIJEKA I SPLIT S POSEBNIM
OSVRTOM NA LUKE KOPAR I TRST**

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Summary

In the first part of this article the authors analyse the legal status of the ports as maritime domain in the Republic of Croatia. In the second part, authors spell out about Sea Port Act of 1995 with special review at the seaports open to public traffic Rijeka and Split. They point out a new concept of separation of functions in the port, the role of Port Authority, transition of social ownership, special regime of concession for port activities and status of port assets (movables and immovables). Finally, in the third part the legal status of the Croatian seaports open to public traffic is compared with Slovenian law (port of Koper) and Italian law (port of Trieste).

Sažetak

U prvom dijelu ovog rada autori analiziraju pravni status luka kao pomorskog dobra u Republici Hrvatskoj. U drugom dijelu, autori govore o Zakonu o morskim lukama iz 1995. s posebnim osvrtom na morske luke otvorene za javni promet. Naglašavaju novine tog zakona (podjela obavljanja lučkih funkcija, uloga Lučke uprave, pretvorba društvenog vlasništva, poseban postupak koncesija za lučke djelatnosti, status lučkih pokretnina i nekretnina). Konačno, u trećem dijelu uspoređuju položaj naših luka te slovensko (luka Koper) i talijansko pravo (luka Trst).

1. Introduction (The ports as maritime domain)

Uvod (Luke kao pomorsko dobro)

The new **Croatian Maritime Code** (hereafter - CMC) was passed on February 2, 1994 and came into force on March 22, 1994.¹ The provisions of the CMC regulate: the maritime and submarine areas of the Republic of Croatia, the safety of, navigation on the internal waters and the territorial sea of the Republic of Croatia; **the regime of the maritime domain**; the basic material and legal relations concerning waterborne craft; contractual and other obligatory relations concerning ships; procedures concerning the registration of waterborne craft, limitations of the ship operator's liability; enforcement proceedings and injunction, and security measures on ships (art. 1, (1)).²

The maritime domain is the public estate of interest to the Republic of Croatia, is under her special protection, and should be used and/or exploited under the conditions and in the manner prescribed by law (art. 48). The maritime domain includes the internal waters and the territorial sea, its seabed and subsoil, as well as parts of the dry land that are by their nature intended for public maritime use or are declared as such (art. 49 (1)). The

¹ See OGRC No. 17/94, 74/94, 43/96. The CMC derogated The **Maritime and Inland Navigation Law** of the Republic of Croatia (see OGRC No. 53/91).

² For more details see **Dragan Bolanča: The New Croatian Maritime Code**, "Acta Juridica Hungarica", Budapest, No. 1 - 2, 1997, pp. 60 - 63 and **Dragan Bolanča - Axel Luttenberger: Some Views on the New Croatian Maritime Code**, "Zbornik radova Pravnog fakulteta u Splitu", No. 1 - 2, 1995, pp. 113 - 117.

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maritime domain includes the seashore, **ports** and harbours, breakwaters, embankments, dams, sandbars, rocks, reefs, mouths of rivers flowing into the sea, sea canals, and live and inanimate natural resources (fishes, minerals, etc.) in the sea and in the marine subsoil (art. 49 (2)). There is no property in the maritime domain or other proprietary rights on any basis (art. 51 (1)).³ Anybody is free to use and/or to be benefited by the maritime domain according to its nature and purpose in conformity with the provisions of the CMC (art. 51 (2)). Special use and/or economic exploitation of a part of the maritime domain may be conceded to physical and legal persons (concession) provided that such use is not in contradiction with the interests of the Republic of Croatia (art. 51 (3)). Special use of the maritime domain is any use that is not general use or economic exploitation of the marine domain (art. 51 (4)).⁴ As we could see above the ports are part of the maritime domain.

Some articles of the CMC relate to ports giving the meaning of several terms.⁵ A **port** is a water area and with water directly connected land area with built-up and non built-up wharf structures, breakwaters, equipment, installations and other facilities intended/ designed for berthing, mooring and sheltering seagoing ships, loading and discharge of things, embarkation and disembarkation of things and passengers, warehousing and other cargo handling operations, production, refinement and processing of goods, and other economic activities in connection with these activities concerning matters of business, traffic or technology (art. 5 (31)). A **port open to international traffic** is a port free for the admission of waterborne craft of all flags (art. 5 (32)). The ports should comply with the prescribed conditions of the safety of navigation (art. 90 (1)), other questions in connection with ports that are not regulated by the CMC should be laid down in a special law (art. 90 (2)). Ports may be those open to public traffic or those intended for special purposes if it has been previously established that the prescribed conditions for the safety of navigation in ports are complied with (art. 91 (1)). The ports open to public traffic or those for special purposes *should be instituted by a special legal provision*, and the conditions of the safety of navigation in the ports open to public traffic

