ENTERPRISES WITH THE MUNICIPAL PROPERTY SHARE IN LEGAL DOCUMENTS ON THE NATIONAL AND LOCAL LEVEL

PODNIKY S MAJETKOVOU ÚČASŤOU MIEST V LEGISLATÍVNYCH DOKUMENTOCH NA NÁRODNEJ A MIESTNEJ ÚROVNI

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I. Introduction

Constitution of the Slovak Republic as a basic legal act guarantees the right of Slovak self-government to own and to use their property. The main purpose of the municipal property usage is to ensure the needs of inhabitants living in the territory while the public interest must be kept as a priority.

The municipal property ownership can significantly influence the level of economical development of the municipality. Municipalities have greater freedom in dealing with their own property in comparison with other rights connected to other budget revenues⁽¹⁾. There are determined three main purposes of the municipal property usage⁽²⁾:

- self-governmental purposes – securing of the self-gov-

ernment functions (execution of the original and transferred competencies,

- public purposes – providing of the public services,
- entrepreneurial activity.

According to the theory, especially the tangible fixed asset as well as the asset directly determined for the enterprising is used for the entrepreneurial purposes after securing all of the original and transferred competencies as well as the public services⁽³⁾. The more effective is the municipal property usage the less dependent is the self-government on the state budget⁽⁴⁾. On the other hand, there are many obstacles in the sphere of entrepreneurship for example non-effective links towards the Social Insurance Agency, Customs Administra-

⁽¹⁾ KAGANOVA, O. – STONE, R.N.: Municipal Real Property Asset Management: An Overview of World Experience, Trends and Financial Implications. In: Journal of Real Estate Portfolio Management. 2000, vol. 6, no. 4, s. 307 – 326.

⁽²⁾ ŠVANTNEROVÁ, L. – KOŽIAK, R.: Ekonomika miestnej samosprávy, Banská Bystrica: EF UMB, 2005, s. 96, ISBN 80-8083-117-3.

⁽³⁾ ŽÁRSKA, E. et al.: Komunálna ekonomika a politika, Bratislava: Ekonóm, 2007, s.192, ISBN 978-80-225-2293-9.

⁽⁴⁾ TEJ, J.: Správa a manažment, Prešov: UPJŠ, 2007, s.232, ISBN 978-80-89040-33-9.

Abstract (EN)

Municipal enterprising in particular using of municipal property for entrepreneurial purposes is a phenomenon, which is widespread among Slovak municipalities as well as abroad. There are different purposes for what these enterprises are established e.g. agriculture, provision of all range of public services as well as other typical commercial activities. There are numerous issues connected with this phenomenon while legislative regulation is with no doubt one of those, which must be tackled among the firsts. The paper provides an analysis of different existing legal documents which have been adopted in Slovak condition and which have implication on regulation of municipal enterprising. The documents on national as well as on local level were the subject of the research while missing unified definition, very generally formulated regulations, usage of outdated legislation and lack of transparency were identified as the main issues which need to be addressed.

Keywords (EN)

legal regulation of municipal entrepreneurship, municipal property, enterprises with municipal property share

Abstrakt (SK)

Podnikateľské aktivity miestnych samospráv a využívanie samosprávneho majetku na podnikateľské účely je fenomén prítomný v mnohých mestách nielen na Slovensku ale aj v zahraničí. Podniky s majetkovou účasťou miest sú zamerané na rôzne účely ako napr. poľnohospodárstvo, poskytovanie verejných služieb alebo iné komerčné aktivity. V praxi existujú mnohé problémy spojené s týmto fenoménom, pričom právna úprava je bezpochyby jedným z tých, ktoré by mali byť adresované medzi prvými. Príspevok sa zameriava na analýzu rôznych existujúcich právnych dokumentov, ktoré boli prijaté v podmienkach Slovenska a ktoré majú dopad na úpravu podnikov s majetkovou účasťou mesta. Predmetom záujmu boli dokumenty jednak na národnej a jednak na miestnej úrovni, pričom boli identifikované nasledovné problémy: chýbajúca jednotná definícia podnikov s majetkovou účasťou miest, príliš všeobecná formulácia právnej úpravy najmä na miestnej úrovni, využívanie zastaralej a právne prekonanej legislatívy a tiež nedostatočná miera transparentnosti.

