

CONFLICT OF INTEREST – CASE OF THE PUBLIC PROCUREMENT IN SLOVAKIA**

Abstract

Article deals with the conflict of interest occurring in the process of public procurement. Conflict of interest is a negative phenomenon, which is generally forbidden. Contracting authorities are obliged to adopt adequate measures to prevent and remedy conflict of interest. If they fail to fulfil this obligation, consequences may appear in the form of cancellation of the procurement process, or even in the form of claim for damages caused by maladministration. Author compares European Union's and Slovak approach to this topic with regard to recent case law of the courts of the European Union.

Keywords: *internal market, conflict of interest, public procurement, damage, sound administration.*

1. Introduction

An operational internal market belongs to the goals of the European Union. Operationability of the market directly depends on the *fair business environment and effectivity of enforcement* and Union shall adopt suitable measures. Pursuant to Article 3 of the Treaty on European Union (hereinafter: TEU) and Article 26 of the Treaty on Functioning of the European Union (hereinafter: TFEU) Union shall establish an internal market, which comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. It shall even reflect, within the free movement of persons, new migration challenges (Mokrá, 2016). Internal market is then a precondition for sustainable development of the Europe based on balanced economic growth and price stability, a highly competitive social market economy, and a high level of protection and improvement of the quality of the environment. Achievement of the sustainability of economy was not only the pre-accession condition, but it is ongoing duty

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of each member state to strengthen administrative capacities necessary for implementation and application of European Union law (Mokrá, 2017, p. 283).

Public procurement is an integral part of this settlement. European Union provides exhaustive legislation (hereinafter: EU Public Procurement Directives¹) with the aim to prevent discrimination of undertakings (or preferential treatment) and to preserve a transparent competitive environment at the market of public contracts, which ensures an effective spending of public finances. As the European Commission states on its website (European Commission, n.d.), over 250 000 public authorities in the EU spend around 14% of GDP (around €2 trillion) per year on the purchase of services, works and supplies. Therefore, ensuring of functional market is crucial. Management and eliminating of the conflict of interest is just one step of this task, but it undoubtedly provides a safeguard for the fair, competitive and sound procurement.

In this article, author is focused on the conflict of interests in the process of public procurement. Analysis deals with the approach of the contracting authority to this issue with regard to current EU and Slovak legislation, case law and introduced best practices. The aim of the article is to verify, whether recent Slovak regulation on conflict of interest is sufficient, and if not, to suggest its improvement.

2. The European concept of conflict of interest

Conflict of interest is a negative phenomenon which is generally forbidden. The conflict of interest is present in various areas of law and many definitions of this term exist. OECD provides definition, that 'conflict of interest' involves "*a conflict between the public duty and private interest of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities*" (OECD, 2003, p. 24). Also McDonald (2006) recognizes three basic elements of the conflict of interest: (1) existence of the official duty, which origins from the position connected with public power; (2) existence of the private or personal interest, which can have form of a financial interest, or provision of special advantage to the officer or his/her relative; and (3) interference of private interest with professional responsibilities (objective professional judgement). These general definitions can be used as a starting point. EU market regulations, however, do not use common general definition for whole internal market, but introduce special definitions for various market areas (e.g. competition law, state aid law, public procurement law).²

Regarding the public procurement, the conflict of interest is prohibited, too. If it occurs, it results into violation of the principle of equality and principle of non-

¹ These are: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

² See for example Article 61 (3) of the Regulation (EU, EURATOM) 2018/1046 or Article 4 (2) of the Directive (EU) 2019/1.

discrimination, as *links between procurer and tenderer provide to related tenderer an uncompetitive advantage over other tendering competitors* [underlined by the author]. Due to this fact, public sources³ are considered to be spent ineffectively. *The contracting authority is therefore, at all events, required to determine whether any conflict of interests exist and to take appropriate measures in order to prevent and detect conflict of interests and remedy* [underlined by the author] them (*eVigilo*, 2015, para 43).

