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PUBLIC SUPERVISION ON THE PUBLIC PROCUREMENT MARKET IN SELECTED EU MEMBER STATES (SELECTED ASPECTS)

PUBLICZNY NADZÓR NAD RYNKIEM ZAMÓWIEŃ PUBLICZNYCH W WYBRANYCH KRAJACH CZŁONKOWSKICH UNII EUROPEJSKIEJ (WYBRANE ASPEKTY)

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Abstract: The article relates to the issue of the public supervision held by specialised bodies responsible for the proper functioning of the system of public procurements in individual member states of the European Union. Minimisation of the risk of irregularities in the field of public procurements requires a multi-aspect approach, including the efficient performance of activities performed within the carried out supervision. Juridical solutions relating to the discussed subject matter, applied by the legislators of the individual states, will be presented in the article. Attention is drawn to improper regulations that should be changed by the legislators of the indicated EU member states, which are often unclear and conflict with each other. Moreover, the EU law concerning to public supervision over the public procurement market, which should be applied in all member states, must be addressed. The *de lege ferenda* conclusions and proposals presented in the article will contribute to the more effective functioning of the public procurement market. The study was prepared within the framework of a research project funded by the National Science Centre – decision DEC-2014/14/E/HS5/00845.

Keywords: public procurement, European Union, law.

Streszczenie: Artykuł dotyczy kwestii nadzoru publicznego sprawowanego przez wyspecjalizowane organy odpowiedzialne za prawidłowe funkcjonowanie systemu zamówień publicznych w poszczególnych państwach Unii Europejskiej. Minimalizacja ryzyka nieprawidłowości

ci w dziedzinie zamówień publicznych wymaga wieloaspektowego oddziaływania, w tym sprawnego przeprowadzania czynności wykonywanych w ramach sprawowanego nadzoru. W artykule zostaną przedstawione rozwiązania jurydyczne dotyczące przedmiotowej materii zastosowane przez ustawodawców poszczególnych państw. Uwaga będzie zwrócona na niewłaściwe regulacje prawne, które powinny być zmienione przez normodawców wskazanych państw Unii Europejskiej (często są one niejasne i sprzeczne ze sobą). Ponadto nie sposób nie scharakteryzować norm prawa Unii Europejskiej dotyczących publicznego nadzoru nad rynkiem zamówień publicznych, które powinny być stosowane we wszystkich państwach członkowskich. Przedstawione w artykule wnioski i propozycje *de lege ferenda* mogą przyczynić się do skuteczniejszego funkcjonowania rynku zamówień publicznych. Publikację przygotowano w ramach projektu finansowanego ze środków Narodowego Centrum Nauki – decyzja DEC-2014/14/E/HS5/00845.

Słowa kluczowe: zamówienia publiczne, Unia Europejska, prawo.

1. Introduction

Public supervision over the public procurement market is indispensable for democratic legal order. Correct operations in this scope are conducive to the prevention of pathologies in spending public funds and to the occurrence of regularities in the sphere of public property management which should be based on the principles of lawfulness, economy, reliability and purposefulness. It is therefore vital that the supervising bodies have a proper level of independency, as only then will their activities not be concerned by improper restrictions not leading to the assumed goals (Arrowsmith, Linarelli, and Wallace, 2000).

Firstly, it is worth emphasising that the structure of the supervision over the public procurement market itself should include such elements as: supervision functions; supervision tasks; supervision activities; legal status of the supervising bodies; verification (also by the court) of the supervising activities (Knosala, 2010). Supervision means control combined with the possibility to intervene in the activities of the entity under supervision. This means examination of the supervising body's activities connected with the possibility to provide support, influence or modify such activity by the organisationally or functionally superior body, in order to ensure compliance with the law concerning such activities, and in specific cases, also compliance with particular detailed values which are also lawfully provided (Boć, 2003).

The most instructive supervision categories include current and preventive supervision. Beside these, the representatives of the public economic law include the basic supervision types, also regulation and police supervision. One should also distinguish the material administrative law supervision, as well as constitutional the administrative law supervision (Szewczyk, 1995). The consequence of the control activities performed under supervision is the issuance of post-control recommendations and the administrative decision of an imperative nature (see: Figure 1).

