

Public Benefit and Public Interest in the Slovenian Legal System – Two Sides of the Same Coin?

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ABSTRACT

Purpose: Driven by the question of how the concepts of public interest and public benefit differ, this paper delves into the Slovenian legal system. Through an in-depth analysis of legal concepts, national regulations, and case law from the Slovenian Constitutional Court and selected cases from the European Court of Human Rights, its aim is to illuminate the key differences between both terms. Ultimately, the paper seeks to establish fundamental guidelines for understanding the distinct meaning and application of each concept.

Design/methodology/approach: The research is based on a content analysis research design, reviewing secondary literature sources. It employs qualitative methods by analysing the relevant theoretical points, rules, and constitutional case law in the Slovenian legal system, as well as selected European Court of Human Rights case law. The analysis focuses on identifying and extracting key theoretical arguments, legal definitions, and practical applications of both concepts. To distinguish between public benefit and public interest, the analysis adopts a comparative approach, examining how each concept is defined, applied, and balanced in different legal contexts. Additionally, synthesis is used to identify commonalities and divergences between different perspectives on these concepts. Finally, conclusions about the relationship between public benefit and public interest are drawn based on the analysed data.

Findings: Public interest and public benefit are abstract concepts. The analysis of relevant Slovenian systemic regulations shows that the two are sometimes applied interchangeably. However, theory suggests that there are certain differences in terms of their tangibility and enforceability. Constitutional case law refers to both concepts in a general way without fully defining their content, yet it does not treat them as synonyms.

Academic contribution to the field: Public interest and public benefit are central concepts of public administration science. Public interest is

key in defining and shaping administrative relations decided in an administrative procedure. It represents the core value of the public sector, ensuring that its operations are legitimate. Public benefit, on the other hand, is the general benefit of an organised wider community, superior to the benefits of individuals and generally considered equivalent to substantive legality. As public and private interests collide, state intervention with appropriate regulation is necessary to protect the public benefit.

Originality/significance/value: This research contributes to the understanding of the concepts of public interest and public benefit within the Slovenian legal system and is a novelty in the field as no such overview has been undertaken before. Its value lies in the analysis of Slovenian constitutional case law over the last twenty-two years and insights into European Court of Human Rights case law. The focus on European Court of Human Rights and Slovenian legislation and case law limits the generalisability of the findings to other contexts. This approach was chosen as much of the relevant legislation for this research is independent of EU influences. Nonetheless, being an EU member state, Slovenia's legal framework shares some commonalities with other European systems. The added value of the analysis lies in its relevance for understanding how these concepts are treated in similar legal systems, offering valuable insights for comparative studies.

Keywords: administrative decision-making, administrative-political process, constitutional case law, public benefit, public interest, Slovenia

JEL: K 19

1 Introduction¹

In a contemporary society, numerous intersecting interests are pursued in the everyday life. Firstly, we have individual interests, which revolve around personal preferences and desires, such as the pursuit of spiritual fulfilment or material possessions. Secondly, there are common interests that emerge when groups of people unite to achieve shared objectives. However, it is crucial to understand that groups do not always voluntarily unite. Various factors such as external pressures (e.g. threat of war), circumstances (e.g. economic crisis), or shared challenges can bring people together, even without their explicit choice. This means that common interests can also bring people together despite their differences, as can be seen in the case of groups fighting for general beliefs or principles (e.g. environmental protection or human rights). Thirdly, general interests take shape through the dynamic interplay of various individual interests, adapting and evolving through interpersonal relationships (Trpin, 2005). Moreover, general interests can be shaped also through the collective interests, which emerge from the shared needs, goals, and values of a group of individuals, and they can significantly influence the formation of general interests within a community or society (e.g. right to

¹ This article is a revised and updated version of the paper entitled "Public interest and public benefit as guidelines on administrative action", presented at the NISPAcee Annual Conference, Ljubljana, 21 October – 23 October 2021.

drinking water, collective interest in environmental conservation, prohibition of torture etc.). The term “public interest” can refer to shared interests or values that can be either broad and indefinite or embody a universally accepted moral standard (Sorauf, 1957).

The concept of the public interest holds a central position in political science, law, and public administration, and is defended by public interest advocacy groups. The term also plays a crucial role in the legal realm, particularly in the domain of regulatory commissions (Cochran, 1974). However, the broad scope and vagueness of the concept pose challenges to its practical application (Bezemek and Dumbrovský, 2020). On the other hand, Miloserdov (2021) emphasizes the importance of establishing a legal definition for public interests to improve the efficiency of legal activities.

The public interest theory of regulation claims that the primary goal of regulation is to safeguard the public interest from the influence of private interests, with a particular focus on corporate entities (Balla, 2011). The classical public interest theory is positive theory focusing on what motivates policy makers and also normative theory focusing on what should motivate policy makers (Levine and Forrence, 1990). However, the effectiveness of regulatory measures in serving the public interest has been questioned, as some scholars argue that inherent flaws make regulatory efforts inherently unsuccessful (Posner 1974; Horwitz 1989). This viewpoint is based on the idea that regulatory authorities might be influenced by internal factors or the self-interest of regulators, hindering the achievement of the public interest. This critical perspective has initiated debates in the field of regulatory research, especially within the contexts of public-interest versus private-interest theories and actor-centered theories (Ginosar, 2012).

The definitions of the concept of public interest may vary depending on disciplines, as they derive from different intellectual traditions. Economic school of public interest is a traditional one, dealing with market failures and market absence, focusing on economic goals. Meaning that the market fails to generate actions or outcomes in accordance with the public interest. Social school further on deals with other social and political goals (e.g. equality, environment etc.) (Ginosar, 2012). Finally, the procedural school of public interest theory prioritizes the democratic issues and difficulties connected with the regulatory procedure rather than the regulatory objectives (Christensen, 2011).

Further on, the “common good” has traditionally driven political philosophy and it is considered to be the target of politics and public service. Already Locke and Rousseau regard the pursuit of the “common good” as the objective of society or governmental endeavors (Rousseau, social contract, 2001). The concept of common good, however, varies significantly among philosophical doctrines. Previously Aristotle defined the common good as “good proper to, and attainable only by, the community, yet individually shared by its members”. At the same time, Aristotle recognizes that the common good may not coincide with the sum total of particular goods (Diggs, 1973; Dupre, 1993). A complete history of the concept is beyond the scope of the present

paper, but the base upon this paper is built on is to recognize that the common good is not simply the sum of individual benefits. In this broader context, public benefit can refer to what is beneficial for all or most members of a community, while public interest is a more general concept regarding issues of great importance to the society, like human rights or democratic principles which impact the welfare of an entire society (see Table 1).

Table 1: Public benefit v. Public Interest

	Public Benefit	Public Interest
Definition	Activities that enhance the general well-being of society	Matters of great importance to society
Scope	Specific and measurable	Broad and subjective
Consequences	Direct practical impact on individual lives	Supporting fundamental values and addressing societal matters

Source: own

In some cases, the two concept may be antithetic, like in the case of the realization of a big public infrastructure (e.g. a stadium). In specific cases, the public benefits generated by the infrastructure may collide with the public interest, by diverting public money from essential public services.

The case of Julian Assange illustrates even better the delicate balance between public interest and public benefit. Exposing illegal behaviors committed by governments, including violations of human rights is clearly in the public interest. Wikileaks revelations raised awareness about critical matters of transparency and accountability, helping the public to take more informed decisions. On the other hand, it may be argued that the release of sensitive information may have compromised military operations, damaged diplomatic relationships, and infringed privacy. The ongoing detention of Julian Assange is revealing the choice to privilege the public benefit derived from maintaining secrecy in certain areas and discouraging transparency over the public interest in freedom of press and the human rights to a fair trial (Springer et al., 2012; Driver, Andenæs and Munro, 2023).

The paper deals with the public interest as an institutional and normative phenomenon, which is particularly important in a state governed by the rule of law. To fulfil the criteria of the rule of law, the public interest should be shaped through a democratic process of policymaking. It must be noted that the public interest and the rule of law influence each other. The democratic process of policymaking is a crucial process through which these dynamics are negotiated and refined, aiming to achieve a harmonious balance between individual and collective interests within the bidding framework of legal principles. The rule of law defines legal criterions within which public interest is defined and protected. It ensures that the decisions are made by the rules

within legal framework. On the other hand the concept of public interest is crucial for the foundation of the rule of law. Legal system needs to recognize and balance different interest within the legal system, which is vital for forming the rule of law. Moreover, the rule of law itself is a result of balanced various interests that are recognized by the system. The conclusion would therefore be that the rule of law and public interest are intertwined “concepts” that shape each other. The paper deals with the shaping of the public interest through the process of public governance based on the Parsons’s theory of three levels of governance.

Law is one of the primary instruments for delineating the concept of the public interest. However, besides the public interest, Slovene legislation defines also the public benefit, sometimes even as a synonym thereof. Both terms are variable legal concepts, the content of which is yet to be given substance in each individual case in accordance with the purpose established by law. Normally, the concept of public interest should be interpreted with regard to the objectives of the law and the conditions it sets for acknowledging rights, legal entitlements, or obligations. For example, when public body in administrative procedure decides whether a party has a right to public money (e.g. social benefits, subventions etc.) in this case the public interest is *efficient use of public funds* in accordance with the purpose as defined by law (Kovač and Jerovšek, 2023). What will be the objectives of the law and the conditions it sets for acknowledging rights, legal entitlements, or obligations is up to the legislator in a given time and space and is subject to changes under the influence of social changes during specific time and specific space. Acknowledging inherent variability and complexities of the concepts allows for a more refined understanding of their application in diverse legal and social contexts.