³ See art. 65: "The concessionaire may, by consent of the lessor, establish a hypothec on the facilities that he has built on the maritime domain, under conditions referred to in the concession agreement". This article is not in accordance with the article 51 (1) - cf. **Dragan Bolanča**: *Problem stvarnih prava na pomorskom dobru*, "Pravo u gospodarstvu", Zagreb, No. 7 - 8, 1996, pp. 834 - 835.

⁴ Compare **Gordan Stanković**: *Pomorsko dobro u Pomorskom zakoniku Republike Hrvatske*, "Informator", Zagreb, No. 4197 - 4198, 1994, pp. 6 - 7, **Ivo Grabovac**: *Pomorsko pravo Republike Hrvatske*, Split, 1997, pp. 29 - 31, **Ivan Romštajn**: *Osnove hrvatskoga prometnog prava i osiguranja*, Osijek, 1996/1997, pp. 91 - 92.

⁵ See more **Vinko Hlača**: *Luke otvorene za javni promet* (review in book *Pravni problemi instituta pomorskog dobra u Republici Hrvatskoj s posebnim osvrtom na luke otvorene za javni promet*), Split, 1998, p. 21 *et passim*.

or those for special purposes should be determined by the Government of the Republic of Croatia (art. 91 (2)). The managing body of the port should maintain the port so as to secure safe navigation (art. 92). The managing body of the port open to public traffic should on terms of equality make it possible for any physical and legal person to use the wharfage, waterfronts, moles and other facilities in the port according to their purpose and within the capacity of the available facilities, if not otherwise provided by the CMC or by another law (art. 93 (1)). As regards the exploitation of a port open to international traffic and the payment of port dues the foreign waterborne craft are equal to the Croatian ones, on terms of reciprocity (art. 93 (2)).

In the matter of sea ports the fundamental act is the **Sea Ports Act** (hereafter - SPA) which was passed on December 19, 1995 and came into force on January 5, 1996.⁶

The SPA (art. 2 (1) contains the same definition of the term "port" as the CMC (see *supra* 3). This act divides ports into those open to public traffic and those for a special purpose. In the **port open to public traffic** any physical and legal person on terms of equality can use the port according to its purpose and within the capacity of the available facilities (art. 2 (2)). The **port for a special purpose** is a port for the needs of a company, another physical or legal person (nautical tourism port, industrial port, shipyard, fishery port etc.) or government body (military port, police port etc.) - art. 2 (3).

2. Sea ports open to public traffic and the SPA

Luke otvorene za javni promet i Zakon o morskim lukama

a) A new concept - separation of functions in the port

Novi koncept - odvajanje funkcija u luci

With the entry into force of the SPA a new strategic concept of port management, operation and development has been introduced in Croatia. Unlike the previous legislation, the SPA has effectively separated strategic management from commercial activities in public ports introducing a dualism of entities in charge of such activities. On the one hand, the functions of strategic management, development, protection and maintenance, as well as coordination and control of commercial activities have been entrusted to the

⁶ See OGRC No. 108/95, 6/96, 137/99. The previous legislation substantially regulating the matter of sea ports was primarily contained in the **Maritime and Water Demesne, Ports and Harbours Act** (OGRC No. 19/74, 39/75, 17/77, 18/81; hereafter - MWDPHA. This act was repealed by the SPA.

Port Authority, a State entity subject to a predominant influence from the Government. On the other hand, the commercial activities should be in the hands of a number of commercial companies. In order to be able to perform commercial activities (and thus earn profit) within the port, such companies must obtain appropriate authorization (concession) from, and pay certain charges to, the Port Authority.⁷

The purpose of the above concept is to foster private incentive and investment, enable competition, and thus increase the quality standards and reduce prices, with the overall purpose of increasing (or regaining) the competitiveness of Croatian ports. The described regime does have an important impact on the status of assets in the ports, or, more precisely, the facilities constituting the port infra and suprastructure.

The concept envisaged by the SPA has not been fully introduced yet. Although the Act entered into force in January 1996, and set up some short deadlines for the transformation from the old to the new regime, the process of transition is still in course.⁸

b) Port Authority⁹ Lučka uprava

As already indicated, a division of powers has been introduced in the ports of Rijeka and Split between the Port of Rijeka (Split) Authority and the commercial companies engaged in port activities (primarily Luka Rijeka and Luka Split).

