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Legal Protection of Concession Contracts – at the Interface between Public and Private Law and European and National Law

Ochrona prawna udzielania koncesji – między prawem publicznym a prywatnym oraz między prawem europejskim a krajowym

ABSTRACT

This scientific paper discusses the legal protection of concession contracts in Slovene law. The main objective is to identify the problems caused by the current regime and to propose some solutions. To achieve this aim, it relies in particular on the comparative and dogmatic research method. The author notes that the legal protection depends on the type and value of the concession: for concessions falling within the scope of Directive 2014/23/EU it is provided in accordance with the rules of the EU directives on legal protection, while other concessions are subject to the rules of national law. Legal protection also varies depending on whether the dispute falls under administrative or civil law: public-law disputes are usually decided by administrative courts and civil-law disputes by ordinary courts. Such a regime may interfere with the right to effective judicial protection, as there is often no clear dividing line between public and private law protection. This can lead to delegation of cases between different authorities and a prolonged decision-making process. The author therefore considers that all disputes relating to concession contracts should be decided by one court – the Administrative Court. In addition, it is necessary to establish mechanisms to ensure effective protection of non-selected tenders, as the current regime does not provide for such protection. The novelty of the presented research lies in the fact that no scientific papers deal with the covered issues published so far. The author believes that the paper has a cognitive value for both science and practice.

Keywords: concessions; legal protection; administrative act; administrative dispute; review procedure

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INTRODUCTION

A concession contract has a dual legal nature: on the one hand, it is a contract under the law of obligations, on the other hand, the grantor acts not only as a contracting party but also as an authority.[1] In view of these characteristics, Slovene administrative doctrine[2] and case law[3] classify it as an administrative contract. Due to its mixed legal nature, the legal protection of a concession contract is also dual, depending on whether the subject matter of the dispute falls within the scope of administrative or civil law. However, this often leads to difficulties in delimiting the competences of the different authorities, which is particularly typical in cases where a certain (the same) issue is regulated by both public and private law.

The aim of this paper is to critically analyse the legal protection of concession contracts in Slovene law and – relying on the comparative law experience – to resolve some of the dilemmas that such a regime creates in practice. The topic is particularly interesting in light of the recent changes brought to the legal protection of concession contracts by the Certain Concession Contracts Act (in Slovene: *Zakon o nekaterih koncesijskih pogodbah*)[4] and the Legal Protection in Public Procurement Procedures Act (in Slovene: *Zakon o pravnem varstvu v postopkih javnega naročanja*),[5] which have not yet been discussed in detail in Slovene administrative doctrine. Previous discussions have focused mainly on particular aspects of legal protection in public procurement procedures,[6] but not on concession contracts. This paper is therefore the first comprehensive contribution on the legal protection of the concession contracts in Slovene legal literature.

The paper seeks to confirm or disprove the following hypotheses:

H1: Judicial protection against decisions of the National Commission for the Review of Public Procurement Procedures is effective.

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[1] Judgment of the Supreme Court of the Republic of Slovenia of 24 September 2019, no. III Ips 20/2019-7.

[2] For more, see R. Pirnat, *Pravni problemi upravne pogodbe*, "Javna uprava" 2000, vol. 36(2), pp. 151–152; K. Štemberger, *Upravna pogodba kot posebni institut upravnega prava – kje smo in kako naprej?*, "Pravnik" 2021, vol. 76(5–6), p. 258; J. Ahlin, *Uporaba pravil obligacijskega prava za razmerja iz koncesijske pogodbe: koncesijska pogodba na meji med javnim in zasebnim*, "Lex localis – Journal of Local Self-Government" 2008, vol. 6(2), pp. 249–250.

[3] Judgment of the Supreme Court of the Republic of Slovenia of 28 October 2015, no. III Ips 64/2014.

[4] Official Gazette of the Republic of Slovenia, no. 9/19, as amended, hereinafter: ZNKP.

[5] Official Gazette of the Republic of Slovenia, no. 43/11, as amended, hereinafter: ZPVPJN.

[6] For example, see A. Mužina, *Državna revizijska komisija – državni organ sui generis*, "Pravna praksa" 2002, no. 10–11, pp. 3–4; idem, *Pravno varstvo v postopkih oddaje javnih naročil*, Ljubljana 2002; R. Pirnat, *Sodno varstvo zoper odločitve državne revizijske komisije*, "Pravna praksa" 2016, no. 6–7, pp. 1167–1179.

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H2: The division of jurisdiction over concession contracts between administrative courts and courts of general jurisdiction leads to an interference with the right to effective judicial protection.

METHODOLOGY

The first part of the paper focuses mainly on the comparative method, both in terms of legal regulation and legal literature. The second part critically analyses the current legal protection regime in relation to concession contracts in Slovene law by using dogmatic and axiological methods. The axiological method is particularly useful in exploring and identifying the legal problems of the current regime and in formulating possible solutions or proposals for the future, while also taking into account selected comparative law solutions. The research is closely linked to the question of the effectiveness of the current legal order, and the sociological method was therefore also used, as it is the basis for distinguishing between norms and their implementation in (judicial) practice. The synthesis of the arguments allowed to formulate the conclusions, confirm or disprove the hypothesis, and possibly offer improvements for *de lege ferenda* regulation.