In European law, public interest is not defined. Its application at the European level may correspond to the interests of public institutions and to private interests. Meaning that the public interest is not necessarily represented by public institutions, either common EU institutions or Member States, but also private entities. There were attempts to find a common definition of public interest at European level that would be based on national definitions. The research by Hossfeld et al. (2018) analyzed countries representing common law and civil law systems (United Kingdom, Germany, Spain, France, Italy, and Romania). However, no common definition could be derived. The terminology in the law among countries was diverse (e.g. public interest, common good, general interest etc.). None of these countries established a definition of the concept and have several different interpretations of the concept. In Romania, it correlates with the national interest, while in Spain it correlates with the interest of public institutions. In Italy similarly as in Slovenia, the concept is employed to administrative procedures or the public goods protection. It is deemed respected when the administration’s decision-making procedure involves the representation of multiple interests, including private and collective interests, thereby granting legitimacy to the procedure (Hossfeld et al., 2018). Ultimately, in United Kingdom, the concept of the public interest predominantly serves as a means to validate or rationalize the actions of dif-

ferent private or public entities and is a suspect notion. Namely, in Anglo-Saxon jurisdiction the adjective “public” refers to society as a whole and not government or public entities. Things done in public interest are things done in the interest of society. On the other hand, also in continental Europe, the term “public” can be used this way, but more often, it is associated with governments and their institutions or agencies (Hossfeld et al., 2018). Based on comparative approach no common concept at the European level could be established, nor common definition. The same applies for EU (Hossfeld et al., 2018). According to Article 17 of the TEU “The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.” However, the EU law does not define what is general interest (Herault, 2009).

Based on the research by Hossfeld et al. (2018) there are several findings established with which we could strongly agree. In general, the concept refers to the interests that need to be protected or defended. As such, it makes it possible to legitimize an action and is therefore a tool applied by the policy. Finally, leaving the concept without clear definition can serve better to the functioning of the whole system (e.g. possibility to adapt the adoption of international accounting standard to the particularities of the European financial market) (Hossfeld et al., 2018). As argued by de Lima and de Fonseca (2021) the notion of public interest is subject to debate, and determining the criteria for effective regulatory outcomes should consider the socioeconomic disparities among the countries under examination. Since there is no common definition among countries and on EU level, the aim of the paper is to define situation in Slovene system.

Therefore, the paper analyses the meaning of public interest and public benefit in Slovenian legal system, since both of these concepts are relevant and present in Slovene law. The relevant regulation in the field of administrative law is identified (selected procedural as well as substantive law) and analyzed to determine the content of both terms. Since both terms are variable legal terms of which the content is yet to be determined by interpretation, the relevant Slovene constitutional case law of the last twenty-two years is studied and the differences between the concepts are identified. Furthermore, selected relevant case law of European Court of Human Rights is presented.

2 Methodology

Article uses a content analysis design, focusing on secondary literature sources related to public benefit and public interest. Data sources include academic journals, books, relevant national legislation, European Court of Human Rights case law and Slovene constitutional case law.

The analysis focused on identifying and extracting key theoretical arguments, legal definitions, and practical applications of both concepts. To distinguish between public benefit and public interest, the analysis adopted a comparative approach, examining how each concept is defined, applied, and balanced in different legal contexts and where relevant other multidisciplinary con-

texts. Additionally, synthesis was used to identify commonalities and divergences between different perspectives on these concepts. Finally, conclusions about the relationship between public benefit and public interest were drawn based on the analyzed data.

The choice to focus primarily on European Court of Human Rights and on Slovene legislation and case law limits the generalizability of the findings to other contexts. Such approach was performed since most of the relevant legislation for this research is absent from EU influences. On the other hand, being Slovenia an EU member state, its legal framework shares some commonalities with other European systems. The added value of the analysis is its relevance for understanding how these concepts are treated in similar legal systems, offering valuable insights for comparative studies.

3 Administrative-political process as a tool do define public matters

Every organization exercises its authority to determine its objectives and the methodologies employed to attain them, a process commonly referred to as governance process (Virant in Vlaj, 2006, p. 50; cf. Rahman, 2019). The process takes place in organizations and public law communities, of which the broadest community is the state.² According to Parsons, this governance function commences at the highest echelon, the institutional level, where the organization's overarching goals are established – encompassing what the organization and its members aim to accomplish within a specific timeframe (Šmidovnik, 1980, pp. 26–27). This crucial decision-making process revolves around the interests of the organization's members, guided by the value judgments that are fostered within the organization itself. Of course when taking perspective from the state as the broadest public law community we cannot ignore the democracy and the principle that sovereignty belongs to the people. The ultimate source of political power rests with the citizens, which have the right to participate in the political process, elect representatives and impact policy decisions.

The institutional level of an organization consists of its highest governing bodies, organized in accordance with political principles and vested with the authority to make decisions that influence all members of the organization (Šmidovnik in Vlaj, 2006, p. 37).³ At this level, decision-making is predominantly guided by value guidelines. Consequently, members of highest governing bodies are not necessarily expected to possess specialized expertise but are required to possess a general understanding and political dedication to the advancement of both society and the organization, as well as their respec-

2 The state is the only one with political power and can empower narrower territorial public law communities such as municipalities, provinces, other local authorities and other public law communities to perform their tasks.

3 The distribution of power across institutional levels can be affected by different forms of state governance, such as centralized or federal structures. E.g. in a state system with strong level of autonomy granted to subnational entities, organizations may show a distributed power structure across various institutional levels, particularly in different fields or sectors.

tive interests. Bodies at this level usually do not deal with technical details of issues under consideration. Instead, they rely on the expertise of professionals who have compiled relevant information at lower organizational levels. Moreover, at this level, participants typically do not possess professional roles; rather, their roles are honorary and politically oriented. The established *modus operandi* involves engaging in deliberations during meetings, where decisions are reached through thorough consideration, either by consensus or majority vote (Šmidovnik in Vlaj, 2006, p. 37).

Subsequently, in pursuit of the objectives established at the institutional level, there exists what Parsons refers to as the instrumental level. At this stage, the focus is on identifying specific instruments or means to realize the set goals. Decisions made here revolve around particular technical issues, relying on fact-based decision-making grounded in expert premises (Šmidovnik, 1980, p. 27). At the operational level of governance, tasks are executed and decisions are taken by organizations comprising professionals who must meet specific professional criteria and possess relevant expertise and work experience. The indispensable qualities sought in these professionals are consistency, proficiency, and professionalism. A significant aspect of the instrumental level is the implementation or executive level, where decisions aimed at achieving the established goals are typically made by executive bodies representing the upper echelons of the organizational structure, whether administrative or professional in nature. Such decisions carry both political and professional implications. This stage of governance is characterized by the highest concentration of social power within the organization, as well as an equally significant concentration of responsibility (Šmidovnik, 1980, p. 28). Objectives pursued at the institutional level are the political goals that are to be realized through the instrumental level. Basis for successful achievement of these goals is democratic legitimacy, meaning that authority and actions of a government derive their legitimacy from the consent and will of the people. The political decisions will be considered legitimate if they are in accordance with the principles of democratic governance.

The final technical level of an organization falls outside the realm of governance. It serves as the operational layer responsible for producing direct products, effectively functioning as an effector (Šmidovnik in Vlaj, 2006, pp. 38–39; Brezovšek, Haček and Kukovič, 2014, p. 24).

Parsons's theory of governance levels finds applicability in the realm of administrative-political processes and decision-making concerning public affairs, encompassing multiple stages. When addressing public matters, the focus lies in fulfilling various social needs. Consequently, it becomes crucial to discern the specific social needs prevailing in a given time and space, prioritize them accordingly, and ascertain the responsible parties to meet and satisfy those needs in a well-defined manner. This process of public governance places significant emphasis on the role of political leaders. They wield the authority to shape the country's policies through the formulation of political goals, national programs, and strategic initiatives (see more in Sever, 2021).

Firstly, we need to decide in the process of public governance which needs are to be satisfied through public communities⁴, which organize relevant public institutions to bring decisions. The public interest representing the need or interest of the social community organized at the state or local level needs to be defined.

The state is responsible for determining which matters require regulation to establish a legal order and prevent conflicts, and which matters are left to the discretion of private entities. When there is no necessity to safeguard the public interest, there is also no need for state regulation and supervision. In such cases, the relationship between parties is left to their own free will, allowing for voluntary agreements and arrangements without direct interference from the government. The state and its apparatus should do only what is expressly permitted by regulations, as opposed to individuals who are free in their actions, except in the case of matters that are expressly forbidden.

The administrative-political process or decision-making in public matters involves several distinct stages, with the institutional and instrumental stages being the primary ones. At the institutional stage, the community establishes its (political) goals, defining the overarching objectives it aims to achieve. On the other hand, during the instrumental stage, decisions are made regarding the implementation of the set goals (Virant, 2009, pp. 14–15). The institutional level of governance encompasses both the state and self-governing local communities, wherein the state delegates a portion of its political authority.⁵ It is at this level where the goals of a public community are established through political decision-making processes. These goals are expressed and recognized as the public interest. At the state level, political decisions are primarily formulated and adopted through representative bodies (except in the case of a referendum), namely the National Assembly and the National Council.

