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Public Services Concession in Slovenian Legislation

KATJA DRNOVŠEK & BOŠTJAN BREZOVNIK

ABSTRACT Because of the public sector crisis, the role of the state in the provision of public service activities has been gradually changing ever since the 1980s, as the role of the financier in public infrastructure, as well as of the provider of public service activities, was increasingly being assumed by the private sector, while the state began to strengthen its role in the areas of regulation and supervision.With the involvement of the private sector in the so-called project financing of investments in construction of infrastructure and the consequent provision of public service activities, new and innovative forms of cooperation between the public and private sector (public-private partnership) have gradually been introduced as an addition to the already established concession and public procurement relationships. At the same time, states have in addition to classic (budgetary) financing gradually introduced new ways of financing public service activities, which enabled the repayment of investments in public infrastructure and reimbursement of (private) providers for goods delivered or services rendered (public goods). Undoubtedly, these forms of cooperation between the public and private sector call for regulation of certain complex issues. This article focuses on the examination of forms of integration between the public and private sector in the provision of public service activities in the framework of concession relationships.

KEYWORDS: • public services • concession • public-private partnership • concession relationship • Slovenia

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CORRESPONDENCE ADDRESS: Katja Drnovšek, Ph.D. Student, Assistant, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: katja.drnovsek@um.si. Boštjan Brezovnik, Ph.D., Associate Professor, University of Maribor, Faculty of Law, Mladinska ulica 9, 2000 Maribor, Slovenia, email: bostjan.brezovnik@um.si.

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1 Introduction

Despite the fact that no general and precise definition of concession[1] can be found in legal theory (the word derives from the Latin word '*concessio*, *concessimus*' or '*concedere*' and means *'I granted*, *we granted*' or *'to allow'*), the concession may be defined as a mandate given (granted) in the prescribed manner and in the prescribed form by the state, local community or by the authorised body, generally to a person of civil law. The body granting the mandate is known as the awarding authority, while the person to whom the mandate is granted is called the concessionaire.

Subject of the mandate is generally the provision of public service activities (commercial or non-commercial) or management, use or exploitation of natural goods (natural resources, public goods or other things in public ownership). The mandate is therefore granted to pursue an activity under the exclusive competence of the state or local community (Borković, 1981, 23; Krbek, 1932: 59-92). However, according to *Čebulj*, this mandate cannot simply be equated with a public mandate in the narrow sense, which may be granted to persons of civil law to perform classic functions of state administration. It is nevertheless true that intertwining might occur, particularly in cases where the concessionaire makes decisions about the rights and obligations of legal and natural persons on the basis of a public mandate when performing the activity that is the subject of the concession. (Čebulj, 1996: 237).[2]

Based on the above assumptions, concessions can roughly be divided into two groups, namely: • concessions for the provision of (commercial or non-commercial) public service • concessions for the use, exploitation or some other special right to natural resources, public goods or things in public ownership.[3] While the subject of the public service concession, regulation of which will be further examined, is granting/acquiring special or exclusive rights to provide activities of (commercial or non-commercial) public service, the subject of the concession for management, use or exploitation of natural goods is granting/acquiring special or exclusive rights to manage, use or exploit natural goods.

The public service concession, which is generally granted by the legislator or representative body of the local community (exceptionally also by the executive or administrative authority of the state or local community, or by other person of public law authorised by the legislator), allows the transfer of special or exclusive rights for the provision of public service activities from the state domain *in largo sensu* to the domain of persons of private law. In this context, we need to distinguish between the establishment and granting of the concession. The establishment of the concession merely signifies the decision by the legislator or representative body of the local community that a particular public service activity shall be provided as a concession activity instead of being provided by the state or

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local community itself, or instead of granting a special or exclusive right to provide public service activities to an independent (specialized) person of public (or private) law with the establishment thereof. The concession is established with the concession act that, depending on who established the concession, can either be a statute, an act of local community or executive authority, or even an administrative decision (Brezovnik, 2008: 195).

Granting the concession is essentially the final part of the procedure prescribed for the selection of the concessionaire, which is normally carried out with a public tender, which is based on the concession act. The result of this procedure is the act of selection of the concessionaire that is usually issued by the administration, which means that it has the nature of an administrative decision. While the concession relationship is generally established with the act granting the concession, this act does not yet provide all the details of the concession relationship, so it is usually followed by the third act, namely the concession contract (Čebulj, 1996: 238-239).

The dilemma addressed by both legal theory and practice refers to the question of whether the concession relationship is a purely private-law or public-law relationship. The theory often states that the concession relationship is a mixed relationship, because it combines elements of both public and private law[4] (reglementary and contractual part of the concession). It could therefore be described as a special legal relationship entered into by, on the one hand, the awarding authority as the public authority, thus *ex iure imperii,* which consequently has special powers in the legal relationship, which would not be the case had it acted as *de iure gestionis* (Ahlin, 2007: 21), and on the other hand, the concessionaire (natural or legal person of public or private law), who acquires a special or exclusive right to provide public service activities.

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While a large part of the 20th century, at least in our part of the world, represents a period of stagnation in terms of concessions, the end of the last century can certainly be described as a period of resurgence and flourishing of this institution, encouraged by the crisis of the public sector that began in the 1980s *(Commission Interpretative Communication on Concession Under Community Law* (OJ C 124/2, 04.12.2004)). A similar trend can also be observed in Slovenia, which has after independence reintroduced the already abolished institution of public service concessions with the adoption of the Institutes Act in 1991. The latter regulates the general procedure for granting the (non-commercial) public service concession, while mainly referring to concessions granted to (private) institutes that meet the required conditions for the provision of public services. In terms of providing a public service, such institute (the so-called *institute with public rights* under the Institutes Act) has the rights, duties and responsibilities of the public institute. The

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concession for the provision of public service can naturally also be granted to a company, society, other organization or individual that meet the required conditions for the provision of public services. The concession for the provision of public service activities may be granted by a statute, an act issued by the local community or city or by a decision of the competent authority in accordance with the law or ordinance (the concession act). A special feature of this regulation lies in the fact that the concession may be established and granted by both general and individual act - an administrative decision. The Institutes Act also provides that the concession may be granted for a limited period, but does not determine any time limits (which are apparently intended to be regulated by sectoral legislation). A significant disadvantage of the discussed legal regulation of (non-commercial) public service concession lies in the fact that it fails to regulate several institutions that are typical for the concession relationships, such as the transfer of the concession, mandatory concession, duties and rights in the event of force majeure, liability of the concessionaire (for the employees' conduct) and in this respect the possibility for the awarding authority to temporarily assume the provision of public service and the liability of the awarding authority for the concessionaire's conduct.

