***TURIBA* UNIVERSITY**

FACULTY OF LAW

ERNESTS SAULITIS

SYNOPSIS OF THE DOCTORAL THESIS

PUBLIC PERSON'S PROPERTY AND FORMS OF IMPLEMENTATION OF PROPERTY RIGHTS

STUDY PROGRAMME "LEGAL SCIENCE"

FOR A DOCTORAL DEGREE IN LEGAL SCIENCE
SUB BRANCH "CIVIL LAW"

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The doctoral thesis and its summary are accessible for public review at the library of the *Turiba* University, Graudu Street 68, Riga.

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General overview of the doctoral thesis

The doctoral thesis "Public person's property and forms of implementation of property rights" is a scientific research that analyses the property of legal entities under public law (hereinafter – public persons) and their use in accordance with the various forms of implementation of property rights that are most common in practice. The research is based on the works of civil law and public law authors. Among Latvian civil law specialists it is worth mentioning *Dr. iur.* V. Sinaiskis, *Dr. iur*. V. Bukovskis, *Dr.iur.* V. Kalnins, *Dr. iur*. J. Vebers, *Dr. iur.* J. Rozenfelds, *Dr. iur.* E. Kalnins, *Dr. iur.* K. Balodis. Prominent among foreign authors are *Dr.* F. J. *Peine*, *Dr. O. Lepsius*, *Dr. H. Hardinghaus*, *Dr. H. Arbousset*, as well as I. Prokrovski (*Покровский И. А.*) and V. Jelasevich (*Ельясевич В. Б.*). The scientific research works of these and other authors were used to carry out historic research, problem analysis and ascertain the theoretical concepts related to actual problems identified in practice. Normative enactments of Latvia and other countries, court practice and law doctrines have been applied to analyse the issues and problems as well as to argument the opinions expressed. Widely accepted reliable sources from the Internet and practice materials have been used.

The actual results of the doctoral research have been disseminated through scientific publications and presentations made at scientific conferences in Latvia and abroad. Significant attention has been focused in the research on the comparative analysis of the relevant legal institute based on legal doctrine and normative enactments in Latvia, Germany and France. This is due to the fact that these issues in the Latvian law doctrine have been relatively less studied. On the other hand even when common trends have been identified in the normative enactments of the abovementioned countries, national law traditions, social environment and law enforcement practice play a significant role. A systematic research of the existing regulation was carried out within the research framework and new theoretical concepts in Latvian law science were offered. In addition analysis of theoretical concepts were carried out and specific solutions were put forward for practical implementation including proposed amendments to normative enactments on issues related to public persons' property and private law transactions.

Research methods applied

Widely accepted research methods were applied in the doctoral research. The comparative method was most used taking into account the necessity of identifying similar issues and solutions. The comparative method was applied in several aspects: dogmatic — ascertain the understanding of this legal institute and historical — study the evolution of the

legal institute. Taking into account the fact that the modern understanding of the legal institute under study is not possible without the in depth study of its origins a significant amount of the research was carried out using the historical method in its various forms. Analytical research methods applied to form the theoretical concepts and draw logical conclusions played a significant role. The scientific inductive method was also used for these purposes — forming general conclusions or establishing appropriate relationships from several individual facts. Deductive research method was applied to draw specific conclusions regarding the topic under research based on the opinions of authors of sources summarised in the doctoral research as well as the personal experience and opinions of the author of this research. The descriptive method is extensively used to analyse the interaction between the object of the research and the research environment or context and thereby identify the various forms of expressions of property rights. In this specific case the research would be incomplete without the application of the sociological method. Therefore the doctoral research widely uses concepts and sources found in the doctrines of other fields of science (economics, politics). The research was carried out using sources of literature in various languages including the use of interlibrary services offered by the Latvian National Library for gathering various sources, accessible online scientific journals and databases. Participation in interdisciplinary international scientific conferences abroad played a significant role in gathering sources necessary for the compilation of the doctoral research.

Research hypothesis

"Public law norms regulate the activities of public persons regarding their property or functional assets under their possession regardless of their civil law status."

Goal of the doctoral research

To work out the fundamentals of doctrine of property of public persons and public property pursuant to the Latvian regulatory enactments and legal traditions.

Although the research does not aim to work out a specific draft law, the conclusions section offers specific legal provisions that could be implemented into practice immediately.

Research objectives

The following objectives were set in order to achieve the goals of the research:

1) Analyse the property forms included in Latvian law that correspond to the concept of public property;

2) Identify the laws applicable for activities of public persons with property at their disposal;

3) Clarify the scope of freedom of action of public persons in managing assets in their possession;

4) Study the doctrines related to public property and public things under the Romano Germanic legal system as well as the analogical Latvian normative regulations;

5) Ascertain the legal status of assets in the possession of public persons and the regulations applicable for their management;

6) Identify the problematic issues faced in practice related to the involvement of public persons in economic activities;

7) Study the factors limiting commercial activities of public persons in the normative regulations and analyse their justification;

8) Review possible solutions for legal basis of identification and classification of public services;

9) Identify deficiencies in the existing regulatory framework and on the basis of the research results put forward recommendations for enhancement of normative regulations concerning the implementation of property rights of public persons.

Topicality of the theme and scientific novelty

The scientific research of legal status of public person's property and assets at their disposal within the Latvian law doctrine has not been carried out so far. The legal status of public person's property and assets in their possession is the context of the present research. A law doctrine that at present is less known in Latvia - functional or administrative assets of public persons that are used for fulfilling administrative functions or tasks — has been formulated. Similarly the way in which a public person exercises property rights and other related rights has not yet been researched enough. The research object is the legal relations arising out of the management of public person's property and other assets at their disposal. The perspective offered in the doctoral thesis on public person's property and other assets at their disposal provides doctrinal justification for the exercise of property rights in situations that law enforcers often face in practice. The emphasis is on issues regarding separation of public person's property and public property. The doctrinal justification points out aspects that facilitate the identification of factors that are to be evaluated while making decisions regarding public person's property and assets at their disposal.

Nowadays there is no longer "pure" private law or "pure" public law. Many institutes subject to private law are regulated mandatorily and cannot be amended by the will of the

parties. On the other hand agreements regarding penalties or settlements have become a part of public law even criminal law. Freedom of action to manage the property belonging to public persons or local governments has also undergone essential changes. In fact they are governed by public law regulations at the same time externally maintaining private law characteristics. In individual cases legislators have subjected these private law relations to administrative law control. One often faces situations in practice when one and the same property is handed over to the use of private persons under public law terms – administrative acts which are also private law contracts for their use. Such differences are based on the special legal status of distinct property objects that are noted as public property although such a concept does not exist in the Latvian normative enactments. The theoretical results of the research can also be used to support practice and further the proper legal and effective management of public person's property including the provision of guidelines for their protection through the courts and conflict resolution. On the whole the novelty is in the complex study of public person's property and implementation of property rights considering property as an object under the civil law as well as activities of public persons in terms of management that are exercised using private law entities at their disposal — capital companies.

Theoretical significance of the doctoral thesis

The theoretical significance of the doctoral thesis is expressed in the identification of problems related to the classification of public person's property and forms of implementation of property rights and its theoretical analysis as a result of which new theoretical concepts in the form of doctrine have been worked out.

Practical significance of the doctoral thesis

The thesis includes theoretical analysis of problems faced in practice as a result of which recommendations have been put forward for the enhancement and modernisation of legal regulation of public person's property and their management. The materials resulting from the theoretical analysis can directly be applied in practice in resolving legal issues related to public person's property in capital companies and their management and public services.