The Constitution, as the highest legal act, determines the most general goals of the state. The legislative branch, however, also adopts other important acts laying down the general goals of the state. These include laws, the state budget, national programmes, and the like. Moreover, municipal councils adopt general legal acts (statutes, municipal ordinances) at the level of the self-governing local communities.

The content governed by these acts pertains to the pursuit of goals and the fulfillment of needs of a specific public community within a given time and context. As a result, these acts play a crucial role in defining the public interest of that particular community. The decision of which goals and needs to prioritize becomes a pivotal aspect of the administrative-political process, characterized by value-based, political decision-making (Virant in Vljaj, 2006, p. 53). Political decision-making must be founded on factual information and ways of achieving the set goal, even by renouncing certain other goals. It involves a trade-off between values, desires, benefits, and goals. Its essence is

⁴ See footnote 2 on the meaning of public communities.

⁵ This enables self-governing local communities to perform their municipal competences in accordance with the interests of local community.

not professionalism, but rather the evaluation of benefits. Political decisions are therefore a reflection of society's values in time and space (Virant in Vlaj, 2006, p. 53).

Following the institutional stage, the next phase is the instrumental stage, during which new decisions are made to achieve the goals previously set at the institutional level. Here, the government, as a component of the executive branch, assumes a crucial role in the public governance process at the state level. The transition towards the executive branch occurs due to the societal evolution and the increasing demand to regulate diverse and intricate aspects of life, often reliant on expertise and subject to rapid changes (Rakar and Tičar, 2017, p. 129). If the institutional stage represents the strategic political level, the instrumental stage corresponds to the executive political level. In this context, the Government is responsible for promulgating general legal acts like decrees and ordinances to enforce laws, while ministers, as members of the Government, issue specific rules. The power to issue general acts may also be delegated to bearers of public authority (e.g., public agencies, public chambers). At the level of self-governing local communities, mayors adopt general legal acts. These decisions encompass elements of both political and professional considerations.

The third stage in the governance process is the operational stage, where state administration bodies and bearers of public authority at the state level as well as municipal administrations and bearers of public authority empowered by municipalities enforce decisions made at higher levels (e.g., by issuing administrative decisions). This stage serves as the bridge between political decision-making and professional decision-making at the operational level.

The activity that implies the enforcement of a decision made during the operational stage is no longer part of the governance process, since it does not involve decision-making but can create goods which the organization can yield to the environment (Vlaj, 2006, p. 39).

4 The concepts of public interest and public benefit

The central idea of public administration science turns around the notion of public interest, although it lacks a precise definition (Bučar, 1969, p. 92). It is an abstract legal notion, which belongs in Slovene legal system to indefinite legal concepts. Definitions of the concept of public interest may vary depending on disciplines, as they derive from different intellectual traditions. When relating to the legal discipline, specific content of the public interest needs to be defined in individual cases, taking into account the relevant established facts, to which relevant legal norms are applied. Namely, the law follows certain objectives and sets the conditions for acknowledging rights, legal entitlements, or obligations.

As follows from the previous segment, the present political authorities determine the prevailing public interest within a specific society at the current moment and context. This involves identifying the prevailing or dominant so-

cial values during a particular timeframe. This is evident in positive law. As mentioned above, in Slovene legal system public interest is considered as an indefinite legal concept, which needs its content to be fulfilled based on the established facts of individual case. Indefinite legal concepts represent exceptions to the principle of legality in terms there is derogation from full legal binding. This means that the administrative authority is required to evaluate the content of the public interest in each individual case. It must apply the same criteria in all equivalent cases (Pečarič, 2018, p. 158).

Following the principle of legality, when utilizing an indefinite legal term in a specific case, the competent authority is obligated to define its essence based on the particularities of the case. In this way, the objective of the legal standard is attained (Constitutional Court Decision No. U-I-20/03-8 and Up-724/02-12, 23 September 2004). Hence, the concept needs to be concretely defined within the context of a specific case in time and space. The pivotal tool for achieving this is the administrative procedure, which functions as an instrument of public authorities for determining the rights, obligations, or legal entitlements of an individual. The public interest constitutes a fundamental element in the formulation and configuration of administrative relations determined through an administrative procedure. It serves as the central value of the public sector, guaranteeing the legitimacy of its operations (Bevir, 2011, p. 371).

The fundamental objective of public governance is to define the public interest, which is then shaped through public policies across diverse areas of life situations such as healthcare, environment, welfare, and the economy. Beyond contributing to the formation of the public interest, public administration also takes roles as its protector, spokesperson, and implementer. Since public interest is something that belongs to the public, community in general and from which the whole community should benefit the legitimacy of public administration actions depends on the substance of the public interest, which is formed through constant dialog between public and private authorities through democratic systems that allow freedom of speech, assembly and association (Pečarič, 2018, p. 49, 52).

An interesting example is Czech's Constitutional Court decision on public interest. Namely, there was a case where a legislator by law itself defined what is in public interest (Section 3a of the Inland Navigation Act stated that the development and modernization of the waterway defined by the Elbe watercourse is in public interest)⁶, without leaving any space for discretion (assessment) by the executive branch. The Court considered declaring the public interest in a specifically defined matter by law unconstitutional. It found the contested provision unconstitutional because it violated the principle of separation of powers from the Czech Constitution. As stated by the Court: "By de-

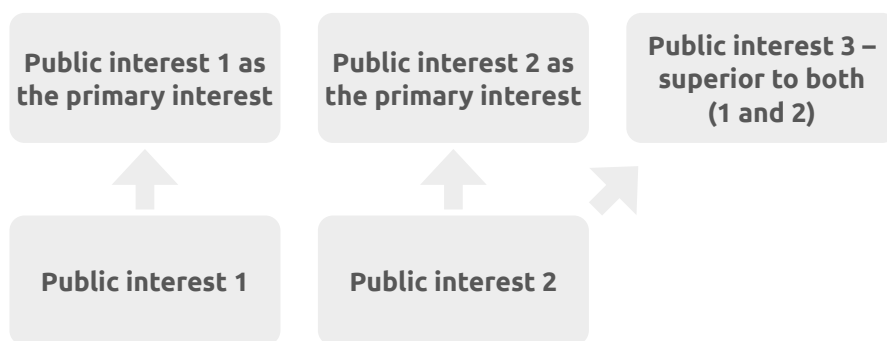
6 The Law stated: "It is in the public interest to develop and modernize the waterway defined by the Elbe waterway from km 129.1 (Pardubice), at the state border with the Federal Republic of Germany, and the Vltava waterway from km 91.5 (Třebenice), including the Vraňany - Hořín navigable channel up to the confluence with the Elbe waterway, including the outlet of the Berounka watercourse up to the harbor of the port of Radotín."

fining the development and modernization of a certain waterway as a public interest in the law, the Parliament did not take into account the requirement for the generality of the legal regulation, in a specific case it used an undefined legal term and thus encroached on the competence of the executive authority." Namely, the public interest should be ascertained through administrative procedure by weighing various particular interests, taking into account all contradictions and comments. The reasoning of the decision should justify the existence of a public interest and clearly show why the public interest outweighed a number of private, particular interests. This means that the public interest determination is performed in the procedure of deciding a particular issue (typically, for example, expropriation) and cannot be determined a priori in a particular case. Due to these considerations, the responsibility to determine the public interest in a specific case usually falls within the executive branch, rather than the legislature (See Czech's Constitutional Court Opinion Pl. ÚS 24/04 of 28 June 2005, 327/2005 Coll., N 130/37 SbNU 641, Lakes on the Elbe). Both branches have different competences within which the legislature issues general legal acts and the executive individual legal acts.

A potential hazard, irrespective of the degree of democracy within a specific system, is the promotion of the specific agendas of individual interest groups camouflaged as the public interest. This can lead to infiltration of these agendas into the existing regulations. As stated by Hayek (1982) "it is often mistakenly suggested that all collective interests are the general interests of society; but in many cases the satisfaction of the collective interests of certain groups may be in complete conflict with the general interests of society. The whole history of the development of democratic institutions is a history of the struggle to prevent individual groups from abusing government to benefit the collective interests of those groups".

Moreover, it is essential to understand that individual interests within the public sphere might collide. When this happens, it becomes imperative to assess which public interest holds greater significance within the specific context (see Figure 1). In other words, it needs to be determined what actions "most effectively advance the public interest" in that particular scenario. Applying the principle of proportionality in such situations is essential and in accordance with the legal principle of good and fair administration (cf. Letnar Černič, 2013).

Figure 1: Public Interests' Conflict



Source: own

A public benefit can be considered as a collective benefit of an organized broader community that exceeds the advantages of an individual (Jerovšek in Jerovšek and Trpin, 2004, p. 73); this denotes the objective effects arising from actions or conduct, carrying a more tangible nature than mere interest. It is enforceable and often viewed as equivalent to substantive legality (Kovač and Sever, 2016, 2017; more on principle of legality and administrative authorities see in Janderová, 2017, pp. 126–28). The legislative and executive branches individually establish, within the scope of their respective authorities, what qualifies as a public benefit within a specific circumstance. The essence of the concept evolves across various stages of social progress (cf. Androjna and Kerševan, 2006, p. 51).

Hereafter we explore specific regulations as part of Slovene domestic law within the domains of public administration and administrative law, which establish principles related to the public interest and public benefit. In certain cases, these two concepts are perceived as synonyms although there are elements in Slovene legislation that demonstrate a distinction between the concepts. The possibility of a differentiation between the two concepts becomes apparent in the formulation of legal norms. The legislator uses the two concepts distinctly or, in certain substantive and procedural determinations, applies the concept of the public interest at one time and the concept of the public benefit at another time, or even both mutually or complementarily (Seibert, 2010).