Such opinion of the court is reflected either in interpretative Recital⁴ of the *EU Public Procurement Directive 2014/24/EU* either in its binding part (Article 24) by stipulating that the concept of conflict of interest shall at least cover” any situation where *staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest* which might be perceived to compromise their impartiality and independence in the context of the procurement procedure. Member States shall ensure that *contracting authorities take appropriate measures to effectively prevent, identify and remedy conflict of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators*” [underlined by the author].

By interpreting the concept of conflict of interest, EU courts have established some standards:

- a conflict of interests entails the risk that the *contracting authority may choose to be guided by considerations unrelated to the contract* in question and that on account of that fact alone preference may be given to a tenderer (*eVigilo*, 2015, para 35);
- a conflict of interest is, objectively and in itself, a *serious irregularity without the necessity to qualify* it by having regard to the *intentions of the parties* concerned and whether they were acting in good or bad faith (*European Dynamics*, 2016, para 46).
- management of conflict of interest requires a *compliance with the principle of proportionality and principle of sound administration*. When assessing the conflict of interest, contracting authority is obliged to realise a thorough investigation to find out, whether such a conflict of interest could affect the conducting of tendering procedure and its outcome. Automatic exclusion of the tenderer from the tender is considered in the EU case law as disproportionate.⁵
- the existence of a conflict of interest must lead the contracting authority to *exclude the tenderer concerned*, where that approach is the only measure available to avoid an infringement of the principles of equal treatment and transparency, which are binding in any procedure for the award of a public contract. That is to say, that *no less restrictive*

³ Not only national public finances, but also the finances from the Structural and Investment Funds of the EU as public procurement of goods, services and works are an essential condition for receive financial support from the EU.

⁴ Para. 16 of the Recital requires contracting authorities to make use of all possible means (including procedures to identify, prevent and remedy conflict of interest) at their disposal under national law in order to prevent distortions in public procurement procedures stemming from conflict of interest.

⁵ See to this regard for example *Lloyd's of London v Agenzia Regionale per la Protezione dell' Ambiente della Calabria*.

measures exist in order to ensure compliance with those principles (*European Dynamics*, 2018, para. 46).

- a tenderer with the conflict of interest shall be excluded from the awarding of public contract *only if* the situation of a *conflict of interests is real and not hypothetical* (*Vakakis kai Synergates*, 2018, para. 99).

In order to ensure the operationability of the public contracts market on the national level (with purpose to preserve the implementation of the principles of the internal market), it is inevitable for Member States to ensure proper transposition of the EU procurement rules into their legal systems. This includes either an effective prevention or remedying the conflict of interest. The EU legislation did not stipulate the exact measures to be adopted, so it is the Member State's responsibility to choose and adopt adequate measures to meet the intended goals.

3. The Slovak concept of the conflict of interest

The EU Public Procurement Directives were transposed into Slovak law by the Public Procurement Act of 18 November 2015 (Act No. 343/2015 Coll. on public procurement and on amendment and supplement of other acts). This Act in Article 23 stipulates that *contracting authority shall ensure that there does not exist any conflict of interest in the procurement that is capable of distorting or restricting the competition or infringing the principles of transparency and equal treatment* [underlined by the author]. As it explains further, the conflict of interest covers mostly (not exclusively) a situation, where person involved⁶ in the outcome or the process of the procurement, has a direct or indirect financial interest, economic interest or other personal interest which may compromise his/her impartiality and independence relating to the procurement.