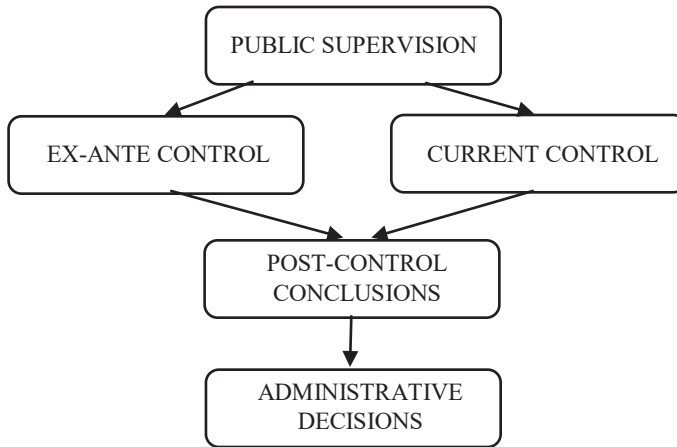


Fig. 1. The sequence of control activities

Source: own elaboration.

In the case of the public procurement law regulation, the supervision is determined by the legal status of the supervising bodies. In the European Union the public authorities may not, among others, discriminate against a given entity on the grounds that it is registered in another EU country; in the description of characteristics of the products and services to be purchased there may not be any reference to specific brands, trademarks or patents; the authorities may not refuse to accept supplementary documents (certificates, diplomas, *etc.*) issued in another EU country, as long as they provide the same level of security, and must make available all information regarding submission of the tenders to all the interested entities, regardless of the EU country of their registration (Schebesta, 2016).

The most important legal acts of the EU law in terms of procurements include the ones adopted by the European Union on 11 February 2014:

- Directive of the European Parliament and of the Council 2014/24/EU of 26 February 2014 on public procurement (classic Directive).
- Directive of the European Parliament and of the Council 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (sector Directive).
- Directive of the European Parliament and of the Council 2014/25/EU of 26 February 2014 on the award of concessions.

Moreover, taking into account the paper's title, the following also merit review: Directive of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/665/EEC and 92/13/EEC on improvement of the effectiveness of review procedures concerning the award of public procurements.

2. Procurement control in selected EU countries

2.1. Poland

As an example of correctly operating regulations in terms of public supervision over the public procurement market, the Polish provision of the Act of 29 January 2004 – the Public Procurement Law – should be mentioned. The President of the Public Procurement Office exercises control in Poland. This is the central body of the government administration which is supervised by the Prime Minister. The body is appointed by the minister responsible for the Economy (currently this is the Minister of Development) by way of an open and competitive application procedure. Apart from the possibility of carrying out the control activities mentioned above, the body's tasks include the development of prescriptive projects regarding the procurements; ensuring the functioning of the legal protection system; elaborating and carrying out training; promoting the professional ethics of the persons involved in the public procurements (Panasiuk, 2005).

The control in Poland is preceded by an investigation carried out by the President of the Public Procurement Office in order to determine whether the proceedings do not violate the Act's provisions. Control over awarding procurements does not form an administrative proceeding and does not result in issuing an administrative decision (Gola, 2013). Two types of control can be distinguished: current and *ex-ante* control. In the former, it is important that the activities of the President of the Public Procurement Office do not have the character of administrative power expressed as the body's unilateral declaration of will, based on administrative law regulations. The body can demand from the Head of the Awarding Entity to submit a copy of the documents connected with the proceedings for awarding a public procurement, certified to be a true copy by the Head of the Awarding Entity. The opinions of experts on the subject of the procurement can also be used for clarification of the matter (Garnecki, 2009).

The President is obliged to determine the actual state of affairs on the basis of the documents collected during clarification or the control investigation. In the latter case – *ex ante* control – it is worth emphasising that it pertains to procurements of framework agreements co-financed from the European Union funds (Szostak, 2011). Pursuant to Art. 169 of the Polish Act, it is carried out prior to the conclusion of an agreement (*ex-ante*), if the value of the procurement or the framework agreement for: construction works, equal to or exceeding the amount of EUR 20,000,000 expressed in PLN; deliveries or services, equal to or exceeding the amount of EUR 10,000,000 expressed in PLN. Initiation of the *ex-ante* control occurs when the President of the Public Procurement Office receives a copy of the documentation of proceedings for awarding the procurement, in order to commence such a control. Upon the managing institution's motion the President of the Public Procurement Office may waive the *ex-ante* control, if, according to the institution, the proceedings were carried out

in compliance with the provisions of the Act. The President immediately informs immediately the contracting party and the applicant about such waiving.