Our first example relates to the General Administrative Procedure Act (Official Gazette of the Republic of Slovenia, No. 24/06 – consolidated version, 105/06 – ZUS-1, 126/07, 65/08, 8/10, 82/13, 175/20 – ZIUOPDVE, 3/22 – ZDeb, hereinafter referred to as GAPA). This fundamental systemic law governs the administrative procedure as a fundamental tool applied by authorities in deciding on administrative matters, specifically relating to the rights, obligations and legal entitlements of parties engaged in administrative relationships.

Essentially, the fundamental criterion for categorizing a subject matter as administrative is the imperative requirement to safeguard the public interest

(Article 2 of GAPA). Significant in terms of defining the purpose of the administrative procedure is the fundamental principle of protection of the rights of the parties and public benefits (Article 7 of GAPA). Different or equal interest or needs of other entities require the state to limit a particular right. Consequently, a conflict arises between public and private interests, prompting the state's intervention through suitable regulations to ensure the protection of the public benefit.

An analysis of the individual clauses within the GAPA highlights the interchangeable use of the terms public interest and public benefit. The GAPA generally refrains from offering precise definitions for these terms, except in specific procedural situations. Thus, derived from the third paragraph of Article 18 of the GAPA, the second instance authority is empowered to take jurisdiction in cases where the first instance authority decision-making is delayed, if consequences detrimental to the human life, health, the environment, or property could follow. Another instance demonstrating this concept is the utilization of a summary fact-finding procedure, applicable when a situation involves urgent measures necessitated by the public interest and cannot be postponed. In such cases, the GAPA establishes the necessity for urgent measures to be demonstrated if risks are posed to human life, public safety, public order and peace, or to property of significant value (Article 144). Similar safeguards must be upheld in cases of an extraordinary annulment of a decision (Article 278). To safeguard these matters, the Act additionally includes provisions for delivering an oral decision (Article 211) and executing a decision against which the time limit for appeal has not yet expired or has an ongoing appeal (Article 236). Moreover, the GAPA demands the continuation of the procedure if it that is deemed essential in the light of public interest (Article 135 of the GAPA). If an evident limitation of public interest is observed in an administrative procedure, the GAPA also stipulates that an authorized individual should undergo additional training on conducting and making decisions within administrative procedures (Article 307b).

The GAPA also refers to the concept of public benefit in various instances: it mentions the representation of public benefit in procedures through the State Prosecutor and Higher State Attorney (Articles 45, 229, 261); the initiation of procedures *ex officio* when demanded by the public benefit (Article 126); the requirement that settlements must not be detrimental to the public benefit (Article 137); situations of lesser significance where a decision may consist solely of an official note, as long as the public benefit remains unaffected (Article 218); and the *ex officio* enforcement of actions when required by the public benefit (Article 286).

The commentary on Article 69 of the Constitution of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a, hereafter Constitution) introduces a separate differentiation, permitting expropriation in the interest of public benefit. This differen-

tiation underlines that public interest and public benefit are not interchangeable terms. It is up to the legislator to define more in detail what is the public benefit (i.e. expropriation purposes) in different fields in accordance with the Constitution (Virant in Šturm, 2002, p. 667). While public interest encompasses only the aspect of interest, public benefit requires a balance between public and private interests (i.e. inviolability of property). Namely, if we would understand public interest as a synonym of public benefit it would be sufficient for the expropriation to take place to define in a spatial plan an interest of a state or a municipality. Consequently, the term public benefit is inextricably linked with the principle of proportionality (Virant in Šturm, 2002, p. 668). This means that the expropriation is admissible if it is in public benefit, fulfilling the following elements: there is a concrete, specific real public need for which the expropriation is an appropriate inevitable means to fulfill it. Finally, public benefit needs to be proportionate with the weight of the intervention in the property right as a consequence of expropriation. In accordance with the principle of proportionality it is permissible to encroach on property only as much as it is needed to fulfill the expropriation purposes (Virant in Šturm, 2002, p. 668, 677). The latter are: public infrastructure; building for the defense; buildings needed for the public services such as healthcare, education, culture and science; protection of cultural heritage; protection from natural disasters; building non-profitable housing etc. (Virant in Šturm, 2002, p. 669–670).

The Inspection Act constitutes an upgrade of the fundamental principle in GAPA, which focuses on safeguarding the rights of the parties and promoting public benefits (Official Gazette of the Republic of Slovenia, No. 43/07 – officially consolidated text and 40/14). Inspection embodies the execution of the constitutional principle of the rule of law (Article 2 of the Constitution), necessitating adherence to relevant regulations. This commitment serves the public interest, and the state governs inspections to fulfil this objective (Jerovšek and Kovač, 2008, p. 170). Article 5 of the Inspection Act advances the aforementioned GAPA principle by introducing the principle of safeguarding both public and private interests. When conducting an inspection, any intervention into the affairs of the accountable parties is permissible only to the extent required for safeguarding the public interest. In accordance with the principle of proportionality, the responsibilities of inspection must be executed to uphold and harmonize both sets of interests, potentially achieving fulfilment in both areas or sustaining an optimal equilibrium (Pečarič in Kovač, 2016, p. 98). According to the Inspection Act, inspectors implement specific measures to safeguard the following categories: situations involving imminent threats to human life or health, animal health, or the immediate risk of harm to the natural and living environment, as well as potential damage to property. Case law establishes that the concept of public interest does not exclusively encompass immediate harm, but can also encompass demonstrated potential harm. (Supreme Court Decision, No. I Up 405/2004, 17 April 2008; Pečarič in Kovač, 2016, p. 100).

Additional significant systemic laws comprise the Government of the Republic of Slovenia Act (Official Gazette of the Republic of Slovenia, No. 24/05 – of-

ficial consolidated text, 109/08, 38/10 – ZUKN, 8/12, 21/13, 47/13 – ZDU-1G, 65/14, 55/17 and 163/22), the State Administration Act (Official Gazette of the Republic of Slovenia, No. 113/05 – officially consolidated text, 89/07 – CC decision, 126/07 – ZUP-E, 48/09, 8/10 – ZUP-G, 8/12 – ZVRS-F, 21/12, 47/13, 12/14, 90/14, 51/16, 36/21, 82/21, 189/21, 153/22 and 18/23), and the Local Self-Government Act (Official Gazette of the Republic of Slovenia, No. 94/07 – official consolidated text, 76/08, 79/09, 51/10, 40/12 – ZUJF, 14/15 – ZUUJFO, 11/18 – ZSPDSL-1, 30/18, 61/20 – ZIUZEOP-A and 80/20 – ZIUOOPE). However, these legislations do not provide precise definitions for the terms public interest and public benefit. These two concepts are also not mentioned in the Decree on Administrative Operations (Official Gazette of the Republic of Slovenia, Nos. 9/18, 14/20, 172/21, 68/22, 89/22, 135/22 and 77/23), which is one of the pivotal regulations governing the operations of public administration.

The Institutes Act is another relevant legislation concerning the organization of public administration (Official Gazette of the Republic of Slovenia, Nos. 12/91, 8/96, 36/00 – ZPDZC and 127/06 – ZJZP), which addresses the continuous and uninterrupted offering of public services in the public interest by the state, municipality, or town (Article 22).

The Public Employees Act (Official Gazette of the Republic of Slovenia, No. 63/07 – official consolidated text, 65/08, 69/08 – ZTFI-A, 69/08 – ZZavar-E, 40/12 – ZUJF, 158/20 – ZIntPK-C, 202/21 – Constitutional Court decision and 3/22 – ZDeb) outlines the categorization of individuals as public employees engaged in the execution of public duties within individual authorities. These responsibilities are closely associated with the exercise of authority or the protection of the public interest (paragraph one of Article 23).

Officials are required to carry out public duties with a focus on the public benefit, maintaining political neutrality and impartiality (referred to as the principle of political neutrality and impartiality; Article 28). Determining the specific public benefit within a given administrative domain is to be deduced from laws, implementing regulations, the budget and other legal acts issued by the National Assembly and the Government. This same approach applies to situations involving discretionary decisions, where the preferred legal decision should be the one perceived as to best safeguarding the public benefit (Virant in Pirnat, 2004, p. 114).

Another crucial systemic regulation is the Public Information Access Act (Official Gazette of the Republic of Slovenia, No. 51/06 – official consolidated text, 117/06 – ZDavP-2, 23/14, 50/14, 19/15 – CC dec., 102/15, 7/18 and 141/22), which guarantees the transparency and accessibility of governmental operations, enabling both individuals and legal entities to acquire information of a public nature (Constitutional Court Decision, U-I-45/16-50, Up-321/18-48, Up-1140/18-38, Up-1244/18-38, 16 September 2021, point 60: “The beneficiary can effectively exercise the right to receive and impart information if he has access to information in which the general public has an interest in knowing.”). Restricting access to public information can impede the meaningful exercise of freedom of expression (Constitutional Court Decision, U-I-45/16-50,

Up-321/18-48, Up-1140/18-38, Up-1244/18-38, 16 September 2021, points 58, 60: "The effective exercise of the right to freedom of expression can only be ensured if the information in which the general public has an interest in being informed is accessible and public.").