Validation and dissemination of research results

List of scientific publications:

1. Saulitis E. (2014). Public Person Functional: Insight in Concept. *Journal of Turiba University „Acta Prosperitatis”*, No.5. Rīga: SIA „Biznesa augstskola Turība”, pp. 93 – 104;

2. Saulītis E. (2013). Publisko korporāciju attīstības tendences un sabiedrības vispārīgās intereses. *Vai ir iespējama reindustrializācija ES un Latvijā*. 27.03.2013. Zinātniskā semināra materiāli. Rīga: RTU, 2013., 59. - 74.lpp;

3. Leja L., Saulītis E. (2012). Publisko tiesību juridiskā persona kā privāttiesību subjekts. *Jurista Vārds* Nr.33 (732), 14.08.2012., 4 - 11.lpp;

4. Saulītis E. (2010). Publisko personu mantas pārvaldība un tās normatīvā regulējuma izstrādes aktuālās problēmas. *Latvijas Ekonomiskās izaugsmes faktori un perspektīvas*. Zinātniskā semināra materiāli**.** Rīga: RTU Izdevniecība, 58. - 67.lpp;

5. Saulītis E. (2009). Publisko personu rīcībspējas un tiesībspējas civilprocesuālie aspekti. *Jurista Vārds* Nr.44 (587), 03.11.2009., 19. - 22.lpp;

6. Saulītis E. (2008). Valsts ietekme uz konkurenci starp augstākās izglītības pakalpojumu sniedzējiem. *Tautsaimniecības un izglītības sistēmas attīstības problēmas*. Zinātniskā semināra materiāli. Rīga: RTU, 35. - 41.lpp.

List of international scientific conferences with published papers in conference proceedings:

7. Janucina D., Saulitis E. (2015). Commercial Companies of Public Persons and their Governance in Latvia – Legal and Ethical Aspects. *Technical University of Sofia XIII International Scientific Conference “Management and Engineering’ 15”.* Conference Proceedings, Volume II. Sofia: Technical University of Sofia, pp.1274 -1283;

8. Dimitrova R. V., Saulitis E. (2015). Public Person Commercial Activities, Indirect Aid and Competition Problems: Bulgaria and Latvia. *Biznesa augstskolas „Turība” XVI Starptautiskā zinātniskā konference „Gudra, ilgtspējīga un iesaistoša Eiropa: izaicinājums attīstībai„*. Konferences rakstu krājums. Rīga: Turība, 83 - 92.lpp;

9. Saulitis E. (2014). Public Person Functional Assets: Trends and Legal Problems. *Sofia Tehnical University XII International Scientific Conference “Management and Engineering’ 14”.* Conference Proceedings, Volume II. Sofia: Technical University of Sofia, pp. 1248 – 1257;

10. Saulītis E. (2014). Publiskas personas funkcionālo aktīvu jēdziens un izpratne. Biznesa augstskolas Turība XV starptautiskās zinātniskās konferences "10 gadi Eiropas Savienībā - sasniegumi, problēmas un nākotnes ieceres" krājums. Rīga: Turība, 508. - 523. lpp;

11. Saulitis E. (2013). Public Corporations, its Legal and Organizational aspects, management and General Interests. *XI International Scientific Conference "Management and Engineering"*. Conference Proceedings, Volume II. Sofia: Technical University -Sofia, pp. 1114 – 1123;

12. Saulītis E. (2013). Ieskats publiskās korporācijas jēdziena juridiskajā izpratnē un to ekonomiskā nozīme mūsdienās. *Biznesa augstskolas Turība XIV starptautiskās zinātniskās konferences krājums*. Rīga: Turība, 2013. 180. - 197. lpp;

13. Саулитис Э. Ю. (2012). Проблематика гражданско правовой деятельности юридического лица публичного права в Латвии. *X International Scientific Conference „Management and Engineering`12*". Conference Proceedings, Volume II. Sofia: Technical University –Sofia, pp. 1050 – 1059;

14. Саулитис Э. Ю. (2012). Гражданско-процессуальная проблематика перехода к системе единого юридического лица публичного права в Латвии. *8-я Международная научно-практическая конференция „Государственное регулирование экономики и повышение эффективности деятельности субъектов хозяйствования"*. Сборник научных статей. Часть 2. Минск: Академия управления при Президенте Республики Беларусь, стр.182 -184;

15. Saulītis E. (2012). Publiskās personas valdījuma problemātika Latvijā. *Biznesa augstskolas „Turība" XIII starptautiskās zinātniskās konferences „Ilgtspējīga uzņēmējdarbība mainīgos ekonomiskos apstākļos" rakstu krājums*. Rīga: Turība, 297. – 304.lpp;

16. Saulitis E. (2011). Public property as a component of competition law. *IX International Scientific Conference „Management and Engineering`11"*. Conference Proceedings, Volume II. Sofia: Technical University –Sofia, pp. 1029 – 1038;

17. Saulītis E. (2011). Publisko personu īpašums un tā tiesiskā statusa aktuālās attīstības tendences. *Biznesa augstskolas „Turība" XII starptautiskās zinātniskās konferences „Jaunas vērtības tūrisma un sabiedrības attīstībai" rakstu krājums*. Rīga: Turība, 172. – 178. lpp;

18. Саулитис Э. Ю. (2010). Системные проблемы нормативного регулирования управления собственностью публичных лиц. *6-я Международная научно-практическая конференция „Государственное регулирование экономики и повышение эффективности деятельности субъектов хозяйствования"*. Сборник научных статей. Часть 2. Минск: Академия управления при Президенте Республики Беларусь, стр.126 -129;

19. Saulītis E. (2010). Publisko pakalpojumu nošķiršanas un klasifikācijas problēmas. *BA „Turība" XI starptautiskās zinātniskās konferences „Cilvēks, sabiedrība un valsts mūsdienu mainīgajos apstākļos" rakstu krājums*. Rīga: Turība, 226. - 232. lpp;

20. Saulītis E. (2009). Publisko personu komercdarbības aktuālās problēmas Latvijā. *RTU 50. starptautiskajā zinātniskā konference. RTU IEVF Zinātniskās konferences materiāli (CSEE` 2009)*. Rīga: RTU, CD;

21. Саулитис Э.Ю. (2009). Публичный сектор и национальное нормативное регулирование после глобального кризиса. *5- я Международной научно-практической конференции „Государственное регулирование экономики и повышение эффективности деятельности субъектов хозяйствования" Академии управления при президенте Республики Беларусь.* Сборник научных статей . Часть I. Минск: Академия управления при Президенте Республики Беларусь, стр.60 – 62;

22. Saulitis E. (2008). Legal aspects of making business in Latvia by publics right's entities. *49th International Scientific Conference of Riga Technical University „The problems of development of national economy and entrepreneurship"*. Conference Proceedings. Riga: RTU, CD;

23. Saulītis E. (2008). Publisko tiesību subjektu uzvedība privāto tiesību jomā kā komercdarbību ietekmējošs faktors. *Biznesa augstskolas Turība IX starptautiskā zinātniskā konference „Darba tirgus sociālie un ekonomiskie izaicinājumi"*. Konferences krājums. Rīga: Turība, CD.

Structure, scope and sources of the doctoral thesis

The thesis comprises an introduction, eight chapters with sub chapters, conclusions and recommendations section as well as a list of sources used. The total scope of the thesis is more than 275 pages. 303 various sources of literature were used in the thesis: literature sources — 158, normative enactments — 99, court decisions — 18, practice materials — 28.

Content of the doctoral thesis

Introduction

The introduction provides a description of the justification of the actuality of the topic, the research hypothesis, goals, objectives, research object, research environment and the scientific research methods applied.