RESEARCH AND DISCUSSION

1. Legal protection of concession contracts in comparative law

1.1. Polish law

Poland has developed one of the most effective systems of legal remedies in the field of public procurement and concessions. The legal framework has been established or improved by the Act of 11 September 2019 – Public Procurement Law,[7] which entered into force on 1 January 2021 and applies also to legal remedies in concession award procedures, unless otherwise provided by the Act of 21 October 2016 on concession contract for works or services.[8] The PPL transposed EU public procurement and legal protection directives (Directives 89/665/EEC and 92/13/EEC, as amended by Directive 2007/66/EC[9]) into the Polish system, while the ACA

[7] Consolidated text, Journal of Laws 2019, item 2019, as amended, hereinafter: PPL.

[8] Consolidated text, Journal of Laws 2016, item 1920, as amended, hereinafter: CA. See Article 54 (2) ACA.

[9] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ L 335/31, 20.12.2007).

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implemented Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.[10]

Economic operators who disagree with the contracting authority's decision to reject their tender or to select a competing tender may appeal against the contracting authority's conduct. The appeal is decided by the National Appeal Chamber (the NAC), an independent, quasi-judicial body with the power to rule on appeals at first instance.[11] An appeal may be lodged against acts of the contracting authority which are contrary to the provisions of the ACA, including omissions. If an appeal has been lodged, the contracting authority may not conclude the contract until the NAC has delivered a judgment or issued a decision terminating the appeal procedure (standstill period).[12] In accordance with the PPL, the NAC has 15 days from the date of submission of the appeal to take a decision on the appeal.[13] This is an instruction period, which the NAC generally respects. In 2019, the NAC took approximately 14 days to reach a decision, and in 2020 it took 30 days, with a significant increase in the number of appeals lodged in 2020 compared to previous years.[14]

The decision of the NAC is subject to judicial review by the Public Procurement Court – District Court in Warsaw. The appeal shall be lodged within 14 days from the date of service of the decision of the NAC and shall not be suspensive. This means that the contracting authority may conclude a contract with the successful tenderer in accordance with the decision of the NAC immediately after its publication, without waiting for the court's decision. The court must decide on the appeal without delay, within one month of receipt of the appeal at the latest.[15] It may reject the appeal, dismiss it as unfounded or uphold it and modify the contested decision.[16] The judgment or decision of the court of first instance terminating the proceedings may be appealed in cassation to the Supreme Court.[17] The appeal may be lodged by a party and by the President of the Public Procurement Office and must be in a formalised form.[18]

[10] OJ L 94/1, 28.3.2014, hereinafter: Directive 2014/23/EU. See K. Kuźma, W. Hartung, *Public Procurement Laws and Regulation, Poland 2022–2023*, 20.2.2023, https://iclg.com/practice-areas/public-procurement-laws-and-regulations/poland (access: 22.1.2023).

[11] H. Izdebski, M. Kulesza, *Administracja publiczna. Zagadnienia ogólne*, Warszawa 2004, pp. 140–142.

[12] Article 577 PPL. The exceptions are regulated in Article 578 PPL.

[13] Article 544 PPL.

[14] Urząd Zamówień Publicznych, *Sprawozdanie Prezesa Urzędu Zamówień Publicznych z funkcjonowania systemu zamówień publicznych w 2020 r.*, https://www.uzp.gov.pl/__data/assets/pdf_file/0009/51030/Sprawozdanie-Prezesa-Urzedu-Zamowien-Publicznych-z-funkcjonowania-systemu-zamowien-publicznych-w-2020-r.pdf (access: 22.1.2023), pp. 43–45.

[15] Article 587 (1) PPL.

[16] Article 588 PPL.

[17] J. Niczyporuk, *The Polish Supreme Court in the Public Procurement Procedure*, "Studia Iuridica Lublinensia" 2022, vol. 31(4), p. 198.

[18] Article 590 PPL.

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Disputes relating to damages are brought before the civil courts in civil litigation. The same applies to disputes arising out of the performance of a contract.[19]

1.2. Croatian law

The Concessions Act (in Croatian: *Zakon o koncesijama*),[20] which transposed Directive 2014/23/EU into Croatian law, governs the procedure for granting public concessions as *lex generalis*. Specific issues of granting concessions which also fall within the scope of the ZK are regulated as *lex specialis* by sectoral laws.[21] The scope of regulation in the ZA is broader than in Directive 2014/23/EU, because the ZK includes rules for awarding concessions below the threshold for the application of Directive 2014/23/EU which differ slightly from the rules applicable to concessions above the threshold. Among the provisions that apply in all cases are provisions on legal protection.

Legal protection against acts issued in the concession award procedure is ensured through an appeal procedure before the State Commission for the Control of Public Procurement Procedures (in Croatian: *Državna komisija za kontrolu postupaka javne nabave*, hereinafter: the DK) in accordance with the Public Procurement Act (in Croatian: *Zakon o javnoj nabavi*)[22] as *lex specialis* and the General Administrative Procedure Act (in Croatian: *Zakon o općem upravnom postupku*)[23] as *lex generalis*.[24]

Not only competitors or tenderers in the concession award procedure, but also any other economic operator who has a legal interest in obtaining the concession in question, even if it has not yet submitted an application to participate in the procedure, is actively entitled to lodge an appeal before the DK, provided that it has suffered or is likely to suffer damage as a result of the alleged infringement of its subjective rights.[25] The Public Procurement Office of the Government of the Republic of Croatia and the State Attorney's Office are also authorised to lodge an appeal.[26] The lodging of an appeal leads to a standstill period.[27] In 2021, the DK received 19 appeals in 281 concession award procedures.[28]

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[19] P. Janda, *Teza 3 do art. 185*, [in:] S. Babiarz, Z. Czarnik, P. Janda, P. Pełczyński, *Prawo zamówień publicznych. Komentarz*, Warszawa 2010, p. 646.