It establishes that numerous public interests can coexist alongside. Consequently, despite certain exemptions from unrestricted access to specific information (such as classified data, professional confidentialities, personal information, etc. – for additional information, refer to paragraph two of Article 6 of the Public Information Access Act), the legislation permits access to such information when the public interest in disclosure outweighs the public interest or the interests of other individuals in not disclosing the requested information (paragraph two of Article 6). The Act also provides for the granting of an exclusive right for the re-use of information if this is absolutely necessary for the provision of a public service or other services in the public interest (paragraph four of Article 36a). Also, it allows collecting data on account balances and payment transactions debited to the accounts of the registered taxable persons (public utility institutes, public companies, etc. – see paragraph two of Article 10a) in order to strengthen the transparency and accountability of the management of the financial resources held by obliged entities under this law and because of the overriding public interest in disclosing information on the use of these resources,

As defined in the Public Procurement Act (Official Gazette of the Republic of Slovenia, Nos. 91/15, 14/18, 121/21, 10/22, 74/22 – Constitutional Court decision, 100/22 – ZNUZSZS and 28/23), public interest relates to matters concerning public health, the well-being of individuals, and the safeguarding of the environment (Article 75). Moreover, the Legal Protection in Public Procurement Procedures Act (Official Gazette of the Republic of Slovenia, Nos. 43/11, 60/11 – ZTP-D, 63/13, 90/14 – ZDU-11, 60/17 and 72/19) specifies that, within the context of the same act, public interest is acknowledged to be present when there is a potential risk to human life and well-being, public security, or harm to property of great value (paragraph one of Article 6). Pursuant to Article 45, economic interests are deemed to be overriding reasons relating to the public interest, requiring that the contract remains in force, but only in exceptional cases where the consequences of the challengeability of the contract could disproportionately affect the performance of the contracting authority or the state.

Furthermore, there exists the Public-Private Partnership Act (Official Gazette of the Republic of Slovenia, No. 127/06), where point 19 of Article 5 outlines that public interest refers to a general benefit as defined by law or a derived regulation. It is established through a decision that identifies the public interest in establishing a public-private partnership and executing projects within the framework of the Act's various public-private partnership models. This decision is taken by the representative body of a self-governing local community or the Government (Article 11). The objective of the Public-Private Partnership Act is "to enable and promote private investment in the construction,

maintenance and/or operation of structures and facilities of public-private partnership and other projects that are in the public interest (hereinafter: promoting public-private partnership), to ensure the economically sound and efficient performance of commercial and other public services or other activities which are provided in a method and under conditions that apply to commercial public services (hereinafter: commercial public services), or other activities whose performance is in the public interest, to facilitate the rational use, operation or exploitation of natural assets, constructed public good or other things in public ownership, and other investment of private or private and public funds in the construction of structures and facilities that are partly or entirely in the public interest, or in an activity provided in the public interest" (paragraph one of Article 6). One of its principles, as established in Article 15, is the principle of balance, which mandates that a harmonious distribution of rights, responsibilities, and legal advantages between public and private partners is upheld within a public-private partnership. As derives from the Public-Private Partnership Act, safeguarding the public interest encompasses ensuring public commodities or services, a responsibility falling under the jurisdiction of the public partner. Public services deliver goods and services whose provision aligns with the public interest, as determined by the state or local community's decision (Pečarič and Bugarič, 2011, p. 19).

Another example is the Exercising of the Public Interest in Culture Act (Official Gazette of the Republic of Slovenia, No. 77/07 – official consolidated text, 56/08, 4/10, 20/11, 111/13, 68/16, 61/17, 21/18 – ZNOrg, 3/22 – ZDeb and 105/22 – ZZNŠPP), stipulating that public interest in culture means interest in the creation, transmission and protection of cultural goods at national and local levels which is exercised by providing the conditions for them (Article 2).

As a final option, an important source is also the Resolution on Legislative Regulation (Official Gazette of the Republic of Slovenia, No. 95/09), which stipulates that the reason for the retroactive effect of certain legal provisions can only be a justified public benefit, provided that the acquired rights are not interfered with (Chapter VII: Implementation of the Resolution). In accordance with the principle of legality, retroactivity is not allowed except in certain specific situations. This is explicitly written already in Slovene Constitution in Article 155, which defines that "Laws, regulations and general acts cannot have retroactive effect. Only a law may provide that individual provisions of the law have retroactive effect, if the public benefit so requires and if this does not prejudice acquired rights."

The aforementioned analysis underlines that the concept of public interest serves as a classic illustration of an indefinite legal concept. Its actual meaning needs to be established on a case-by-case basis, aligning with the intentions stipulated by the law or other regulations, and in accordance with the legal prerequisites for attaining rights, obligations, or legal entitlements (Jerovšek and Kovač, 2016, p. 48). Consequently, the competent state bodies are obliged to confer specificity to it on an individual basis, all while safeguarding the fundamental constitutional principles and provisions. Nonetheless,

the explanation of its essence should refrain from infringing upon absolute human rights (Letnar Černič, 2013). Only through this approach can we effectively prevent arbitrary decisions, misuse of public power, and the promotion of specific private interests (Letnar Černič, 2013).

This comparative analysis across selected Slovene legislation leads to the assumption that the assessed systemic regulations as well as other unmentioned sectoral regulations⁷, define as public interest or acting in the public benefit the following: safeguarding human life and well-being, preserving animal health and life, preserving the natural environment, securing valuable property, ensuring public safety, among others. While we might expect a higher degree of specificity in the definitions of such concepts, they nonetheless remain categorized as indefinite legal concepts. Their substance will be concretized on a case-by-case basis through decisions taken by the competent administrative body.

In a broader context, we can argue that the definition of both public interest and public benefit predominantly resides within the realm of value-driven, political decision-making. Public interest signifies the interest of a specific societal group, carrying a wider, social interest. It embodies a normative aspect, where the general interest becomes public through legal norms. Its formation is formed by the impact of governmental bodies, informal collectives, ideological, and even subconscious influences. It stands as a fundamental value of the public sector. Public benefit represents objective effects because of an activity or behavior and is equalized with substantive legality (Kovač and Sever, 2016).

5 Notions of public benefit and public interest in the case-law of European court of human rights and Slovene constitutional court

As examples of relevant cases where there is a conflict between public interest and public benefit, we report two judicial decisions from the European Court of Human Rights.

Leander v. Sweden case (European Commission of Human Rights, 1985; European Court of Human Rights, 1987) set a precedent for protecting individuals from secret surveillance by government agencies. In 1979 Mr. Torsten Leander lost his new job as technician at the Naval Museum at Karlskrona, in the south of Sweden because he failed the state security vetting procedure. No more explanations were given even when Mr. Torsten appealed with the Commander-in-Chief of the Swedish navy and subsequently with the Swedish government. Mr. Leander submitted his case to the European Commission of Human Rights, which subsequently forwarded the complaint to the European

⁷ For example: Medicinal Products Act (Official Gazette of the Republic of Slovenia, Nos. 17/14 and 66/19); Decree on Protected Wild Animal Species (Official Gazette of the Republic of Slovenia, Nos. 46/04, 109/04, 84/05, 115/07, 32/08 – CC dec., 96/08, 36/09, 102/11, 15/14, 64/16 and 62/19) etc.

Court of Human Rights. Leander argued that the procedure violated Article 13 of the Convention, asserting that everyone is entitled to an “effective remedy”. Mr. Leander supposed that the special surveillance was a consequence of his political beliefs. Subsequently, the Commission expanded the scope of the complaint to include Article 8, which pertains to the right to privacy and family life, and Article 10, which concerns the right to freedom of expression.

Among the key issues examined included whether the Swedish security vetting system was a) essential for national security and b) lawful, since, according to Swedish constitution: “no entry regarding a citizen in a public register may without his consent be founded exclusively on his political opinion” (According to Chapter 2, section 3, of the Swedish Instrument of Government (regeringsformen, which forms the main constituent of the Swedish Constitution)). Was the public benefit of national defense granted by such surveillance system enough to harm the public interest of the right to privacy and family life and the right to freedom of expression?

Mr. Leander argued that the vetting process was excessively broad, exceeding what could reasonably be considered necessary for national defense. He noted that the procedure applied to over 185,000 jobs, with more than 100,000 security checks conducted annually, a significant number given Sweden’s population of about 8 million. The government, however, described to the commission that the numbers provided by Mr. Leander were exaggerations but maintained that the actual figures were classified to protect national security interests.

Mr. Leander lost in the European Commission of Human Rights (European Commission of Human Rights, 1985) and also in the European Court of Human Rights (European Court of Human Rights, 1987). In 1989 the Säpo (Swedish Security Police) commission disclosed the real figures on people under secret surveillance that were even higher than what Mr. Leander was suggesting (Säpo kommittén, 1990). More than a decade after the Court’s decision, on October 29, 1997, Dennis Töllborg, Leander’s attorney, was granted access to the entire file on the Leander case (see ECHR application 9248/81). The documents revealed that Leander was placed on file solely due to his political beliefs, indicating that the Swedish government had significantly misled both the Commission and the Court.

On November 27, 1997, the Swedish government officially declared that there were no valid reasons, either in 1979 or at present, to classify Mr. Leander as a “security risk.” It acknowledged that his dismissal from the Naval Museum was unjustified. As compensation for the wrongful violation of his rights, the government awarded him 400,000 Swedish crowns.

Key takeaways from the Leander v. Sweden (1987) case to ensure a fair trade-off between public interest and public benefit:

- Secret surveillance without adequate legal basis and judicial supervision can violate the right to privacy.

- Governments must establish clear and explicit legal standards for surveillance activities and provide individuals with effective means of challenging unlawful intrusions into their privacy.
- In a democratic framework, transparency and accountability are essential to ensure that surveillance measures are proportionate and justified.