Chapter 1: Understanding of the concept of public person's property.

The chapter is divided into six sub chapters that analyse issues related to the concept of property as well as provides a review of the prevalent opinions in Latvian law doctrine

(*Dr. iur.* V. Sinaiskis, *Dr.iur.* J. Rozenfelds, *Dr. iur.* K. Balodis, *Dr. iur.* K. Dislers). A study of the dynamics of the idea of public (state) property in various sources has been carried out. Latvian normative enactments do not include the concepts "public person's property" or "public property". The subjective principle is used in Latvian normative regulations to determine ownership of property i.e. ownership of property is determined depending on under which entities' possession the property exists or as it is registered in public registers. Therefore property is said to be state or local government property, private property as well as property of natural or legal entities in the normative enactments, doctrine and in practice. Although administrative law science has developed considerably since the regaining of independence a lot of issues have not yet gained the attention of scholars and law enforcers. One of such issues is the legal status of property belonging to public persons. One can find terms in civil law doctrine such as "state property" or "local government property" or "private property" more in the economic context rather than the legal context as under property law all owners are equal with regards to the exercise of their rights. [1]

Although the idea of *res publica* is inherent in Roman law, the origins of modern public property and public law doctrine can be traced back to France which experienced radical social changes in the 18th century. In accordance with the patron principle, the ruler has the absolute power over his sovereign subjects and is responsible for their welfare. Therefore the king's property is not subject to any special restrictions (e.g. hunting in the king's forests), subjects can use the usual means, for instance land and waterways for personal travel purposes. After the 1789 French revolution all the king's property became national property and was not divided as private and public property. [2] Although social – political formations brought in as a result of the 1789 French revolution did not last long, its consequences had a significant effect on French public and private law. With the development of legal thought in the 19th century the concept of *public domaine* that included significant resources of the society emerged. The idea of possible restrictions regarding property rights to these resources was put forward (Proudhon and his followers) [3], and resources in the public domain were divided into *naturel* and *artificial.*

Parallel to the concept of public property, the concept of state private law property still existed and property objects which in doctrine were considered to be part of public domain

[1] Balodis K. (2007). Ievads civiltiesībās. Rīga: Zvaigzne ABC, 34.lpp
[2] Arbousset H. (2005). Droit administratif des biens: Domaine des personnes publiques. Levallois-Perret : Studyrama, p.31
[3] Hardinghaus H. (1966). Öffentliche Sachherrschaft und öffentliche Sachwaltung. Berlin: Dunckerk&Humbolt, S. 79

were classified in civil law sources as state property and were subject to legal regulations separate from the general civil law provisions. H. Hardinghaus justifiably points out that the *Le Code civil des Français* (hereinafter – FCC), that is linked to the origins of public law, originated simply as result of change of words: The clauses 538 – 541of the code have been almost literally taken from 1790 "*Code dominial*", replacing the concept of „state property with "public property" [4]. In turn the origin of these norms are based on a much older regulation related to the crown's property (*domaine de la corounne*). With the further development of administrative law doctrine and normative regulations the concept of administrative things and administrative property emerged. Movable and immovable property that belong to the artificial part of public domain and other property that were used to provide services to meet the community and administrative needs were considered to be property objects. The control of activities of public administration related to the use and accessibility of these property objects was subject to the control of administrative courts.

The study of normative enactments and doctrines of other countries indicate that the special status of "public property" was linked to the following motives:

- Public property is especially important for the whole society in terms of its special usage (public roads and waterways) or important for each and every member of the society in terms of its natural features (air, unique nature objects);
- Public person's property is used to provide for public needs and their usage is granted usually through public law instruments;
- The rights to use of public person's property is an essential economic value and it is the duty of public persons to ensure equal (without any discrimination) accessibility rights to all those who are interested.

Therefore it is reasonable to consider the opinion of German legal scholar F. J. Peine that public property object is not a special object but almost any object with certain usage possibilities. [5]

The basis of modern law classification is the division of law into public and private law. A similar approach can be identified to issues related to ownership of property: generally state or private property. Community property as undivided common property is almost unusual phenomena in modern civil law where the very idea of common property is

[4] Hardinghaus H. (1966). Öffentliche Sachherrschaft und öffentliche Sachwaltung. Berlin: Dunckerk&Humbolt, S. 77

[5] Paine F. J. (2002). Vācijas vispārīgās administratīvās tiesības. Vācijas administratīvā procesa likums. Rīga: TNA, 407. lpp

considered as an encumbrance.[6] *E. Ostrom's* research indicates that such an approach is not justified in cases when the property object or the right to use of such resources is based on cooperation or survival of the community.[7] At the same time it is these very circumstances that show the impossibility of applying this concept in relation to all public (state) property objects and rights. When a group of persons collaborate (voluntarily or otherwise) for economic reasons, the individuals are united in the understanding of necessity to limit the competition among themselves for the effective use of the resources. The opinion that property ownership concepts is more an economic significance is to be critically evaluated as in terms of property law all owners have equal rights to their own property. Carrying out relevant research it is to be concluded that differences are not only economic in nature.[8] Even if a civil law state is just one of property right carriers who does not have any special advantages over other law subjects, state property could comprise property, assets that could not be given to private persons pursuant to the respective legal system but at the same time cannot be excluded in terms of usage under civil law. In fact a major part of this state's property is not an object of civil property law even when it is civil sources that indicate that this particular object is under state ownership. The protection of property rights and possession of these objects is usually carried out under legal protection mechanisms foreseen in the civil law.

Sources that comprise a comparative analysis of main public property and public things doctrine are relatively few. H. Hardinghaus provides an analysis focusing on German law doctrine that clearly shows the interaction and main trends of both these systems. On the whole one can agree to H. Hardinghaus' opinions and the systematisation offered that is based on public things and public law concepts. However discussions give rise to the question whether „public things" concept can really be considered as a liberal approach regarding public property issues.[9] The „public things" concept does not destroy the private law based property rights to things but only restricts the right to usage for public interest (aim of the object – „*Sachzweck*").

The Latvian regulations on public property and public things similar to components of other property law systems are quite eclectic. In fact modern Latvian normative enactments do not include the concept of public property or public things. Similar to French law the

[6]See, for instance, LCL clauses 1067 – 1081

[7] Ostrom E. (1990). Governing the Commons: The Evolution of Institutions for Collective Action. Cambridge: Cambridge University Press, p.14

[8] Different viewpoint - Balodis K. (2007). Ievads civiltiesībās. Rīga: Zvaigzne ABC, 34.lpp

[9] Hardinghaus H. (1966). Öffentliche Sachherrschaft öffentliche Sachwaltung. Berlin: Dunckerk&Humbolt, S. 78

origins of Latvian public property and public things can be found in civil law. Regulations of the Local Civil law summary (hereinafter – VCLK) that are related to the classification of property according to the owners (clauses 590 -596) have not been transferred to the Civil Law of the Republic of Latvia [10] (hereinafter – the LCL). Therefore it could be considered that the concept of ownership of property according to ownership classification features was stricken off with the coming into force of the Latvian civil law LCL. However the VCLK regulations contain references to public (state) property that cannot exist as private ownership in any public shipping or rafting rights (VCLK clauses 1014, 1015, 1016), free fishing rights in the sea and Kurzeme rivers (VCLK clauses 1032, 1033), as well as the state as the sole person to whom the rights to fishing in public rivers and lakes belong (VCLK clauses 1033, 1036 remarks). It should be mentioned that many of these VCLK regulations were introduced in the 20's and 30's of the 20th century. Therefore it would be quite premature to consider that this legal material is derived from Roman law, even if the system of restriction of property use rights and certain individual rights such as shipping rights undoubtedly belong to a much more ancient legal order.