"Remedy" in the terms of Slovak law, shall be guaranteed by the duty of involved person to notify immediately the contracting authority of the existence of the conflict of interest in relation to tenderer participating in the procurement in any phase of the process. Contracting authority is then obliged to adopt reasonable measures and realise a remedy. Reasonable measures, according to the applicable Slovak law are mostly: an exclusion of the involved person from the process of procurement or the modification of the obligations and responsibilities of the involved person in order to avoid a conflict of interest. The binding text of the Slovak law complies with the European Union's. The exemplificative enumeration of the relevant situations differs from the EU approach and covers only a minimum number of situations. An attention should be raised regarding the fact that while the EU concept, when identifying the conflict of interest, deals with the

⁶ Pursuant to Art. 23 (3) of the Public Procurement Act by *involved person* we can understand mostly (not exclusively) the employee of the contracting authority, who participates in preparation or realization of the procurement, or other person, who provides support to contracting authority and who participates in preparation or realization of the procurement; person with decisive powers of contracting authority which may affect the result of the procurement without necessarily being involved in its preparation or implementation.

exclusion of the tenderer, Slovak concept relies rather on the exclusion of the employee. This may weaken the effectiveness, as contracting authority itself may still remain involved.

Slovak approach is focused on the relation of the involved person to the tenderer. *As there is only a general clause, lot of questions arise.* How, for example, can the relation of the involved person to the tenderer be assessed? Must the tenderer be a close relative or any relative at all? How far relative must the tenderer be in order not to be considered in relation with the involved person? And, what happens in the situation, when the close relative of or close person to the involved person has the business connection with the tenderer, or the statutory body of the tenderer? Or what if they were friends? What if none of them (involved person and tenderer) discloses the truth about their relation?

Assessment of these questions, as well as effectiveness of the preventive and remedy measures relies on the (subjective) abilities of the contracting authorities (e.g. state institutions, villages, schools, companies own by the state, etc.).⁷ This is the weakest point of the regulation, as many contracting authorities are unaware of the meaning and the wide scope of the concept of the conflict of interest (especially regarding the recent case law of the CJEU). Effectiveness of its implementation is therefore questionable.

With an aim to help, the Public Procurement Office issued a soft law instrument. In its guidance on identification of conflict of interest (Public Procurement Office, 2016) the Public Procurement Office recommends contracting authorities to adopt their own code of conduct and to identify a group of involved persons, who may participate in the process of procurement. It also introduces a draft form, which is supposed to help contracting authority to identify involved persons with conflict of interest. Contracting authority is recommended to submit this form to its employees participating in procurement process. A form requires data (beside the identification of the person) regarding that person's status (whether person is/is not an employee of the contracting authority or cooperates on the other contractual basis) or powers in relation to the public procurement (e.g. person is responsible for elaborating the procurement contract, or approving tender material, or is a member of assessment committee, or prepares an electronic auction, etc.) and declaration of the person, whether, in relation to the relevant public procurement, he/she is in conflict of interest regarding the tenderer in various phases of the procurement. It is clear, that such "help" covers the basic line of the topic but does not provide effective (complex) solution to any of the above-mentioned questions.

Question on relation between the involved person and the tenderer is essential. From the Slovak law, it is not clear, how this should be implemented. On the one hand, strict interpretation of the relation could cause the ineffectivity of regulation. On the other hand, too wide interpretation may cause the breach of the principle of proportionality. To find answer to this question, we can look for inspiration in other legal sources. For example, Slovak Bankruptcy Act (Act No 7/2005 Coll on bankruptcy and restructuring and on change and amendment of other acts)⁸ provides an exhaustive definition of the related persons. Inspired by the Bankruptcy Act, involved person could be deemed related to the tenderer if he/she:

⁷ Contracting authorities are defined in Articles 7-9 of the Public Procurement Act.

⁸ See the Article 9 of the Slovak Bankruptcy Act.