In addition to the described regulation of concessions under the Institutes Act, we can also find some provisions in sectoral legislation governing the provision of certain activities of non-commercial public service. Thus, for example, in accordance with provisions of the Health Services Act, public service in health care can be carried out by domestic and foreign legal and natural persons if they meet the conditions provided by law. The concession for the provision of public service in primary health care is granted by a decision of the municipal administrative authority with the consent of the Ministry of Health, while the concession for the provision of public services in other activities is granted by a decision of the Ministry of Health. In all decision-making procedures, the awarding authority must also acquire the opinion of the Health Insurance Institute of Slovenia and the competent chamber or professional association. The Health Services Act also provides the content of the concession contract and the procedure to revoke the concession. Specific regulation of concessions can also be found in the Pharmacies Act, according to which the concession for the provision of pharmaceutical activity can only be granted to a private individual (a pharmacist). The concession for the provision of pharmaceutical activity is granted by a decision of the competent municipal authority on the basis of prior consent of the Ministry of Health and the opinion of the chamber of pharmacy and Health Insurance Institute of Slovenia, following a public tender. Similarly to the Health Services Act, the Pharmacies Act also regulates the substantive content of the concession contract and the procedure to revoke the concession. A distinctive feature of the Pharmacies Act is a manner in which pharmaceutical activity for which the concession was granted may continue to be carried out after the concessionaire's death.

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Besides the described regulation of the public service concession for health care activities, some specifics can also be found in the field of education and schooling. Thus, for example, according to the Organization and Financing of Education Act, the concession for the provision of public service in education may be granted to a private kindergarten or school, if that is allowed by the programme, as well as to a private person who meets the conditions laid down for the implementation of state-approved programs. For the performance of activities and tasks necessary for the implementation of educational activities, the concession may also be granted to other institutes, corporations and other legal entities or natural persons. Similarly to the already described example of regulation of concessions under the Health Services Act and the Pharmacies Act, the concession under the Organization and Financing of Education Act is also granted by a decision issued on the basis of a public tender, the content of which is determined by the Organization and Financing of Education Act. The Organization and Financing of Education Act also determines the substantive content of the concession contract and the procedure to revoke the concession.

Based on the described examples and other sectoral legislation, we can conclude that due to the incomplete regulation of the institution of non-commercial public service concession under the Institutes Act, the legislator attempted to solve some open issues related to concession relationships in sectoral legislation, but has done so in an unsystematic, imprecise and disorganized manner.

In addition to the above-mentioned inadequate legal regulation of the non-commercial public service concession, we also need to mention the relatively detailed but still insufficiently regulated commercial public service concession under the Services of General Economic Interest Act. The act provides that the concessionaire can be a natural or legal person (after amendment in 2007 the Services of General Economic Interest Act no longer restricts the concession to persons of private law, but allows for the possibility to grant concessions to a person of public law) who meets the conditions for the provision of activity that is the subject of the commercial public service concession. The subject and conditions for the provision of commercial public service are determined in the concession act, which is a general act issued by the government or local community. The concession is granted following a public tender, where the awarding authority selects the concessionaire with an administrative decision in administrative procedure. In practice, however, this provision is causing considerable problems, since it is not clear whether the public tender is a part of administrative procedure, when this procedure commences, and how certain basic institutions of administrative procedure (participation in the proceedings, the right of the party to be heard on the facts and circumstances, oral hearing, etc.) are to be used in this procedure. The Services of General Economic Interest Act contains fairly detailed provisions on the content of the concession contract, which is concluded between the awarding authority and the selected concessionaire and

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which regulates their mutual relations. However, various unsolved questions were encountered in practice: what happens in case of unsuccessful negotiations on the concession contract, how a subsequent amendment of the concession act influences the concession relationship, what happens with the provision of public service after the termination of the concession, especially in case of early termination, and other similar questions.[5]

Unlike the Institutes Act, the Services of General Economic Interest Act also regulates other institutions of the concession relationship, such as the termination of the concession relationship, the transfer of the concession, mandatory concessions, duties and rights in the event of force majeure, liability of the concessionaire (for the employees' conduct) and in this respect the possibility for the awarding authority to temporarily assume the provision of public service and the liability of the awarding authority for the concessionaire's conduct.

In addition to the discussed systemic regulations (the Institutes Act, the Services of General Economic Interest Act), provisions of the Public-Private Partnership Act should also be mentioned. Chapter V of the act specifically regulates certain issues related to the concession for the provision of commercial public services and the concession for the provision of other activities (the latter could be understood as non-commercial activities). By specifically regulating certain issues with the Public-Private Partnership Act, the legislator brought confusion into legal system. Because of the inconsistent application of terms (the Public-Private Partnership Act uses the term *concession for services*, which can be understood as a concession for public services), the Public-Private Partnership Act determined that for the selection of the concessionaire and the implementation of the concession relationship, when the subject of the concession is the provision of commercial public services or activities provided in a manner and under conditions that apply for commercial public services, provisions of the Services of General Economic Interest Act apply in addition to provisions of the Public-Private Partnership Act. However, when the subject of the concession is the provision of other (non-commercial) activities, provisions of the Services of General Economic Interest Act appropriately apply for the selection of the concessionaire and the implementation of the concession relationship. This is not only completely illogical, but the application of the said provision in practice also raises the question as to which provisions of the Services of General Economic Interest Act should actually be used, since the Public-Private Partnership Act did not impose a subsidiary use of provisions of the Services of General Economic Interests Act. To make the situation even more complicated, the legislator determined that provisions of the Public-Private Partnership Act that apply to concessions for constructions should also be appropriately used.