Chapter 2: The concept and understanding of public person's functional assets

The chapter comprises five subchapters dedicated to analysis of the understanding of the concept of property contained in actual normative regulations — *Law on Prevention of Squandering of the Financial Resources and Property of the State and Local Governments* (hereinafter — LPSFRPSLG)[11] and *Law on Alienating the Property from the Public Person* [12] (hereinafter — LAPPP*)* in the relevant context. The opinion expressed for discussion is that the inclusion of public person's property objects used for fulfilling administrative functions and tasks in the public property category is not justified if the private person does not have the subjective public rights to use such objects or it is subject to the subjective public rights of some other private person. The concept of property is used to describe property objects in Latvian regulations that govern the public person's actions regarding property objects at their disposal, but in other regulations the same concept is used to describe rights and therefore there exists a dualism in normative enactments of LCL. At the same time it is to be concluded

[10] Civillikums (LCL). Pieņemts 28.01.1937. Publicēts: Valdības Vēstnesis Nr. 41, 20.02.1937. Pēdējie grozījumi 05.03.2015.
[11] Publiskas personas finanšu līdzekļu un mantas izšķērdēšanas novēršanas likums (LPSFRPSLG). Pieņemts 19.07.1995. Publicēts: *Latvijas Vēstnesis* Nr. 114 (397), 02.08.1995. Pēdējie grozījumi 13.03.2014.
[12] Publiskas personas mantas atsavināšanas likums (LAPPP). Pieņemts 31.10.2002 . Publicēts: *Latvijas Vēstnesis*, 168 (2743), 19.11.2002. Pēdējie grozījumi 06.11.2013.

that the understanding of the concept of property in the doctrine has not been taken into account while drafting the regulations and in fact the common or utility meaning is used to describe a simple property object. The public person's civil law property objects used for ensuring the fulfilment of administrative functions can be considered functional assets as the main importance of these property objects is for the provision of administrative functions and public persons may have property rights to such objects for a limited time.

Assets at the disposal or possession of public persons usually have two possible statuses: they are public (state) objects or they are public person's civil law property objects which are generally used for the fulfilment of administrative functions. The distinction of whether they are objects or assets is defined in the normative regulations. The border is determined by circumstances or by the fact that the legislator has deemed the specific object (asset) type as alienated or it specifically defined in the normative regulations as an exclusively public (state) property object. Defining the public person's civil law property object as public property, actions with this property are subject to public law regulations with regards to providing for the general interests of the society. However this do not exempt public person's further rights to use these objects as civil law property objects including the right to alienate these objects. Therefore the public person's civil law property objects used for the provision of administrative functions are deemed to be public person's assets whose main objective is the provision of administrative functions or in other words functional assets. Public person's functional assets have several features. Its primary one, however is the use of the specific property object for the provision of administrative functions even if those are only foreseen in the future. Under the economic reforms public person's functional assets are not subject to privatisation as these assets are used or would be used for the provision of administrative functions. Pursuant to actual normative regulations the public person has the duty to return back the functional assets to its original owner if there is no longer the necessity or possibility of use of the object for the provision of administrative functions.

It is to be concluded from the regulations that the legislator has clearly determined the criteria used for the alienation of public person's property objects and rights to their management or the grant of rights of their use rights - price. The concept of price offers significant assistance to ascertain value criteria and indicators as in accordance with accepted practice, money is the criteria for monetary transactions. Different opinions can be proposed regarding the possibility to determine the true value of the asset as a property object or service. But there is only one criterion — whether a person is willing to pay the market value. One cannot ignore the fact that it is possible to determine the overall economic value of any property object or grant of rights to use that in practice is reasonably defined as "probable

market value". In the modern world even public administration is evaluated by the effectiveness of provision of services. Therefore economic criteria including service costs and price are becoming increasingly important. Consequently the balance of terminology used also changes as the significance of legal features and classification decreases — they play a subordinate role within the overall system.

Chapter 3. The development of idea of legal entity and its impact on the understanding of public person's transactions

The chapter comprises six sub chapters. In order to be involved in civil law transactions it is not enough to just have a property object — one needs a subject to exercise rights inherent to the property object. The aim of this chapter is to provide an insight into the development of the idea of legal entity to further facilitate the understanding of issues related to the legal capacity of public persons. Nowadays the idea of artificial rights subjects and their involvement in legal relations, in particular, in the context of various private law transactions is self-evident. With the transformation of communities into states and local governments as well as recognition of association of such persons under public law issues regarding the capacity of these subjects to act and their legal capacity arise. A legal entity can be considered as one of the most interesting legal phenomena as this highly abstract institute can only exist in a society with highly developed legal traditions. It would be premature to state that ancient societies did not have such forms, but sources accessible today indicate that the origins of legal entity in the modern understanding can be found at the end of the Roman republic.

The origins of the idea of legal entities can be found in Roman law as a means to address the necessity for ensuring the proper functioning of Roman satellite states — *municipia*. The property of the *minicipia* were not recognised as „truly" public property and the transactions done were not truly of public nature, and under civil law they were similar to those of common person's — *singulae personae*.[13] The praetor' s edicts with which private and public law norms were exercised played a major role in ensuring the possibility of „normal" participation of the *municipia* in civil law transactions at the same time retaining their public stature and certain privileges. However, the understanding of personal liability of *municipia* representatives in transactions done in their interest existed for a long time.[14] Therefore one cannot refer to Roman law for the modern understanding of legal entities as their representative's status could not be understood as those acting as legal entities, and third

[13] Еляшевич В. Б. (2007). Юридическое лицо, его происхождение и функции в римском частном праве. Москва: Статут, стр. 162
[14] Ibid - стр. 203

parties were not provided legal guarantees that the transaction was done in the interests of specific subjects and their fulfilment was guaranteed. The special status of *municipia* was also transferred to other associations of persons. However certain essential transactional restrictions existed. [15] With the emerging of the Roman Empire „*fiscus*" was used to identify legal entities who were awarded significant privileges e.g., fiscal property could not be acquired by prescription. At the same time during the empire the state treasury was not recognised as a legal entity and its legal capacity was closely related to regal persons (*princeps*). [16] The institute of legal entity did not acquire a full-fledged status under Roman law. However it laid the basis for the understanding of legal capacity of a person who was not a natural entity as well as special methods of exercise of the capacity that is widely used even today.

During the medieval times the idea of legal entity was taken over by canon law and became an important tool for the establishment of various legal relations. Canon law was influenced by the Roman *universitas* — property becomes a universal marker for the idea of a legal entity including also those formed by by association of persons. The state was not considered to be a legal entity during this particular period of time as it was linked to the monarch. At the same time cities with their own relatively democratic governance model in fact became inheritors of the idea of Roman *municipia* and in individual cases could be considered the origins of the modern public law legal entity model.

New eras with their enlightened ideas and scientific approach led to the eruption of new ideas. F. Savigny created the modern concept of legal entity as a fictitious person. O. Gierke could be considered the significant author the reality theory, whose ideas formed the basis for works of future researchers. R. Ihering also represents reality theory in the context of legal entities, wherein he creates a reflection of his own interest theory. However there was a certain conflict as a legal entity can exercise their claims only through representatives which further raised the issue of legal entity status not directly to the subjects but to its representative organs. Discussions were put to end by French legal scholars J. Michod and R. Salleills, who defined legal entities as a social reality. Further discussions on the idea of legal entity perceived it as a social phenomenon and continued to fluctuate from one saviour to another interpreting the issue as a social fiction or social reality. However the discussion cannot be deemed to have concluded as apart from subjects who have been granted

[15] Покровский И. А. (2004). История Римского Права. Москва: Статут, стр. 329
[16] Ibid - стр. 332

legal entity status for efficiency purposes there are other subjects who to certain extent enjoy similar legal capacity but without a legal entity status.