[20] Official Gazette of the Republic of Croatia, no. 69/17, as amended, hereinafter: ZK.

[21] Article 83 ZK.

[22] Official Gazette of the Republic of Croatia, no. 120/16, as amended, hereinafter: ZJN.

[23] Official Gazette of the Republic of Croatia, no. 47/09, as amended, hereinafter: ZOUP.

[24] Article 399 ZJN. See also D. Aviani, *Posebnosti upravnih ugovora i njihove sudske kontrole u hrvatskom pravu*, "Zbornik radova Pravnog fakulteta u Splitu" 2013, vol. 50(2), pp. 362–363.

[25] Article 401 ZJN.

[26] *Ibidem*, pp. 364–365.

[27] Article 423 ZJN.

[28] Republic of Croatia, State Commission for the Control of Public Procurement Procedures, *2021 Report on Work*, https://www.dkom.hr/UserDocsImages/dokumenti/izvjescaORadu/Izvješće%20o%20radu%20za%202021.pdf?vel=3975930 (access: 22.1.2023), p. 16.

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The DK has cassation powers only, as it cannot change the contracting authority's decision on its own.[29] The DK must decide on the appeal within 30 days of the lodging of a complete appeal, unless otherwise provided by law.[30] The statutory time limit for reaching a decision is thus longer than in the Polish legal system. The average time taken by the DK from the receipt of an appeal to the adoption of a decision was 27 days in 2021, with a trend toward a reduction in the time taken to reach a decision compared to the previous year.[31]

The decision of the DK is not subject to appeal, but a party may initiate an administrative dispute before the High Administrative Court.[32] An action in an administrative dispute is not suspensive (but an interim injunction may be requested) and must be decided by the Court within 30 days of its receipt.[33] If the High Administrative Court annuls the decision of the DK, it also decides on the application for review (it has reformatory powers). In some cases, there is an extraordinary appeal against a decision of the High Administrative Court to the Supreme Court to review the legality of the decision.[34]

If the tenderer has suffered damage because of a breach of the provisions of the ZK, he may seek compensation for the damage before the ordinary courts.[35]

Legal protection in relation to the performance of the concession contract (disputes concerning the legality of the termination, implementation and nullity of the administrative contract) is provided before the administrative courts in accordance with the provisions of the ZUS.[36] In addition to the main claim, the plaintiff may also seek compensation for damage caused by the defendant.[37] Administrative disputes are decided by the administrative court with territorial jurisdiction over the seat of the public entity that is party to the contract.[38]

[29] Article 428 ZJN.

[30] Article 432 (2) ZJN.

[31] Republic of Croatia, State Commission for the Control of Public Procurement Procedures, *op. cit.*, p. 16.

[32] Cf. F. Staničić, *Kontrola nad sklapanjem upravnih ugovora*, "Zbornik radova Pravnog fakulteta u Splitu" 2016, vol. 53(1), pp. 241–242.

[33] Article 434 (3) ZJN.

[34] Article 78 of the Administrative Dispute Act (in Croatian: *Zakon o upravnim sporovima*; Official Gazette of the Republic of Croatia, no. 20/10, as amended), hereinafter: ZUS.

[35] D. Aviani, *op. cit.*, p. 365.

[36] See Article 3 ZUS; Article 151 ZOUP.

[37] Article 59 (2) ZUS.

[38] Article 13 (5) ZUS.

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2. Legal protection of concession contracts in Slovene law

2.1. *Ex ante* legal protection

Legal protection in relation to the conclusion of a concession contracts differs in Slovene law depending on the law governing concession contracts.[39] If the concession falls within the scope of Directive 2014/23/EU, legal protection is provided in accordance with the rules of the EU legal protection directives, which have been implemented into Slovene law by the ZPVPJN. Directive 2014/23/EU has been transposed into Slovene law by the ZNKP and applies to those concessions which correspond to service concessions or works concessions within the meaning of Article 2 (2–3) ZNKP, on the further condition that the concessions threshold value is equal to or higher than the threshold value referred to in Article 8 (1) of Directive 2014/23/EU, and that there are no legal exceptions to the application of the Act.[40] The extension of the legal protection directives to concessions subject to the Directive 2014/23/EU was a significant innovation for the national legal order, resulting in unification or, at the very least, significant approximation of legal protection rules in the field of concessions and public procurement.

If any of the criteria for the application of the ZNKP are not met, the concession award procedure is not subject to the rules of the ZNKP, but only the provisions of sectoral (national) regulations.[41] In accordance with these rules, legal protection is provided in an administrative procedure (appeal procedure) and administrative dispute (in the case of service concessions), or in a review procedure under the provisions of the ZPVPJN (in the case of works concessions).[42]

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[39] K. Štemberger, *Legal Dilemmas in the Field of Granting Concessions in Slovenian Law and Some Solutions in Comparative Law*, "Hrvatska i komparativna javna uprava" 2022, vol. 22(1), pp. 53–56.

[40] Eadem, *Vpliv nove pravne ureditve sklepanja koncesijskih pogodb na področju gospodarskih javnih služb*, "Javna uprava" 2019, vol. 55(1–2), pp. 122–123. See also B. Zuljan, *Novosti Zakona o nekaterih koncesijskih pogodbah ter pravne negotovosti pri podeljevanju koncesij za izvajanje lekarniške in zdravstvene dejavnosti*, "Javna uprava" 2019, vol. 55(3–4), pp. 63–68.