Kľúčové slová (SK)

právna úprava podnikania miest, mestský majetok, podniky s majetkovou účasťou miest

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tion and other institution of the state administration⁽⁵⁾. These obstacles within the area of municipal entrepreneurship could be also completed by the missing and insufficient legal regulations dealing with the observed area. That fact was the reason why this paper focuses on the analysis of those regulation while the emphasis is firstly put on the national level and then on the local level.

II. Analysis of the legal regulations on enterprises with municipal participation at the national level

Using of the public or municipal property for the entrepreneurial purposes is in the Slovak conditions performed by three main ways and those are enterprising in the form of commercial companies, by using the municipal contributory and budgetary organizations and finally, especially in case of smaller municipalities, enterprising in own name according to the trade licensing act.

The main legislation framework for the commercial companies is given by the Commercial Code, which in case of each commercial company states the general provisions, issues regarding the basic capital, rights and obligations of the partners, legal relationships towards the third parties, company bodies, rules of setting up the business, cancellation and liquidation of the business⁽⁶⁾. Limited liabilities companies and join stock companies are the most common legal entities in the field of enterprising with the municipal property. Other forms of commercial companies are used only in few cases.

Usage of the public finance as such is regulated by the Act No 523/2004 Coll. on the budgetary rules of the public administration as amended. Based on this act, the public finances are perceived as those means which are used by the subjects operated in the public administration, which means legal persons registered in the Registry of the Organizations run by the Statistical Office of the Slovak Republic as well as registered as the subjects of public administration according to the unified methodology of the European Union. It is also stated in the act that the public finances can be only used for those purposes, which are in line with the specific measures while each subject using these finances must comply with the rules of economy, efficiency and effectiveness⁽⁷⁾.

One part of the mentioned legal act is dedicated to regulation of the contributory and budgetary organizations, which can be established by the public subjects. For the purposes of the paper it is essential to mention mainly the contributory organizations as these can, till certain extent, perform entrepreneurial activities.

Contributory organizations are in the legislation character-

ized as legal persons of the state, municipality or higher territorial unit, which are connected to them by contribution. All the contributory organizations that comply with mentioned criteria are listed under the public sector according to the methodology ESA 95, which means that the Statistical Office of the SR runs a register of all organizations belonging to the public sector. Sales of these organizations are shown for both for the main as well as entrepreneurial activity⁽⁸⁾.

The act regulates the entrepreneurial activities of these organizations as follows: contributory organization can perform entrepreneurial activity which exceeds the framework of its main activity only if it reaches the goals given by the founder which established the organization. The revenues from this activity must cover the cost of the entrepreneurial activity. Entrepreneurial activities of these organizations are also limited by another fact, in particular, if the contributory organization reaches loss, the manager of the organization must either cover the loss or the entrepreneurial activity will be cancelled. In such case usually the contributory organization is transferred into budgetary organization, which performs only the main activity (main purpose of establishing the original contributory organization)⁽⁹⁾.

Different approach can be seen when the entrepreneurial activities of the contributory organization are successful and its sales form more than 50% of the production costs. In such case transformation into the commercial company seems to be logical step, as this company is not limited in producing profit. Even though the mentioned legal act does not contain rules for the direct transformation of the contributory organizations into the commercial companies, this transformation can be performed "indirectly". When the contributory organization does not fulfil the requirements for its operation stated by the legislation, it is cancelled without legal successor, which means that all the rights and obligations will be transferred on the founder (municipalities)⁽¹⁰⁾. As using municipal property for the entrepreneurial purposes is one of the rights of Slovak municipalities, they can establish a new commercial company by using this property. Due to this fact it can be assumed that the increased number of commercial companies established by the municipalities could be caused by using of the property that was originally aimed for running of the contributory organizations.

