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**The Regime of Concessions for the Nautical Tourism Ports in Croatia –
Practical Problems and Harmonization with the EU Law**

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Legal status of maritime domain

Constitution of the Republic of Croatia

- sea, seashore and islands are of interest to the Republic of Croatia and enjoy its special protection

Act on Ownership and other Real Rights

- sea and the seashore are common goods - *res extra commercium*
- Republic of Croatia takes care, administers and is responsible for common goods

Maritime Domain and Seaports Act

- maritime domain is a common good of interest to the Republic of Croatia
 - ports are part of maritime domain
 - economical exploitation – on the basis of **GRANTED CONCESSION**

Concession granting procedure – applicable law?

A) *Lex specialis*:

Maritime Domain and Seaports Act / 2003

Regulation on Concession Granting Procedure on the Maritime Domain / 2004

B) *Lex generalis*:

Concession Act / 2008

Concession Act / 2012

- aimed at raising transparency and quality of concession granting procedure
- aimed to be applicable to all concession granting procedures

Lex posterior derogat legi priori.

BUT

Lex posterior generalis non derogat priori specialis.

Concession granting procedure – applicable law in practice

1. CONCESSION GRANTORS

- a) MDSPA and Regulation
- b) MDSPA, Regulation and Concession Act

3. MINISTRY OF THE SEA, TRANSPORT AND INFRASTRUCTURE

- aware of discrepancies
- apply MDSPA primarily

2. STATE COMMISSION FOR CONTROL OF PUBLIC PROCUREMENT PROCEDURE

- since 2011 dismissed numerous appeals regarding decisions on concession granting on maritime domain due to lack of jurisdiction, referring to the MDSPA

4. ADMINISTRATIVE COURT IN RIJEKA

- Ruling Usl-1972/14-4, from 13.11.2015.
- MDSPA and its by-laws should have primacy over Concession Act; Concession act should be applied subsidiary

Concession granting procedure, MDSPA

Concession for nautical tourism port

- no special provisions on concession granting procedure
- appropriate application of general provisions on concession granting procedure on maritime domain

How to initiate the concession granting procedure?

1. Initiative for concession granting procedure – any natural or legal person
2. Competent body examines
 - a) is the area maritime domain entered into land register
 - b) verifies compliance of the planned interventions on maritime domain with physical plans

Boundaries of maritime domain and its publication in land registers

- boundaries of maritime domain are only partially determined
- very often the status of maritime domain is not published in land registers
 - there is no legal obligation for its registration (no subject to ownership)
 - possibility of its entry – 'common good shall be entered into land registers if so requested by any person having a legal interest therein' (Art. 17/3 Land Registration Act)
- from 2003. - obligation to determine the boundaries of maritime domain and its entry into land registers are prescribed as statutory requirements for concession granting (Art. 7/4 MDSPA)
 - intention was to increase legal certainty
 - commendable for the new ports

Entry into land registers as a statutory requirement for concession granting in existing nautical tourism ports?

- incompatibility of the state in land registers and real state
- numerous complex proprietary problems regarding maritime domain
 - number of ownership and other proprietary rights acquired and registered (both valid and invalid legal basis)
 - hampers the registration process

Whose problem is unregistered maritime domain?

- 1. Republic of Croatia?**
 - maritime domain enjoys special protection (Constitution)
 - takes care, administers and is responsible for common goods (AOR)
 - should pay compensation to registered owners with valid legal basis for acquisition (Law on expropriation and compensation)
 - 1/3 of concession fee is paid to state budget
- 2. Concession grantor?** - shall initiate the procedure for the entry into the land register (Concession Act, Art. 63)
- 3. County / town or municipality?** – 1/3 of concession fee is paid to county budget and 1/3 to town or municipality budget
 - unregistered maritime domain will block the concession granting processes, and existing ports will remain abandoned and inactive
- 4. Concessionaires and investors?** – for major investments building licences may be obtained only if whole port is entered into land register as a maritime domain