The Port Authority is a non-profit institution, capable of gaining rights and obligations in legal transactions (art. 30 (1) and (6) SPA). The Port of

⁷ It must be pointed out, for the sake of completeness, that the previous legislation (i.e. the MWDPHA) did also formally entrust the management of a port to the State (or, more precisely, to the units of local selfgovernment, such as municipalities), while the use, i.e. the commercial exploitation, was in the hands of commercial companies which had to be duly authorized for that purpose by the bodies of local self-government. In reality, though, the strategic thinking and control in terms of management, development and exploitation was in the hands of the commercial companies - for more details see **Rudolf Capar**: Pomorsko upravno pravo, Zagreb, 1987, pp. 181 - 186, **Dragan Bolanča**: *Pravni režim luka otvorenih za javni promet u hrvatskom pomorskom zakonodavstvu*, "Zbornik Pravnog fakulteta u Zagrebu", br. 3 - 4, 1999, pp. 469 - 471.

⁸ See **Ivan Miloš**: *Model pretvorbe i privatizacije luka javnog prometa s posebnim osvrtnom na "Luku" Rijeka*, "Naše more", Dubrovnik, No. 3 - 4, 5 - 6, 1998, pp. 135 - 142. In the meantime "Luka Rijeka" p. o. (Enterprise in Social Ownership) became "Luka Rijeka" d.d. (joint stock company). In 1999. Enterprise in Social Ownership "Održavanje i izgradnja luke" p.o. Split became joint stock company also. But, the transition of enterprise "Luka" p.o. Split is still in course - see **Dragan Bolanča**: *Pravni status hrvatskih pomorskih luka otvorenih za javni promet s posebnim osvrtnom na luku Split*, "Zbornik radova Pravnog fakulteta u Mostaru", No. XII, 1999, pp. 147 - 151.

⁹ About role of Port Authority see **Drago Pavić**: *Sustav upravljanja hrvatskim morskim lukama za javni promet* (review in book *Pravni problemi instituta pomorskog dobra u Republici Hrvatskoj s posebnim osvrtnom na luke otvorene za javni promet*), Split, 1998, pp. 39 - 48.

Rijeka Authority (hereafter - PRA) was set up by the State, pursuant to the Government's decision that came into force on 28 May 1996.¹⁰ The Port of Split Authority (hereafter - PSA) was established on 29 April 1997.¹¹

Among other powers, the PRA and PSA:

- manages and controls the facilities of port infra and supra structure, and, as such, collects concession charges from commercial entities in consideration of granting them the concession to carry out port activities (including the use of the existing facilities of the port infra and suprastructure) and/or build new facilities of port infra and suprastructure (art. 10 - 22 SPA);

- determines the maximum prices at which the port activities may be rendered (port tariffs) - art. 20 SPA;

- collects port dues (art. 47).

The decision-making within the PRA and PSA is carried out by two bodies, i.e. the Management Council and the Manager (art. 35 (1) PSA). The Management Council consists of seven members and a president. Four members and the president are appointed by the Government (art. 35 (2) PSA). In certain circumstances, the government is authorized to dismiss the Management Council (art. 37). The Manager, in turn, is appointed by the Management Council with the consent of the Minister of Transport and Maritime Affairs, and is responsible to the Management Council and the Government (art. 40 (3) SPA).

Any profit generated by the PRA and PSA must be used solely for the maintenance and development of the port infra and suprastructure (art. 46 SPA). The Republic of Croatia is jointly and severally liable for the obligations of the PRA and PSA.¹²

c) Transition of social ownership Pretvorba društvenog vlasništva

Although the concept of a so-called social ownership of companies has been abandoned in Croatia and widely extinguished by virtue of the **Transformation of Socially-Owned Enterprises Act**,¹³ it is still alive at some instances. While Luka

¹⁰ See *Decision on Establishment of the Port of Rijeka Authority* (OGRC No. 42/96).

¹¹ See *Decision on Establishment of the Port of Rijeka Authority* (OGRC No. 45/97).

¹² See art. XV and art. XIV in the acts mentioned in foot-notes 10 and 11.

¹³ The *Transformation of Socially-Owned Enterprises Act* (OGRC No. 18/91, 83/92, 16/93, 2/94, 9/95; hereafter -Transformation Act) was aimed at extinguishing the social ownership of companies by turning them into companies with known owners. Such manoeuvre did not necessarily have the effect of putting all the companies into private hands; many companies are still owned by various state funds, agencies and the like. In this aspect, the Transformation Act is to be distinguished from the Privatization Act, that was passed more recently.