The idea of public law legal entity emerged with the desire of the bourgeoisie to gain greater influence in state administration and restrict the power of the monarch. The necessity of state and local governments to participate in civil law relations can be considered the origins of legal entities, as public law tools were inadequate for this purpose. Initially only one state institution — *fiscus*, gained a limited private law subject nature. Initially the *fiscus* was liable for private law cases instead of the state at the same time retaining its public law establishment nature. The public law legal entity idea and the relevant *fiscus* theory was worked out by the German legal scholar *O. Mayer.*[17] According to this theory *fiscus* as a private law relations carrier and the state as a carrier of public power are not two separate legal subjects but just two sides of the legal phenomenon of the state. The public law legal entity concept cannot be considered final and needs adaptation to the specific needs of legal systems.

Chapter 4. Public person as a private law subject.

The chapter consists of five sub chapters and analyses the civil procedural problems that exist for representatives of public persons. It was found that a quite understandable legal structure of public law legal entities for private law activities has been developed in Latvian institutions, court practice and doctrine which is reflected in the following:

(A) public law legal entity is represented by the institution;

(B) Public law legal entity is represented by the institution in contractual obligations that arise out of legal agreements concluded by the institution;

(C) public law legal entity is represented by the institution in the conclusion of legal agreements that fall within the competence of the relevant institution;

(D) on issues regarding property apart from property claims public law legal entities are represented by institutions under whose possession the aforesaid property exists;

(E) public persons are represented by their "will formation" organs or specially defined institution for non-contractual relations and property claims cases.

(F) One public person in a civil case can be represented by several institutions if it is necessary to ascertain the objective truth for making decisions in civil cases to the necessary extent;

[17] Waechter K. (2008). Verwaltungsrecht im Gewährleistungsstaat. Tübingen: Mohr Siebeck, S. 62

(G) institution representing the public law legal entity cannot have two different statuses in a case i.e. the institution cannot be at the same time the plaintiff and the defendant, or represent the public law legal entities in these statuses.

Several institutions can represent the public law legal entities if it is necessary to ascertain the objective truth for making decisions in civil cases to the necessary extent. Consequently the *Civil Procedure Law*[18] (hereinafter — CPL) regulations need to be made more specific foreseeing the relevant status for institutions representing public law legal entities in cases where they are invited as representatives. CPL regulations on recovery need to be more specific taking into account the non-alienable nature of public property in LCL and special laws, as well as stipulating a recovery procedure if such is initiated against public law legal entity regarding property or financial assets at the disposal of the relevant institutions.

Chapter 5. Institution as a possessor of public person's assets

The chapter consists of three sub chapters which analyse the consequences of the regulations of the first part of section 91 of the *State Administration Structure Law*[19] (hereinafter — the SASL), as the existence of public person's property in the possession of the institution creates several theoretical and practical problems regarding the civil law classification and legal capacity of the institution concerning the possession. The inclusion of private law institute in public law in this particular case is not well thought as the part 1 of section 91 of SASL constitutes a conflict of laws, the resolution of which is not possible without amendments in the relevant normative regulations. The direct transfer of private law institute to a public person and the constituted subjects' activities in private law is practically not possible due to organisation of internal relations according to public law. The complete separation of public administration from activities in the private law field is less feasible at the present stage of social development and basically not useful as well. Therefore public persons and civil law relations of its constituted subjects as well as transactions that are carried out with third parties should be regulated pursuant to existing civil law regulations.

Analysing the legal concept of possession by institutions in the Latvian normative regulations context it is to be concluded that it leads to restricted capacity of institutions in the exercise of their rights and is to be deemed as factual possession — holding in the civil law interpretation. At the same time possession of institutions has legal possession features as the

[18] Civilprocesa likums (CPL). Pieņemts 14.09.1998. Publicēts: *Latvijas Vēstnesis* Nr. 326/330 (1387/1391), 03.11.1998. Spēkā esošs. Pēdējie grozījumi 15.02.2016.
[19] Valsts pārvaldes iekārtas likums (SASL). Pieņemts 06.06.2002. Publicēts: *Latvijas Vēstnesis* Nr. 94 (2669), 21.06.2002. Pēdējie grozījumi 22.10.2015.

involvement of the institution in private law relations is permissible only when it is clearly foreseen in its competence. The regulations of the part 1 of section 91 of SASL basically convert it to actual power institutes — possession, property rights constituting the right to dispose of and use property (property object). However the institution does not have independent legal capacity and exercises the capacity of public persons to the extent of delegation. The problems identified related to private law transactions and possession of public persons and constituted subjects can be resolved by amending the part 1 of section 91 of SASL with the following wording: „*(2) The assets of public persons shall be in the legal possession of the institution and the institution shall exercise its actual possession. Exercising the possession of public person's assets, the institution shall have rights to represent the public person in the field of private law within the scope of its competence. The institution shall act reasonably with assets transferred to its possession*."

Chapter 6. Public corporations as a form of exercising of public person's property rights

This chapter consists of five sub chapters that analyse the characteristic features of a public corporation — organisational independence and separation of functions. Public persons usually have rights of legal entities according to their legal form but the criteria is not the decisive one as a public law entity or an institution can be established without the rights of legal entities. Today public corporations have an independent legal entity status and it is established as a special non-profit organisation or also as a capital company under private law. The basis of the formation of a public corporation is the attempt to exercise state administrative functions with private law tools at the same time retaining public administration control on the fulfilment of specific administrative tasks. The opposite trend is also observed when issues in the field of private law are transformed into public interest issues by fully or partly nationalising and creating a state monopoly in sectors that are defined as especially significant to the interests of the society.

As formations wherein both public power and the capabilities of economic enterprises to react quickly to situation changes are combined, public corporations are beyond the scope of ordinary institutions and economic activity subjects. This often determines the necessity to form such legal subjects with special external normative enactments to ensure the legitimisation of special status or exceptional rights. According to assessments included in the *Organisation for Economic Co-operation and Development* (hereinafter — OECD) guidelines, the general activity spheres of state enterprises and public corporations are linked to sector policies, regional development, provision of accessibility to general welfare services

and „natural monopolies". The basis for economic activities of such public persons is the set of social economic and strategic interests that leads to the problem of excessive use of public power in the management of economic subjects and distortion of its economic effectiveness and competition. As a general solution it is proposed to take steps to ensure that state-owned enterprises and public corporations comply with management guidelines formulated by the OECD principles to ensure the professional activities of subjects and management practices correspond to public interest. [20]

The Latvian normative regulations on capital companies belonging to public person lack the linking of its aims to public interests and profit as a functional criterion cannot be in conflict with the provision of overall interests. The preconditions of restrictions of commercial activities of public persons that are stipulated in section 88 of *SASL* are at present interpreted mechanically without any links to the provision of overall needs and interests of the society which in essence is the sole criterion to recognise the involvement of public persons in such kind of activities as justified. Problematic issues with public (state) property management can be identified with another type of public corporation also– asset management institutions. The term "institution" has been deliberately used as often asset management corporations take the legal form of institutions i.e. their legal nature is not separate from the public law legal entities that established them. Such a situation cannot be considered fully well thought situation as asset management is always associated with certain risk of losses and commercial risks. It is permissible that the management of non-commercial public (state) property, which in fact is property used for the provision of public functions, be carried out by public corporation organised as an institution. However it is completely not understandable to hand over commercial or public (state) property with significant economic value to the management of institutions at the normative level.

