

# BRATISLAVA LAW REVIEW

PUBLISHED BY  
COMENIUS UNIVERSITY IN BRATISLAVA  
FACULTY OF LAW

ISSN (print): 2585-7088  
ISSN (electronic): 2644-6359

## MEASURES AGAINST AVOIDANCE AND ABUSE OF PUBLIC PROCUREMENT REGULATION & PRIVATE LAW ASPECTS OF PUBLIC PROCUREMENT (BRATISLAVA, 25 NOVEMBER AND 9 DECEMBER 2021) / Adam Máčaj, Daniel Zigo

Mgr. Adam Máčaj  
Comenius University in Bratislava,  
Faculty of Law, Institute of European  
Law  
Šafárikovo nám. 6; 818 00 Bratislava,  
Slovakia.  
adam.macaj@flaw.uniba.sk  
ORCID: 0000-0002-3086-8025

Mgr. Daniel Zigo, PhD., LL.M.  
Comenius University in Bratislava,  
Faculty of Law, Institute of Clinical  
Legal Education  
Šafárikovo nám. 6; 818 00 Bratislava,  
Slovakia.  
daniel.zigo@flaw.uniba.sk  
ORCID: 0000-0003-2414-3471

This report was prepared as part of the  
research project APVV-17-0641  
"Improvement of effectiveness of legal  
regulation of public procurement and  
its application within EU law context".

### **Suggested citation:**

Máčaj, A., Zigo, D. (2021). Measures against Avoidance and Abuse of Public Procurement Regulation & Private Law Aspects of Public Procurement (Bratislava, 25 November and 9 December 2021). *Bratislava Law Review*, 5(2), 131-136. <https://doi.org/10.46282/blr.2021.5.2.273>

**Submitted:** 16 December 2021  
**Published:** 29 December 2021

Once again, Comenius University in Bratislava, Faculty of Law held two conferences related to contemporary issues in public procurement and its regulation by the European Union and national law. Both conferences were held as a part of the research project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context" and focused on various interdisciplinary issues of public procurement in current law and policy. Due to the pandemic restrictions connected to the COVID-19, the conference was held in online format, allowing professionals from all over the country to participate.

The first conference „Measures against Avoidance and Abuse of Public Procurement Regulation" took place on 25 November 2021. The conference was opened

by JUDr. Miroslav Hlivák, PhD., LL.M., president of the Office for Public Procurement of Slovakia, and Assoc. Prof. JUDr. Ing. Ondrej Blažo, PhD., director of the Institute of European Law at Faculty of Law of the Comenius University in Bratislava.

JUDr. Miroslav Hlivák, PhD., LL.M. followed up with a keynote speech aimed at providing outline of legislative initiatives dealing with public procurement. He outlined several areas of interest for various stakeholders involved and introduced various initiatives that already resulted into changes in legislation, but also visions and prospects for future of public procurement law and policy. Specifically, legislative changes introduced pertained to independence of the Office for Public Procurement, accelerating the public procurement procedures, in particular easing the procedure in case of contracts with low value, or changes aiming to streamline the complaint mechanisms. At the same time, initiatives for legislative amendments enshrined providing for a more effective implementation of liability for abuses and avoidance of public procurement legislation, which included the amendments to criminal law, unadopted as of yet.

JUDr. Miroslav Čák focused on the issue of public procurement in cases of construction and development, specifically in connection to cases of constructing affordable rental housing projects. The presentation outlined how multiple cities and municipalities, since 2018, in dozens of public procurement procedures, sought to avoid public procurement regulation in these projects in order to be able to award the contract to specific company they preferred. Once these authorities secured funding from state fund, they were bound by public procurement legislation, however the municipalities subsequently requested the procurement participants to have ownership or lease of a plot of land having specifications that were especially hard to fulfil, and often the contracting authorities themselves held title to such lands, which they then granted to the preferred company, creating a covertly discriminatory scheme. In other cases, the contracting authorities abused an exception that declared acquisition of existing real estate to fall outside the applicable regulation.

JUDr. Ing. Maroš Katkovčín, PhD. focused on the role of interim measures in public procurement oversight of the contracting authorities. Interim measure is regarded an exceptionally powerful tool of the Office of the Public Procurement, especially in ongoing procurements, as it allows total suspension of ongoing procurements. On the other hand, while this measure allows for control of manifestly excessive abuse of applicable regulation, the measure at the same time comes at a cost of promptness of the proceedings, which in itself may lead to rendering the objectives of the procurements pointless due to passage of time. The trouble may then be exacerbated due to the current legislation, which e. g. allows the interim measure to be issued without possibility of the contracting authority to challenge it, allows the statutory time-limits to elapse even while the procedure is suspended, and the interim measures are often granted at the very outset of the oversight Office for Public Procurement exercises. The discussion should therefore question whether these issues should be addressed by legislative amendments, or changes in practice of the Office for Public Procurement as the oversight authority and reasoning of its interim measures.