Rijeka transformed into a company with identified owners (joint stock company), Luka Split has not yet been transformed, the process of such transformation is in progress (see *supra* foot-note 14). Until the SPA came into force, both management and commercial powers had been concentrated in the hands of Luka Rijeka (Split). Luka Rijeka (Split) had acquired the *right to use* the port from the local municipality. As the beneficiary of such right to use the port, Luka Rijeka (Split) had a right and/or a duty to (*inter alia*): (a) maintain and build port facilities; (b) commercially exploit the port; (c) determine the terms of business in the port and the port tariffs. It was the beneficiary of all the port dues. Moreover, as the user of the port, Luka Rijeka (Split) was using the areas and/or objects constituting the maritime demesne free of any charge. Under the old regime, Luka Rijeka (Split), as the user of the port, was authorized to collect port dues, i.e. such amounts of money that were due by the customers for the mere use of port (e.g. lying in berth for the purposes other than loading/discharging and/or embarking/disembarking, or for the period longer than necessary to carry out such operations).

Under the current regime, with the introduction of the PRA and PSA, Luka Rijeka and Luka Split have been discharged of the rights and responsibilities they had before, and turned into an ordinary participant of the commercial life in the port (enjoying some preferential rights that will be discussed below). Further, Luka Rijeka and Split are now deprived of port dues.

The change of enterprises in social ownership Luka Rijeka and Luka Split into the ports of Rijeka and Split is, of course, not a simple exercise. The final and transitional provisions of the SPA envisage the "scenario" according to which this change should be carried out. Setting aside the deadlines (which have not been met anyway), the major features of the transition are as follows:

- an enterprise in social ownership (Luka) must pass a decision on transformation into a company with identified owners and, following such transformation, must consolidate its business with the principles and provisions of the SPA (art. 60);

- once established, the Port of Authority (PRA and PSA) takes over the management of the facilities constituting the port infra and suprastructure. Along with this, the PRA and PSA take over all the powers arising out of such management (i.e. the power to grant concessions and collect charges therefor; the right to collect port dues). Furthermore, the PRA (PSA) takes over all Luka Rijeka's (Luka Split's) outstanding but unpaid claims against third persons in connection with services and the use of the maritime demesne. At the same time, the PRA (PSA) takes over Luka Rijeka's (Luka Split's) liabilities arising due to building and development of the port infra and suprastructure until the

establishment of the PRA (PSA) - art. 59 (3) and (4),¹⁴

- once enterprises in social ownership (Luka) is transformed, it will be entitled to receive a priority concession¹⁵ for carrying out the port activities and using the port facilities (art. 61).

- until receiving the priority concession, Luka is entitled to use the port facilities according to the rights it enjoyed under the old legislation (art. 59 (5)). Luka's "old" legal position has thus been preserved until the time it receives the priority concession, except as expressly regulated in the SPA (as is the case with losing the right to collect port dues and losing its outstanding unpaid claims against third persons). Consequently, until receiving the priority concession, Luka has the right to use the port facilities without paying any charges for the use of the areas and/or facilities constituting the maritime demesne. It must be pointed out, however, that the **Decree on Conditions for Granting Concessions for Port Activities**¹⁶ does prescribe that, until it is transformed and until it receives the priority concession, the existing user of the port infra and suprastructure should enter into a contract with the Port Authority regulating the use of such infra and suprastructure as well as the *charges* for such use. Such provision, however, is illogical and contrary to the SPA as a higher-rank legislation, and, as such, should be prevailed by the cited principle contained in the SPA.¹⁷

¹⁴ Although the SPA is somewhat vague on this issue, the art. XI and XII of *Decision on Establishment of the Port of Rijeka Authority* (art. X and XI of *Decision on Establishment of the Port of Split Authority*) prescribe that the process of taking over Luka's rights and obligations shall be based on Luka Rijeka's (Split's) balance sheet showing the situation as at 31 December 1995 (1996). Theoretically, the financial situation as shown in such balance sheet is probably considered as the "zero position" for entering of the PRA (PSA) into the rights and duties of Luka Rijeka (Split). Nevertheless, there is a slight discrepancy in scope between the rights and obligations taken over by the PRA (PSA). It is justified that the PRA (PSA) is taking over all Luka's rights arising in connection with the use of the maritime demesne if, at the same time, it is taking over Luka's obligations arising due to the building and development of port facilities. On the other hand, the provisions that purport to place all Luka's outstanding but unpaid claims for the port services into the hands of the PRA (PSA) is unfair to Luka. If the Port Authority becomes the "master" of the port facilities, it should take over Luka's rights and obligations only to the extent that they refer to the port facilities. *Claims for services*, on the other hand, are the consequence of Luka's commercial activities in the past, and it is not justified to deprive Luka from such claims. Especially because such claims may now be outstanding simply due to the slowness of the judicial protection or some similar reason.