In the case of the President of the Public Procurement Office's decision, an important role is played by the formative standard in verifying compliance (or non-compliance) of actions taken by participants of the public procurement market. It is due to the standard that proper supervision over the public procurement market can be exercised.

In analysing the area of control over the public procurement market, it should be noted that the President of the Public Procurement Office's independence is also essential. In the case of this public administration body, the following levels of independence can be distinguished:

- financial independence (free use and disposal of financial assets);
- organisational independence (the freedom of creating the organisational structure of the Public Procurement Office);
- independence from the public authority;
- independence from entities operating on the public procurement market (contracting parties and contractors) (Szydło, 2013).

The degree of independence varies across EU member states. Note that the President of the Public Procurement Office is an example of limited independence from the public authority. This results from the fact that the Prime Minister appoints the central body of the governmental administration, which leads to the conclusion that the very process of controlling the public procurement market may be dependent to a certain degree on the public authority and, thus, on the current political situation in a country. The limited platform of independence may also weaken the independence from entities operating on the public procurement market. However, the body supervising the public procurement market should act independently from any contracting parties and contractors' interests. It should have no interests or other relations or links with these entities. The above also applies to persons performing control functions, to whom the exclusion procedure has been applied. One may say that it is a kind of a corruption-preventing measure and contributes to the proper operation of Poland's public procurement market (Wiśniewski, 2006).

2.2. Czech Republic

Another interesting system of the public procurements is present in the Czech Republic. In this country, the competent body in terms of the public procurements is the Office for the Protection of Competition. Its objectives include ensuring fair competition on the procurement market as well as carrying out proceedings for awarding the public procurement in a clear and non-discriminating manner, which leads to choosing the most profitable tenders. The key legal act in this area is the Act on Public Procurement of 19 April 2016, which introduced changes with regard to the amendment of the European Union law regarding the discussed subject.

Regulations regarding the public supervision were included by the Czech legislator in Art. 248-272 of the above-mentioned Act.

The office exercises supervision over observance of the public procurement law as well as criteria of awarding the public procurements. It makes decisions in terms of, for instance, whether the contracting entity acted in compliance with the Act when it awarded the public procurement or during a specific procedure, or whether the contracting entity's practices aimed at awarding the public procurement are compliant with the Act, apart from the procedure for awarding the procurement. The control proceedings are carried out upon a motion or *ex officio*. The reasons for initiation of the proceedings include: incorrect notice on the procurement, incorrect removal of a participant from the proceedings, inconsistent, erroneous application of the criterion for tender evaluation. The employees responsible for carrying out the control proceedings are obliged to keep confidentiality (Art. 271). After conclusion of the control proceedings, the Office imposes sanctions for violation of the provisions concerned.

2.3. France/Belgium

In France, the institution responsible for regulation, analysis and control of the public procurements is the Ministry of Economy and Finances. Inter-ministerial unit for procurement and public services delegation investigations (Mission interministérielle d'enquête sur les marchés publics et les délégations de service public) is maintained by the Ministry, and it has powers of control in terms of verification of correctness and impartiality of the carried-out proceedings, as well as their compliance with the public procurement and competition law.

Until 2015, the main legal act regulating the concerned subject was the Public Procurement Code (Code des marchés publics). It was repealed with Decree no. 2015-899 of 23 July 2015 on public procurement. The Public Procurement Code is to be replaced with a new public order code. Temporarily, the public procurement law is regulated in Implementing Regulation no. 2016-360 of 25 March 2016 on public procurement. Pursuant to this act, the entities in respect of which the control proceedings are carried out are obliged to enable and facilitate the document verification and have to provide all necessary information (Art. 64). The French Ministry of Economy and Finances comprises the inter-ministerial unit for procurement and public services delegation investigations (Mission interministérielle d'enquête sur les marchés publics et les délégations de service public) is responsible for the supervisory procedures. The unit has powers of control in terms of the verification of correctness and impartiality of the carried-out proceedings, as well as their compliance with the public procurement and competition law. Corresponding procedures are implemented in Belgium, where public procurement involves many acts. The main legal act regulating the matter of awarding public procurements is the Public Procurement Act: *Loi relative aux marchés publics*– of 17 June 2016. The current Public Procurement Act thoroughly transposed the procurement

directives regulations. Belgian public procurement law is fully harmonised with the EU law.

