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INLAND PORTS IN THE REPUBLIC OF CROATIA: APPROVALS FOR PORT ACTIVITIES INSTEAD OF CONCESSIONS

ABSTRACT

According to the 1998 Act on Inland Ports, the right to perform all port activities within inland ports of the Republic of Croatia is given on the basis of concession, obtained through bidding. It has been noticed in practice that modern business processes and traffic flows are more dynamic than before when classic concession relations were created. Also, types and amounts of cargo are changing every couple of years, which is followed by quick adjustments, instead of working according to rigid and long-term defined decisions and concession contracts.

Furthermore, the practice has shown for some activities that the number of port providers (such as ship suppliers, port-agency and freight forwarders) should not be limited. This means that the system of a limited number of port providers is important only for the activities that require location within a port, as the port area is physically limited. Therefore, the new Act on Navigation and Inland Ports from 2007, whose frame has been completed by sub-law acts during 2008, has replaced the complex concession system for performing activities in inland ports by a more liberal approval system. On the basis of these, higher dynamics of work of port providers is enabled as well as easier adjustment to market conditions. Furthermore, the main limitation factor that determines the number of port users becomes the available physical space within a port, which provides undisturbed competition, along with larger offer of port services that do not require that space. It is also important to point out that the new Act specifically includes distribution and cargo logistics, also processing and improvement of goods as well as industrial activities including production that enable complete economic utilization of port capacities into the existing port activities, thus significantly changing the role of the port itself as a logistic centre.

KEYWORDS

inland ports, port activities, port authorities, concessions, approvals

1. 1998 ACT ON INLAND PORTS

Legal status of inland waterway ports and their categorization, port area, port activities and performance, building and the usage of port facilities, order in ports, structure of port authorities and other rele-

vant issues for port activities performance have been regulated by the *Act on Inland Waterway Ports*¹ [*Zakon o lukama unutarnjih voda – ZLUV*] in the Republic of Croatia since 1998.

According to Article 15 of ZLUV port activities were as follows: 1. attach and detach of ships, yachts, fishermen's, sport and other boats and vessels; 2. loading, unloading and transshipment of goods; 3. storing and transporting goods and other materials; 4. loading and unloading of passengers; 5. other economic activities in immediate economic, traffic or technological relation to those (i. e. ship provision, services for passengers, piloting and dragging, port mechanisms' services, port-agency business and shipping agent, trade, parking, quality and quantity control etc.). Also connected to Article 15 is Article 16 of the same Law. It states that ports opened for public transport, beside port activities listed under Article 15, may perform other activities, the performance of which is covered by the Law, as well as activities that follow the port ones in smaller scope but on a regular basis.

ZLUV strictly determined under Article 17 that the right to perform port activities is given on the basis of concession. The concession turns out to be the only way to legally perform some port activities in inland water ports. In accordance with ZLUV, the concession is given based on public tender by the port authority, and is given for a temporary period of time if specific, strict conditions are fulfilled. Once a concession is provided by the port authority, the authorized person has the right to perform port activities for several years. The longest period for concession was determined by Article 33 Item 1 of *Regulation on Concession for Performing Port Activities in Inland Water Ports*² [*Uredba o postupku davanja koncesije za obavljanje lučkih djelatnosti u lukama unutarnjih voda*] and it is 30 years.

2. ABOUT CONCESSIONS IN GENERAL

The term "concession" originates from Latin *concessio, onis*, meaning allowing, permitting, forgive-

ness. The meaning is similar in most of the European languages; French *concession* is permit, license, benefit; German *Konzession* is allowing, permitting. "One could say that the term concession a certain permit, allowance or approval is considered." [1]

"Concession stands for an act (grant, approval, permit, *Erlaubnis*) of one State's authority, that allows its citizens, other state or foreign citizens to perform certain activities on its territory for which the right to issue individual permits is usually held" [2] Although the term is interpreted uniquely, one may say that concession is a permit for the performance of particular activities that is conditioned by a specific approval. [3] The procedure of giving concession is a complex one. "There are two legally separate documents issued for each concession. The first one is the decision on concession while the other one is a contract on concession based on the concession act. The first document, the decision on concession is individual, brought by the party providing the concession and is one-sided in the sense of its content which is determined strictly by the party who gives the concession. (...) The other document is a contract on concession and is signed on the basis of the decision on concession. This contract is a form of civil-law issue and results from the good will of both sides and the civil law applies to both parties". [4] It should be added that the concession procedure in the Republic of Croatia is burdened by enormous law and insufficiency of the current *Act on Concessions*³ [*Zakon o koncesijama*], which resulted in the fact that almost every concession system in Croatia is regulated by a different act. [5]

The concession system in inland waterway ports in the Republic of Croatia is in accordance with the general theory on concessions. The granting of concession is done in such a way that the management board of the port authority makes a decision on concession as an administrative act, based on which the Head of the port authority signs the concession contract with the future authorized person. Only when the contract is signed one may confirm that the concession has been granted.

