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HOW MAY COVID-19 BE (MIS)USED AS A JUSTIFICATION FOR UNCOMPETITIVE TENDERING? CASE STUDY OF SLOVAKIA¹

Keywords: COVID-19, public procurement, uncompetitive tendering, extreme urgency, proportionality

Summary

The COVID-19 pandemic caused disaster in every area of life, public procurement notwithstanding. This article considers the problem of possible misuse of COVID-19 pandemic as a cover to justify uncompetitive tendering of public contracts. It contains the analysis of general conditions set by the EU law and also by national legislation, which must be met while using the method of direct awarding of contracts by contracting authorities, as well as specific conditions clarified by the European Commission in its 2020 Guidance for emergency situation procurement related to COVID-19. It also deals with the Slovak law applicable in this area, and the real practice of Slovak contracting authorities. In this regard, a quantitative analysis was realised to answer the question, whether Slovakia complies with the Union's rules in both levels – legislative, as well as in practical.

Introduction

COVID-19 has indeed brought unpredictable challenges to the whole world. Amongst them, public procurement plays an important role. In this regard, various reports² from countries or international organizations indicate the consequences in the form of the loss of transparency or even worse, increase of frauds and

¹ This paper was prepared within the project APVV-17-0641 "Improvement of effectiveness of legal regulation of public procurement and its application within EU law context".

² See, for example, FREE Network: Combating Misuse of Public Funds in COVID-19 Emergency Procurement. Available: <https://freepolicybriefs.org/2020/09/28/covid-19-emergency-procurement/> [viewed 08.11.2021.].

corruption. Other impacts led to disruption of certain supply chains, which caused a huge increase of demand for specific goods and services. Some governments therefore have been using COVID-19 as an unforeseeable event, which provide a justification for them to procure goods, services and even works without any call for competition, arguing that it is the case of extreme urgency. Clearly, that might have been the case of 2020. However, is this justification still applicable in 2021? European Commission was aware of possible abuse of the situation to evade competitive procurement rules within the European Union. As Ceocea et al. have aptly pointed out, [procurement] process that takes place under conditions of uncertainty and risk can be influenced by factors that are difficult to anticipate, which may disrupt both the conduct of public procurement processes carried out at the level of contracting authorities and the functioning of the public procurement system as a whole³. Therefore, soon after this pandemic bomb blasted, European Commission provided a Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (hereinafter – COVID-19 Procurement Guidance). Research in this article is focused mainly on the two following questions:

- Does Slovakia comply with EU's COVID-19 Procurement rules?
- Has the situation in Slovakia changed during the particular waves of the pandemic?

The hypothesis presumes, that the Slovak Republic complies with the Union's public procurement rules applicable to COVID-19 uncompetitive tendering.

Methods such as doctrinal analysis, quantitative analysis, comparison, deduction, and synthesis were used in the research. For the purposes of this article, negotiated procedure without publication and direct awarding have the same meaning.

1. Conditions for uncompetitive tendering

The fundamental goal of the public procurement is to ensure the most efficient use of public funds and increase the efficiency of public spending.⁴ This is to be ensured through the bidding procedure open to the widest competition possible. Competitive tendering simultaneously is the prerequisite for the sound application of the principle of non-discrimination in public procurement. As such, it presents the basic method of procuring goods, services and works under

³ Ceocea C., Ceocea R. A., Vatamaniuc A., Mihălaş V. Organization of the Public Procurement Process at the Level of the Contracting Authorities in Romania. Particularities and Solutions for the management of Public Procurement Procedures organized in the Context of Emergency of COVID-19 Crisis. Studies and Scientific Researches. Economics Edition, 2020, No. 32, p. 42

⁴ To objectives of the procurement, see for example Blažo O. and Kováčiková H. Access to the Market and the Transparency as Principles of Public Procurement in the Legal Environment of the EU Neighbourhood Policy. International and Comparative Law Review, Vol. 18, No. 2, 2018, pp. 218–236. <https://doi.org/10.2478/iclr-2018-0048>, p. 224.

EU public procurement law, regulated by the Public Procurement Directive⁵ (hereinafter – PPD). However, PPD recognises particular derogations from open procedures of procurement. In these cases, contracting authorities do not publish prior calls for tender, contract terms are negotiated directly only with one supplier, formal procedural requirements are lowered or not applied, minimum time limits as well as stand-still clause are not applied, too. CJEU therefore have established that derogation from the duty to buy goods, services or works in competitive manner “must be interpreted strictly, and the burden of proof lies on the procuring authority” (Commission v. Greece⁶). Exemption therefore can be used only in very exceptional circumstances. Moreover, four general and four specific conditions have to be cumulatively met for approbation of such derogation:

Firstly, the procured supplies must be used for legitimate goal. Legitimacy of the goal can be verified through the assessment of competences and roles exercised by the contracting authority in comparison with those, which were entrusted to it in its statute. Consequently, procurement of goods, services or works, which do not serve for fulfilment of entrusted tasks of contracting authority, cannot be considered to be a tool for achievement of a legitimate goal.