Concession granting procedure

The competent body decision on public tender for concessions shall contain:

1. the type and scope of economic exploitation
2. **INFORMATION ON WHAT SHOULD CONTAIN THE FEASIBILITY STUDY**
3. the initial amount of concession fee
4. the period of time for which the concession is being granted
5. public tender period
6. information about public opening of tenders
7. other relevant information by which eligibility for concession can be proved
8. an excerpt from Detailed Environmental Plan or a location permit.
9. **THE AWARD CRITERIA** (Art. 21 of the Regulation on Concession-granting)

Feasibility study

1. contains the amount of investments and the mode of depreciation
2. proves that the tender has adequate technical, professional and organizational capacities for realization of the concession
3. proves that the tender has the guarantee for realization of the plan and program for realization of the concession

Shall be drawn up in accordance with the content and in the form set out in the tender documentation.

Concession grantor may require detailed study but does not have to.

Criteria for the evaluation of the tenders

set by

The Regulation on Concession Granting Procedure on Maritime Domain

	until 2/2017	from 2/2017
1. offered amount of fixed part of concession fee,	20%	30%
2. offered amount of variable part of concession fee,	10%	30%
3. offered amount of total investment according to feasibility study	25%	40%
4. revenues from main business in previous year	15%	
5. profit made in previous year	15%	
6. number of newly created jobs	5%	
7. tender's experience in performing activities in a field for which concession is granted	10%	

Would Concession Act help?

Two possible criteria:

1. **economically most advantageous tender** from the concession grantor's stance when it meets the criteria of the object of the concession in question, for example: quality, which includes technical merit, aesthetic, innovation, functional and environmental characteristics, running costs and management costs, cost-effectiveness, after-delivery service and technical assistance, delivery date and delivery period or period of completion of works, price of the service for the final beneficiaries, the amount of the concession fee, or
2. **highest fee offered** for the concession.

- **PROBLEM!** at the **discretion of the concession grantor**

Valorisation of legitimate investments which increased the value of the maritime domain

In frame of DELICROMAR project we interviewed marinas concessionaires in ACI, Dogus Group, Kaštela, Punat, Zadar, Baotić, Service Center and Marina Trogir, etc.

PROBLEM! By expiry of the concession, former concessionaire does not have the right to compensation for the investments he made.

Investments in the NTPs, either in **construction of new ports**, or in **reconstruction of the existing facilities**, increase the value of the maritime domain.

Possible solutions - Croatian Law and EU Law

Compensation for former concessionaire could be made in form of:

- a right to **priority concession** or statutory right to be granted **concession at request**
- **privileged position** in concession granting
- **extension** of the concession period
- **monetary compensation**

Croatian Law- Extension of the concession (Art. 22 MDSPA)

Exceptionally, at the request of the concessionaire,

- ✓ county government can, with consent of the Government of the Republic of Croatia, extend concession period to total of 30 years
- ✓ the Government of the Republic of Croatia can extend concession period to total of 60 years

and, can change other conditions specified in the concession-granting decision and in concession contract, but only :

- if new investments justify this economically,
- in case of a *force majeure*.

Monetary compensation in case of revocation of concession

- *Art.29/2 MDSA* only in the event of revocation of concession the concessionaire shall be fully entitled to compensation of expenses for structures which belong to maritime domain, in proportion with the period of time of which he has been deprived in using the concession.
- *Art. 33 MDSA* if concessionaire has built something on maritime domain on the basis of the concession, he has right to remove all additions which are not permanently attached to maritime domain if it is possible without substantial damage to maritime domain. Other buildings and structures, indivisible from maritime domain shall be considered as it's part - no compensation !