As it was stated before another way how municipalities can perform entrepreneurial activities is by operating business in its own name, which means according to the Act No 455/1991 Coll. on trade licensing as amended. This act describes the trades as any systematic activity conducted independently under the conditions stipulated in this Act by a natural person or a legal person in his (its) own name and on his (its) own responsibility for the purpose of making a profit.

According to the act the person eligible for carrying on a trade is any natural person or legal person meeting the conditions stipulated by the Act while general conditions for car-

⁽⁵⁾ LÁZÁROVÁ, E.: Hodnotenie kvality služieb jednotných kontaktných miest v oblasti živnostenského podnikania podnikateľkami a podnikateľmi v Nitrianskom kraji. In: Kvalita podnikateľského prostredia: zborník príspevkov z medzinárodnej konferencie, Nitra, 25. 11. 2011. Nitra : SPU v Nitre, 2011. s. 48 - 53. ISBN 978-80-552-0719-3.

⁽⁶⁾ Act No 513/ 1991 Coll. Commercial Code as amended.

⁽⁷⁾ Act No 523/2004 Coll. on the budgetary rules of the public administration as amended

⁽⁸⁾ Act No 523/2004 Coll. on the budgetary rules of the public administration as amended

⁽⁹⁾ Ibid.

⁽¹⁰⁾ Ibid.

rying on a trade are that: the natural person must be at least 18 years old, he must have full legal capacity, he must have no criminal record. In case of legal persons, those natural persons or that natural person who represents the legal person, as a legal representative must meet these conditions⁽¹¹⁾.

The Act also divides the trades into several categories:

a) Industrial Trades which may be carried on after proving the professional qualification

b) Notifiable Trades which may be carried on once they have been reported (to the Trade Licensing Office), provided that the stipulated conditions are met,

c) Permitted Trades which may be carried on only the basis of a licence

In activities of municipalities the trades used for entrepreneurial activities usually belong to the industrial or notifiable trades mainly in the sphere of tourism⁽¹²⁾.

When analyzing the legislation dealing with public entrepreneurship it is inevitable to mention also the Act No 552/2003 Coll. on performance of work in public interest as amended. This act is applied on the employees of the business with the municipal property participation when:

They are legal persons established by the state body, National Property Fund of the SR, municipality or higher territorial unit when the property participation of those bodies is higher than 67%.

Other legal persons established by the state body, National Property Fund of the SR, municipality or higher territorial unit when the majority of the members of their executive and controlling bodies or board of supervisors is appointed by the state body, National Property Fund of the SR, municipality or higher territorial unit⁽¹³⁾.

According to this act the main obligation of employees performing the work in public interest is to comply with the Constitution of the Slovak Republic, constitutional acts, acts, other generally binding regulations and internal regulations and implement those to their best knowledge and belief, while respecting and protecting the human integrity and human rights⁽¹⁴⁾.

The act also determines the way how positions in the public (therefore also municipal) subjects should be occupied. The positions of the senior executive (manager), who works as a statutory organ of the company, can be given to a person only after the job interview.

The last aspect of the Act, which needs to be mentioned here, is that the senior executive (manager), who works as a statutory organ of the municipal company with 100% municipal property participation cannot enterprise or run any other profitable activity and/or be a member of executive, controlling bodies or board of supervisors in other subject performing entrepreneurial activity. Other employees can enterprise or run other profitable activity and/or be a member of executive, controlling bodies or board of supervisors in

⁽¹¹⁾ Act No 455/1991 Coll. on trade licensing as amended.

⁽¹²⁾ SEDLÁKOVÁ, S.: Aktuálne trendy v získavaní doplnkových zdrojov financovania obcí. In: Societas et res Publica, 2012, vol. 1, no. 1, s. 53 - 64. ISSN 1338 - 6530.

⁽¹³⁾ Act No 552/2003 Coll. on performance of work in public interest as amended.

⁽¹⁴⁾ Ibid.

other subject performing entrepreneurial activity with previous written notice of their employer⁽¹⁵⁾.