Chapter 7. Commercial activities as a form of exercise of public person's property rights

The chapter is divided into nine sub chapters. *SASL* regulations create a problem of linking the liberal ideology expressed in this law with the necessity for effective use of public resources. The rights of state and local governments to work in the private law sphere including the right to carry out commercial activities is not an exceptional right but a means to

[20][s. a]. OECD Guidelines on Corporate Governance of State-Owned Enterprises. (2005). Paris: OECD, p. 55. Iegūts 25.01.2013. no http://www.oecd.org/corporate/corporateaffairs/corporategovernanceofstate-ownedenterprises/34803211.pdf

satisfy social needs without using public power. It is necessary to additionally regulate the public person's commercial activity to avoid distortion of market competition but activities of public persons in the private law sphere and their commercial activities cannot be considered non-compliant to public administration principles. It is necessary to specify the regulations concerning public person's commercial activities in the SASL and *Public Persons Enterprises and Capital Shares Governance Law*[21] (hereinafter — PPECSGL) appending the normative regulations with issues related to the legal capacity and capabilities of public persons in the private law sphere foreseeing that commercial companies belonging to public persons can set tasks that are not aimed at making a profit but satisfying the needs of the society and fulfilment of state administration tasks in the private law sphere as well as include provisions that foresee liability for institutions and officials for carrying out illegal commercial activities, obligation to terminate the functioning of commercial companies non-compliant with the laws as well as possible compensation for losses occurred due to these commercial activities.

Managing public property is always related to administrative decision making and this comes under public law. In turn implementation of the decision is subject to private law. The supervision and control of the decisions are subject to administrative procedure regulations only in cases directly foreseen in those normative enactments. The provision of public services is the task of the administration and decisions related to the provision of these services are considered to be administrative decisions. The opinion that organisation of provision of public services under private law cannot be subcontracted is considered to unfounded. It is necessary to evaluate the administration model used for capital companies belonging to public persons in Latvia to involve recognised industry experts and workers and if necessary also consumer representatives and ensure public control over this public activity. With regards to members of administrative and supervisory board of capital companies a restricted revocable principle should be applied to decrease the influence of political decisions on these persons.

Commercial activities of public persons are subject to special normative regulations in Latvia which include a number of acceptability criteria for commercial activities of public persons — public persons may carry out commercial activity only though capital companies belonging to them and it is allowed only in certain circumstances that are stipulated in the law. However there is a conflict between the overall aims of commercial activities — to make

[21] Publiskas personas kapitāla daļu un kapitālsabiedrību pārvaldības likums (PPECSGL). Pieņemts 16.10.2014. Publicēts: *Latvijas Vēstnesis* Nr. 216 (5276), 31.10.2014. Pēdējie grozījumi 18.06.2015.

a profit and the aims of public person's activities — satisfy the needs of the society. Although the acceptability criteria for commercial activities of public persons in Latvian normative regulations can be considered to be understandable and well defined there is a problem related to the content and application of the criteria in practice. It is also defined by the scope and area of activity of public persons and the goals as there is an essential difference between the needs of the local governments and implementation of strategic aims at the national level.

Public person's commercial activities are subject to general civil law regulations; in particular there is an obligation to carry out the activities adhering to principles of good faith. Taking into account principles of good faith is not only a legal criterion but to be interpreted as an ethical one that coincides with general understanding of honest and just actions. The good faith criterion is applicable to commercial activities of public persons in all its stages including the decision to start such activities. An especially important issue to be analysed is the impact of commercial activities of public persons on the existing market participants and their legitimate aims.

Pursuant to normative regulations that are in force as of 01.01.2015 Latvia has introduced a relatively centralized governance model for public person owned capital companies. In addition to objective verification criteria (education, absence of criminal record or personal insolvency) for candidates as members of the management board, the normative regulations foresees a concept "impeccable reputation" the completion of which as a legal requirement is a rather long and complicated process. Taking into account the fairly broad interpretation and understanding limits it is necessary to narrow them down, e.g. with professional reputation or substitute them with professional competence criteria that are already included in the regulations.

Chapter 8. Public services as a form of exercise of public person's property rights

The chapter comprises five sub chapters. The term "public services" is not used in existing Latvian normative regulations and the separation of public services and theoretical base for its classification have yet to be worked out as well. At present there is a lack of broader scientific discussion on issues related to terminology and consolidation of the relevant legal institute in the normative regulations. Such would be necessary to create the basis for the systematisation of national normative regulations, provision of support for law enforcers and prevention of unfavourable consequences for Latvia that may arise due to non-adherence of European Union requirements regarding public services and the grant of support.

Public services or public property management could be of significant economic value and could be compared to commercial activity. Some cases have been identified in Latvia when attempts have made to circumvent the restrictions imposed on public persons through the help of agencies. The trend is expressly observed in local governments when often household services for residences as well as heating, water supply and canalisation have been provided for through local government agencies. Taking into account the status of public agencies in Latvia it could be stated that such services are provided for by public person institutions. If the agency is not formed as a special state administrative institution with specific sphere of activities, the provision of public services is handed over to public person agencies usually in cases when the services have an economic value. Consequently the question of public person's impact on competition and indirect support to this issue arises.

The classification and terminology of public service offered in European Union normative regulations and other documents is aimed at the implementation of overall economic policies. Thus their nature and terminology used prohibit to use it as a basis for legal classification of public services for administrative law purposes. At the same time it is not useful to work out the theoretical base for public services and terminology at the national level as the results obtained would not be compatible regulations and the understanding of this institute included in the European Union documents.

Three basic variants can be reviewed in the cases of public services when a person can be considered the direct or indirect recipient of public services:

a) the exercise of state public power to satisfy individual needs within administrative procedure – „public administration services";

b) receiving services provided by public service enterprises - „public regulated services";

c) receiving other services, the accessibility to the provision of which has been directly or indirectly been defined as obligation in public administration normative enactments – „general public services".

Conclusions and recommendations

The results of the doctoral research validate the hypothesis put forward — public law norms regulate the activities concerning public person's property and assets. Although it is not unified under one normative enactment there are features of unification — they are imperative by nature, law enforcers have the freedom to apply them within the limits foreseen in the normative enactments or such limits arise from the obligatory preconditions stipulated in various normative enactments. It also enables to express the opinion that the Latvian

regulations includes property objects, the legal status and forms of exercise of property rights of which are linked to the ownership status and operational aims.

Taking into account the analysis carried out in the doctoral thesis the following conclusions and recommendations have been put forward for defence:

1. Objects handed over for public use and dispute resolution.

Conclusions: The concept of public property does not exist in Latvian normative regulations and thus there is no legal basis for using this term for the classification of property objects. However, Latvian normative regulations include two types of objects ("property") the rights to use of which are of certain public nature. These are usually defined in Latvian normative regulations as „in public use", which on the whole could also include common access to resources with special economic value. One could agree with the criteria restricting the use of objects meant for public use determined in administrative practice — all persons have equal rights to use of property handed over for public use to the extent and forms of use stipulated in the norms. The inclusion of public person's property objects used for the fulfilment of administrative functions and tasks in the public property category is not justified if they do not have a public use object status defined in the normative enactments with the exception of cases when public use is the form or component of exercise of administrative functions and tasks.