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2.1 Parties to the Concession Relationship

The parties to the concession are the awarding authority, which can under Slovenian legislation be either the state or local community or other person of public law, and the concessionaire. It is worth noting that in Slovenian legal system, like in some foreign systems,[6] there are some exceptions to these statements in relation to the awarding authority. First, we would like to draw attention to a controversial provision in the Services of General Economic Interest Act, which stipulates that '*following the authorisation by the republic or local community, their bodies and organizations may also act as the awarding authority*'. If that provision is applied to current regulation of municipalities in Slovenia, this would mean that the following municipal bodies may act as the awarding authority: the mayor, the municipal council, the supervisory board; and possible core parts of the municipality (in organizational terms) as organizations. While the Local Self-Government Act stipulates that the provision of local public services may be delegated to core parts of municipalities, the question is raised of whether core parts of the municipality may actually act as the awarding authority in the concession relationship. Undoubtedly, other public entities under the Public-Private Partnership Act are included among the awarding authorities. The Public-Private Partnership Act provided definition of the concession relationship and stated that '*the concession relationship is a bilateral legal relationship between the state or self-governing local community or other person of public law as the awarding authority and a legal or natural person as the concessionaire, in which the awarding authority awards to the concessionaire a special or exclusive right to perform commercial public service or other activity in the public interest ...*'. In the cited provision, the clause '*or other persons of public law as the awarding authority*' is particularly controversial, as the legislator did not define which are these other persons of public law. The Public-Private Partnership Act contains the definition of '*other public partner*' which refers to '*a legal person of public law established by the state or self-governing local community or by another person that performs public procurement pursuant to provisions of the act governing public procurement, and may establish public-private partnerships only when provided by a statute or regulation issued on the basis thereof*'. Based on the above, these are other persons that perform public procurement pursuant to provisions of the Public Procurement Act. In Article 9, the Public Procurement Act lists the following contracting authorities: • authorities of the Republic of Slovenia and of self-governing local communities; • other persons of public law; • public companies that perform one or more activities in the field of infrastructure, and • entities that perform one or more activities in the field of infrastructure if they are granted special or exclusive rights for this activity by the competent authority of the Republic of Slovenia. 'Person of public law' refers to a person with the following characteristics: • established with a specific purpose of pursuing needs in the general interest that are not of industrial or commercial character; whereas industrial or commercial character is a characteristic of an

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entity that operates with other entities on the market under conditions of free competition by carrying out commercial activities aimed at supplying products or services to private or public commercial operators; • is a legal person and • is financed at more than 50% by the authorities of the Republic of Slovenia and self-governed local communities, or other persons of public law; or are subject to management supervision by those bodies or persons; or have an administrative, managerial or supervisory body, more than half of whose members are appointed by authorities of the Republic of Slovenia and of self-governed local communities, or by other persons of public law. Based on this, the range of other persons of public law who may under provisions of the Public-Private Partnership Act grant a concession is very wide. In fact, it refers to all (specialized) persons of public law that obtain a special or exclusive right with the establishment (public companies, public institutes, public commercial institutes). Following this conclusion, we have to note the controversy of the Public-Private Partnership Act provisions, with which the legislator allowed the transfer of special or exclusive rights, acquired by an independent (specialized) person of public or private law with the establishment, to the concessionaire independently of public authorities.

In terms of the definition of the awarding authority, we must draw attention to the issue of multilateral concession relationships, where a number of local communities and the state or one or more local communities are acting as the awarding authority (a form of public-public partnership). It is clear that current regulation of public service concessions allows various forms of (public-public) partnerships between several awarding authorities, but we have to note that there are no provisions in legal acts that would regulate the procedure to issue a common concession act (which has to be adopted with the same text by all awarding authorities) and the common award of concession.

Despite the fact that administrative theory often states that the concessionaire can only be a person of private law, under current Slovenian legislation that regulates both commercial and non-commercial public services there are no restrictions on the granting of concessions to legal persons of public law[7] (exceptions can only be found in sectoral legislation where the legislator imposed restrictions on entities which can act as concessionaires in order to pursue the public interest - for example, the Pharmacies Act stipulates that the concession may only be granted to a private individual (a pharmacist) who meets the conditions defined by law). An open question under current legislation in connection to the concessionaire is when the selected tenderer becomes the concessionaire; or in other words, when do they obtains rights and obligations under the concession relationship. While the current legislation does not provide a clear answer, there are two concepts of granting/acquisition of rights and obligations under the concession relationship. While the Services of General Economic Interest Act states that the concessionaire is '*selected*' with an administrative decision (*the awarding authority decides on the selection of the concessionaire with administrative decision*), the (non-commercial) public service concession is '*established*' and '*awarded*', the Institutes

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Act provides that *'the concession for the provision of public service may be "given" ... '*.[8] Therefore, in the case of commercial public services, the administrative decision only decides on the selection of the concessionaire, while the selected concessionaire acquires rights and obligations under the concession relationship with the signing of the concession contract. According to the Services of General Economic Interest Act, the constitutive element of the concession relationship is thus the concession contract, which is not the case for non-commercial public service concession.

The concession contract is concluded between the awarding authority, which can be under the regulation of commercial and non-commercial public services either the state or self-governing local community or other person of public law under the Public-Private Partnership Act, and the concessionaire, who can be either a person of private law (natural or legal persons) or a person of public law. In the concession relationship, the subject of which is the provision of public services, with the concession contract the awarding authority awards, and the concessionaire acquires, a special or exclusive right to perform public service activities.

There is no doubt that more than one person can act as the awarding authority, which is in practice especially common in the area of the provision of commercial public service activities, where public service activity is performed with the use of infrastructure (e.g. water supply, sewage network), which is spread over the territory of several awarding authorities (e.g. self-governing local communities), or when awarding authorities (several local communities or local communities and the state) join together for joint ventures in the construction of infrastructure that is used for the provision of public service activities for which the concession was awarded. It is thus possible, for example, for several local communities to conclude the concession contract (e.g. for the provision of commercial public service activities) with one concessionaire. In this case, they can conclude a single contract, despite the fact that strictly speaking there are several concessions (each local community may grant a special or exclusive right to perform public service activities only in their territory). The awarding authorities must in such case particularly determine which body of which awarding authority shall exercise special rights of the awarding authority.

The question that frequently occurs in practice is whether several persons can also act as the concessionaire. Despite the fact that, for example, the Services of General Economic Interest Act defines the concessionaire as a "natural and legal person", the prevailing opinion in theory states that the use of singular form in this provision does not suffice to draw a conclusion on the limitation to only one natural or legal person, as regulations often use a singular form in generic sense, as a reference to persons, without also determining their number.[9]

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2.2 Concession Act - Establishment of the Concession Relationship

Under the current regulation of commercial and non-commercial public service concessions, the concession is established with the concession act (which is *conditio sine qua non* for the establishment of the concession relationship). In theory, the concession act is defined as a necessary and essential public-law element of the concession relationship, since it determines those elements of the concession relationship which are in the public interest and with which the awarding authority ensures that the concession is implemented in the public interest.