III. Analysis of the legal regulations on enterprises with municipal participation at the level of self-government

The issues of using the municipal property for the entrepreneurial purposes are partially targeted in several legal regulations with national scope; however, concrete and more specific regulations are mostly adopted on the regional and local level. As the main focus of the paper is on the legal regulations of the entrepreneurial activities performed by Slovak municipalities, the following analysis is mainly focused on the local or self-governmental level.

A document called "Principles of Municipal Property Management" (further mentioned as "Principles") can be seen as one of the main documents that regulate the usage of municipal property for the entrepreneurial purposes. In case of this document it must be distinguished between that which was adopted in the form of a generally binding regulation and that adopted as a resolution. The "Principles" adopted as a generally binding regulation must undergo the process of public marking up and for their approval 3/5 majority presence of the members of municipal council is required, while for those adopted as a resolution only majority of members is needed. Therefore, the "Principles" in form of generally binding regulations can be stated as with higher legislative importance and it should be also mentioned that in this form the document has higher legal power in comparison with the other form.

The decision about the extent of regulation of public entrepreneurship in the "Principles" is solely the decision of the particular municipality; therefore, there exist significant differences between different municipalities. The following paragraphs contain examples of the texts, which were adopted by the municipal councils as parts of "Principles of Municipal Property Management"⁽¹⁶⁾.

There are several issues connected with the topic of public entrepreneurship, which are usually regulated by the "Principles". Acquiring of property belongs to such issues and it is usually stated that "a municipality can acquire property based on a specific act, by buying, by getting as a present, by entrepreneurial or other activity, by property participation in other legal or physical persons or by shares in the commercial companies in accordance with the Commercial Code or shares in other organizations according to the specific regulations."

Beside the way of acquiring of property there are also usually stated the ways how a municipality can manage its prop-

⁽¹⁵⁾ Ibid.

⁽¹⁶⁾ Document "Principles of Municipal Property Management" of municipalities: Brezno, Revúca, Žilina, Liptovský Mikuláš, Šaľa

erty. These are the most common ways⁽¹⁷⁾:

- attribution of the property under management of other organizations,
- invest the property as an input to commercial companies, enterprise,
- use it for establishment of a new legal entity.

In majority of municipalities the “Principles of Municipal Property Management” contains also general provisions on the fact that the municipal property (movable as well as real estate) can be invested into a commercial company or other legal person while this is a decision of the municipal council. The property invested into a commercial company becomes its property and the municipality must discard such property from its accounting records. The municipality can enclose a contract with the commercial company about the real estate’s management (examples of such municipalities: Brezno, Revúca, Žilina and others)⁽¹⁸⁾.

All the mentioned acts are the matter of approval of the municipal council. Other competences of the municipal bodies regarding the municipal enterprises are regulated as follows: “the mayor when performing as a general assembly of a limited liability company with 100% property share of the municipality can decide, after previous approval of the municipal council, in the following cases: decision about the changes in the collective contract (foundation charter), approving of the memorandum of associations and their changing, decisions about increasing or decreasing of the basic capital and decision about non-financial input, decisions about any change in ownership of real estates, decisions about all financial and non-financial investments into commercial company, about enclosure of a rental contract in case of real estate when it is longer than 5 years, decisions about cancelling of a company or about the change in the legal form. Similar regulations are applied also in case of municipal property participation lower than 100%.”⁽¹⁹⁾

Disposal of securities and execution of rights determined by the ownership of securities and property shares is another area, which is usually regulated by the “Principles”. Within this framework there is also stated that it is the mayor who acts as a member of the General Assembly in case of enterprises with 100% municipal participation and he is bound by the municipal council’s decisions in following areas: approving of the memorandum and its changes, decisions about the subjects and form of the securities, decision about the changes in the collective contract (foundation charter), decisions about increasing or decreasing of the basic capital, decisions about transferring of the municipal share or its division, decisions about agreement with the transferring or division of the business share belonging to another partner, decisions about securities emission, appointing and calling of from the position of statutory representative, appointing and removing from office and evaluation of the members of the Board of Supervisors and other bodies established by the memorandum, excluding of partner from the company, decision about cancelling of the company.