[41] For example, see Services of General Economic Interest Act (in Slovene: *Zakon o gospodarskih javnih službah*; Official Gazette of the Republic of Slovenia, no. 32/93, as amended); Public-Private Partnership Act (in Slovene: *Zakon o javno-zasebnih partnerstvih*; Official Gazette of the Republic of Slovenia, no. 127/06), hereinafter: ZJZP; Health Services Act (in Slovene: *Zakon o zdravstveni dejavnosti*; Official Gazette of the Republic of Slovenia, no. 23/05, as amended), ZZDej; Mining Act (in Slovene: *Zakon o rudarstvu*; Official Gazette of the Republic of Slovenia, no. 14/14, as amended), hereinafter: ZRud-1; Water Act (in Slovene: *Zakon o vodah*; Official Gazette of the Republic of Slovenia, no. 67/02, as amended), hereinafter: ZV-1; Pharmacy Practice Act (in Slovene: *Zakon o lekarniški dejavnosti*; Official Gazette of the Republic of Slovenia, no. 85/16, as amended), hereinafter: ZLD-1.

[42] Articles 62 and 63 ZJZP.

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2.1.1. Legal protection in administrative procedure and administrative dispute

Concession contracts are usually concluded based on an administrative act, which selects the most successful tenderer. As a rule,[43] all tenderers have a right to legal protection against this act if they consider that there have been irregularities in the selection of the concessionaire. Legal protection is provided by an appeal against an administrative act, unless an appeal is excluded by law, and in court proceedings before an Administrative Court (administrative dispute). If an appeal against the administrative act is not allowed, tenderers may apply directly to the Administrative Court, which will review the legality of the administrative act. Otherwise, they can only bring the case before the Administrative Court after exhausting the ordinary remedies (when the administrative act becomes administratively final[44]).[45]

An appeal is generally suspensive and therefore suspends the execution of the administrative act, and thus the conclusion of the concession contract, until the appeal has been (administratively finally) decided. The appeal procedure is governed by the ZUP and by specific rules[46] in the field of concession relations, which apply as *lex specialis*.

In an administrative dispute, the court decides on the legality of administratively final administrative acts, and on the legality of other acts only if the law so provides.[47] The Administrative Dispute Act (in Slovene: *Zakon o upravnem sporu*)[48] defines an administrative act as "an administrative decision and other public-law, unilateral, authoritative individual act issued in the exercise of an administrative function, by which an authority has decided on a right, obligation or legal benefit of an individual, legal person or another person who may be a party to the procedure for issuing the act". The decision by which the concessionaire was selected by the grantor corresponds to the concept of an administrative act and, if it is administratively final, may be subject to judicial review. However, a tenderer cannot challenge in an administrative dispute any illegality that may have occurred in the publication of the invitation to tender by which the grantor invites economic operators to participate in the concessionaire selection procedure. Since a call for tenders is not an administrative act, any illegality of the terms of the call for tenders

[43] An exception is provided for, e.g., in Article 65 (2) ZJZP.

[44] An administratively final administrative act is an act against which no ordinary legal remedy can be filed in the decision-making procedure. See Article 224 (1) of the General Administrative Procedure Act (in Slovene: *Zakon o splošnem upravnem postopku*, Official Gazette of the Republic of Slovenia, no. 24/06, as amended), hereinafter: ZUP.

[45] See Article 13 (2–3) ZUP.

[46] For example, see Article 58 ZJZP.

[47] E. Kerševan, V. Androjna, *Upravno procesno pravo: upravni postopek in upravni spor*, Ljubljana 2017, pp. 501–502.

[48] Official Gazette of the Republic of Slovenia, no. 105/06, as amended, hereinafter: ZUS-1.

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may be invoked only by means of an action brought against the selection decision (administrative act).[49]

The Administrative Court has the power to annul an unlawful administrative act, to amend it and decide on the administrative matter itself, to establish the illegality of the administrative act which has affected the applicant's rights or legal interests, or declare it void.[50] In an administrative dispute, the plaintiff may also seek compensation in the so-called adhesion proceedings for the damage suffered as a result of the implementation of the contested administrative act,[51] but not for other damage, as this would interfere with the subject-matter jurisdiction of other (ordinary) courts.[52] Such damage must be claimed by the plaintiff before the courts of general jurisdiction.

As a rule, the filing of an action in an administrative dispute does not have suspensive effect,[53] which means that the administrative act can be enforced, and the concession contract concluded on its basis. In practice, a court may therefore subsequently find that the administrative act based on which the contract was concluded is unlawful. This raises the question of the validity of a concession contract concluded based on such an administrative act. A particular problem arises in situations where such a contract has already been fulfilled, which may happen in practice, given the length of time it takes to resolve court cases. The average time taken to resolve cases before the Administrative Court was 14.9 months in 2021 and 13.7 months in 2020, which shows that the duration of proceedings is increasing.[54]

If the court annuls the administrative act, it shall return the case to the authority that issued the administrative act for new adjudication. Depending on the content of the case, the court may also annul other acts issued in the procedure for issuing the contested administrative act.[55] The case shall be returned to the state in which it was before the annulled administrative acts were issued.[56] However, this power applies only to acts which were adopted in the context of the procedure for the adoption of the administrative act, and not to acts adopted after that stage, including the con-

[49] Decision of the Administrative Court of the Republic of Slovenia of 5 December 2016, no. I U 1689/2016.

[50] Article 33 (1) ZUS-1; Article 68 ZUS-1.

[51] Article 7 (2) ZUS-1.

[52] P. Golob, [in:] *Zakon o upravnem sporu: s komentarjem*, ed. E. Kerševan, Ljubljana 2019, pp. 383–384.

[53] Article 32 (1) ZUS-1.