There is no unified regulation of the institution of concession act in valid legislation. While the Services of General Economic Interest Act precisely determines the contents of the concession act, which is general and abstract and determines in advance the arrangement of the provision of public service and the conditions that must be met by the concessionaire, the act of concession, as defined by the Institutes Act, is in its formal sense either abstract (statute, ordinance) or specific (administrative decision). The Institutes Act does not specify its contents.

Despite the clearly determined contents of the concession act under the Services of General Economic Interest Act, the Public-Private Partnership Act provides a completely different arrangement, which leads to doubt and uncertainty in legal practice. The Services of General Economic Interest Act provides that the concession act determines the subject and conditions for the provision of commercial public service for each concession. The concession act is an act issued by the government or local community and includes: • activity or matters that are the subject of commercial public service; • the territory of the provision of commercial public service, users and relationship with the users; • conditions that must be met by the concessionaire; • any public authorisation granted to the concessionaire; • general conditions for the provision of commercial public service and the use of goods provided therewith; • the nature and extent of monopoly or a manner of its prevention; • start and duration of the concession; • sources of financing of commercial public service; the manner of payment to the concessionaire or the manner of payment of compensation for the provision of public services or security; • supervision of the provision of commercial public service; termination of the concession relationship; • the body that carries out the selection of the concessionaire; • the body that is responsible to conclude the concession contract, and • other elements necessary for the establishment and provision of commercial public service. Contrary to the above-cited provision of the Services of General Economic Interest Act, under the Public-Private Partnership Act the legislator determined that the content of the public-private partnership act (in case we are discussion the form of the concession partnership, the subject of which is granting of special or exclusive rights to provide commercial public service, the term concession act is used instead), must be -

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depending on the substance and nature of public-private partnership - sufficiently broad not to impede negotiations between public and private partners, in accordance with the fundamental principles of the Public-Private Partnership Act. Upon analysis of the discussed provisions of the Services of General Economic Interest Act and the Public-Private Partnership Act, some doubts may arise in regard to the application of these provisions and the content of the concession act that grants a special or exclusive right to provide commercial public service activities. While the Public-Private Partnership Act otherwise determined that its provisions apply for procedures of establishment and implementation of public-private partnerships with regard to those issues that are not otherwise regulated by a special act or regulation issued on the basis thereof for certain forms of public-private partnership, the question arises of primacy of the application of provisions of the Public-Private Partnership Act in regulation of the content of the concession act establishing commercial public service concession.

In addition to these questions, some issues related to the content of the concession act under the Services of General Economic Interest Act also need to be addressed. According to *Virant,* the legislator made two mistakes when determining the above-listed elements of the concession act, namely: the duration of the concession and the amount of the concession fee paid by the concessionaire to the awarding authority do not belong to the part of the concession relationship governed by public law and should not be a part of the concession act. The author further states that the awarding authority should not determine those elements in advance, unilaterally and imperiously, but should instead invite the candidates for the concession to specify in their bids the period for which they would be willing to enter into the concession relationship and the amount of the concession fee that they are willing to pay. Those parameters can nevertheless (if the conditions are otherwise met and if the offered quality of implementation is the same) represent essential evaluation criteria in the selection of the concessionaire (Virant 1996: 2).[10] This interpretation is reasonable. The duration of the concession must ensure reimbursement of the invested capital (in infrastructure) to the concessionaire, while it must also maintain the business risk of the concessionaire for exploitation of the infrastructure.[11] In practice, however, the current system of funding of the provision of commercial public service activities frequently overlooks the impact of funding of investments in infrastructure on the price of public goods that has to be paid by users. It often happens that due to the incorrect assessment by the awarding authority, the concession act determines a shorter duration of the concession relationship from the 'optimal' one, i.e. the period in which the awarding authority recovers the investment in infrastructure under the condition that users are ensured 'affordable' prices of public goods. The consequence of such decision by the awarding authority is often reflected in the high cost of public goods. Furthermore, it should be noted that limitations of the duration of the concession relationships can be found in sectoral legislation, but these are isolated cases, as substantive legal acts that govern commercial public services generally

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do not set these restrictions. Therefore, the decision on the duration of the concession relationship is left to the entity responsible for the adoption of the concession act. A similar situation can be found in the regulation of non-commercial public service concessions. The Institutes Act thus provides that a non-commercial public service concession may be granted for a limited period, while neither the Institutes Act nor sectoral acts impose any restrictions on the duration of the concession relationship, the subject of which is the provision of non-commercial public service activities. We can thus conclude that the decision on the duration of the concession relationship is left to the awarding authority.

2.3 Selection of the concessionaire

One of the key problems in the process of awarding concessions is inadequate legal regulation of certain procedural issues. The adoption of the concession act and implementation of the public tender are generally followed by the selection of the concessionaire and the conclusion of the concession contract with the selected concessionaire. Despite the fact that both the Services of General Economic Interest Act and acts in the field of non-commercial public services regulate the institution of public tender, it can be established that individual acts in sectoral legislation either directly regulate certain issues related to the public tender for the concession or refer to the regulation in the systemic act. In this context, we need to mention provisions of the Public-Private Partnership Act, which regulates the institution of public tender in great details, but for the cases of concession partnerships where the concessionaire acquires the right to provide commercial (or other (non-commercial)) public service nevertheless stipulates that the Services of General Economic Interest Act also applies for the public tender. Let us recall that the awarding authority may, in accordance with provisions of the Services of General Economic Interest Act, select concessionaires on the basis of the public tender, which is published in the Official Gazette of the RS. The basis for the public tender is the concession act, which also determines the form and procedure of the public tender. We can thus conclude that the institution of public tender for the establishment of the public service concession is incoherently and inadequately regulated.

