

INDEPENDENCE OF PUBLIC PROCUREMENT AUTHORITY*

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Abstract: *Nowadays, many countries suffer from loss of confidence of their citizens. Huge protests are spread throughout many states even in the EU. The time has come to analyze the principles of good governance in order to make states trustworthy organizations again. This paper aims to contribute to the discussion by focusing on independence of state authorities. As public spending is often a cause of citizens' dissatisfaction with governments, the independence of public procurement authorities shall be analyzed in particular. This paper deals with requirements for independence and applies them to a chosen public procurement authority, the Office for Public Procurement, which is the central authority for administration of public procurements in the Slovak Republic. Since there have been many affairs related to misspending of public resources, the de facto independence of the Office for Public Procurement can be questioned. Therefore, the paper puts forward the legal framework in which the Office for Public Procurement operates, and discusses its functioning in practice.*

Keywords: *Public procurement, Office for Public Procurement, Independence, De facto independence*

1. INTRODUCTION

We can observe the increase of lack of confidence towards states all around the world. Arguably, better functioning of the state apparatus might, at least partially, increase the confidence of citizens towards the state. This paper deals with public procurement authority in the Slovak republic, the Office for Public Procurement (the “Office”), and its independence. It is assumed that independence of this institution may significantly change the course of public spending in Slovakia. Since the scope of this paper is quite limited, we will mainly focus on the leadership of the Office and its *de jure* independence.

Hence, the paper is organized as follows. First, the various concepts of independence will be presented, based on an OECD recommendation as well as opinions of scholars. Second, the Office for Public Procurement will be outlined, in order to assess whether it may be seen as independent. Third, a recent case related to public procurement will be discussed in order to assess the de facto independence of the Office for Public Procurement.

2. VARIOUS CONCEPTS OF INDEPENDENCE

In general, we may distinguish between several basic concepts of independence each dealing with a different aspect. First, we can recognize the political independence, i.e. from politicians; and the functional independence, i.e. from business. Companies and firms usually stand in the position of regulated subjects.

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Second, one may distinguish between the *de jure* and the *de facto* independence. The former looks into the set of legal rules; hence, it assesses the legislative framework based on which the institution operates. The latter focuses on the functioning of the institution in real world. It may happen that the *de jure* independence seems to be on a sufficient level, however, the real functioning of the institution is under influence of, for instance, the government.

In 2017, OECD issued a document dedicated to culture of independence [1]. It presents five areas by which independence should be safeguarded, namely clarity and responsibility, transparency and accountability, financial independence, independence of leadership, and staff behavior. In relation to the fourth aspect, the procedure of nomination, appointment and dismissal of the institution's leader is significantly important. Conflict of interests with both politicians and business sphere should be precluded [1].

Naturally, the OECD is not the only one exploring independence of institutions. Many scholars have conducted deep analysis of institutions selected by them, whereas they paid attention to what may be a positive and what a negative element of their independence [2] - [4]. Due to limited scope of this paper, we will focus on work of one particular - academic.

Zemanovičová assessed the independence of Antimonopoly Office of the Slovak Republic, which is the national competition authority in Slovakia. For the assessment of the public procurement authority, which will be conducted in the next chapter, it shall be highlighted that she was not satisfied with lack of requirements for a transparent selection procedure for the leader of the institution or members of the appeal body of the institution. She also pointed out the possible risks connected with the re-election for the position and monocratic decision making on the first instance of the institution. It was also proposed by her that an announcement mechanism for meeting with persons from political or business environment should be introduced.

3. LEGAL FRAMEWORK OF THE OFFICE FOR PUBLIC PROCUREMENT

It is interesting to note that there is no explicit legal provision which would describe the Office as independent. This is so regarding the Act on public procurement [5] as well as Directive on public procurement [6], Directive on the award of concession contracts [7], Directive on procurement by entities operating in the water, energy, transport and postal services sectors [8].

As indicated above, we will mainly focus on the leadership aspect of the independence provided in Sections 140-146 of the Act [5]. The head of the Office is the President of the Office, who is nominated by the government, however, he or she is elected by the National Council of the Slovak Republic, i.e. the Slovak parliament. It is undoubted that the appointment by the parliament is to be seen as a positive factor, especially due to the fact that it is a collective body. However, it cannot be omitted that the Slovak Republic is a parliamentary democracy, hence, as a rule, the government has the support of the majority of the parliament.

None the less, the independence of the President of the Office is supported by the fact that the publicity of the call for "registration" of the candidates for the function is provided by law. The independence is also put on a higher level also thanks to public hearings of candidates for the function and clearly stated reasons for the dismissal of the President. The term of the presidency is set for five years, which is also positive. On the other hand, the independence of the President is undercut by the fact that he may be re-elected for the function.

As far as the requirements for the person of the President are concerned, one has to admit that these requirements are brief. The legislation prescribes its separation from the political parties. None the less, there are no explicit requirements for work experience or formation of candidates for the position of President.