¹⁵ See **Dragan Bolanča**: *Prvenstvena koncesija*, (review in book *Pravni problemi instituta pomorskog dobra u Republici Hrvatskoj s posebnim osvrtom na luke otvorene za javni promet*), Split, 1998, pp. 61 - 68.

¹⁶ See OGRC no. 52/96.

¹⁷ Unlike the SPA, which is an act of Parliament, the said Decree has been passed by the Government. As such, it constitutes a lower-rank regulation which, according to the constitutional principles, must be in accordance with the higher-rank legislation.

d) Regime of concession *Koncesijski sustav*

The ports of Rijeka and Split are international ports open to public traffic. The types of activities that may be performed in these ports are listed both in the SPA (art. 9) and the Decision on Establishment of the Port of Rijeka (Split) Authority (art. V).¹⁸ Commercial entities may perform any of those activities only upon a concession which consists of the act of concession and concession's agreement (art. 10 (7) and (8) SPA). Except for certain cases of building and using new port facilities (where concessions are granted by the Port Authority or the Government or the Parliament, depending on the length of the concession period - art. 21 (4)).), concessions are granted by the PRA or PSA. Again, except for cases of building and using new port facilities (where concessions may be granted for a period of up to 99 years), concessions for carrying out port activities may be granted for a period of up to 10 years. Concessions are granted on the basis of a public tender (10 (4)). As it appears from the relevant provisions of the SPA as well as the accompanying regulations, the *choice of concessionaire* should be based on the applicant's competitiveness in terms of: investment and business plans, quality of service, organization and equipment, know-how, financing, concession charge offered, impact on the port's overall turnover, environment protection, etc (art. 11 - 12). The *concession period* should be determined having in mind the time necessary for the amortization of the investments planned by the concessionaire (art. 13).. The *concession charges*, in turn, should be determined taking into account, *inter alia*, the extent of the planned investment. In summary, the duration of the concession and the amount of the concession charge should be so balanced as to protect investment and guarantee the return of capital.¹⁹

As already indicated, Luka as a transformed company has the right to receive a priority concession. The priority concession differs from ordinary concessions in that: (i) the priority concession is granted to an *already known entity (Luka Rijeka)*; (ii) it is not granted on the basis of a public tender, but on the basis of a *written request*; (iii) it is granted for a period of *12 years*.

In principle, turning Luka Rijeka and Luka Split into a concessionaire will definitely have a negative impact on them. Instead of rendering services and collecting charges at its own rates, as was the case

¹⁸ For more details see **Dragan Bolanča: Koncesije za obavljanje lučkih djelatnosti u morskim lukama otvorenim za javni promet**, "Zbornik radova Pravnog fakulteta u Splitu", No. 3 - 4, 1998, p. 527 *et passim*.

¹⁹ Concessionaires are free to form their prices for the port services performed. Nevertheless, as already indicated, the Port Authority has the right to prescribe the maximum prices for port services (the tariffs). Also, in certain circumstances the Port Authority shall have the right to reduce the tariffs, always having in mind the competitiveness of the port and capabilities of the concessionaires (art. 20).

so far, Luka will now have to render services at the rates determined by the Port Authority and pay charges to the Port Authority for rendering the services. Nevertheless, in comparison with other concessionaires, Luka will definitely have certain benefits due to the regime of priority concession. The regime of the priority concession is such that, in our opinion, Luka will not need to offer self-restricting terms of the concession just to beat the competition. The aim of the priority concession should be to serve the transitional purpose of soothing the possible negative impacts that the shift from a quasi-monopolistic position in the port of Rijeka (Split) to the regime of free competition may have on Luka.

e) Port assets²⁰

Lučka imovina

When considering the legal regime of the port assets, a distinction must be made between the movable and immovable assets. The situation with the movables is clear: they belong to the enterprise Luka Rijeka and have been included in the evaluation of Luka's assets for the purposes of transformation. On the other hand, the immovables deserve special attention in this opinion. There are basically two categories of immovable assets in the port (art. 2 (5) and (6)):

- port *infrastructure* (including piers, jetties, roads, railroads, buoys and the like);
- port *suprastructure* (including office buildings, warehouses, silos, tanks, cranes etc.).