The stage of public tender ends with the selection of the concessionaire (award of the concession). Based on current regulation of both commercial and non-commercial public services, the act of selection of the concessionaire can be considered an act of public law. The awarding authority decides on the selection of the concessionaire with an administrative decision. The same regulation applies under the Institutes Act; however, the awarding authority may also grant the concession with a statute or ordinance of the municipality. The procedure for the selection of the concessionaire (except in the case of non-commercial public service, when the concession is granted by a statute or ordinance of the municipality) by public tender is carried out under the General Administrative Procedure Act. One of the reasons for this legislative solution is to ensure legal

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security for candidates, who have the right to appeal, as well as the right to file an action for a review of the legality of the decision in an administrative dispute. Furthermore, the cited provisions of the Services of General Economic Interest Act and the Institutes Act impose on the competent authority a more formalized selection procedure, oral hearing and formality of the decision .According to *Virant,* the legislator did not fully follow this model (the selection of the commercial public service concessionaire). The principle of substantive legality in administrative procedure requires that the operative part of the decision is based on an abstract substantive norm. While material criteria for issuing an administrative decision on the selection of the concessionaire can be found in sectoral legislation regulating non-commercial public services, neither the Services of General Economic Interest Act nor sectoral regulations governing commercial public services have addressed this issue. Therefore, the criteria for selecting the concessionaire (of commercial public services) have to be determined by the concession act. Any act issued without such legal grounds is in substantive sense unlawful. The same is true for the concession act that does not include the above-mentioned criteria (Virant 1996: 3).

The practice has shown that in the procedure for the selection of the concessionaire, not all the institutions of the General Administrative Procedure Act can be used (a notice to supplement the application, a possibility to state new facts, hearing of the parties, mandatory oral hearing, etc.). (Mužina, 2004: 513-518). As noted by *Pirnat,* the current wide application of administrative procedure for awarding concessions has caused many problems, since the administrative procedure is not intended for public tender and for submission of competitive offers, and is therefore highly inappropriate (Pirnat 1999: 21).However, the existing legal regulation of concessions is not problematic only because of the application of various institutions of administrative procedure. In practice, we can especially detect problems in cases where the concession act did not determine the awarding authority whose competent body shall issue an administrative decision on the selection of the concessionaire and provisions regulating the amendment of the concession contract and the termination of the concession. This problem particularly affects concessions granted by municipalities. In this context, the question is which authority is actually responsible for issuing the decision. As mentioned above, the tendering procedure under the Services of General Economic Interest Act and the Institutes Act is followed by the selection of the concessionaire, which is carried out with an administrative decision issued by the municipal administration. Despite the clear provision of the Local Self-Government Act, problems are encountered in practice in the selection of the commercial public service concessionaire, mainly due to a subsidiary application of the General Administrative Procedure Act and the unclear provision of the Services of General Economic Interest Act, which stipulates that the concession act shall determine the authority responsible for the selection of the concessionaire, while the selection is often carried out by the authority without

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competence to do so. The opinion has prevailed in practice that the legislator delegated the competence to determine the (municipal) authority authorised for the selection of the concessionaire to the municipal council, but the Constitutional Court of the RS took the position that this opinion is unlawful, unless the concession act determined that the municipal administration is the authority authorised for the selection of the concessionaire.[12]

2.4 Contents of the Concession Relationship and the Concession Contract

The rights and obligations of the awarding authority and the concessionaire constitute the contents of the concession relationship. The fundamental right - and generally at the same time also obligation - of the concessionaire is to provide the activity that is the subject of the concession, under conditions laid down in the concession act and concession contract. It generally begins with the conclusion of the concession contract; however, some acts, particularly of sectoral legislation which regulates non-commercial public services, stipulate that the concession relationship is not created with the conclusion of the contract, but with the finality an administrative decision by which the concessionaire is selected. Hence the differences in legal consequences of the conclusion of the concession contract. While in the case of non-commercial public services the conclusion of the concession contract, which regulates relationships between the awarding authority and the concessionaire related to the provision of public services and determines conditions that must be met by the concessionaire providing public service pursuant to the acts regulating the public service, generally only represents realization of the act of concession (as it is called by the Institutes Act), the concession contract concluded between the awarding authority and the concessionaire for the provision of commercial public service activities is a constitutive element of the concession relationship.

The concession contract generally in details regulates the relationship between the awarding authority and the concessionaire. This is a contractual relationship, the contents of which are composed of individual rights and obligations of the awarding authority and the concessionaire, related to the commencement of the provision of activity that is the subject of the concession, financing, the awarding authority's guarantees, termination of the concession, etc.[13] However, it is not a typical civil law contract. In modern theory, especially under the influence of French and English examples, the prevailing opinion is that the contract contains both contractual and reglementary elements (which will be discussed later in this paper) (Čebulj, 1996: 239). Today, a prevailing opinion states that the concession contract contains both the provisions that were agreed upon by the parties and the provisions that merely represent the expressed will of public authorities (Mužina 2004: 276-278).The latter (therefore reglementary) elements of the concession contract seek to comprehensively regulate the substance, i.e. following the model of the legislative regulation, but for that reason they also significantly limit the options of one contracting party when negotiating the contents of the concession

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contract. At the same time, these elements should at least to some extent allow an insight into the concession relationship and the obligations of the concessionaire arising from the concession relationship, which are of course intended to pursue particular public interest (Grilc, 1991: 13-27).

Before we continue the discussion, it is worth mentioning the relationship between the concession act and the concession contract, which is under the current regulation of commercial and non-commercial public services insufficiently regulated. While the Institutes Act and sectoral legislation in the field of non-commercial public services provide no rules that would regulate the issue of conflicts in the event of discrepancies between the concession act and the concession contract, the Services of General Economic Interest Act provides that in the event of conflicts between provisions of the concession act and provisions of the concession contract, provisions of the concession act apply. While the legislator has thus solved (in)consistencies between the concession act and the concession contract at the time of the conclusion of the contract, it did not address the question of possible later discrepancies that may result from unilateral amendments to the concession act. In this respect, the question naturally arises as to which amendments to the concession act that affect the contents of the concession relationships are still permissible. In theory, we can find the opinion that only amendments relating to the arrangement of the provision of public service are allowed, but not also to the elements that directly affect the concessionaire's status (Virant 1996: 4), however, such opinion is not supported by legal provisions under the Services of General Economic Interest Act (Mužina 2004: 684; Pirnat, 1999; Virant, 1996: 4). We must naturally not ignore the expectations of the concessionaire, who demands trust not only in the existence of the concluded concession relationship and acquired (exclusive) rights, but also in the existence of the concession act that established the concession relationship. The concessionaire's demand is reflected in the commitment of the awarding authority to respect the constitutional principle of protection of legitimate expectations, which is an element of legal certainty and thus of the rule of law.