2.4. Germany

German regulations regarding public procurement are present in many legal acts. The Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) of 15 July 2005 is of importance. It is applied in cases of public procurement the values of which exceed the amounts provided for in the 2004/18/EU and 2014/24/EU Directives. Two systems of public procurement control are distinguished in Germany. The first consists in the administrative control of the public procurements exercised by the control offices. The second one is exercised by chambers of public procurements and higher regional courts, however it only refers to the procurements with an estimated value of the minimum of the lower thresholds defined in the EU Directives. If the estimated value is lower, the tenderers whose rights were violated by the contracting entity's decision are entitled only to claim for compensation.

In cases of public supervision over the public procurements market, the first system should be described. At federal level, the public procurement supervising body is the Ministry of Communication, Construction and Housing, as well as higher financial directorates. Proceedings at the control office are initiated ex officio or upon a motion, and the premise for such initiation is an objective violation of the provisions of the public procurements law. It should be emphasised that the control offices may oblige the proceedings' participant to stop violating the law and advise the contracting entities and the contractors in terms of applying the regulations in the procurements, as well as act as an arbitrator in the case of any disputes. The decision of the control office can be appealed in the public procurements chamber.

2.5. Sweden

The Swedish Competition Authority (Konkurrensverket) is the supervising body in terms of public procurement. It is worth noting that this is an entity characterized by a high degree of independence in all aspects. There are no doubts about the influence of politics on his appointment. Its tasks are aimed at the efficient functioning of the public procurement market for society and the participants of the proceedings. Supervisory activities are directly targeted at illegal practices in public contracts. The principles of its functioning are included in the Public Procurement Act of 15 July 2010. The Public Procurement Department is divided into two sections operating at the Authority.

The first one – Section for General Supervision (AU1) – exercises control with regard to the obligation of maintaining compliance with the Public Procurement Act. The second one is the Section for Penalties (AU2). During the supervisory activities, the authority can collect all necessary information regarding the activity of the entity awarding the public procurement. It can demand explanation and the provision of documents. The objectives of the supervisory activities include

promoting effective competition in the private and public sector, with benefits for the consumers, as well as efficient public procurements in favour of the public and economic entities operating on the market. The Authority's decision can be appealed in the administrative court.

3. Conclusion

In the social market economy, the public procurement system's effectiveness depends on the correct and effective normative solutions that directly affect the condition of the entities participating in public contract-awarding proceedings. The effectiveness of the public procurement system is undoubtedly related to choosing the most advantageous bid which should be subject to a control exercised by the supervisory bodies.

The considerations presented above prove that the system of public supervision over the public procurement market in the EU member states is coherent. The supervising authorities often have similar legal measures aimed at the performance of their tasks in the analysed juristic sphere. Their activities are indispensable for democratic regulatory order. It is also worth noting that spending public funds must be transparent, in compliance with the most basic and instructive provisions of public procurement law. Therefore, the mere introduction of legal protection measures (such as complaint to the court) is not sufficient. The legislator must establish such principles as to enable carrying out supervisory activities by the public authorities, both prior to the procedure as well as during it. This statement allows for the conclusion that prevention in the area of awarding public procurements is significant not only from the point of view of the parties interested in the conclusion of the agreement, but it also plays an important role for society as a whole, and the public interest, as the proceedings involve public funds. It should be also noted that the supervisory activities prevent such common pathologies of the 21st century as corruption and money laundering. The legal mechanisms discussed in the article are directly aimed at the elimination of such phenomena from public administration (Gola, 2013).