- is or was an employee, statutory body or a member of the statutory body, manager, procurator, or member of the supervisory board of the tenderer, or
- holds a qualified interest in the tenderer, which is equal to at least 5% of the registered capital of the legal entity or the voting rights in the tenderer, or the possibility to exercise control over the management of the tenderer, or indirect interest (which means an interest held indirectly through legal entities, in which he holds a qualified interest);
- is or was an employee, statutory body or a member of the statutory body, manager, procurator or member of the supervisory board of the legal entity, which holds a qualified interest in the tenderer, or
- is a person, who is close (i.e. ascendant or descendant in direct line, sibling, spouse or other person, who would feel the harm suffered to the party as his own) to the tenderer, or above-mentioned subjects.

To this regard, it would correspond to the principle of legal certainty, if such definition or other would be provided either as a definition in the legal act, or as the part of best practice introduced by the market regulator. Uniform application of this question by Slovak contracting authorities would help to achieve the homogeneity of the market.

Other sources of inspiration for management of the conflict of interest could be found in the OLAF's *practical guide on identifying the conflict of interest in public procurement* (OLAF, 2013), which explains how to identify, manage, prevent and sanction conflict of interest existing between contracting authority (its employees) and tendering competitors. As Public Procurement Office did not recommend any best practices in its guidelines, it should at least refer to this document as referential code of conduct policy. Reference to the recent case law of the EU courts would be useful, too.

For the management of the conflict of interest, author recommends the following approach:

Firstly, the Public Procurement Office should issue a better (improved) conflict of interest policy guide and code of conduct on this matter. These will ensure homogeneity, legal certainty and the proper implementation of the principle of transparency in the procurement process.

Secondly, the involved person shall provide contracting authority with the list of existing related persons. This list shall be updated annually, or when it is relevant (e. g. when participating in public procurement). At the beginning of the procurement, every participating employee or cooperating person shall fill in a declaration of absence of conflict of interests.

Thirdly, contracting authority shall actively and provably investigate and check on case by case basis, that there is no conflict of interest. When the conflict of interest is detected, contracting authority shall assess, whether it has potential to affect the process or outcome of the procurement. If so, it shall adopt proportional, transparent and effective measures (e.g. notification on this fact, suspension of the involved employee, exclusion of the problematic tenderer, etc.).

Besides that, other effective tools that can improve the management of the conflict of interest might be education and professionalization of the contacting authorities regarding

this matter, sufficient remuneration of the procurers, as well as a deterrent consequence for the partially process and decision.

4. Consequences of the breach of the conflict of interest

Failure of the contracting authority to provide an inquiry and assessment of the conflict of interest means at the same time the infringement of the obligation of due diligence and sound administration. Also, it directly results into infringement of the principle of equal treatment of tenderers and may have *two consequences*:

- (1) the Public Procurement Office may order contracting authority to remove wrongful act or cancel the whole procurement;
- (2) harmed tenderer may claim damage for the lost opportunity.

As the ECJ reminded in *Vakakis kai Synergates* (2018, para. 150, 151), the contracting authority is required to ensure, at each stage of a tendering procedure, respect for equal treatment and, in consequence, that all tenderers enjoy equal opportunities. Therefore, in order to ensure respect for the principle of equal treatment, it is required to determine on a case-by-case basis, and following a detailed evaluation, whether a person or candidate is in a situation of conflict of interests prior to the decision whether to exclude him/her from the tendering procedure and to award the contract.

As abovementioned option No. (1), i.e. when the infringement of the procurement principles is detected, causes no application problems, author will further focus on the claim for damage having in mind the recent case law. Regarding the conflict of interest, author referred to the EU case law as there is no relevant case law of the Slovak courts in this matter.