EU Law - Directive 2014/23/EU on the award of concession contracts

- Recital 15 agreements having as their object the right of an economic operator to exploit certain public domains or resources, such as land or any public property, in particular in the maritime, inland ports or airports sector, where State establishes only GENERAL CONDITIONS FOR THEIR USE WITHOUT PROCURING SPECIFIC WORKS OR SERVICES, should not qualify as concessions within the meaning of this Directive.
- Examples: PUBLIC DOMAIN OR LAND LEASE CONTRACTS.

Directive 2014/23/EU on the award of concession contracts

- **Art.43** regulates only possibilities of modification of concession during its term when a new concession award procedure is not required- **NO AUTOMATIC RENEWAL OR EXTENSION OF CONCESSION PERIOD !**
- The main feature of a concession is transfer to the concessionaire of an operating risk of economic nature involving the possibility **that he will not recoup the investments made in operating works and services.**

Automatic extension of concession in practice CJEU

- In joined cases *C- 458/14* and *C-67/15 Promoimpresa srl v Consorzio dei comuni della Sponda Bresciana del Lago di Garda e del Lago di Idro* and *Mario Melis and others v the Comune di Loiri Porto San Paolo* initiated at requests for a preliminary ruling from Italian courts CJEU decided:
- „Article 12/1 and 2 of Directive 2006/123/EC on services in the internal market must be interpreted as precluding a national legislation, which permits the automatic extension of existing authorisations for exploitation of State-owned maritime and lakeside property for tourist and leisure-oriented business activities, without selection procedure for potential candidates.”

Automatic extension of concession in practice CJEU

- CJEU considered that exploitation of State-owned maritime and lakeside property for tourist activities is not a concession, within the meaning of EU law, because this kind of authorisation does not concern the provision of a particular service entrusted by the contracting authority, but it is an authorisation to exercise an economic activity on State-owned land.
- Should not be qualified as concession ! Directive 2014/23/EU (Recital 15).
- Directive 2006/123/EC on services in the internal market is applicable.

Art. 12 of the Directive 2006/123/EC and concessions

- ✓ number of authorisations is limited because of the scarcity of available natural resources
- ✓ authorisation procedure provides full guaranties of impartiality, transparency and publicity
- ✓ authorisation shall be granted for an appropriate limited period, no automatic renewal of authorisation is allowed
- ? no advantage on the provider whose authorisation has just expired (or is about to expire)
- ? is it applicable on concessions for NTPs

The Law on Providing Tourism Services (LPTS)



Tourist services in nautical tourism ports (Art. 45 LPTS)

1. berthing services for vessels and tourists-sailors staying aboard
2. lease of vessels with or without crew (charter, cruising...)
3. services of manoeuvring the vessels for tourists-sailors
4. accommodation, safeguarding and maintenance of vessels at berth in sea and in dry dock
5. services of supplying tourists-sailors (with water, fuel, groceries, spare parts, equipment...)
6. equipping and preparing of vessels
7. providing various information to tourists-sailors (forecasts, nautical guides and the like)
8. other services for the purposes of nautical tourism

Are they port services?

Port services are excluded from the scope of Directive 2006/123/EC (Art.2/2/d) !



Services provided in NTPs

- ✓ by their nature are prevalingly tourism and leisure-oriented
- ✓ Directive 2006/23/EC could apply on concessions for NTPs
- ✓ no automatic renewal of concessions for NTPs is allowed

Conclusion

- Numerous problems in practice – necessity of adopting new, comprehensive and accurate regulatory framework MDSPA
 - resolve open issues of acquired ownership – carry out expropriation
 - make every effort in putting in order land registers regarding ports of nautical tourism
- According to EU Law, by expiry of the concession, former concessionaire does not have the right to compensation
- Reasons ? Possible market foreclosure and restriction of competition
- Under Croatian Law - extension of concession period, monetary compensation only in case of revocation of concession
 - ? compatibility with EU Law
 - ? adverse effect on development of maritime domain and NTPs

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THANK YOU FOR YOUR ATTENTION!