Article 20 of ZLUV determines that the concession decision consists of: trade company and port activity determination; method, conditions and timeframe of performance, authorizations and obligations of the party granting the concession, rights and obligations of the authorized person receiving the concession, including the right to build, maintain and modernize the port structures; concession fee or the basis for such. The concession contract is based on the concession decision and must include, according to Article 21 of ZLUV: port activity covered by the concession, special conditions that must be met by the authorized person for the concession, concession fee, conditions and terms of fee payment, guarantees of

the authorized person, other rights and obligations of the authorized person, methods of solving the problems in case of concession determinations prior to its expiration.

3. CONCESSION RELATIONS AS BRAKES OF PORT ECONOMIC DEVELOPMENT

The performance of port activities based on a concession has its advantages and disadvantages from the economic point of view. The advantage lies certainly in the fact that the port has strong control over the performance of the port activities. Another advantage is that the authorized person, when the concession relation is established, has fixed operating conditions agreed over a long term, scope of operation within port area, long-term defined concession fees, information on whether or not, and how many competitors may be expected, etc. Generally, the authorized person for concession may make long-term plans of the development and investments in stable frames of the concession relationship.

On the other hand, the inflexibly set economic relationship based on the previously mentioned two comprehensive legal documents, may in case that the economic circumstances change, make the work of the authorized person difficult or even impossible. Also, the complex and relatively slow procedure of obtaining the concession, may endanger the arrival of persons interested in performing the port activities, especially if there is temporary or seasonal need for a particular port activity (such as e. g. sudden arrival of a large number of passengers, need for maintenance of ship equipment of a particular producer, etc.) One should not forget that concessions, as legal institute were created at a time of significantly slower economic implementations, when traffic flows and port activities were stable and similar for the periods of several decades.³

Concessions are by theory granted where some limited resources exist, i. e. when complete entrepreneurial freedom would not be opportune for any reason (limited space, obligation of providing service at the time of year when it is not commercial, limited natural resource...). Considering inland waterway ports, the main limiting factor for port activities there, is the space. There are activities such as cargo loading or unloading that require large spaces within a port. Further, there are also such activities as freight forwarding that require only a small office space, and not even that – because a forwarder may come when called.

At the beginning of making new legislative regulations on inland ports, two models were taken into consideration. The first one needed concessions only for

port activities that require permanently and relatively large space within the port, while the other one suggested that the entire concession system be abandoned in favour of a more liberal approval system. The latter attitude prevailed, so that the new *Act on Navigation and Inland Ports*⁴ [*Zakon o plovidbi i lukama unutarnjih voda – ZPLUV*] does not recognize concessions any longer. They have been completely replaced now by approvals, while the concession model has remained only in transitional regulations, for the existing concessions until their expiration.

4. ACT ON NAVIGATION AND INLAND PORTS

ZPLUV has defined significantly more widely the port activities, and, apart from enumerating them quantitatively more precisely and more comprehensively, it has also added the important quality shifts regarding better economic valorisation of the port area. According to Article 141 of ZPLUV, the port activities include port services and other economic activities performed within the port area, that include: 1) nautical services: mooring and unmooring of vessels; boxing; vessel handling at anchor; supply of vessel, crew and passengers; 2) transportation services: loading, unloading, transshipment, transfer and stacking of cargo; warehousing, bailing and other transportation operations depending on the type of cargo; preparing and bundling of cargo; 3) passenger handling services; 4) freight forwarding services and port agency. Other economic activities include the distribution and cargo logistics, processing and refinement of cargo and industrial activities, including production, that enable more complex economic usage of port capacities. Additionally, Article 142 of ZPLUV determines how other activities apart from those listed under Article 141 in ports may be performed, that are usually performed along with port services.

Adduction of activities such as distribution and cargo logistics, processing and refinement of cargo and industrial activities including production among port activities, that enable better economic usage of port capacities, significantly changes the port character in comparison with the previous legal regulation. The legislator has rightfully concluded that modern port is no longer just a point for transshipment of goods or some simplified operations such as bundling but has now become a combination of the port area and the entrepreneurial zone. More complex economic activities can now be performed within a port, such as e. g. assembling automobiles delivered in parts, etc.

Additional argument to this solution is the real situation that has failed to integrate ports with the existing entrepreneurial zones, due to several reasons

(from physical distance to differences in legal regulation). Naturally, in order to apply this new port role in practice, it is necessary to adjust the size of the port area and to organize traffic connection within the port.

As mentioned, ZPLUV does not recognize concessions any longer. According to Article 143 the port users may perform port activities within the port area on the basis of approvals. Such approval is an administrative act brought by the port authority, with previous consent by the Ministry. No appeal may be taken against such an act but an administrative dispute may be initiated.