2.5 Transfer of the Concession

We can find two ways to transfer the concession in existing legal regulation of public services, namely: • the complete transfer, which actually represents a subjective termination of the concession for the existing concessionaire, as a new concessionaire takes his place (Mužina 2004: 711) and • partial (incomplete) transfer of the concession, where the concessionaire delegates the provision of commercial activity that is the subject of the concession to a third party (subcontractor), but still remains the holder of rights and obligations under the concession relationship.

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Since the implementation of the concession refers to the right acquired by a particular entity as the concessionaire, the latter needs consent to transfer the concession. *Mutatis mutandis*, the same applies to cases in which the concession is transferred by the awarding authority. In terms of whether the concession is transferable or not, the theory distinguishes between the subjective and the real concession (Čebulj 1991: 6-11).

Transfer of the concession is essentially a transfer of rights and obligations arising from the concession contract. In contract law, the rules of assignment apply for such transfer (Pirnat, 2003: 1614). It must be noted that in the case of the complete transfer of the concession, we are not talking about the assignment (cession), debt assumption or combination of the assignment and debt assumption, but are instead talking about the transfer of the contractual relationship from the concessionaire 'transferor' to the concessionaire 'transferee' in its entirety. This would apply if the concession contract could be (entirely) considered a legal transaction under civil law. However, because of the administrative legal nature of the concession contract, some special arrangements are necessary in terms of the transfer of the concession. Upon analysis of current legal framework, we can conclude that the transfer of the concession is only regulated by the Services of General Economic Interest Act and the Public-Private Partnership Act. The former regulates the transfer of the concession and distinguishes a situation where the concession is transferred by the concessionaire and a situation where the concession is transferred by the awarding authority. The latter regulates the transfer of special and exclusive rights which are the subject of the concession relationship and are transferred by one provider of public-private partnership to another.

In accordance with the Services of General Economic Interest Act, the concessionaire can transfer the provision of commercial public service that is the subject of the concession to another person only if the transfer is foreseen in the concession contract and to the foreseen extent. Otherwise, the transfer is possible only with authorisation of the awarding authority. Similarly, the awarding authority may transfer the provision of commercial public service that is the subject of the concession in its entirety or in part only in cases stipulated by the Services of General Economic Interest Act, or for reasons specified in the concession contract, or otherwise only with the consent of the concessionaire. A similar provision can be found in the already discussed Public-Private Partnership Act, which provides in the second paragraph of Article 74 that the contractor of public-private partnership may transfer special and exclusive rights to other contractors only in accordance with the law and with the prior consent of the public partner. This means that the Public-Private Partnership Act requires prior consent of the public partner (awarding authority) for the transfer of special and exclusive right that is the subject of the concession contract in the concessionary public-private partnership, while the Services of General Economic Interest Act requires authorisation for essentially identical cases.

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The most important question in this regard refers to the legal nature of the authorisation or consent of the awarding authority for the transfer. On the one hand, it can be said that the authorization or consent is an authoritative act of the awarding authority and is therefore legally binding, while on the other hand, it can be considered that the awarding authority grants the authorization or consent as a contracting party, i.e. as a legal person and not as a public authority. According to this interpretation, the authorization or consent of the awarding authority is a business act and is not legally binding, but is within their discretion. According to *Pirnat,* a solution of this issue depends on the nature of the legal act by which the concession has been granted. If the concession is granted with the conclusion of a contract, then that contract is the legal basis under which the concessionaire has acquired the rights and obligations in the concession relationship. In this case, the authorisation by the awarding authority is a business act, as the transfer of the concession is essentially the transfer of the concession contract. However, if a special law stipulates that the concession is granted directly with a decision, from which it can be concluded that the concession contract only represents its realization, the authorisation must have legal nature of the administrative act, which also amends that decision (Pirnat, 2003: 1614).

A special issue that arises in connection with the transfer of the concession relationship is also a question of whether the concessionaire (the transferee) has to enter into a new concession contract with the awarding authority or if the previously concluded concession contract between the concessionaire 'transferor' and the awarding authority suffices. Both *Pirnat* and *Mužina* consider that this would generally suffice, but for reasons of clearer regulation of relations between the awarding authority and the concession transferee as the new concessionaire, a new concession contract should be concluded, which nevertheless should not regulate the concession relationship any differently, as that would otherwise be a new concession relationship and a new procedure would be needed to grant the concession. *Mutatis mutandis*, the same applies in the case when the concession is transferred by the awarding authority (Mužina 2004: 717; Pirnat, 2003: 1614-1615).

2.6 Amendment and Termination of the Concession Relationship

One of the rights of the awarding authority in the concession relationship that does not apply in classic civil-law contractual relationships is its right to unilaterally, provided that this is in the public interest (e.g. in the provision of public goods), impose new obligations on the concessionaire that are not covered by the concession contract. It is true that the concessionaire is in such case entitled to adequate compensation, but the unilateral imposition of new obligations is not a reason that may be asserted as a reason for the termination of the concession relationship. Unlike the described unilateral imposition of new obligations on the concessionaire, the amendment of the concession relationship does not occur by

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adding new obligations, but by changing the existing ones. Therefore, those obligations that are included in the concession act and concession contract from the very beginning. Typically for the concession, such modifications can be carried out independently of the will of the concessionaire, if they are justified by public interest for the purpose of which the activity that is the subject of the concession is being provided. No agreement is thus necessary to amend the concession relationship; instead, unilateral will of the awarding authority, dictated by public interest, is sufficient. Not even the right acquired by the concessionaire with a final act of award of the concession is an obstacle to this fact. In this case, the concessionaire only has the right to compensation for any damage caused by the amendment of the concession relationship (Čebulj, 1996: 243).