[54] For more on this, see Act amending and supplementing the Administrative Disputes Act, Draft, EVA 2021-2030-0018, 22.11.2021, https://e-uprava.gov.si/.download/edemokracija/datoteka-Vsebina/523326?disposition=inline (access: 21.1.2023), p. 8; Republic of Slovenia, Supreme Court, *Annual Report on the Efficiency and Effectiveness of the Courts 2021*, Ljubljana, May 2022, https://www.sodisce.si/mma_bin.php?static_id=2022051615093292 (access: 5.1.2023), p. 40.

[55] Article 64 (3) ZUS-1.

[56] Cf. T. Steinman, [in:] *Zakon o upravnem sporu*..., p. 364.

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tractual stage. In theory, once the administrative act has been reversed, the contract should be terminated and the matter should be restored to its pre-contractual status, with a new decision being adopted as the basis for a new contract. But the current legal framework does not allow this. Moreover, under the ZJZP, the Administrative Court has the power not to annul the decision on the selection of the private partner, but only to declare it unlawful and, at the plaintiff's request, to award damages or refer the plaintiff to litigation to claim compensation, if the annulment of the decision or other act would impose a disproportionate burden on the private partner, which had been performing the contract up to that point. However, compensation for damages is not adequate compensation for the tenderer with whom the contract would have been awarded if there had been no infringement of the rules in the award of the concession contract.[57] According to case law,[58] the unsuccessful tenderer is only entitled to compensation for the negative contractual interest, which mainly covers the costs of preparing the tender, and not to compensation for lost profits, as is typical of many comparative legal systems (e.g. French, German).[59]

A possible solution to this problem theoretically exists in the form of interim injunctions. The administrative court may grant an interim injunction if this is necessary to avoid irreparable damage that could result from the execution of an administrative act.[60] Therefore, if a third party challenged the legality of the decision before the conclusion of the contract and requested an interim measure from the court, the court would be empowered to prohibit the conclusion of the contract until the judgment had become final.[61] However, the issuance of an interim injunction in accordance with Article 32 (2) ZUS-1 is not possible in the case of concession contracts, since the concession decision (the act of selecting the concessionaire) is not executed in an administrative procedure, and therefore, suspension of such a decision is also not possible either. On the other hand, an interim injunction for the purposes of provisional regularisation pursuant to Article 32 (3) ZUS-1 is not excluded in these relationships.[62] This provision provides that the court may issue interim injunction to temporarily regulate the situation in connection with the contentious legal relationship, if it appears likely that such regulation is necessary,

[57] D. Možina, *Odškodninska odgovornost v zvezi s postopki javnega naročanja*, "Podjetje in delo" 2018, vol. 22(1), pp. 21–22.

[58] See judgments and decisions of the Higher Court in Ljubljana: of 13 October 2015, no. I Cpg 253/2015; of 16 September 2015, no. I Cpg 1731/2013. See also judgments of the Supreme Court of the Republic of Slovenia: of 25 September 2012, no. III Ips 147/2009; of 13 December 2001, no. III Ips 20/2001.

[59] For more, see H. Schebesta, *Damages in EU Public Procurement Law*, Switzerland 2016, pp. 117–152.

[60] Article 32 ZUS-1.

[61] Similary F. Staničić, *op. cit.*, pp. 239–241.

[62] Decisions of the Supreme Court of the Republic of Slovenia: of 15 January 2001, no. I Up 1208/2000; of 7 March 2001, no. I Up 272/2001.

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particularly in lasting legal relationships. Since a concession relationship is, by its very nature, a legal relationship of a lasting nature, in which serious and irreparable damage may result from the execution of an administrative act (and the subsequent conclusion of a contract), the conditions for the granting of such an interim injunction may be fulfilled.[63] However, administrative courts have so far not recognised the interim injunction as a useful instrument for resolving such cases.[64]

2.1.2. Legal protection under the provisions of the ZPVPJN

The ZPVPJN provides legal protection in the pre-review procedure before the grantor, in the review procedure before the National Commission for the Review of Public Procurement Procedures (in Slovene: *Državna komisija za revizijo postopkov oddaje javnih naročil*, hereinafter: the DKOM), and in the court procedure before the District Court in Ljubljana as the only territorially competent court in Slovenia.[65] In the court procedure, the plaintiff may claim that the contract is voidable and seek damages for breach of the rules governing the conclusion of concession contracts.[66] Judicial protection before the Administrative Court (administrative dispute) is provided against the DKOM decisions, but it is limited to enforcing a declaratory claim, and is excluded in cases envisaged by law.[67]

The pre-review procedure starts with the lodging of a review request to the grantor. Any person who has or had an interest in the award of the concession and who has or may have suffered damage because of the alleged infringement, as well as the defender of the public interest, shall be entitled to lodge a request for a review in the pre-review and review procedure.[68]

The lodging of a request for review leads to a standstill period during which the grantor cannot conclude a concession contract with the successful tenderer, i.e. until the decision on the selection of the concessionaire has become final. Upon receipt of a request for review, the grantor shall verify that the procedural prerequisites are met. If there are no grounds for rejecting the request, the grantor shall accept it for consideration. The continuation of the proceedings before the DKOM occurs when the grantor dismisses the request for review as unfounded, when the request for review is granted and the procedure for the award of the concession is only partially

[63] A. Mužina, *Koncesije: pravna ureditev koncesij v Sloveniji in EU*, Ljubljana 2004, pp. 571–573.

[64] For more, see E. Kerševan, *Začasna odredba v upravnem sporu*, [in:] *Državna uprava, ustavna demokracija in mednarodno pravo: Liber Amicorum Anton Jerovšek*, ed. P. Jambrek, Ljubljana 2022, pp. 143–146.