These are the only measures of ex-ante control that clearly affect the reduction of pathologies in public administration. Importantly, they create the scope for stability for contractors and assurance about the contracting parties' actions. Unfortunately, even if the best possible instruments are introduced to the public procurement system, negative phenomena cannot be eliminated if the efforts to introduce the right social education model preventing the phenomenon of pathological relations and systems fail. Note that the ethical behaviour of persons operating in the public procurement system affects the image of 'good law'. However, one can never depart from the necessity to take legal standards to perfection, if only given the ever-changing social and economic conditions prevailing over participants of the public procurement process (Panasiuk, 2005).

The supervisory activities discussed in the article relate to the existence of legal forms of actions in the European Union. Properly designated bodies equipped with statutory powers can intervene in the functioning of the country and its economy. For instance, the substantive basis for the preventive supervision decision constitutes not only the regulations authorising a given body to make decisions in a given matter, but also regulations indicating the conditions for issuing such a decision. It should be also remembered that issuing a negative decision in cases of the preventive supervision is a unique type of sanction and constitutes a kind of nuisance (Kocowski, 2009).

References

- Arrowsmith, S., Linarelli, J., and Wallace, D. (2000). *Regulating public procurement: national and international perspectives*. London: Kluwer Law International.
- Boć, J. (2003). *Prawo administracyjne*. Wrocław: Kolonia Limited.
- Directive 2007/66/EC of the European Parliament and Council of 11th December 2007 amending Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (the classic directive).
- 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 (the sectoral directive).
- Directive 89/665/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.
- Gola, J. (2013). Kontrola Prezesa Urzędu Zamówień Publicznych jako instrument zapobiegania korupcji w administracji publicznej [Control of the President of the Public Procurement Office as Instrument Preventing Corruption in Public Administration]. In T. Kocowski, J. Sadowy (Eds.), *Kontrola zamówień publicznych [Public Procurement Control]*. Wrocław: Public Procurement Office.
- Granecki, P. (2009). *Public procurement law commentary*. Warszawa: C.H. Beck.
- Knosala, E. (2010). *Zarys nauki administracji*. Warszawa: Wolters Kluwer.
- Kocowski, T. (2009). *Reglamentacja działalności gospodarczej w polskim administracyjnym prawie gospodarczym*. Kolonia Limited. Wrocław.
- Konkurrensverket. Swedish Competition Authority. (n.d.). Retrieved January 1, 2020 from http://www.konkurrensverket.se/globalassets/english/publications-and-decisions/rapport_2015-7_english.pdf
- Ordonnance n° 2015-899 du 23 juillet 2015 relative aux marchés publics. (n.d.). Retrieved January 1, 2020 from <https://www.legifrance.gouv.fr/eli/ordonnance/2015/7/23/EINM1506103R/jo/texte> Data
- Panasiuk, A. (2005). Zamówienia publiczne – legalność i etyka [Public Procurement – Legality and Ethics]. *Kontrola Państwowa*, (4).
- Schebesta, H. (2016). *Damages in EU Public Procurement Law*. Vienna: Springer.
- Szewczyk, M. (1995). *Nadzór w materialnym prawie administracyjnym*. Poznań: Wydawnictwo Naukowe UAM.
- Szostak, R. (2011). Kontrola zamówień publicznych finansowanych ze środków europejskich – zagadnienia organizacyjne [Control of Public Procurement Financed from EU Funds]. *Samorząd Terytorialny*, (11).
- Szydło, M. (2013). *Krajowy parlament jako regulator sektorów sieciowych*. Warszawa: Wolters Kluwer.

The Public Procurement Law Act of 29 Jan. 2004 (Dz.U. 2015.2164, as amended)

Urząd Zamówień Publicznych. (n.d.1). Retrieved January 1, 2020 from https://www.uzp.gov.pl/__data/assets/pdf_file/0014/24233/system_zamc3b3wien_publicznych_Francja.pdf

Urząd Zamówień Publicznych. (n.d.2). Retrieved January 1, 2020 from https://www.uzp.gov.pl/__data/assets/pdf_file/0029/24887/zp_w_niemczech2001.pdf

Wiśniewski, P. (2006). Korupcja w obszarze zamówień publicznych w Polsce-zagrożenia i rekomendacje na przyszłość. *Analizy i Opinie*, (67). Instytut Spraw Publicznych. Warszawa.