⁽¹⁷⁾ Ibid.

⁽¹⁸⁾ Ibid.

⁽¹⁹⁾ Ibid.

Statutory representative is obliged annually submit a Management Report about the economic management of the commercial company for the previous year as well as a Report about the Attribution of the Property to the municipal council. The deadline is usually 30th June of the particular year. If the legislative framework requires also Audit, mayor is obliged to submit also this audit (e.g. in Liptovský Mikuláš)⁽²⁰⁾.

In case of some municipalities (e.g. Brezno) the above stated text is also completed by following: “the way of execution of rights determined by the ownership of the securities and property shares in the legal persons established by the municipality, where the municipality represents so called controlling entity or has the decisive influence, is performed in accordance with the principles of transparency and effectiveness.” Including of terms as transparency and effectiveness into documents regulating municipal enterprising can be seen as a proof of a progressive view, which includes the elements of New Public Management and the element of responsible attitude towards the municipal finances⁽²¹⁾.

Beside all that parts mentioned above there is also another element which can be seen in numerous “Principles” and it is the fact that the municipality can enclose a contract about property management with other commercial company or other legal person while this contract must contain: the purpose of property usage, timeframe for the property management, obligations of the contract parties including the right for contract withdrawal. Municipality is not allowed to give permission to this legal person for establishment of lien on the property. The contract about the property management is in the Slovak conditions primarily enclosed for the purposes of management of apartments. Žilina can be seen as an example of such regulation as it uses the possibilities for municipal entrepreneurship in relatively wide scale; in particular, there are 6 enterprises with 100% municipal share, 2 enterprises with majority share and 4 enterprises with the municipal share lower than 50%. This state is also reflected in the extent of legal regulations adopted on the local level. Beside the “Principles”, Žilina adopted also another methodological document called “Principles of Functioning of the Delegated Representatives of Municipality in the Commercial Companies and Other Subjects with the Municipal Participation”. These representatives must operate according to the stated rules and they must perform all their rights and obligations in such way that there will be no property or financial damage as well as no conflict of public and personal interest of these representatives. Similarly as in the previous case there are the principles of economy, effectiveness and efficiency mentioned here⁽²²⁾.

Within the “Principles” of Žilina there is also information about the Register of companies with municipal share which contains following data about the companies: name of the company, date of establishment, date of cancelling of the company, names of the municipal representatives in the com-

⁽²⁰⁾ Ibid.

⁽²¹⁾ Ibid.

⁽²²⁾ “Principles of Functioning of the Delegated Representatives of Municipality in the Commercial Companies and Other Subjects with the Municipal Participation” internal document of Žilina

pany bodies. Existence of this Register in Žilina can be seen as rather unique and it significantly contributes to increased transparency in the area of companies with municipal share. Therefore, Žilina can be considered as an example of “best practice”.

Municipality Šaľa is another subject which needs to be tackled within this paper and the reason is that the municipality was in the year 2012 awarded as the most transparent town in Slovakia. This is why it can be expected, that there will be more emphasis put on the legal regulations covering the area of municipal enterprising. In case of Šaľa all these issues are mostly captured in the “Principles of Municipal Property Management” which was adopted as a generally binding regulation and approved by the municipal council. This document covers the property management in larger extent as there is whole paragraph dedicated to this topic. Significant part of the paragraph tackles the attribution of the property under management of other organizations, predominantly to contributory and budgetary organizations and not to the commercial companies. Attribution of the property under management of commercial company should be directly regulated by specific contract enclosed between particular parties.

Direct regulations dealing with the municipal property shares in the commercial companies can be found in the part “Management of Securities and Property Shares”, where the property share is described as the rate of municipal participation on the net basic capital, while execution of rights given by the securities ownership and ownership of property shares on the commercial companies established by the municipality or those where the municipality has decisive influence is performed with emphasis put on the transparency and effectiveness.