For a comprehensive description of Leander case, please see: ('The Leander case: challenge to European court decision', 1997).

As second judicial decision of the European Court of Human Rights, we report the case of the Sunday Times v. United Kingdom (European Court of Human Rights, 1979), as it concerns the balance between freedom of expression (public interest) and several aspects of public benefit.

Between 1958 and 1961, thalidomide was prescribed as a sedative also to pregnant women. In 1960 it became apparent that this treatment could result in severe birth defects and deformities (Mcbride, 1961). By November 1961, the drug's manufacturer, Distillers, pulled it from the UK market, facing lawsuits from 70 affected families. In 1972, the Sunday Times of London published an article to highlight Thalidomide cases in UK (Sunday Times of London, 1979). The article criticized the settlements as out of proportion for the injuries suffered. In 1972, a court injunction blocked The Sunday Times from publishing other articles on the topic, as it would constitute contempt of court. The issues sparked public debate in Parliament and media. In 1976, the court lifted the ban. As side effect of the Sunday Times publication, a new compensation deal worth £32.5m (around 10 times the original figures) was finally arranged. The Sunday Times exposed in 1976 that the drug's developers had not met basic testing requirements before unleashing it on the market (Sunday Times of London, 1979).

The European Court of Human Rights examined the case (European Court of Human Rights, 1979) through the lens of "prescribed by law" in Article 10 of European Convention on Human Rights. While acknowledging unwritten law's validity, the Court emphasized two key requirements: accessibility and precision. The law must be clear enough for citizens to understand potential consequences of their actions.

In this case, the Court found that while the applicants could foresee some consequences, the law lacked sufficient precision, making the interference not "prescribed by law." Next, the Court assessed the interference's purpose and necessity. While recognizing the legitimacy of protecting the judiciary's role, the Court considered the restriction excessive. The public interest in freedom of expression outweighed the need for such a broad injunction.

Here the balance was between the freedom of expression and its limitation by law, as foreseen in article 10 of European Convention on Human Rights, therefore, the Court settled that the injunction violated Article 10, citing both procedural ("prescribed by law") and substantive ("necessary in a democratic society") shortcomings. The Court concluded that the social need (public

benefit) for restricting the article did not outweigh the public interest in free speech, as protected by the European Convention.

Further on, our survey focuses on Slovene national system. To determine whether the concepts of public interest and public benefit have remained consistent or evolved over the past two decades, an analysis of the case law from the Constitutional Court of Slovenia spanning over the last twenty-two years was conducted. By examining the Constitutional Court's rulings, any variations or changes in these notions within this timeframe were sought and identified.

To study the various interpretations of the public interest, we analyzed Constitutional Court decisions available at <https://www.us-rs.si/odlocitve/>. The search was based on the following criteria:

- Use of the term: javn* int* (Slovenian abbreviation for public interest);
- Time period: 1 January 2001 – 1 January 2023;
- Type of act: decision;
- Type of matter: constitutional complaint;
- Legal areas, which are relevant for administrative law⁸: state regulation; local self-government; administrative law other; denationalization; social security; public finance (taxes).

The search engine gave 55 results. Out of these, only 11 decisions actually concerned the public interest.

The same criteria was applied to analyze the public benefit using the term javn* kor* (Slovenian abbreviation for public benefit). In this case, the search engine gave 88 results for the period 1 January 2001 – 1 January 2023. Out of these, 43 decisions concerned the public benefit. However, 29 of these decisions were dealing with the same matter (pensions) and thus were given the same interpretation by the Court (see e.g. decisions: Up, 273/14, 27 June 2015, point 5; Up-283/14, 27 May 2015, point 5 etc.).

Comparison of the two decades did not provide many differences. As a result, an overall case law analysis is conducted to explore the notions of public interest and public benefit over the last twenty-two years.

Based on this analysis, the conclusion drawn is that the Constitutional Court does not interpret the content of public interest or public benefit. Both concepts present indefinite legal concepts, which legislator applies to cover different factual events and situations which have in common semantic content.⁹

8 The search engine of Constitutional Case-Law offers to choose decisions in different areas (criminal law, civil law and administrative law). The paper is focusing on administrative law and related concepts of public interest and public benefit, therefore the chosen legal areas are the ones relevant for administrative law.

9 "The essence of indefinite legal concepts is that the legislator uses them in the description of an abstract factual situation when he wants to use such a concept to cover various factual events and situations that have a common semantic content. The use of indefinite legal concepts does not in itself mean a violation of the principle of definiteness of regulations. Even the definition of prohibited behavior with an indefinite legal term is not in itself constitutionally inadmissible." (Decision U-I-136/07, 10 September 2009, point 14).

The use of such concepts is not breaching the Constitution since already the rule of law principle requires general and abstract solutions (Constitutional Court Order U-I-413/98, 25 May 2000). Frequently, the Court refers to public interest or public benefit in a generalized way in the context of a specific administrative area (e.g. Up-2411/06, 22 May 2008: administrative area of inspection supervision, which is performed due to public interest). Below is given an analysis of the decisions that were identified as most valuable for the analysis of both concepts. Firstly, we begin with the case-law on public interest, which is followed by case-law on public benefit.

Decision Up-395/06, U-I-64/07, 21 June 2007 delves into the concept of public interest concerning denationalization, which is one of the typical administrative fields in Slovene law system. With Denationalization Act (Official Gazette of the Republic of Slovenia, No. 27/91-I and amendments) the legislator enacted the restitution of expropriated property in kind as the rule. On the other hand, this principle was limited by provisions under which the possibility of denationalization by restitution was excluded in individual cases where rather a compensation was foreseen. The Denationalization Act defined a differentiation between the beneficiaries to whom the nationalized property will be returned in kind and those who will receive a compensation. According to the Constitutional Court (see Decision U-I-140/94, 14 December 1995) the legislator had justified reasons to regulate differently the legal status of beneficiaries arising from public interest and objective obstacles to the restitution of property. In this way the legislator protected the acquired right of ownership of natural and civil persons on that property, the collections of galleries and other similar institutions, public museums, natural monuments and cultural monuments, public-law institutions and their undisturbed functioning, etc. According to the Denationalization Act the property cannot be returned if it is exempt from legal turnover or ownership cannot be acquired. The question is if this is applicable also to cultural monuments and natural attractions. According to the court restrictions on the return of cultural monuments and natural sites due to the importance of these properties cannot be without reasonable cause.

“The Constitution within the framework of general provisions, i.e. in its 5th article, states some positive obligations of the state, among which also includes care for the preservation of natural wealth and cultural heritage. Article 70 The Constitution is intended for the protection of natural resources, while Article 73 is for the protection of natural and cultural heritage. The constitutional concept of property from Article 33 is only given substance by the statutory by which the legislator, by virtue of the power conferred on it by Article 67(1) of the Constitution determines the manner in which property may be acquired and enjoyed in such a way as to ensure its economic, social and ecological function.” (Decision Up-395/06, U-I-64/07, 21 June 2007, point 53).

Therefore the Constitutional Court in its decision Up-395/06, U-I-64/07, 21 June 2007 interprets that the intensity of public interest varies depending on the nature of the assets involved. Consequently, distinct types of property are subject to varying legal regimes. The significance of a particular type of things

to the community influences the legislator's scope in defining the content of property rights associated with it. In essence, the more crucial a certain type of property is for the community, the greater the flexibility for the legislator to determine the scope and boundaries of property rights (Decision Up-395/06, U-I-64/07, 21 June 2007, point 53).

In terms of public interest Decision Up-1850/08, 5 May 2010 is of great interest. It explains the specifics of public law relations v. civil law. Precisely, the pursuit of public interest falls under the responsibility of the state, entailing specific obligations on its part. However, it is crucial to note that the state's obligation to serve the public interest does not automatically grant individuals the right to demand fulfilment of these obligations from the state. In other words, individuals do not possess a right or legally protected interest against the state. This situation is appropriately termed as a legal reflex, i.e. the reflexive effects of a legal norm. In public law, authorities must pursue defined public interests and follow prescribed methods. However, individuals lack the right to legally compel authorities to fulfill these obligations, even if it could benefit them. In the realm of public law, while addressing statutory obligations of administrative authorities, it is essential to assess whether a regulation grants individuals rights or legally protected interests that can be asserted and defended in administrative dispute or other judicial proceedings (Decision Up-1850/08, 5 May 2010, point 9).

There are instances where the protection of an individual's interest aligns with the broader context of the public interest. An illustrative example is Article 70 of the Constitution, which relates to public goods. According to this provision, the acquisition of special rights to use public goods is subject to conditions prescribed by law. Legal provisions defining the potential establishment of a special usage right on a public good aim to balance diverse interests. They not only outline the abstract possibility for a specific individual but also seek equilibrium between ensuring general use and the abstract interest in establishing a special usage right (Decision Up-267/11, U-I-45/11, 3 April 2014, point 12). State and local authorities play a crucial role in overseeing the management of public goods that fall within their ownership. Functioning both as proprietors and as regulatory entities, they are constrained by legal norms defining the public interest in this context. As proprietors, they must allow equal use of the public good according to its intended purpose, as specified by law. Simultaneously, when acting as governing authorities, the state or local entity must define and ensure the lawful conditions for acquiring specific usage rights for a public good (Decision Up-267/11, U-I-45/11, 3 April 2014, point 13). Moreover, local authorities are legally required to facilitate the widespread use of public roads as they are recognized as a public good. Secondly, they are obligated to permit individuals to obtain special usage rights on public roads, provided it aligns with legally specified conditions, thus balancing public interest with individual needs (Decision Up-267/11, U-I-45/11, 3 April 2014, point 16).