JUDr. Andrej Beleš, PhD. dealt with current issues of machinations in public procurement, from the viewpoint of criminal law. In Slovakia, the amount of persons prosecuted under the provisions dealing with machinations in public procurement varies depending on the specific crime committed, however, Slovakia prosecutes up to ten times fewer suspects in comparison to Czechia in certain types of offences. In order to streamline the effective implementation of criminal law, the legislation should more clearly and unambiguously delimit which violations of public procurement law are relevant from the viewpoint of criminal law, and which are to be dealt with under the public

procurement procedures and oversight, or under administrative law penalties. Further issues requiring consideration under criminal law through the lens of public procurement include matter of evidence, calculation of harm caused, and the severity of applicable penalties. Nevertheless, apart from legislative changes, question necessarily is whether the prosecuting authorities themselves are sufficiently capable in the specifics of public procurement to efficiently investigate and prosecute the offenders.

PhDr. Matúš Džuppa, LL.M. dealt with the usage of Big Data in the fight against abuses and avoidance of public procurement legislation. The available data related to e. g. finances of companies, personnel etc. were gathered into several huge databases that allow automatization of certain activities related to public procurement, allowing more transparent procurement, and using the database as a measure of prevention from abuses, or conflicts of interest. The database available allows for quantitative comparison of practices not only on part of contracting authorities, but also suppliers, and their disaggregation on the basis of various criteria. Pooling of data allows consideration of various factors, such as how many public procurements a contracting authority initiates, how many participants are in each procurement, what were the prior relations between them, and how the specific procurements were eventually concluded. At the same time, behavioural patterns of contracting authorities can be ascertained through the usage of Big Data e. g. when some companies won 100 % of the contracts, they applied for with one specific contracting authority.

Mgr. Daniel Zigo, PhD., LL.M. presented the research carried out within the research project APVV-17-0641, which focused on one of the relatively new measures of transparency in public procurement in the Slovak Republic – the register of public sector partners (RPSP). In the first place, it differentiated between the principle of transparency in public procurement and the transparency that the RPSP was supposed to bring to the public procurement procedures, as it is aimed at openness on the part of private sector entities, through the obligation to disclose their beneficial owners. Within the objective, the research then focused on several specific areas of functioning of the register. Efficiency indicators have been defined as two basic indicators, which assess whether the register can achieve its goal, and propriety indicators, which in turn assess whether this goal is being achieved in a reasonable way. In the author's opinion, the main indicator of the effectiveness of RPSP is a significant impact on revealing the real ownership structures of companies. The propriety indicators are then, in particular, the adequacy of the costs associated with the RPSP for the company, and the adequacy of the obligations that the law imposes on concerned stakeholders in relation to the results of the register. The adequacy and effectiveness of the RPSP could also be scrutinized by analysing alternative ways of achieving a defined goal. In evaluating the empirical data, the presented research concluded that RPSP is a relatively effective tool in determining the real ownership structures, and the obligations imposed on private sector entities, although extensive, are offset by a prospective procurement contract. As part of the study of possible alternative models of functioning of the register, the research then presented several proposals *de lege ferenda*, aiming to improve the efficiency in practice.

Prof. JUDr. Katarína Kalesná, CSc. and JUDr. Mária Patakyová, PhD. focused on interplay of public procurement and state aid in their presentations. The general presumption of public procurement is that compliance with the regulation excludes the possibility to find the awarded contract to constitute state aid is currently being challenged. The interaction between competition law and public procurement is considerable especially in case of public undertakings and services of general economic interest, as such undertakings are often not bound by the regulation, having exceptional status in areas such as research & development. Some of such undertakings are even

not selected by public procurement at all, which raises its own set of issues and questions, such as the amount of compensation these undertaking may receive in comparison to undertaking that in fact are awarded the contract through the public procurement. Some Member States in the EU regard services of general economic interest exceptionally broadly, where even public procurement itself may be considered such a service, e. g. services of electronic public procurement. The question posed then is whether this entire sphere will eventually be exempted from the provisions of competition law as well.

At the same time, provision of state aid through public procurement is often a reality as well, as public procurement generally satisfies most of the elements of state aid under Article 107 of the Treaty on the Functioning of the European Union. The issue at hand is whether the consideration for performance of a contract constitutes aid *per se*, as the contracts generally are presumed to be performed under market conditions, and therefore suppliers do not receive any aid or benefit outside the market conditions. The outlined problems may arise e. g. when regulations are breached when awarding the contract, or when a single participant is awarded the contract without any competitor. The manifest cases of aid are present especially when contracts are overpriced, the amount of goods provided is excessive, or goods and services which are not necessary are contracted anyways. In such cases, the contracting authorities are at particular risks of flouting the state aid rules, in particular when such contracts constituting state aid are not notified to the European Commission.