In relation to the two Vice-Presidents of the Office, similar provisions take places. The major difference is in proposing and appointing of them. As oppose to the President of the Office, the proposal for candidates comes from the President of the Office and the Vice-Presidents are appointed by the government instead of the parliament. The President of the Office also determines the issues which each of the Vice-Presidents shall be responsible for, as well as the order in which they substitute him.

Apart from the leadership of the Office itself, there is also another body which plays vital role in the functioning of the Office. The Council of the Office is the appeal body against the first-instances decisions of the Office. It consists of the President, the Vice-Presidents and six other members. The President is also the president of the Council, and the same applies to the Council's vice-presidents. Let us now zoom in on the appointment procedure of these other members.

The procedure is to great extent similar to the appointment of the President or the Vice-Presidents. The other members are appointed by the government. The manner of selection of them is specified in the regulation of the government pursuant to Section 143 para 1 of the Act [5]. It should be taken positively that the other members cannot be employees of the Office. This means that two-thirds of the Council are occupied by persons who are outside of the Office. The term of the other members is for five years.

As to the personal requirements, the other members shall be citizens of the Slovak Republic, have full legal capacity and generally no crime record. Moreover, they shall have a university master degree and at least five years of practice in the public procurement sector. Therefore, eventually, there are some requirements for education and professional experience. However, it cannot be omitted that they are not leaders of the institution itself, only members of the appeal body.

4. FUNCTIONING OF THE OFFICE FOR PUBLIC PROCUREMENT

In order to discuss de facto independence, this paper presents one recent case which, first of all, presents the real powers of the Office; second, it casts doubts on the independent functioning of the Office. In relation to this point it must be highlighted that presentation of this case has no intention to state that any influence was done on the Office in practice. The author would like to stress that she only presents the publicly known facts about the case and she does not take any normative position in relation to it.

Recently, a Slovak economic journal published an article named “The Country of Over-Charged Stadiums” [9]. The article describes a public procurement which was conducted by the Slovak Football Association in relation to the grandstands. It was related to renovation of football stadiums in various Slovak towns. The Association was procuring a framework contract for the provider of grandstands, so that each town did not have to procure the grandstands on its own. This, in itself, does not represent a problem. However, what seemed a little problematic was the fact that there were only two tenders in the public procurement procedure; and one of them was excluded. Moreover, it was the tenderer with the allegedly lower tender, i.e. the lower proposal.

The Association, as the contracting authority, excluded the tenderer due to his alleged insufficient experience and alleged insufficient proof of financial standing. The tenderer lodged a complaint to the Office of Public Procurement. The Office confirmed the complaint towards the first reason for exclusion, however, the Office was not satisfied with the reasoning of the tenderer towards the second reason. Therefore, all in all, the exclusion of the tenderer by contracting authority was upheld by the Office on the first instance.

The core of the legal dispute related to insufficient proof of financial standing was related to the fulfilment of the condition whether it was objectively impossible for the tenderer to provide a loan commitment. The excluded tenderer did not have such commitment, as he claimed that it had not been possible for him to get such commitment from any bank approached by him. Instead of the commitment, the tenderer provided an information on the opening of a current-account credit facility for an amount exceeding EUR 5 000 000, and a sworn statement that he would have, in a case of succeeding in the public procurement, sufficient amount of money at his disposal.

The contracting authority did not accept this as a sufficient proof of financial standing, which was upheld by the Office for public procurement on the first instance. The excluded tenderer lodged an appeal against this decision; however, the Council of the Office did not change the first instance decision. The excluded tenderer was not willing to surrender; therefore, he lodged an action against the appeal decision of the Council of the Office. The Regional Court in Bratislava dismissed the action, hence, the excluded tenderer appealed from this court decision to the Supreme Court of the Slovak Republic. In these proceedings, the Supreme Court decided to refer a preliminary question to the Court of Justice of the EU based on Article 267 TFEU. The Court of Justice issued its ruling [10], based on which the Supreme Court ruled that the Regional Court of Bratislava, and therefore also the previous assessments, were based on error in factual as well as legal assessment of the case. The Supreme Court held that the documents submitted by the excluded tenderer were suitable to fulfil the requirement of financial standing. [11] Thus, it was eventually confirmed that the tenderer was wrongfully excluded.

5. CONCLUSION

In order to strengthen the confidence of individuals towards a state, it is important for state to function in a proper manner. As presented by this paper, public procurement authorities play crucial role in efficient public spending. Their independence should be of particular interest. As it flows from the paper, there are many points on which the independence of the Office for Public Procurement might be improved. *De jure* independence of the Office is not perfect and, unfortunately, there are cases based on which the Office does not *appear* as an independent institution [1]. Naturally, to reach the level on which an institution *seems* independent is difficult, however, that is the point to which the legislator should aim.

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