Beside the “Principles” Slovak municipalities use also other documents for regulating the municipal enterprising. Contract for managing property is an example of such document and it can be found in case of municipalities such as Šamorín, Levice, Poprad etc. However, it is necessary to mention that this form of regulation is legally overcome.

Instead of the process when the property is managed by the commercial business Slovak legislation prefers when such property is directly inserted into a commercial company or rented to these legal entities. Such contract is often enclosed between a municipality and its contributory or budgetary organizations (e.g. Žarnovica, Martin, Vrbové, Humenné), while this process is in accordance with the valid legislation.

Another example, which needs to be mentioned here, is when the company statutes regulate the municipal property usage for the entrepreneurial purposes itself. This case can be found in Topoľčany, in particular in the firm Mestské služby Topoľčany ltd.

In some municipalities the Organization Code of the company serves as the regulation, which is publicly accessible for example for the company Enerbyt ltd. where the municipality Štúrovo has its property share. Similar case is when the links between the municipality and company and regulated by the Foundation Charter (Kežmarok).

Municipality Bánovce nad Bebravou can be seen as a specific case, as these days there is a process of turn of the “Princi-

ples” to the form of generally binding regulation what shows that there is an interest in the self-government in giving more significant legal value to this document. A municipal representative stated that there will be a special paragraph in the changed document which will be specifically targeting the relationship between the municipality and its commercial company.

IV. Conclusions

Based on the studied documents, which are dealing with regulating of municipal property usage on entrepreneurial purposes, several conclusions could be derived.

Regarding the national level it is clear fact that unified definition of such enterprises is missing and this has inevitable further implication on the legislative regulation of such companies. Therefore, one of the main suggestions would be to adopt one central legal definition of these subjects that would create the baseline for all related legal acts on all levels. What is more, this would also encourage experts to adopt similar approach towards these entities when conducting research.

Regarding the regulations on the local level it can be stated that in several cases they were formulated rather in general terms, what is more, only in those documents which are compulsory. On the one hand, this situation can offer a space for flexible solutions for unexpected issues; on the other hand, however, there can be also suspicion about missing transparency in solving these issues. One of the direct implications of such situation is more difficult access to information what inevitably implies decrease in public control. Therefore, more specialized and tailor made approach adopted at this local level should be essential, additionally it would also contribute to increased transparency what is a goal of all well developed municipalities.

In case of some municipalities there could be observed also incorrect and outdated explanation of legislation as there still can be found attribution of the municipal property under the management of commercial companies, where the property is different from apartments. This fact leads into other implications, which are not just of legal nature but also from economical and accounting fields. This situation reflects frequent and unclear changes in Slovak legislation, which requires significant transaction costs on the one hand, and on the other it shows low flexibility and ability of some Slovak municipalities to adjust to changing environment.

When evaluating the situation about municipal enterprising, the lack of transparency in case of some municipalities can be mentioned as well. This can be seen especially in those cases where the municipal enterprising is regulated directly by the enterprise’s Memorandum as this document is not usually published on the internet as it is in case of generally binding regulations. There exist a strong correlation between the size of municipality and the level of transparency of municipal enterprises. Increased transparency in bigger municipalities the author explains by several factors⁽²³⁾:

⁽²³⁾ ŠÍPOŠ, G.: Transparentnosť miest na Slovensku a v Maďarsku: porovnávacie štúdia, Bratislava: ADIN, s.r.o., 2011, s. 66, ISBN 978-80-89540-03-7.

- stronger position of the civil society and media in creating pressure on openness of the process in the municipality,
- bigger budgets and consequently higher interest in investment into broader providing of information (web pages of better quality, video records etc.).

When Internet is considered as one of the main instruments used for accessing information it is important to say that the structure of some web pages of Slovak municipalities is unclear and difficult to use. In many cases there is no option for "search" at the web page what also makes it bit more difficult to access the required information about some public affairs. That is why, clear and user friendly web pages created by professionals seem to be a necessity in this sphere and it would definitely contribute to better access to required information.

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