The second conference „Private Law Aspects of Public Procurement“ took place on 9 December 2021 and focused on the issues which formed counterpart to the first conference, predominantly related to private law and its interaction with public procurement regulation. The conference was opened by Assoc. Prof. JUDr. Ing. Ondrej Blažo, PhD., director of the Institute of European Law at Faculty of Law of the Comenius University in Bratislava.

Assoc. Prof. JUDr. Hana Kováčiková, PhD. focused in the first presentation on compensation for damages caused by the state authorities in public procurement procedures. The general law on state compensation of damages in administrative proceedings is inapplicable to public procurement procedures, and therefore other legal regimes of liability have to be considered. However, as no contract is concluded before public procurement awards the contract, potential contractual liability of contracting authorities for violations of public procurement regulation under commercial law and the Commercial code is also excluded in Slovakia. The only applicable regime is therefore the general liability regime stipulated in the Civil Code. Unfortunately, while the courts recognized possibility of using such regime, very little jurisprudence deals with the specifics of applying the said regime on liability for damages caused throughout the public procurement procedure, and therefore the practice of such regime is little explored thus far. Specific issues then arise e. g. the question whether the claimants have to prove intent of the contracting authority to cause harm in order to seek damages via judicial proceedings, or whether existence of harm can be proven in conduct before contract is awarded, and what types of compensation may be sought, or whether legislative amendments are required to further clarify the liability regime.

Assoc. Prof. JUDr. Jana Duračinská, PhD. presented essential views on contractual terms in public procurement. Contracts are specific in public procurement, both from the viewpoint of contracting authority and the suppliers. Contractual freedom is limited in the interests of transparency and financial efficiency, and the suppliers have only limited ability to interfere with the terms and conditions of the contracts they compete for, even if those contracts would violate mandatory provisions of national law.

Instead, other regimes are enshrined in the legislation to ensure legality, such as possibility to ask the contracting authority for clarifications before contracts are concluded, or before offers are made. Similarly, changes to contracts after conclusion or submission of offers has to be regulated appropriately and differently from law of contracts governing private parties, having regard to the specifics of public procurement contracting. Changes in contracts that are unlawful are also sanctioned with specific procedures allowing to claim the contracts void, such as procedures before Office for Public Procurement, not the judiciary. Certain abuses of contractual terms may even lead to exclusion of undesired competition by the contracting authorities, e. g. through disproportionate contractual damages. To remedy the issues, proposals and existing standardized contractual terms and conditions may be considered, with the prospect of their implementation into Slovak law and practice.

Assoc. Prof. JUDr. Peter Lukáčka, PhD. and JUDr. Peter Kubolek examined relations between commercial law and public procurement regulation, including the historical development of public procurement, as well as contractual terms, dating back to Roman law. The interaction relates especially to the extent of oversight that should be exercised over contracting authorities, where two principal opinions are present. First argues that Office for Public Procurement should refrain from assessment of procedures and principles of public procurement, while opposing opinion argues for more extensive oversight, including fairness and efficiency of the contracts concluded. More extensive interplay is nowadays present even in areas of green public procurement and corporate social responsibility, as well as public procurement and fight against the COVID-19 pandemic, which both pose new questions for the public procurement law, policy and practice. Secondary goals in public procurement generally are being increasingly important, and the emerging practice has shown that the goals such as social public procurement may be achieved even when not requested by the contracting authorities beforehand through public procurement, but through mutual agreement of the successful contractor and the authority when concluding the contract itself.

Finally, JUDr. Juraj Tkáč, PhD. dealt with the relationship between procuring authorities and consultants. While the issue itself is not addressed in the EU law, OECD incentivizes states to professionalize the public procurement globally. With that in mind, Slovakia adopted amendments to the Law on Public Procurement that will enter into force in 2022. The law reflects the need for professionalization by recognizing the position of professional supervisor, person that may perform various tasks associated with public procurement, as well as exercise oversight. Concerning consultants and professionals in public procurement, the essential issue is whether contracting authorities are allowed to seek compensation from the consultants for harm caused in the course of their work in public procurement. The question then is whether in case of finding of violations of applicable regulation, the liability between the contracting authority and the professional supervisor should be liable jointly, or exclusively, and to what extent and under what conditions may professional supervisors be held liable.

Both conferences drew widespread attention from academia, professionals, and state bodies daily involved in public procurement. The outlined issues posed vital questions not only as regards the current state of play, but also problems and obstacles in application of current public procurement law, as well as future prospects of development in securing transparent, efficient, and timely performance of public procurement. Although the grant scheme forming the backbone of the provided research slowly draws to a close, the discussed issues shall have a long-term influence on public procurement in Slovakia, and the researched topics have a significant prospect for further development of scientific and legal knowledge in the future.