Indeed, the conclusions drawn from Decision Up-741/12, 2 July 2015, support the notion that a single legal norm can encompass the protection of multiple interests, including both the public interest and various distinct private interests. This indicates that an individual's legal interest can be safeguarded within a general legal norm¹⁰ that prescribes specific actions to be taken by an authoritative body (e.g., in areas like health protection, environmental conservation, etc.). This protection is possible when the norm serves to safeguard both the collective interest and the individual's interests, and when the individual's entitlement can be clearly established (Decision Up-741/12, 2 July 2015, point 8; Kerševan, 2004, p. 82). Moreover, in this decision Constitutional Court indirectly gives substance to the public interest by giving examples such as coexistence in the immediate neighborhood, environment protection, quality living conditions and health protection as defined by legislator (Decision Up-741/12, 2 July 2015, point 14).

Finally, Decision U-I-309/13, Up-981/13, 14 January 2015 (point 23) establishes content of the public interest in the context of enabling immigrants the right to family life in accordance with Article 8 of the European Convention on Human Rights. The public interest in this administrative field is state and public safety and economic prosperity. As mentioned, Article 8 of the European Convention on Human Rights protects the right to respect for private and family life. This right imposes positive and negative obligations to the state (*Ahmut v. Netherlands*, no. 21702/93, 28 November 1996, point 67). To respect the right to family reunification the state has a negative obligation not to expel an alien when is required, and a positive obligation to allow an alien to enter and reside on its territory when it is required. In both cases, the appropriate balance needs to be struck between the competing interests of the individual and of society as a whole. In both cases, the state has a certain margin of discretion. To find the balance between private and public interest (to which the Court in this case refers as interest of society as a whole) protection of public security or the economic well-being of the country is relevant. To determine the extent of the state's obligation, the European Court of Human Rights requires that the factual circumstances of the case are assessed. To determine the extent of the state's obligation the specific circumstances of the individual involved and the public interest of the society as a whole, which is, supposed to receive that individual need to be taken into account. The State has a certain margin of discretion in this respect (Decision Up-1243/18, 3 June 2021, points 7 and 8).¹¹

10 "If there is justified legal interest of a particular person in a norm of a zoning act, depends on the content of the norm; thus, it is possible that the norm protects only the public interest, that both the both public and private interests are protected, or that one or more private interests are protected. This may be explicitly stated in the particular norm or may depend on its interpretation." (Decision Up-741/12, 2 July 2015, point 10)

11 See *Gül v. Switzerland* (no. 23218/94, 19 February 1996, point 38) "The Court reiterates that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision (art. 8) do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and

In the field of taxes, the Constitutional Court states that the objective of raising tax culture is aimed at increasing the efficiency of the tax system and an efficient tax system is clearly in the public interest (Decision U-I-106/19-19, Up-190/17-22, 10 March 2022, point 15). In this decision the Court firstly decided on a petition for a review of the constitutionality of the fifth paragraph of Article 20¹² of Tax Procedure Act (Official Gazette of the Republic of Slovenia, No. 117/06 and amendments). It repealed this paragraph and upheld the Constitutional Court's appeal, annulled the contested Administrative Court judgment and referred the case back to the Administrative Court for a new decision. In its explanation the Constitutional Court established that the contested measure did not pass the proportionality test in the strict sense, i.e. weighing the benefits conferred by the contested measure against the gravity of the interference with the affected human right (Decision U-I-106/19-19, Up-190/17-22, 10 March 2022, point 22). The contested fifth paragraph of Article 20 of Tax Procedure Act was a substantive supplement to the regime set out in the first paragraph of Article 20, which provides for the public publication of information on legal persons who are tax non-payers. The Constitutional Court already established that goals of this regulation are raising tax culture, improving payment discipline and encouraging voluntary, correct and timely payment of tax obligations, and the objective of transparency (Decision U-I-122/13-13, 10 March 2016, point 9). The Constitutional Court established that the contested regulation pursues the first of the aforementioned objectives of the basic regulation (Article 20 of Tax Procedure Act), i.e. raising tax culture. The Constitutional Court concluded that the goal was evidently to enhance the efficiency of the tax system, and it is unquestionably in the public interest to have a tax system that operates efficiently. Therefore the regulation in question was pursuing an objective that was constitutionally permissible.

The weight of the public interest may justify a different legal regulation of a certain right and outweigh the principle of the protection of legitimate expectations (see Decision U-I-110/15, Up-568/15, 1 March 2018, point 27: "unification of rights of social protection nature or conditions for them, while ensuring reasonable (re)use of the funds intended therefor, are factual reasons substantiated in the prevailing and constitutionally permissible public interest"; cf. U-I-79/12, 7 February 2013, point 12). The principle of legitimate expectations in fact ensures to the individual that the state will not arbitrarily worsen his or her position, i.e., it will not worsen their position without reasonable grounds in the public interest.

"The deterioration of an individual's legal position is therefore a *conditio sine qua non*, without which it is not possible to speak of a violation of the principle of the protection of legitimate expectations". (Decision U-I-78/16, Up-384/16, 5 June 2019).

of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation..."

12 The fifth paragraph of Article 20 of Tax Procedure Act defined the following: "the list of defaulters shall also include information on natural persons who became the beneficial owners of a legal person included in the list of defaulters after the legal person already had outstanding unpaid tax liabilities within the meaning of the second..."

The decisions referring to the public benefit tend to be more general in nature. In most cases, the Constitutional Court uses the term public benefit as a general term, without providing specific and detailed content (e.g., Decision Up-2501/08, 19 February 2009, in which the Constitutional Court only refers to provisions as set in Administrative Dispute Act, second paragraph of Article 32 (Official Gazette of the Republic of Slovenia, no. 105/06 and amendments), which define that if an applicant demonstrates that enforcing a decision (act) would cause irreparable harm, the court will temporarily halt the measure until a decision becomes final. The court must consider the balance between the applicant's potential damage, public benefit, and the interests of other parties, ensuring a proportional approach.). For example, the state can interfere with human rights only when permitted by the Constitution, or when the rights of others or public benefit necessitate it. The intervention must have a constitutionally permissible goal (legitimacy test), and its proportionality is evaluated by the Constitutional Court through a strict proportionality test based on established constitutional law judgments. The test is comprised of the assessment of three aspects of the intervention: appropriateness, necessity and proportionality in the strict sense of the word (Decision Up-1116/09, 3 March 2011, point 12; Decision U-I-106/19-19, Up-190/17-22, 10 March 2022, 14).

Decision Up-89/05, 7 December 2006 (point 6) is another case in which Constitutional Court refers directly to the legal provisions. This time of the Constitution. In accordance with article 69 of the Constitution, property rights to real estate can be revoked or limited for the public benefit upon compensation. This case is an interesting example of state interference in private ownership by building transmission line. Namely, the administrative bodies and lower courts stood on the position that if only electric lines are trespassing the land of the party, there is no need to prove that the investor of the transmission line construction is obliged to demonstrate the right to dispose of the land. The Constitutional Court concluded that this was not in the accordance with the right to private property from Article 33 of the Constitution. Further on, Constitutional Court established in Decision Up-395/06, U-I-64/07, 21 June 2007 that public benefit can be protected on goods under special constitutional protection (e.g. forests and land as part of natural resources) with the state being their owner. The case deals with regulation of system issues of ownership and, in this context, the establishment of the state property on things that were in the social ownership, which should be in exclusive competence of legislator (Decision Up-395/06, U-I-64/07, 21 June 2007, point 32). The object of nationalization must be clearly defined by law or easily ascertainable based on it; otherwise, the law would not align with the rule of law principles (Article 2 of the Constitution). Consequently, the legislature cannot delegate the determination of nationalization subjects to the executive branch without specific criteria. This is to avoid contradicting the constitutional principle of the separation of powers (Article 3 of the Constitution) and the provision in the second paragraph of Article 120, emphasizing that administrative bodies must operate within the framework of the Constitution and laws (Decision U-I-312/96, 14 January 1999, point 13).

The right to compulsory basic education is essential for children's development (see case *Timishev v. Russia*, nos. 55762/00 and 55974/00, 13 December 2005). Individual's basic education besides the benefits it gives to the pupils, serves the public good (Decision U-I-45/16-50, Up-321/18-48, Up-1140/18-38, Up-1244/18-38, 16 September 2021, point 89; see also *Pononyovi v. Bulgaria*, no. 5335/05, 21 June 2011: "education is a right that enjoys direct protection under the Convention. It is expressly enshrined in Article 2 of Protocol No. 1 [...] It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions."). Individuals have the right to education, which is also an obligation since they are obliged to attend primary school. In accordance with the second paragraph of Article 57 of Constitution they have the right to free compulsory primary school education. Mandatory minimum of primary school education must be uniformly determined. The goal is to guarantee that individuals, based on their preferences and abilities, acquire a level of compulsory primary school education that enables them to pursue further education after completing primary school. Additionally, the education should adequately prepare them for the demands of life in various societal situations (Decision U-I-45/16-50, Up-321/18-48, Up-1140/18-38, Up-1244/18-38, 16 September 2021, point 89). Parents have the right to enroll their child in a public or concessioned private school within the school district where the child resides. The primary school in that district is responsible for admitting the child upon parental request. Enrolling a child in a primary school in another district is only allowed in exceptional cases with the consent of both schools. The education system ensures that all children in a specific district have the opportunity to enroll in a public school in their residential area, offering them equal opportunities to achieve educational goals and standards (Decision U-I-45/16-50, Up-321/18-48, Up-1140/18-38, Up-1244/18-38, 16 September 2021, point 89).