In case *Vakakis kai Synergates*, the contracting authority, while preparing the procurement, asked a company A. and its expert to provide certain information for the preparation of the Terms of Reference. Expert of this company provided requested information. Later, a consortium, whose member was also company A., which participated in the preparation of Terms of Reference, participated in the tender and won. Despite the fact that contracting authority was informed by the applicant (*Vakakis Kai Synergates*) and two other companies on possible existence of the conflict of interest (undertaking A.'s involvement in the drafting of the Terms of Reference constituted an advantage over the other competitors), it *did not provide the proper investigation* and responded that there was no conflict of interest and that there had been no unfair competition in the procedure. Such unlawful acts in the conduct of the tendering procedure fundamentally vitiated that procedure and affected the chances of the applicant, whose tender was ranked second, being awarded the contract. If the contracting authority had fulfilled its obligation of due diligence and had adequately investigated the extent of involvement of the employee of one member of winning consortium in the drafting of the Terms of Reference, it is not excluded that it might have established the existence of a conflict of interests in favour of company A justifying its exclusion from the procedure. Therefore, *by deciding to award the contract to*

the consortium with member A. *without having conclusively established that the latter was not in a situation of a conflict of interests even though significant evidence suggested the existence of an apparent conflict of interests, the contracting authority affected the chances of the applicant being awarded the contract.* Therefore, applicant in this case won the claim for damage caused by the loss of an opportunity.⁹

From this case we can conclude, that *obligation of contracting authority to due diligence when assessing the conflict of interest is an immanent part of the principle of sound administration* guaranteed in the Article 41 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10. 2012, pp. 391-407). In Slovakia, it is applied through the case law of the Slovak Supreme Court, which in ŽSR case (*Železnice Slovenskej republiky*, 2017) concluded that, even in public procurement (which explicitly excludes the applicability of general administrative law) Article 41 of the Charter of Fundamental Rights of the European Union, as well as Recommendation CM/Rec (2007) 7 of the Committee of Ministers to member states on good administration, must be taken into consideration.

Breach of the principle of sound administration may therefore result also in the cancellation of the tender by the decision of the Public Procurement Office and to claims for damages caused by maladministration.

5. Conclusion

The issue of conflict of interest is complex and has many layers and it was not possible to cover it all in this article. However, even by choosing a few aspects of the topic author found that Slovak legislation and practice have gaps regarding this matter.

Firstly, a more precise definition of conflict of interest is missing. Therefore, a legislative change would be appropriate. For example: *the contracting authority or its employees in charge shall not take any action which may bring their own interests into conflict with those of public procurement process. They shall also take appropriate measures to prevent a conflict of interests from arising in the functions under their responsibility and to address situations which may objectively be perceived as a conflict of interests. A conflict of interest exists where impartial and objective exercise of the functions of a contracting authority is compromised for reasons involving family, emotional life, political or national affinity, previous working connection realised in the last 5 years, economic interest or any other direct or indirect personal interest.* Such definition shall be supplemented by a Code of conduct of the contracting authority containing the recent best practices of the EU and Slovak procuring authorities, above-mentioned declarations, procedural protocols and sanctions, which shall be reflected also in the employment contracts of the employees of the contracting authority.

At this point, author agrees with Lecheva (2015), that thoroughgoing verification of red flags indicating the conflict of interest will not only ensure the fair and sound procurement, but at the same time frustrate and prevent multiple corruption, irregularities and fraud in the award and execution.

⁹ See para. 193 of the Judgement to the conditions for compensating and Judgement in this case from 12 February 2019 to the amount of damage.

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SUKOB INTERESA – PRIMER JAVNIH NABAVKI U SLOVAČKOJ

Sažetak

Članak se bavi pitanjem sukoba interesa koji se pojavljuje u procesu javnih nabavki. Sukob interesa je negativni fenomen koji je generalno zabranjen. Ugovornici su dužni da preduzmu odgovarajuće mere kako bi se sukob interesa sprečio i otklonio. Ako se ova obaveza ne ispuni, mogu se pojaviti posledice u formi poništavanja postupka javnih nabavki, ili čak i u obliku zahteva za naknadu štete zbog loše uprave. Autorka poredi pristup Evropske unije i Slovačke u vezi sa ovom temom, imajući u vidu praksu sudova Evropske unije.

Ključne reči: unutrašnje tržište, sukob interesa, javna nabavka, šteta, dobra uprava.

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