Immovable assets in the port are traditionally subject to a special *non-ownership* regime. The legal formula behind such regime is as follows: ports, by definition, constitute part of the *maritime domain*. The maritime domain, including any immovable assets located within the domain area, may not be subject to anyone's ownership and enjoys the State's special care; consequently, all immovables located within the port area are maritime domain and may not be subject to ownership. This has been the legislative principle under the previous law (see art. 4 and 26 MWDPHA), as well as under the current one (see *supra* 1). The two regimes differ, however, concerning Luka's rights and responsibilities with respect to these assets.

Under the old regime, Luka as enterprise in social ownership enjoyed the right to use the immovable assets constituting the port *infra* and *suprastructure* by virtue of the authorization received from the local municipality. Such right of use included not only the right to commercially exploit the facilities, but also a right and a duty to manage, maintain and develop

²⁰ See **Vinko Hlača: Pravni problemi upotrebe i korištenja pomorskog dobra u morskim lukama** (review in the book *Pomorsko dobro - društveni aspekti upotrebe i korištenja*), Rijeka, 1996, pp. 93 - 94. **Dragan Bolanča: Pretvorba društvenog vlasništva u lukama otvorenim za javni promet**, "Pravo i porezi", Zagreb, 1998, No. 8, pp. 5 - 8.

the same. The use of the facilities was subject to no charge. On the other hand, Luka was responsible for the maintenance and development of the infra and suprastructure facilities. Building of such facilities was to a substantial extent financed from Luka's own sources.²¹

Under the new regime, building and maintenance of the port infra and suprastructure is the responsibility of the PRA (PSA). Commercial entities may receive a concession to use such facilities, in consideration of which they have to pay certain charge. When established, the PRA (PSA) took over the management of the port infra and suprastructure, as well as all Luka's financial rights and obligations from the previous period in connection with the same. Until it is transformed and until it receives a priority concession, Luka will have the right to use the port infra and suprastructure facilities at no charge. In principle, the shift to the new regime will have a two-way financial impact on Luka. On the one hand, having ceased to be the prime responsible party for the building and maintenance of the port facilities, Luka is released from the appertaining financial burden. On the other hand, the duty to pay concession charges is an item of cost that Luka has not had before.

Much like in the case of the concessions for port activities the amount of the concession charge should reflect the amount of the concessionaire's planned investment during the concession period. Accordingly, if Luka has plans to invest in the maintenance and development of the port facilities involved in the priority concession, the amount of concession charge should be such as to enable Luka to return the investment within the concession period.

The transitional provisions of the SPA, read in conjunction with the relevant provisions of the Decision on Establishment of the Port of Rijeka (Split) Authority, contemplate that, with the shift of the management over infra and suprastructure in the port, the PRA (PSA) takes over all Luka's rights as well as all its obligations in connection therewith. If at the time of the take-over Luka had any outstanding obligations from the past in connection with the building and development of the port facilities (e.g. unpaid loan installments), such obligations are now the responsibility of the PRA (PSA). As a counterpart thereto, the PRA (PSA) is authorized to collect any claims that Luka had against third persons in connection with the use and commercial exploitation of the maritime domain. Nevertheless, it may be the case, at least with some facilities, that Luka's capital investments made *before the take-over* have not been fully covered by Luka's revenues before the take-over. The amount of such uncovered investment has not been taken over by the PRA (PSA), because it represents the

sums of money already paid by Luka (which amounts are therefore not considered as Luka's obligations for the purpose of take-over). Those amounts will therefore remain in Luka's balance sheet as a loss, whereas the assets into which the investment was made are no more under Luka's control. Moreover, Luka could now be required to pay concession charges for the use of such facilities. For this reason, it is strongly suggested that, in negotiating the terms of the priority concession, Luka attempts to arrange for a regime whereby the payment of concession charges would be reduced (or, if necessary, abolished altogether during the period of priority concession) so that it reflects that amount of Luka's investment in the building and maintenance of the port infra and suprastructure which has not been taken over by the PRA (PSA). We believe that the concept of priority concession has been introduced in order to enable Luka to acquire such concession terms and conditions which will enable it to recover its past investments to the highest possible extent and prepare for the new competitive regime of using port facilities in the future.