[65] Article 2 ZPVPJN.

[66] Article 49 (1) ZPVPJN.

[67] Article 39a ZPVPJN.

[68] Article 14 and Article 6 (2) ZPVPJN.

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annulled, and the applicant lodges a timely request for the initiation of the review procedure with the grantor, or in the case of the grantor's silence, when the request for the initiation of the review procedure is received by the grantor. In these cases, the law requires the grantor to provide the DKOM with all documentation on the concession award procedure and all documentation on the pre-review procedure.[69]

The review procedure starts when the DKOM receives a request for review from the concessionaire. The DKOM cannot therefore initiate the procedure *ex officio*. It may grant the request for review and annul the concession award procedure, in whole or in part, or order the grantor to remedy the breaches, reject the request for review, or simply find that the request for review is justified, if the breaches identified in the review procedure cannot be remedied.[70] The DKOM therefore cannot replace the grantor's decision by its own decision, nor can it select (another) tenderer.[71] It must take its decision within 15 working days of receiving a complete request and all documentation. In justified cases, it may extend the time limit by a maximum of 15 working days, in which case it must inform the grantor, the applicant and the successful tenderer before the expiry of the time limit.[72]

In 2021, the DKOM resolved review requests within an average of 16.24 working days from the receipt of a complete review request and all documentation, or 26.88 working days from the receipt of the review request.[73] It can be concluded that the DKOM decides relatively quickly and significantly faster than the administrative courts.

The new Article 39a ZPVPJN regulates an administrative dispute against decisions of the DKOM. The action must be brought within 30 days of notification of the DKOM decision. A decision of the DKOM which is the subject of a challenge in an administrative dispute is nevertheless enforceable in accordance with the provisions of the ZUS-1.[74] Although not expressly provided for by law, the ZUS-1 applies in the event of an administrative dispute, except in cases where the ZPVPJN provides otherwise. Therefore, if the request for review is dismissed, the grantor and the successful tenderer will be able to conclude the contract irrespective of any administrative disputes. Moreover, the ZPVPJN also excludes the possibility of interim injunctions, which are otherwise admissible in an ordinary administrative dispute.[75]

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[69] Article 29 ZPVPJN.

[70] Article 39 ZPVPJN.

[71] J. Tekavc, *Zakon o pravnem varstvu v postopkih javnega naročanja*, "Pravna praksa" 2013, vol. 32(1), p. 30.

[72] Article 37 (1) ZPVPJN.

[73] DKOM, Poročilo o delu 2021, https://www.dkom.si/mma/Poro__ilo_o_delu_2021.pdf/20220607112309 42/?m=1654593789 (access: 22.1.2023), p. 42.

[74] Article 32 (1) ZUS-1.

[75] Article 39a (3) ZPVPJN.

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The plaintiff is limited in the claims he can bring, as he can only seek a declaration that the DKOM decision is unlawful (declaratory action). This means that the decision of the DKOM is still valid and final. An administrative dispute against decisions of the DKOM is also not admissible where the request for a review has been lodged against the invitation to tender, the content of the publication or the tender documentation and where the contract in question is awarded following a small value procurement procedure (which will be particularly relevant in the field of public procurement) or a tendering procedure following prior publication.[76] In addition, in an administrative dispute against a decision of the DKOM, it is not possible to claim compensation for damages. The plaintiff will therefore have to bring a separate legal action to claim the damages suffered. The Administrative Court must decide on the action within 90 days of receipt.[77] The decision of the Administrative Court is not subject to appeal,[78] but extraordinary remedies are available, as they are not expressly excluded by law.

2.2. *Ex post* legal protection

Legal protection in relation to the performance of the concession contract is divided between public law and private law protection. If the grantor issues administrative acts in connection with the performance of the concession contract, the concessionaire may challenge the legality of these acts in an administrative procedure and/or in an administrative dispute. However, if the dispute relates to a matter governed by the rules of contract law, it shall be decided by the courts of general jurisdiction.

This distinction is especially characteristic of the various forms of termination of the concession relationship, including revocation of the concession[79] (a public law form) and termination of the concession contract for breach (a private law form). If the concession is revoked by an administrative decision of the grantor, the concessionaire will have to seek legal protection against the decision in the administrative sphere. On the other hand, if the contract is terminated, the concessionaire will have to seek legal protection in the civil sphere – before the courts of general jurisdiction.

However, it is often difficult to distinguish between the revocation of a concession for breach of contract and the contractual sanction of termination of the contract. In many cases, sectoral laws do not include a clear demarcation and refer to the same breach as a ground for both termination of the contract and revocation

[76] Article 39a (4) ZPVPJN.
[77] Article 39a (6) ZPVPJN.
[78] Article 39a (7) ZPVPJN.
[79] R. Pirnat, *Koncesijska pogodba*, "Podjetje in delo" 2003, no. 6–7, pp. 1607–1618.

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of the concession.[80] In accordance with the position held by administrative theory[81] and jurisprudence,[82] the essential distinctive feature separating the revocation of a concession as a result of a breach and the termination of a concession contract lies in the fact, that in the case of revocation of a concession, not only has a breach of a concession contract occurred, but also a breach of public legal acts governing the concession (e.g., a concession act, decisions on the unilateral amendment of the contract, decisions issued by the grantor in the process of supervision). The termination of the contract is, *a contrario*, a sanction only for a breach of the contract and not for the breach of other legal acts. However, such a delimitation does not necessarily stem from the legislation, since often a certain (the same) reason in some cases constitutes a circumstance justifying the termination of the contract and in others the revocation of the concession. Thus, for example, according to the ZZDej,[83] the fact that the concessionaire has partially or completely ceased the activity that is the subject of the concession is a reason for revocation, and according to the ZV-1[84] this is a reason for the termination of the contract.