The denial of the renewal of a temporary residence permit and the order to leave the Republic of Slovenia not only impact the foreigner but also affect the family members. The assessment of the measure's influence should consider its impact on the effective enforcement of the right to respect the family life of all individuals affected, including the applicant, her spouse, and their under-age child (Decision, Up-1243/18-15, 3 June 2021, point 12). The first-instance authority failed to assess key factors such as the duration of the applicant's spouse's residence in Slovenia, as well as the social, cultural, and family ties of the family in both the spouse's country of origin and Slovenia (Decision, Up-1243/18-15, 3 June 2021, point 14). Additionally, the authority did not determine any potential obstacles the appellant might face if required to relocate to the spouse's country of origin, nor did it evaluate the severity of potential issues arising from such a move, particularly concerning the welfare of the under-age child (Decision, Up-1243/18-15, 3 June 2021, point 14). The first-instance authority neglected to evaluate the potential for ongoing contact between the applicant's spouse and minor children if only the spouse were to leave Slovenia. Considering that this could impact personal contact between the children and their father and potentially affect the children's well-being in the event of parental separation, the authority should have determined

the existence of any obstacles to further contacts. Furthermore, the authority failed to assess the feasibility and proportionality of the adopted measure in terms of effectively protecting the interests of the children directly affected by the decision (Decision, Up-1243/18-15, 3 June 2021, point 15). Finally, the authority made poor judgment from the point of view of the best interests of the children (Decision, Up-1243/18-15, 3 June 2021, point 16). Therefore, when deciding on extending temporary residence permit in the Republic of Slovenia to the foreigner married to Slovene citizen, having together under-age children the Administrative Unit will have to weigh the respect for the family life of the appellant, her spouse and their children against the public benefit. The Constitutional Court annulled decisions of Administrative Court, Ministry of Health and the Administrative Unit of Ljubljana and returned the case for a new decision to the Administrative Unit, which will need to assess whether a measure is necessary in a democratic society and proportionate to the objective pursued (Decision, Up-1243/18-15, 3 June 2021, point 18). It will also need to assess the proportionality of the intervention in terms of safeguarding the utmost advantages for under-age children.

Decision U-I-6/13, Up-24/13 deals with tax enforcement on receivables outstanding of tax debtor. In a tax enforcement proceeding, a tax debtor faced tax foreclosure of their monetary claims initiated by the first-instance tax authority. Following the decision to introduce tax enforcement, the tax enforcement officer directed the appellant to pay the seized monetary claim to cover the prescribed amount bill. However, the appellant contested this decision, arguing that they had no outstanding debt to the tax debtor (U-I-6/13, Up-24/13, 11 February 2016, point 11). Resolving a dispute between a tax debtor and a third-party alleged debtor regarding a monetary claim is in the interest of the tax authority, the tax debtor, and the state acting as the creditor in the tax enforcement procedure. The tax debtor seeks the initiation and management of the procedure by the state authority for realizing their monetary claims and determining the repayment process. The Constitutional Court states, that "The state pursues public benefit to ensure effective tax collection and (as soon as possible) repayment tax debt." The Constitutional Court was tasked with examining whether the Supreme Court's position, which permits tax enforcement on a third party's property to recover a foreign tax debt, even when the third party disputes the existence of the tax debtor's claim, infringes on the third party's right to have their obligations judicially determined. This scrutiny was aimed to assess if such limitations amount to a violation of the right outlined in the first paragraph of Article 23 of the Constitution (right to judicial protection) (U-I-6/13, Up-24/13, 11 February 2016, point 15). The Constitutional Court found a violation of the right to judicial protection from the first paragraph of Article 23 of the Constitution and the first paragraph of Article 6 of the ECHR and annulled the contested judgment and returned the case to the Supreme Court for a new decision (U-I-6/13, Up-24/13, 11 February 2016, point 17).

Article 158 of the Constitution underscores the significance of upholding the finality of state decisions in legal relationships. The finality principle re-

quires that interference with the right obtained through an individual act or the obligation imposed in this manner should cease, as it would undermine confidence in the legal system. Case Up-195/13, U-I-67/16 (10 February 2017) dealt with the possibilities of reassessing the right to a pension and changing the final assessment in favor of the beneficiary due to erroneous or incomplete data on benefits. The Constitutional Court supported the government's emphasis on finality. Namely, The regulation that restricts extraordinary legal remedies to the minimum aims to reinforce the principle of finality of legal decisions. In doing so, it does not contradict the pursuit of the public benefit. However, the Constitutional Court asserted that such changes do not compromise private interests or erode trust in the legal order. It emphasized that the option for reassessment and error correction actually enhances confidence in the legal system, given the shared responsibilities between the beneficiary and the Pension and Disability Insurance Institute of Slovenia overseeing the pension assessment procedure (Decision Up-195/13, U-I-67/16, 10 February 2017, point 16).

As previously stated, two main conclusions emerge from the above analysis. Firstly, the Constitutional Court generally refrains from providing detailed interpretations of the terms public benefit and public interest in its decisions. Instead, these terms are commonly mentioned in a more generic manner. Secondly, significant differences between the two decades are not apparent. The Court typically uses public benefit or public interest distinctly, without treating them as interchangeable synonyms. The reason for this is that a decision explicitly interpreting the meaning of both concepts was not detected. Therefore, mostly the Constitutional Court mentions either one or the other term. Even if there are cases where both terms are mentioned in the same decision, the court does not go into details of their interpretation, but is rather referring to the terms existing in the law (e.g. public health, public safety, environment protection etc.) or general meaning e.g. public interest as an interest of society as a whole. Mainly, it refers to the expressions of either public benefit or public interest as it is mentioned in the law. An upgrade of current analysis could be performed by analyzing Constitutional Courts' decision in the procedure for the review of the constitutionality and legality of regulations or general acts. This Constitutional Court's procedure reviews the relevant legislation. Since the legislation is the one that applies indefinite legal terms of public benefit and public interest, it would be interesting to analyze Constitutional Court's interpretations in its decisions on constitutionality and legality of regulations or general acts.

6 Conclusion

Both public interest and public benefit are abstract concepts. The analysis of the relevant systemic regulations has shown that the two are sometimes applied intertwiningly. However, the theory presented above suggests that there are certain differences in terms of their tangibility and enforceability.

Thus, a public benefit is the general benefit of an organized wider community that is superior to the interests of an individual. As such, it indicates objective effects as a result of activities or behavior and is more tangible and, hence, more enforceable than interest. In the broadest sense, it is also equivalent to substantive legality. This means it is up to the legislator to define what public benefit is. The principle of legality in administrative law requires the final issued decision to respect both the substantive conditions of the substantive law and the principles of and the rules of procedure (formal legality). Substantive legality refers to decision-making on a right or obligation to the extent of the rights and obligations provided for in the substantive rules. Substantive legality is generally established by the Constitution and obliges the authority, when making a decision to apply the substantive rules which determine the nature, content and the nature and scope of the rights, obligations and legal interests of the parties in the administrative act issued. The authority is permitted to acknowledge rights and legal entitlements and impose obligations through an individual administrative act solely in alignment with the provisions stipulated by substantive rules. It is imperative that the law defines the authority's competence to issue individual administrative acts and defines the conditions or specifications of the abstract factual circumstances serving as the foundation for the issuance of individual administrative act (Kovač and Jerovšek, 2023).

Public interest denotes a subjective attitude towards certain benefits or in a particular situation. It is the interest of a certain social community and implies a general, broader social interest. It is a normative phenomenon, i.e., the general interest becomes public on the basis of a legal norm through the institutional level of governance. It encompasses both the state and self-governing local communities, wherein the state delegates a portion of its political authority. It is at this level where the goals of a public community are established through political decision-making processes. These goals are expressed and recognized as the public interest.

Finally, as seen in the case of expropriation (see chapter 4) it is up to the legislator to define more in detail what is public benefit (i.e. expropriation purposes) in different fields in accordance with the Constitution (Virant in Šturm, 2002, p. 667). While public interest encompasses only the aspect of interest, public benefit requires a balance between public and private interests (i.e. inviolability of property). Different public interest represent different importance for public benefit (e.g. building a new traffic infrastructure can be beneficial to fulfill certain public needs, but on the other hand it contributes to the higher pollution). Namely, if we would understand public interest as a synonym of public benefit it would be sufficient for the expropriation to take place to define in a spatial plan an interest of a state or a municipality. Consequently, the term public benefit is inextricably linked with the principle of proportionality (Virant in Šturm, 2002, p. 668, 676).

The analysis of the Constitutional Court case law over the past two decades did not yield any significant tangible results in terms of giving substance to

these two concepts. The decisions often refer either to the public interest or the public benefit, but mostly in a very generalize way without interpreting the substantive elements for a particular administrative area. Nevertheless, we may understand from certain decisions that both public benefit and public interest refer to concepts such as natural wealth, care for the environment, and health. Similar results were obtained in the analysis of systemic regulations.

In the future, it would be interesting to analyze the substance of both concepts as given in the case law of the Administrative Court and the Supreme Court and Constitutional Courts' decision in the procedure for the review of the constitutionality and legality of regulations or general acts.

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