3. The comparison with ports of Koper and Trieste

Usporedba s lukama Koper i Trst

a) Port of Koper *Luka Koper*

The basic legal framework in the port of Koper is analogous to the one that used to apply in Rijeka until the entry into force of the SPA.²² Luka Koper, as a port company (i.e. a commercial company engaged in port activities), carries out the tasks of the port manager. Such power was received from the local municipality pursuant to an act which defined the facilities (the port area, the objects of port infra and suprastructure, as well as the unbuilt pieces of coast) to be entrusted to the management of Luka Koper. As the port company, Luka Koper is in charge of the building and maintenance of the port infra and suprastructure.²³

As it follows, the management function in the port of Koper has not been entrusted to a port authority or a similar state institution. The functions of port management and commercial exploitation of the port facilities are concentrated within a single entity - Luka Koper. Unlike its Croatian counterpart (Luka Rijeka), Luka Koper has passed the process of transformation from the social ownership to a

²¹ See **Dragan Bolanča**: *Pravni režim hrvatskih luka otvorenih za javni promet s posebnim osvrtom na pravni status objekata lučke podgradnje i nadgradnje*, "Zbornik radova Pravnog fakulteta u Splitu", No. 1 - 2, 1999, str. 115 - 116.

²² The legal regime of ports in the Republic of Slovenia is governed primarily by the **Ports Act** (Official Gazette of the Socialist Republic of Slovenia No. 7/77, 29-1403/86, 5-262190; Official Gazette of the Republic of Slovenia No. 10-407/91, 55-2515/92, 13-587/93, 66-2401/93, 66-2402/93, 29-1356/95)

²³ Building and/or refurbishing of any shore facility is subject to prior consent of the relevant Harbour Master's Office.

known-owners regime and operates as a joint stock company. Despite the absence of state institutions, Luka Koper is effectively controlled by the State through the State's majority interest in the Luka's stock capital,²⁴ as well as through a substantial number of members in Luka's Supervisory Board. Nevertheless, Luka Koper is financed entirely from its own business, pays taxes and receives no state subsidies.

Apart from carrying out the basic port activities (such as loading/discharging of cargo, embarking/disembarking passengers, warehousing), Luka Koper as the port company may also perform other activities that are associated with, or enable a more thorough and cost-effective use of the port (such as industrial manufacturing, processing, and finishing of goods, as well as towage, pilotage, shipchandling and the like). Nevertheless, Luka Koper has the right to entrust some of these ancillary activities to other commercial companies. At present, Luka Koper's commercial activities are concentrated mainly at terminal operations, each of the terminals constituting a separate profit centre within the joint stock company.²⁵ Many of the ancillary port activities are carried out by separate companies set up by Luka Koper. Some of them are fully owned by Luka Koper,²⁶ while in a number of others Luka Koper holds various capital interests.²⁷ The tariffs for the port activities are determined by Luka Koper. Luka Koper is entitled to collect port dues.

The port assets are, too, under the management of Luka Koper. To the best of our knowledge, and although the Ports Act is silent on this matter, the port facilities, as well as the underlying land, are in the ownership of Luka Koper and have entered into its asset evaluation for the purposes of transformation.²⁸ The Slovenian *Ports Act* does not recognize a concept of maritime demesne.²⁹

b) Port of Trieste *Luka Trst*

The concept of a single port company enjoying a monopolistic position has been abolished in Italian ports fairly recently, with the entry into force of the

Law No. 84 of 28 January 1994.³⁰ This law has introduced a dualism between port management and commercial activities, that is to say, between the port authority and commercial companies.

The port of Trieste has swiftly followed the new concept. The Port Authority is in charge of coordinating the commercial activities within the port, managing the port facilities and determining the strategic business policy.

Commercial activities may be performed within the port on the basis of a *concession* granted by the port Authority. In order to qualify for receiving a concession, an applicant must satisfy the organizational, financial, technological and formal requirements prescribed by the regulations accompanying the Law no. 84/94.³¹ Concessions are granted on the basis of a public tender, which should ensure that the chosen company offers the best terms of business regarding the amount of investment, turnover, level of occupancy of the port facilities, as well as the amount of concession charges. In order to maintain the highest standard of services, the Port Authority may revoke the concession if the chosen company has not achieved the planned objectives, and may determine the highest number of concessions to be issued within a period of time. Also, the chosen company is obliged to make its tariffs public and stick to them.