The public-law nature of the concession is also reflected in the manners of its termination, even though it is necessary to note that due to the mixed nature of the concession relationship, the termination of the concession may also be of the private-law nature. General contract law is normally used for contractual forms, but public law forms, which will be the subject of the following discussions, are either those in which the concession relationship is terminated by force of law **(a.** termination due to the termination of the concessionaire, **b.** termination due to the bankruptcy of the concessionaire), or those in which the termination is a result of administrative decision **(c.** concession revoked due to violations of the concessionaire, **d.** revoking in the public interest) (Pirnat, 2003: 1616).

ad. a. The concession relationship is generally the relationship *intuitu persone,* which expires with the termination of the concessionaire, unless under a special law the concession rights are transferred to legal successors. It is necessary to also regulate the question of how the awarding authority transfers the concession to another concessionaire and thereby ensures the continued implementation of the concession. A special problem is also how to provide the new concessionaire with equipment and facilities that are necessary for the implementation of the concession. The law must determine the obligation of legal successors to the previous concessionaire to enter into an agreement on the transfer of these facilities, of if that fails, to expropriate these facilities for the respective owner.

ad. b. The comparatively relatively common method of terminating the concession contract is also the bankruptcy of the concessionaire. At this point, we should note that the Services of General Economic Interest Act and the Institutes Act do not specifically address this question. Consequently, general rules of the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act apply.

The greatest problem related to the concession relationships is represented by the fact that equipment and facilities constructed for the implementation of the concession, which are at the moment of the commencement of the bankruptcy proceedings owned by the concessionaire, under the Financial Operations,

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Insolvency Proceedings and Compulsory Dissolution Act become part of the bankruptcy estate and that the transfer of ownership, which is generally agreed upon in the concession contract of determined in the concession act, cannot be realized.

ad. c. Under the current legal regulation of both commercial and non-commercial public services, revoking the concession is only possible for two reasons, namely: in the case of violations by the concessionaire and in the public interest.

The revocation based on the listed reasons is stipulated, for example, in the Services of General Economic Interest Act, which allows revoking of the concession if the concessionaire fails to commence with implementation of commercial public service that is the subject of the concession within the prescribed time limit and if it is in the public interest that the activities are no longer provided as commercial public service or as commercial public service that is the subject of the concession. While the first reason should not give rise to different interpretations, the second reason (public interest) justifies the revocation of the concession without any fault attributable to the concessionaire. With that, the legislator provided the awarding authority with the possibility to organize, even during the concession relationship, the provision of commercial public service activity that is the subject of the concession in one of the other forms of the provision of public services determined in the Services of General Economic Interest Act. Therefore, under the provisions of the Services of General Economic Interest Act, this is the 'non-culpable' manner of termination. In order to carry out the revocation, the conditions thereof must be determined in the concession contract or in the concession act. In the second case of the revocation, the Services of General Economic Interest Act provides compensation. At this point it should be noted that in practice the institution of revoking the concession is often incorrectly used. Irregular or negligent provision of public service is frequently listed as a reason for the revocation. However, this definition in concession acts and/or concession contracts is not correct. In general, the revocation of the concession is also regulated by another systemic act, the Institutes Act, which provides that *'the awarding authority may revoke the concession if the concessionaire does not perform public service in accordance with the regulations and acts of concession and the concession contract'*. Slightly more detailed regulation of the discussed institution can be found in sectoral legislation. Thus, for example, under the Pharmacies Act, the revocation of the concessions is some sort of a combination of sanctions for violations by the concessionaire and reasons in the public interest, which is true for some other acts as well *(e.g. the Organization and Financing of Education Act).*

At this point, it is also worth mentioning the interesting and practically proven opinion of *Čebulj,* who states that if reasons occur to revoke the concession from the concessionaire, the awarding authority is not only allowed, but also required to

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revoke the concession in order to protect the public interest. In case it fails to do so, both users of public goods as well as the candidates for the concession may request the revocation before the court (Čebulj, 1996).

3 Conclusions

In 1991, the Institutes Act introduced into Slovenian legal system the previously abandoned institution of public service concessions. It regulates a general procedure for granting of the non-commercial public service concession, while mainly referring to the concessions granted to (private) institutes that meet the required conditions for the provision of public services. Such institute (the so-called *institute with public rights* under the Institutes Act) has, in terms of providing a public service, rights, duties and responsibilities of a public institute. A concession for the provision of public service can naturally also be granted to a company, society, other organization or an individual who meets the required conditions for the provision of public services. The concession for the provision of public service activities may be awarded by a statute or ordinance of the municipality or city or by a decision of the competent authority in accordance with the statute or ordinance (the act of concession). A distinctive feature of such regulation lies in the fact that the concession may be established and granted by both general and individual act - an administrative decision. The Institutes Act further stipulates that the concession may be granted for a limited period, but does not determine any time limits (which are apparently intended to be regulated by sectoral legislation). A significant disadvantage of the mentioned legal regulation of (non-commercial) public service concession lies in the fact that it does not govern some institutions that are typical for concession relationships, such as the transfer of the concession, mandatory concession, duties and rights in the event of force majeure, liability of the concessionaire (for the employees' conduct) and in this respect the possibility for the awarding authority to temporarily assume the provision of public service and the liability of the awarding authority for the concessionaire's conduct. The legislator attempted to eliminate these shortcomings through regulation in sectoral legislation governing the implementation of certain non-commercial public service activities, but was in this respect mostly ineffective due to the unsystematic and disorganized approach.

In addition to the above-mentioned inadequate legal regulation of the non-commercial public service concession, we also need to mention the relatively detailed, but still insufficiently regulated commercial public service concession under the Services of General Economic Interest Act, which may be granted to a natural or legal person who meets the conditions for the provision of activity that is the subject of the commercial public service concession. Unlike the non-commercial public service concession, which can be awarded by general as well as individual administrative act, the concessionaire in the procedure for granting of the commercial public service concession is selected with an administrative decision in administrative procedure. In practice, this fact causes considerable

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problems, since it is not clear whether public tender is a part of administrative procedure, when this procedure commences, and how certain basic institutions of administrative proceedings (participation in the proceedings, the right of the party to be heard on the facts and circumstances, oral hearing, etc.) are to be used in this procedure. The Services of General Economic Interest Act contains fairly detailed provisions on the content of the concession contract, which is concluded between the awarding authority and the selected concessionaire and which regulates their mutual relations. However, various unsolved questions were encountered in practice: what happens in the event of unsuccessful negotiations on the concession contract, how a subsequent amendment of the concession act influences the concession relationship, what happens with the provision of public service after the termination of the concession, especially in case of early termination, and other similar questions. We need to conclude with the reminder that at the time of preparation of this paper, Slovenia has failed at the implementation of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts into its national legal system.