Such a regulation leads to a difficult delimitation of jurisdiction, which results in the delegation of cases between courts and, consequently, in lengthy proceedings. It may also happen that a decision on a dispute arising out of a concession contract depends on a decision of an administrative court on the legality of administrative acts issued in connection with such a contract. This applies in particular to issues governed in part by civil law rules and in part by public law rules. To fully protect its position in a dispute, a plaintiff must therefore initiate two types of legal proceedings: one before an administrative court concerning the legality of administrative acts, and the other before a court of general jurisdiction concerning the performance of an administrative contract, and often also a dispute for damages.

The above-mentioned problem is well illustrated by the case of *Bitenc Pharmacy*. On 19 October 2009, the Municipality of Ljubljana (the MOL), as the grantor, terminated the concession contract of indefinite duration with Bitenc Pharmacy for nonculpable reasons. After the termination of the concession contract, the MOL revoked the concession by decision. Bitenc Pharmacy initiated two court proceedings: an administrative dispute against the decision to revoke the concession and a commercial dispute concerning the termination of the concession contract. The concessionaire succeeded in an administrative dispute – the Administrative Court,

[80] Cf. Article 56 ZLD-1; Article 44j ZZDej; Articles 58 and 59 ZRud-1.

[81] R. Pirnat, *Koncesijska pogodba de lege ferenda*, [in:] *VIII. dnevi javnega prava, Portorož, 10–12 junij 2002, Inštitut za javno upravo*, Ljubljana 2002, p. 724.

[82] Judgment of the Administrative Court of the Republic of Slovenia of 19 January 2010, no. III U 90/2009.

[83] Article 44j (1) ZZDej.

[84] Article 146 ZV-1.

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in a final judgment of 22 January 2010,[85] upheld the action, annulled the decision to revoke the concession and referred the case back to the MOL for reconsideration. The Administrative Court's assessment related to the question of whether there was a culpable reason for the revocation of the concession in the specific case. In resolving this question, the Administrative Court also indirectly addressed the question of the legality of the termination of the concession contract by taking the view "that the right to terminate the concession contract belongs only to the concessionaire" and that "the regulatory framework does not allow the grantor to terminate the concession unilaterally without culpable reasons on the part of the concessionaire". Thus, the Court *de facto* ruled on a question which falls within the jurisdiction of the ordinary courts. The commercial dispute brought by the concessionaire over the unlawful termination of the concession contract lasted until 2015, when the Supreme Court found[86] that the termination of the concession contract was lawful. It stated that Article 18 ZLD must be interpreted in the context of Article 16 ZLD, both of which together do not exclude the possibility of interpreting that the concession may also be revoked by the grantor because of the termination of the concession contract. The Court thus implicitly addressed the question of the legality of the revocation of the concession, which falls within the exclusive competence of the Administrative Court. The concessionaire filed a constitutional appeal against the Supreme Court's judgment, which was decided by the Constitutional Court on 14 March 2019.[87] The Constitutional Court stated that the Supreme Court, by taking a completely different position than the Administrative Court on the same (sic!) legal issue, i.e. on the issue of the legal grounds for termination of the concession for pharmacy activities, had interfered with the final judgment of the Administrative Court and thus violated the right to judicial protection under Article 23 of the Constitution of the Republic of Slovenia (in Slovene: *Ustava Republike Slovenije*).[88] For the above reason, the Court annulled the judgment of the Supreme Court and referred the case back to the Supreme Court for reconsideration. On 24 September 2019, the Supreme Court adopted its final decision, upholding the concessionaire's arguments that the termination of the concession agreement was unlawful.[89]

[85] Judgment of the Administrative Court of the Republic of Slovenia of 22 January 2010, no. I U 2155/2009-21.

[86] Judgment of the Supreme Court of the Republic of Slovenia of 28 October 2015, no. III Ips 64/2014.

[87] Decision of the Constitutional Court of the Republic of Slovenia of 14 March 2019, no. Up-95/16-28.

[88] Official Gazette of the Republic of Slovenia, no. 33/91-I, as amended.

[89] Judgment of the Supreme Court of the Republic of Slovenia of 24 September 2019, no. III Ips 20/2019-7.

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The decision of the Constitutional Court is controversial because, in the light of the normative regime, the courts should never decide on the same legal issue – the Administrative Court decides on the legality of the revocation of the concession, while the ordinary court decides on the legality of the termination of the concession contract. This supports the finding that the delimitation of jurisdiction between the administrative court and the court of general jurisdiction in the case of concession contracts is very difficult.

CONCLUSIONS

Slovene law does not regulate legal protection in relation to concession contracts in a uniform way – as is typical for Polish and Croatian law – but rather depending on the type and value of the concession. Concessions falling within the scope of EU law are subject to the rules of the ZPVPJN, while others are subject to national rules which provide for such protection through an administrative procedure and/or an administrative dispute. Despite the challenge to the administrative act by which the tenderer was selected, the contract can be concluded and implemented, which is particularly problematic since in the case of concession contracts it is not possible to issue an interim injunction to temporarily suspend the execution of the administrative act. The unsuccessful tenderer may only be entitled to compensation for breach of the rules governing the conclusion of the concession contract. However, the tenderer is only entitled to compensation for negative interest, which does not include lost profits. Reimbursement of the mere costs of preparing the tender or participating in the tender is not adequate compensation for the tenderer with whom the contract would have been concluded if the rules had not been infringed. It is therefore necessary to unify the legal remedies for concession contracts and to establish mechanisms in Slovene law that will effectively protect the legal position of the affected tenderer.