Recommendation: Taking into account the existing approach to dispute resolution regarding the rights to use of objects handed over for public use and the diversity of resources accessible for public use it is necessary to acknowledge the existence of such objects and the rights at the normative level as well as determine their overall dispute resolution jurisdiction and limits. The solution used so far — to leave the question of jurisdiction of such cases to the decision of the court and only in specific cases determine the jurisdiction according to normative regulation – has not fully justified itself as it creates the grounds for arbitrary actions of the court and the legislature as well. Thus the second sentence of the third part of section 1 of *Administrative Procedure Law*[22] (hereinafter – APL) after the words "(general administrative acts)", shall be appended with the following words: *„..., as well as decisions on change of type of use of objects handed over for public use or their parts*."

The third part of section 1 of APL after the amendment would be as follows:

[22] Administratīvā procesa likums. Pieņemts 25.10.2001. Publicēts: *Latvijas Vēstnesis* Nr. 64 (2551), 14.11.2001. Pēdējie grozījumi 19.09.2013

(3) An **administrative act** is a legal instrument directed externally, which is issued by an institution in an area of public law with regard to an individually indicated person or individually indicated persons establishing, altering, determining or terminating specific legal relations or determining an actual situation. Administrative acts are also decisions issued by institutions foreseen under the law for such cases regarding individually indefinite group of people who are in specific and identifiable situations (general administrative acts) *as well as decisions on change of type of use of objects handed over for public use or their parts*. Administrative acts are also decisions regarding the establishing, alteration or termination of the legal status of, or the disciplinary punishment of employees of or persons especially subordinate to the institution, as well as other decisions if they significantly limit the human rights of the employees of or persons especially subordinate to the institution. …"

2. Public person's property and public things

Conclusion: Normative enactments (SASL, LPSFRPSLG, LAPPP, Cabinet of Minister's regulations as of 08.06.2010 No.515[23] (hereinafter - MK 515)) that stipulate public person's freedom of action with property and assets at their disposal use the term property, movable property as well as immovable property. The mentioned terms have not been explained in these regulations and therefore it could be concluded that the general civil law sources are used for its interpretation. At the same time terminology used in special normative enactments indicate that all the property objects and rights at the disposal of public persons are included in the concept of property except assets whose alienation is regulated by other normative enactments. Therefore the scope of the term property in these normative enactments in fact is expanded to include the understanding used in everyday life which is relatively linked to the legal understanding.

Recommendation: The conflict can be partly resolved by including a unified interpretation of the term in special normative enactments (SASL, LPSFRPSLG, LAPPP, MK 515). However it would only increase the eclectic nature prevalent in Latvian law and would still not include all the possible objects and rights that are at the disposal of public persons. Taking into account that the initial wording of LPSFRPSLG and LAPPP has been significantly amended it is necessary to work out new normative enactments as a law that would combine the regulations included in both these abovementioned normative enactments

[23] Ministru kabineta 08.06.2010. noteikumi Nr. 515 „Noteikumi par publiskas personas mantas iznomāšanas kārtību, nomas maksas noteikšanas metodiku un nomas līguma tipveida nosacījumiem". Publicēti: *Latvijas Vēstnesis* Nr. 106 (4298), 07.07.2010. Pēdējie grozījumi 03.11.2015.

that are related to the management of public person's assets. Primarily it is necessary to abandon the general use of the term "property" and replace it with the term asset which would refer to all the resources with economic value at the public person's disposal regardless of their civil law status.

3. Public person's conflicts concerning functional assets

Conclusion: Latvia does not have an effective mechanism for resolution of public person's conflicts concerning the transfer of property rights of property objects or other assets, determination of ownership or possession. The unified principle of state administration included in SASL is aimed at protecting subjective public interests of private persons, providing for succession and continuity of public law decisions of state administration. Although there could be possible conflicts concerning the transfer of property rights of property objects or other assets, determination of ownership or possession between different public law persons according to the procedure foreseen in CPL, such an approach is not justifiable from the perspective of public person's property as a functional asset that are necessary for the public person for the fulfilment of its specific functions. Therefore there is in fact no conflict regarding property rights but about the legal justification of transfer of functional assets and their compliance to normative enactment requirements that correspond to basic verification criteria of the legality of administrative acts.

Recommendation: Taking into account the present development stage of Latvian legal system the most appropriate solution is to subject such conflicts to the competence of administrative courts. The regulations should be appended in a new normative enactment but at present the LAPPP could be made more specific by amending it as follows:

1. In Section 1

   append the following wording to the part 2^1):

   "*2^1) functional assets — resources with economic value belong to public persons, at their disposal or possession that are used for state administrative functions , derived public person's functions or delegated for carrying out administrative functions."*;

2. In chapter IV

   append the following wording to the section $43.^2$ of chapter IV

Section $43.^2$. "(1) Petitions of public persons for the transfer of property rights to functional assets, determination of jurisdiction or possession shall be handed over for the review of the regional administrative court where the case is adjudged by panel of three judges. The petitions and cases shall be reviewed pursuant to Administrative procedure law regulations.

(2) The judgements of Administrative regional court could be contested through cassation at the Administrative cases department of the Supreme court."

Remark: The solution foresees a legal instrument for resolution of conflicts between public persons that is topical at present. Such type of conflicts within one public person (institutional conflicts) is to be resolved in accordance with SASL principles and the public administration's hierarchical organisation system.

4. Possession of public person's institution

Conclusion: The regulations of part one of section 91 of SASL on public person's property in the institution's possession creates several practical and theoretical problems related to the civil law classification of the possession and the institution's legal capacity. Evaluating the legal essence of institution's possession in the Latvian normative regulation context it could be concluded that it leads to restricted rights of action of the institution and is considered as factual possession – holding in the civil law interpretation. At the same time institution's possession has legal possession characteristics; therefore it could be protected with the legal protection aids foreseen in the normative enactments, e.g. recovery claims for disrupted possession. If generally the consequences of legal possession could be acquisition of property rights, in the case of institution possession as a right leads to the rights to act with the public person's property which is a component of property rights. Therefore the regulations of the first part of section 91 of SASL in fact basically converts it to a power institute — possession, property rights constituting the right to dispose of and use property (property object). The involvement of the institution in private law relations is permissible only if it is directly foreseen in its competence. Therefore the regulations of section 91 of the SASL should be made more specific to ensure unified understanding of the legal nature of institution's possession and the resulting rights.

Recommendation: The problem identified related to public person and the private law transactions and possession of its constituted subjects can be resolved by amending the first part of the section 91 of SASL in the following wording: *„ (2) Public person's assets shall be in the legal possession of the institution and the institution shall exercise its factual possession. Exercising the possession of assets of public persons the institution shall have the right to represent the public person under private law within its competence. The institution shall act reasonably with assets transferred to its possession*."

5. Institution as a representative of the public person in private law relations

Conclusions: The institution does not have independent legal capacity, but it exercises the public person's legal capacity within the delegated sphere. The institution always represents a public law legal entity and it does not need additional authority for representation in the private law sphere as such a competence of the institution is defined in the constituent normative enactment. In case of claims arising from contractual obligations, the institution representing the public law legal entity which concluded the agreement is summoned as defendant. Latvian institutions have developed as a quite understandable legal structure of legal entities of public law for private law actions in case law and doctrine:

(A) a public person is represented by an institution or official that pursuant to normative enactments constituent to public persons is deemed as the legal representative of the public person;

(B) legal relations of the public person that arise from the contract are represented by the institution that concluded the contract;

(C) public person is represented by the institution in the conclusion of legal contracts that fall within the competence of the relevant institution;

(D) on issues regarding property of public persons apart from property claims are represented by institutions under whose possession the aforesaid property exists;

(E) public persons are represented by their „ will formation" organs or specially defined institution on non-contractual relations and property claims cases;

(F) One public person in a civil case can be represented by several institutions if it is necessary to ascertain the objective truth for making decisions in civil cases to the necessary extent;

(G) institution representing the public law legal entity cannot have two different statuses in a case i.e. the institution cannot be at the same time the plaintiff and the defendant, or represent the public law legal entities in these statuses.