Whereas in determining the period of granting concession as regulated by the *Regulation on Granting Concession for Performing Port Activities in Inland Ports*, the type and the volume of port activities that required concession were taken into consideration, as well as the necessary investments and total economic effects achieved by the concession (Article 33 Item 2 of the Regulation), the new legal solution is contained within the Act itself and introduces direct correlation between the duration of the approval period and the investments into the port. According to Article 144, Item 2 of ZPLUV, the time period for which the licence for the port activities is granted, is determined on the basis of the following criteria:

1. the port user does not intend to undertake significant investments in port; maximum period is 5 years;
2. the port user intends to undertake significant investments in equipment and instruments for performing port services; maximum period is 10 years;
3. the port user intends to undertake significant investments into capital assets, infrastructure or suprastructural objects and devices that serve for performing port services; maximum period is 25 years.

Furthermore, the way in which the period for granting the approval for performing other economic activities is regulated depending on the amount of investment and is determined on the basis of the project feasibility study.

Such direct connecting of approval period and the amount of investments (regardless of how descriptive the investment amount may be) is reflected in the legislator's tendency to transfer at least a part of port construction expenses to port users. Here, a very simple economic logic was used as a guideline: a port user who requests approval for a longer period of time must invest more into the very port. Large investments, which allow the port user to obtain approval for long-term performance of port activities, provides additionally certain good partnership between the port user and the port authority.

It was previously mentioned that the maximum period of granting a concession was 30 years, while the

period for granting approval has been shortened to 25 years. The reason is the same as the reason for replacing concessions by somewhat more liberal approvals: today's economic dynamics in which goods flows are much more variable than before. Here, the period of 25 years should really be taken as a maximum and the approval granted for such a period well justified: in today's globalised world it is very difficult to make a serious business plan for such a long period of time.

It should also be added that on the basis of approval the port authority signs a contract with the port user.

According to strict provision of ZPLUV, the number of port users who perform port activities in the port area may be limited for nautical services and passenger handling services, while for transport services and other economic activities only when such limitation is related to the availability of space within the port area (Article 147). Such provision strictly defines the conditions of limitation of the number of port users, while a part of such restrictions is directly related to an objective category – the port space. The Act is generally oriented towards elimination of any monopolistic (legal or factual) relations within a port, which is in our opinion very positive. Not only should monopolies be treated as exceptions out of constitutional reasons⁵, but they often generate a long list of economically unacceptable behaviours.

5. PORT-AGENCY AND FREIGHT FORWARDING ACTIVITIES – FROM NOW ON FREE OF CHARGE

One of the novelties of ZPLUV, in which the regulation follows the suggestions of legal doctrine, is the specific regulation of port-agency and freight forwarding activities. According to strict provision of ZPLUV, freight forwarders and port agents are exempted from paying fees for using the port i. e. quay. The same issue but related to the Croatian seaports was discussed by Borčić as early as in 1997: "It is unacceptable to have trade associations that perform maritime agency or forwarding activities and that may significantly affect cargo and ship traffic at the port pay fees for performing such activities." [6]

The Croatian legislator accepted in 2006 Borčić's suggestion in the *Act on Amendments and Annexes to the Act on Maritime Assets and Sea Ports*⁶ [*Zakon o izmjenama i dopunama Zakona o pomorskom dobru i morskim lukama*]: port-agency activities at seaports are exempted from the list of port activities and the new Article 65 Item 3 strictly regulates: "The activities of the maritime agency and forwarding activities are performed on the basis of the approval of the port authority."⁷

The agent who facilitates a number of activities in a port (port agent) or brings work to the port as well as to the entire traffic route (freight forwarder) will bring large benefit to the port by performing high-quality work. With their work they facilitate and enable operation of "big" port operators, such as e. g. those who operate transshipping. Moreover, one could consider a model that would reward successful agents and forwarders for improvement of activities within the port and for bringing large and high-quality cargo that fill the port capacities over a long-term period. One should not forget that the main goal of a port is its successful operation – and the port operates successfully when there are loads of high-quality cargo; not only do the persons who perform transshipment and warehousing make profit then, but also all the others who work in a port, from services to caterers.

6. CONCLUSION

ZPLUV inherited a strict concession model for performing port activities. This Act defines the port activities themselves in a somewhat old-fashioned manner; the model for ZPLUV's author was the 1995 Act on Sea Ports⁸ that was revoked in the meantime. In its form, the concession model is a complex one, and in its contents it is long-lasting and inflexible, and therefore not suitable for regulating modern economic relations characterized by continuous change and dynamics. Besides, concessions are, by theory, awarded where there are some limited resources i. e. when full entrepreneurial freedom would not be opportune for any reason, which holds only for particular port activities.