Under the Italian law, ports are considered maritime demesne (*demanio marittimo*), are open to public use, and are subject to no private ownership.³² The management of the maritime demesne is the responsibility of the State. The maritime demesne in the ports is managed by the Port Authorities. As a practical emanation of the regime where port activities are in the hands of private companies, the Port Authority has the right to let the use and operation of port facilities to commercial companies on the basis of a concession, thus excluding such port facilities from the general public use. There is a dualism of legal regimes of immovable assets under concession. On the other hand, the facilities already existing at the time of receiving concession are necessarily the maritime demesne and are thus under the non-ownership régime. On the other hand, any facilities built by the concessionaire during the concession on

²⁴ Luka Koper has the following ownership structure: the Republic of Slovenia owns 51% of the stock capital; various state funds - a total of 18,70%; Koper Community - 7,70%; other legal entities - 2,20%; other shareholders - 20,20%; stockbroking companies - 0,20% - see *Port of Koper Annual Report 1997*, p. 9.

²⁵ At present, there are 11 profit centres. They are separate organizational units within the joint stock company, but have no legal personality of their own.

²⁶ For example, INPO d.o.o., Free Zone d.o.o. and Pristan d.o.o.. Each of those companies operates as a limited liability company.

²⁷ For example, Luka Koper holds 49% of the capital in Adria Tow, a towage company, and in Car Service, while it holds 25% of the capital in Logistic Service.

²⁸ See, for example, Luka Koper's balance sheets as at 31 December 1997 - see *ibidem*, p.25.

²⁹ See Grega Virant: *Pravni položaj uporebnika javnega dobra*, "Pravnik", Ljubljana, No. 9 - 10, 1995, p. 519.

³⁰ The formal stimulus to such a change came from the ruling issued by the European court of Justice in December 1991 to the effect that the legal regime then in force, i.e. the one prescribed by the *Italian Codice della Navigazione* of 1942. was contrary to the principles of the EEC Treaty, in that such regime was not allowing for free competition in the ports; the port companies were the only sources of manpower; as such, they were disinclined to use modern technologies, and, at the same time, were forcing upon disproportional and non-competitive prices see art. 28 - 58 of mentioned act (*Leopoldo Tulio: Codice della Navigazione*, Milano, 1992, pp. 10 - 16).

³¹ Such regulations are contained in the Decree of 31 March 1995 (*Regolamento di cui all'art. 16 della legge 28 gennaio 1994, n. 84*), issued by the Ministry of Transport and Navigation.

³² For more details see Vojko Borčić: *Koncesije na pomorskom dobru u Italiji* (review in the book *Pomorsko dobro i koncesije*), Rijeka, 1995, pp. 69 - 74.

the maritime demesne are the ownership of the concessionaire during the concession period and may be mortgaged in favour of third persons.

With regard to both types of concessions described above, the duration and the amount of *concession charge* should always reflect the level of investment made by the concessionaire, as well as the concessionaire's involvement (in terms of finance, organization, equipment, time and personnel) in the safety activities in the port.

4. Concluding remarks *Zaključna razmatranja*

The Croatian ports by definition constitute part of maritime domain. The *Croatian Maritime Code of 1994* regulates the maritime domain as the public estate of interest to the Republic of Croatia, which is under her special protection, and should be used and/or exploited under the conditions and in the manner prescribed by law. The maritime domain includes *inter alia* seashore, ports and harbours. There is no property in the maritime domain or other proprietary rights on any basis. Anybody is free to use and/or to be benefited by the maritime domain according to its nature and purpose in conformity with the provisions of the *Croatian Maritime Code*. Special use and/or economic exploitation of a part of the maritime domain may be conceded to physical

and legal persons (concession) provided that such use is not in contradiction with the interests of the Republic of Croatia. The most important act for ports open to international public traffic (for example Rijeka and Split) is the *Sea Ports Act of 1995*. This act separates strategic management from commercial activities in public ports introducing a dualism of entities in charge of such activities. On the one hand, the functions of strategic management, development, protection and maintenance, as well as coordination and control of commercial activities have been entrusted to the Port Authority, a State entity with a predominant influence from the Government. On the other hand, the commercial activities should be in the hands of a number of commercial companies. In order to be able to perform commercial activities (and thus earn profit) within the port, such companies must obtain appropriate authorization (concession) from, and pay certain charges to, the Port Authority. The exception is the transformed enterprise in social ownership (Luka) which has the right to receive a priority concession for carrying out the port activities and using the port facilities. In comparison with ports of Koper and Trieste, we can conclude that under the Italian law ports are considered maritime domain, while the Slovenian law does not recognize this concept.

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