Judicial protection against decisions of the DKOM is ineffective, as the plaintiff has only a declaratory action. In this respect, the Slovene regime differs significantly from the Croatian and Polish legal system, where the High Administrative Court and the Public Procurement Court also have reformatory powers. Moreover, under Article 39a ZPVPJN, the Administrative Court – unlike the general regime – cannot award damages to a tenderer, but the tenderer must separately claim them in civil proceedings, which shows the inconsistency of the legal order. However, the ordinary court is not bound by the decision of the Administrative Court in finding that DKOM's conduct is unlawful, but makes that finding independently, so that the benefit of the Administrative Court's judgment is only indirect. As practice shows, this is certainly not a reason for the unsuccessful tenderer to initiate an administrative dispute and to pay the related costs. From 1 January 2021, when Article 39a ZPVPJN became applicable, until September 2022, only nine actions

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had been brought, two had been withdrawn,[90] four judgments[91] had been delivered and three more were pending. It would be considerably more economical to have a regime which would allow the unsuccessful tenderer to obtain the annulment of the unlawful decision of DKOM and to obtain the contract in a new procedure. This would eliminate the claim for damages, which undoubtedly places a greater burden on the State, since, in addition to paying the (unlawfully) successful tenderer, it must also compensate the unsuccessful tenderer, with whom it would have had to conclude a contract if there had been no infringement of the rules governing the award of the concession. The first hypothesis must therefore be rejected.

The division of jurisdiction between the administrative and ordinary judiciaries in relation to the concession contract raises the question of the effectiveness of judicial protection. It is not *a priori* inadmissible for one, two or even several courts to decide on rights and obligations arising out of a factual and legal relationship which can be understood as a complete life whole, or even whether the courts are of the same or different types, since the courts which decide on such a relationship act externally as a single judicial authority. However, such a regulation can become problematic if it significantly prolongs the proceedings, leading to an interference with the right to effective judicial protection and legal certainty. The second hypothesis can thus be partially confirmed.

To avoid the delegation of cases between different courts, a single court should be chosen to have jurisdiction over all disputes relating to the concession contract, if no other judicial remedy is available. This should be an administrative court, since the concession contract has specific administrative law elements that bring it within the sphere of administrative law. The jurisdiction of the administrative courts to decide on all disputes relating to administrative contracts is also a feature of Croatian law. However, the transfer of jurisdiction from the courts of general jurisdiction to the administrative courts requires radical changes in the rules governing administrative disputes. In addition to the legal adjustments, organisational adjustments must also be made. Due to the increasing workload and the new competences of the Administrative Court, administrative justice has already been identified in 2021 as a priority area where measures should be introduced in order to solve cases more efficiently and effectively.[92] The possible addition of competences, without the concomitant adoption of organisational measures and other adjustments, would thus only exacerbate the backlog of cases.

[90] See decisions of the Administrative Court of the Republic of Slovenia: of 19 August 2021, no. I U 499/2021; of 23 August 2021, no. I U 534/2021.

[91] See judgments of the Administrative Court of the Republic of Slovenia: of 6 September 2021, no. I U 594/2021; of 11 October 2021, no. I U 863/21; of 29 November 2021, no. I U 1172/2021; of 17 August 2022, no. I U 631/2022.

[92] Republic of Slovenia, Supreme Court, *op. cit.*, p. 40.

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Judgment of the Supreme Court of the Republic of Slovenia of 24 September 2019, no. III Ips 20/2019-7.

ABSTRAKT

W artykule omówiono ochronę prawną udzielania koncesji w prawie słoweńskim. Głównym celem jest określenie problemów związanych z obecnym trybem udzielania koncesji i zaproponowanie pewnych rozwiązań. Osiągnięcie tego celu wymagało skorzystania z porównawczej i dogmatycznej metody badawczej. Autorka zwraca uwagę, że ochrona prawna zależy od rodzaju i wartości koncesji. W przypadku koncesji objętych zakresem dyrektywy 2014/23/UE udzielana jest zgodnie z przepisami dyrektyw Unii Europejskiej w sprawie ochrony prawnej, podczas gdy inne koncesje podlegają przepisom prawa krajowego. Ochrona prawna różni się również w zależności od tego, czy spór wchodzi w zakres prawa administracyjnego czy też prawa cywilnego. Spory na gruncie prawa publicznego są zazwyczaj rozstrzygane przez sądy administracyjne, a spory na gruncie prawa cywilnego – przez sądy powszechne. Taki system może kolidować z prawem do skutecznej ochrony sądowej, ponieważ często nie istnieje wyraźna linia podziału między ochroną na podstawie prawa publicznego i prawa prywatnego. Może to prowadzić do delegowania spraw między różnymi organami oraz do przewlekłości procesu decyzyjnego. Autorka uważa, że wszelkie spory dotyczące udzielania koncesji powinny być rozstrzygane przez jeden sąd – Sąd Administracyjny. Ponadto konieczne jest

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ustanowienie mechanizmów zapewniających skuteczną ochronę niewybranych ofert, ponieważ obecny system prawny nie przewiduje takiej ochrony. Nowość prezentowanych badań polega na tym, że dotychczas nie ukazała się żadna praca naukowa podejmująca omawianą problematykę. Zdaniema autorki praca ma wartość poznawczą zarówno dla nauki, jak i dla praktyki.

Słowa kluczowe: koncesje; ochrona prawna; akt administracyjny; spór administracyjny; procedura kontroli

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