Recommendations: CPL regulations need to be made more specific foreseeing the invitation of institutions representing public persons in the relevant status. Taking into account the procedural status in CPL, amendments need to done in the following sections of the CPL to specify the representation of public persons:

Amend the first part of section 74 of CPL with the following wording:

"(1) Any natural or legal person may be a party (a plaintiff or a defendant) in a civil case. *An institution representing a public law legal entity may be a party in a civil case as a plaintiff or defendant*."

Amend the first part of section 78 of CPL with the following wording:

"(1) Natural or legal persons *as well as an institution* whose rights or obligations in relation to one of the parties may be affected by the judgment in a case may be third persons in the civil procedure."

Amend the second part of section 82 of CPL with the following wording:

"(2) Cases of legal entities shall be conducted in court by officials or institutions who act within the scope of authority conferred upon them pursuant to law, articles of association or by law, or by other representatives authorised by legal persons."

Amend the seventh part of section 82 of CPL with the following wording:

(7) Cases of legal entities at the cassation instance shall be conducted in court by officials who act within the scope of authority conferred upon them pursuant to law, articles of association or by regulations or conducted using the services of an advocate. *Cases of public law legal entities at the cassation instance shall be conducted by the authorised representatives or using the services of an advocate*."

6. Recovery directed against public person's property

Conclusions: At present recovery directed against public person's property objects or other kinds of assets are possible without any restrictions. Such an approach does not correspond to the principles of state immunity. The state can limit its immunity against civil law claims but cannot reject it fully because it could affect the fulfilment of state functions. In accordance with CPL regulations, recovery can be directed against public property objects and assets that cannot be alienated. Also restricted recovery measures against state budget funds at the disposal of institutions is not permissible as it could threaten the fulfilment of state functions. Therefore the CPL regulations on claims provision and recovery should be made more specific taking onto account the non-alienable nature of public property defined in the Civil law and other specific laws and a special recovery procedure if such is brought against property objects in the possession of public law legal entity institutions or state budget funds should be laid out as well.

Recommendations:

The part (6^1) of section 138 of CPL should be appended with the following wording:

"(6^1) Non-alienable state assets or state budget funds as well as objects of strategic significance designated by the Cabinet of Ministers cannot be used as claim provisions."

Amend the section 572 of CPL in the following wording:

(1) Pursuant to enforcement documents a bailiff shall first direct recovery against such monetary funds of legal persons as are deposited in credit institutions. *Recovery*

cannot be directed against state budget funds that have been granted with due procedure to public law legal entities or institutions.

(2) If by directing recovery against monetary funds of legal persons in credit institutions the claim of the creditor is not satisfied, the bailiff shall direct recovery against the property of the legal person. Recovery cannot be directed against state property or assets that are non-alienable as well as against objects of strategic significance designated by the Cabinet of Ministers.

Append the part (1^1) of section 632 of CPL with the following wording:

"(1^1) The institution may request the suspension of recovery measures if the enforcement of the recovery judgement threatens the fulfilment of functions set out in the normative enactments."

Remark: The transitional regulations of CPL should be appended with a clause that delegates the Cabinet of Ministers to draft the rules and regulations for determining state objects of strategic significance.

7. Public persons rights while acting in the private law sphere

Conclusions: There are special normative regulations in Latvia that foresee activities of public persons in the sphere of private law in the following cases: 1) carrying out activities necessary to ensure its proper functioning; 2) providing services; 3) establishing capital companies or acquiring shares in existing capital companies (first part of section 87 of SASL). Therefore it could be concluded that public persons carry out commercial activities only through capital companies that belong to them. The first part of section 88 of SASL stipulates the criteria that permit such commercial activities. However there is conflict between the general aims of commercial activity – to gain a profit and the operational aims of public persons – to satisfy the needs of the society. From the viewpoint of the regulations it could be concluded that the public person can set the aims of its capital companies that could be considered not characteristic for commercial activities including limiting the possibilities of the capital companies of acquiring a profit from its activities. Although the permissibility criteria for establishment and functioning of public person's capital companies in the Latvian normative regulations is deemed to be well-defined the problem is in its content and use in practice. This is determined by the sphere of activity and aims of public persons as there is a significant difference between the needs of the local government and implementation of strategic objectives at the national level. The rights of public persons to work in the sphere of private law including the right to carry out commercial activities are not exceptional rights but a means to ensure the satisfaction of the needs of the society without exercising public power.

Recommendation: Amend the section 88 of SASL by excluding the term „strategic", which basically in this context is a concept without legal meaning. It is enough to have the term „important", that does not allow the public person to carry out arbitrary commercial activities at the same time allowing them to flexibly react to various kinds of economic and social challenges.

8. Permissibility of activities of capital companies of public persons

Conclusions: As pointed out in the conclusion 7, rights of public persons to act in the sphere of private law including the right to carry out commercial activities through its capital companies is not an exceptional right but a means to ensure the satisfaction of the needs of the society without exercising public power. Therefore activities of public persons in the private law sphere are not considered to be non-compliant with public administration principles. However it is necessary to further regulate the establishment and functioning of public person's capital companies to prevent the distortion of market competition. Although the impact of public person on the market and competition can be expressed in various forms, the possibilities of preventing consequences are focused on two aspects. First of all it is the commencement, continuation and termination of commercial activities that do not correspond to the regulations of SASL. The second essential element is the impact on competition and its distortion. Although the regulations of the SASL and PPECSGL stipulate an obligation on part of the public person to evaluate the compliance of commencement of commercial activities of its capital companies with the normative enactments as well as the obligation to repeatedly evaluate it after the lapse of a particular time period, the regulations cannot be considered sufficient enough as no liability is foreseen for non-compliance. In order to minimise politically motivated decision making in these issues it should be handed over to the supervision of a reasonably independent institution e.g. the Competition Council. Such a solution can be considered optimal from the resource consumption perspective as the potential distortion of competition could now be the grounds for limiting the commercial activities of capital companies belonging to public persons.

Recommendation: The normative enactments should be appended with a regulation that foresees a solution in case of establishment or continuation of functioning of capital companies not in accordance with the normative enactments. In order to achieve the aims the actions of public persons upon finding that the activities of capital companies belonging to it do not correspond to the requirements of the normative enactments should be defined and the competence of the Competition Council should be extended as well, foreseeing it the rights to demand termination of activities that do not correspond to the regulations if the impact on the market cannot prevented by any other means.

Amend the seventh part of section 88 of SASL with the following wording:

"(7) Public person who has established a capital company or acquired ownership in an existing capital company shall reassess its ownership in accordance with the clause herein and the law on management of capital companies and shares of Public persons. *Upon finding that activities of capital companies fully or partly does not correspond to the stipulations of this clause the public person shall make a decision on the termination of the respective activities or the liquidation of the respective capital company or alienation of the shares*."

Amend the first part of section 7 of the *Competition Law*[24] with a clause 9 in the following wording:

"9) demand that the public person carry out assessment of activities of the capital companies belonging to it pursuant to the section 88 of the *State Administration Structure Law* including imposing the obligation to make a decision regarding the termination of the respective non-compliant activities if such could hinder free, fair and equal competition."

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Ernests Saulitis

[24] Konkurences likums. Pieņemts 04.10.2001. Publicēts: *Latvijas Vēstnesis* Nr. 151 (2538), 23.10.2001. Pēdējie grozījumi 21.05.2015.