The new solution brought by ZPLUV defines the port activities in a significantly wider scope. Moreover, it includes industrial activities into port ones, involving production, that enable more complete economic utilisation of port capacities. Thus, the port becomes a specific combination of a port area and the entrepreneurial zone.

Instead of a strict system of concessions that may be granted for a maximum of 30 years, somewhat more liberal approvals have been introduced now. The duration for port activity approval depends on the amount of investments in the port planned by the port user, and the maximum period of time for such approval is 25 years. Also, the number of port users may be limited only to a limited and strictly defined group of port activities.

According to explicit regulation of ZPLUV, the forwarders and port agents are exempted from paying fee for port usage, i. e. quay, which is understandable – the one who facilitates performing a number of works in the port (port agent) or brings work to the port and the entire traffic route (freight forwarder), should not

be charged additional fees for this; amounts that are to be collected on the basis of their successful work from other port users are much higher.

The new legal regulation of performing port activities in inland ports of the Republic of Croatia based on approvals is much more oriented towards modern economic business in comparison to the previous one based on concessions. Additionally, measures towards strengthening the ports as economic centres, where certain port-related industrial processes are carried out, should be of assistance in the development of the Croatian inland ports (Osijek, Sisak, Slavonski Brod and Vukovar) as the centres of economic activity of these cities, as well as counties.

Since the existing concession relations remain in force until the expiration of concessions themselves, and since new big projects based on new approvals may require a period of several years, it will be possible to estimate the effects of the new Act only in a couple of years. Anyhow, new legal regulation provides a high-quality frame for further strengthening of our inland ports as well as enabling some completely new development possibilities, such as strong industrial facilities related to the port.

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SAŽETAK

LUKE UNUTARNJIH VODA U REPUBLICI HRVATSKOJ: ZA LUČKE DJELATNOSTI ODOBRENJA UMJESTO KONCESIJA

Prema Zakonu o lukama unutarnjih voda iz 1998. godine, pravo na obavljanje lučkih djelatnosti u lukama unutarnjih voda stjecalo se na temelju koncesije, a koja se davala putem javnog natječaja. Međutim, u praksi rada luka unutarnjih voda zamijećeno je kako su suvremeni poslovni odnosi i prometni tokovi bitno dinamičniji nego u doba kada su klasični koncesijski odnosi zamišljeni. Također, vrste i količine tereta danas se mijenjaju svakih nekoliko godina, što traži i odgovarajuće brze prilagodbe, a ne rad sukladno kruto i višegodišnje definiranim odlukama i ugovorima o koncesiji.

Nadalje, u praksi se pokazalo kako za neke djelatnosti ne treba limitirati broj lučkih operatera (primjerice opskrba brodova, lučko-agencijski i špediterski poslovi), tj. da je sustav ograničenih broja lučkih operatera bitan samo za djelatnosti koje trebaju prostor u luci, jer je površina lučkog područja fizički ograničena. Stoga je novi Zakon o plovidbi i lukama unutarnjih voda donesen 2007. godine, a čiji se okvir zaokružuje donošenjem podzakonskih akata tijekom 2008. složeni sustav koncesija za obavljanje djelatnosti na lukama unutarnjih voda zamijenio liberalnijim sustavom odobrenja. Temeljem toga želi se omogućiti veća dinamičnost rada lučkih korisnika (operatera) te lakša prilagodba tržišnim uvjetima. Nadalje, glavni ograničavajući faktor koji određuje broj lučkih korisnika po-

staje raspoloživi prostor u luci, čime je omogućena nesmetana konkurencija, a time i veća ponuda lučkih usluga koje taj prostor ne trebaju. Također je bitno napomenuti da novi Zakon među lučke djelatnosti izričito ubraja distribuciju i logistiku tereta, doradu i oplemenjivanje robe, te industrijske djelatnosti uključujući proizvodnju koje omogućavaju potpunije gospodarsko iskorištenje lučkih kapaciteta, čime se bitno mijenja uloga same luke kao logističkog centra.

KLJUČNE RIJEČI

luke unutarnjih voda, lučke djelatnosti, lučke uprave, koncesije, odobrenja

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 3. Concession for building and using of the Suez Canal is given as example; it was granted for 99 years since the day of opening.
 4. "Narodne novine", No 107/07 and 132/07.
 5. Constitution of the Republic of Croatia ("Narodne novine", No 41/01 – revised text) states in Article 49: "Entrepreneurial and market freedom are the basis of economic organization of the Republic of Croatia."
 6. "Narodne novine" No 141/06
 7. It is interesting to mention that Borčić, when asked about the previous *Act on Sea Ports*⁸ [*Zakon o morskim lukama*], which was obviously a model when writing ZLUV, stated: "There is no example in other countries' legislatures that port agency and forwarder agent activities or activities of quality and quantity of goods are considered port activities." – See literature under [6], page 6.
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