Notes

[1] *Borkovic* has conceptually described the concession as the authorisation, while substantively defining it as a legal institution through which the public authority allows a certain subject, natural or legal person, to utilize certain goods, provide certain services or perform certain activity (Borkovic, 1993: 4).
Virant, for example, emphasises that the concession represents a mandate (and not only authorisation) issued by the state (or local community) to a person of private (civil) law for the implementation of public service. The authorization represents the right of its holder to act in certain way, but does not bind him to do so. The concession, however, establishes a contractual obligation of the concessionaire towards the awarding authority. The concession therefore has a positive content, as it (unlike the authorisation) binds the concessionaire to implement activities (Virant 1996: 2).
Grilc and *Juhart* have provided the following definition: '*A concession is a form of governance of certain substances, things, property, public goods and the like, or the provision of services of general interest, provided that one party - the concessionaire (usually a private entrepreneur) is granted monopoly*' (Grilc & Juhart 1991: 14).
The Supreme Court defined the concession pragmatically by stating in the reasoning of one of its judgements (U 594/95-6) that '*in regard to a concession, the state or state body with the authority to provide certain activity of wider social importance that is performed as a public service in the public interest transfers this authorization with the concession to a certain natural or legal person*'.
[2] It is worth noting that the public mandate is closely linked to public services. The common purpose of both public services as well as of public mandate is to allow non-government organizations to authoritatively implement public duties in the general interest. For more on the institution of public mandate, see for example Kovač, 2006: 94.
[3] See Pirnat, 1999: 8.
[4] For the distinction between public and private law, we can refer to the four theories or methods, as listed by *Trstenjak,* namely: • *interest theory* (classification into certain legal branch depends on whether we are pursuing public or private interest in any individual

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case); • *subordination theory* (public law is characterized by the relationship of superiority - subordination, while the private law is characterized by equality of the relationship participants); • *subject theory* (if the relationship participant is an authoritative body, we are talking about public law, and vice versa, if the participant is a private law entity we are talking about private law), and • *special theory* (the relationship of public law only exists when its participant is a holder of authority and also acts in the authoritative role) (Trstenjak, 2000: 942).

[5] See for example Pirnat, 199: 9.

[6] Under French law, generally (only) the state, province, department or municipality or community of municipalities may act as the awarding authority, and only under a special regulation may the awarding authority be another person of public law; e.g. public company.In Italy, the awarding authority may be the state or other person of public law. See Mužina, 2003: 1630.

[7] The Institutes Act for example provides that the concession for the provision of (non-commercial) public service may also be awarded to the company, association, other organization (which can include legal persons of public law) or an individual who meets conditions required for the provision of public service. A similar provision is also found in the Services of General Economic Interest Act, which provides that the Republic or the local community provide the public service by making concessions, while the Services of General Economic Interest Act is not limited to persons of private law.

[8] Similar definitions can be found in the sectoral legislation. Thus, for example, the Health Services Act provides that *'the concession for the provision of public service in primary health care may be granted by a decision'.*

[9] See for example Pirnat, 1999.

[10] Contrary to this opinion, *Mužina,* for example, states that the duration of the concession relationship is one of the key elements on which the success of the concession project depends. It must therefore be determined in advance and unilaterally, also for reasons of equal treatment of all interested persons and operation of public administration. (Mužina, 2004: 443).

[11] In comparative terms, the duration of the concession relationship is regulated by legislation either with a clause of proportionality or with explicitly determined maximum duration. In French law, for example, the duration is set between the minimum of 5 to 10 years and the maximum of 20 to 30 years (concessions in the area of water supply, sewerage, waste management are for example granted for a maximum of 20 years). The duration is determined as a compulsory part in *chair de charges.* Other legislations mainly determine the maximum duration of the concession relationship (Croatia 99 years, Romania 49 years, Albania 30 years).

[12] The Constitutional Court, for example, stated in its decision U-I-303/97 that *'the determination of the municipal council for the selection of the concessionaire for the provision of commercial public service of natural gas distribution in the municipality of Ptuj is in conflict with the provisions of the Local Self-Government Act, which provides that the administrative matters under municipal jurisdiction are in the first instance decided by the municipal administration and in the second instance by the mayor'.* The same opinion can be found in the judgement I Up 671/2000 issued by the Supreme Court of the RS, which states that *'the provision of subparagraph 12 of Article 33 of the Companies Act cannot be understood as the implementation of authorisation from Article 67 of the Local Self-Government Act, which stipulates that the entity other than the municipal administration may decide on certain matters under municipal jurisdiction. Where the law itself states that the administrative matter shall be decided by the municipal administration, it is not possible to transfer authorisation for decision-making to another body.'* A similar

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view can also be observed in the decision by the Constitutional Court of the RS No. U-I-242/96, in which the Constitutional Court stated: *"The concessionaire for the provision of local commercial public service, is on the basis of the provisions of the Local Self-Government Act and the Services of General Economic Interest Act in the first instance selected by the municipal administration and in the second instance by the mayor. Unlawful is therefore the provision of the municipal ordinance, according to which the concessionaire is selected by the city council, while the city administration issues the decision on the basis of such decree, is therefore unlawful.'*

[13] In accordance with the provisions of the Institutes Act, the concession contract regulates relations in connection with the provision of public service between the awarding authority and the concessionaire and determines conditions under which the concessionaire has to provide public service, in accordance with the act governing the public service. More detailed provisions regulating the content of the concession contract can be found in sectoral legislation in the area of non-commercial public service: • The Pharmacies Act thus stipulates that with the concession contract (which must be made in writing) the awarding authority and the concessionaire shall regulate mutual relations in connection with the provision of pharmaceutical activity, the conditions under which the concessionaire must implement their activity, commencement of the concession, period for the termination of the concession, and assets provided by the awarding authority for the provision of pharmaceutical activity.

Similarly, but in more details, the content of the concession contract is also determined by the Services of General Economic Interest Act. According to the latter, the awarding authority and the concessionaire shall with the concession contract (which must be made in writing, otherwise it has no legal effect) regulate their mutual relations in connection with the provision of commercial public service, in particular: • the manner and deadlines of payments and potential security, • relations connected to the assets provided by the awarding authority, • the method of financial and professional supervision by the awarding authority • contractual sanctions for non-performance or improper performance of the public service

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