Secondly, derogation must be [explicitly] established in applicable law. Legal background for COVID-19 justification can be found in the Article 32:2:c) PPD.⁷ This provision sets further set of [specific] conditions which need to be simultaneously met alongside of general ones during direct awarding:

- there are reasons of extreme urgency;
- extreme urgency was brought about by events unforeseeable by the contracting authority;
- the minimum time limits applicable in competitive procurement cannot be kept;
- the situation of extreme urgency was not caused by contracting authority.

And, of course, they must also be met cumulatively (Commission v. Germany⁸). As pointed out by Roberto Caranta,⁹ these requirements are drafted to make sure not every kind of urgency will do, and that contracting authorities cannot avail themselves of their sloppiness.

Thirdly, although the uncompetitive tendering, in fact, means the direct awarding of contract without any call for competition to selected undertaking,

⁵ 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.

⁶ CJEU judgement of 4 June 2009 in Case C-250/07 Commission v. Greece, para. 34.

⁷ “The negotiated procedure without prior publication may be used for public works contracts, public supply contracts and public service contracts in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority.”

⁸ CJEU judgement of 15 October 2009 in Case C-275/08 Commission v. Germany, para. 69.

⁹ In Steinicke M., Vesterdorf P. L. EU Public Procurement Law. Baden-Baden: Nomos Verlagsgesellschaft, 2018, p. 437.

procurement regulation even in such cases requires a compliance with a special procedure – negotiation. Whilst direct awarding, the contracting authority always must unquestionably prove and duly record the reason of the use of such procedure. At the same time, it must also comply with the public procurement principles. Only the due application of principles of transparency and effectivity should guarantee that directly awarded contract is of the best quality and at the best price.

Finally, proportionality test shall ensure that contracting authority by direct awarding of contract does not overstep the limit, which is necessary for securing the attainment of the legitimate objective and the pursued objective of procurement – the purchase of goods, services or works of the best quality and at the best price. Necessity test, which must be done, shows, “whether there exists an alternative measure which achieves the same degree of satisfaction for the first value while entailing a lower degree of non-satisfaction of the second value”.¹⁰ CJEU also pointed out, that

health and life rank foremost among the assets and interests protected by the FEU Treaty and that it is for the Member States to determine the degree of protection which they wish to afford to public health and the way in which that degree of protection is to be achieved. Since the degree of protection may vary from one Member State to another, Member States must be allowed a measure of discretion (Medisanus¹¹).

However, as also reminded by the Slovak Public Procurement Office (hereinafter – PPO) in tender *Príprava strategického parku Nitra*,¹² direct awarding is an “ultimate solution in situations, where it is not possible to procure supply requested by contracting authority in any other way.” It may not be overused by applying it in any case. It may be used only on those occasions when it is not possible to procure the required supply in “classic” procedure in usual open (competitive) procedure. The contracting authority should therefore, actively and with the due diligence, assess the market situation. If there exists a possibility of competitive procurement and there are not cumulatively met conditions set in Article 32:2:c) of Public Procurement Directive, it must use one of the competitive procedures.

2. Conditions for COVID-19 justification

As aptly said by Sánchez Graells,¹³ pandemic procurement may be characterised by: “procure what we need as best as you can, and worry not about the rules for now.” Surely, such approach is highly undesirable for effective functioning of Internal

¹⁰ Pirker B. *Proportionality Analysis and Models of Judicial Review*. Amsterdam: Europa Law Publishing, 2013, p. 29.

¹¹ CJEU judgement of 8 June 2017 in Case C-296/15 *Medisanus d.o.o. v. Splošna Bolnišnica Murska Sobota*, para. 82.

¹² PPO decision of 29 September 2020 No. 13139-6000/2018-OD/5 *Príprava strategického parku Nitra*, para. 53.

¹³ Sánchez-Graells A. *Procurement in the Time of COVID-19* (April 6, 2020). Forthcoming, Northern Ireland Legal Quarterly. Available: <http://dx.doi.org/10.2139/ssrn.3570154> [viewed 02.11.2021.].

Market. Hence, Commission swiftly reacted to pandemic situation by providing a COVID-19 Procurement Guidance. In this guidance, the Commission verified the flexibility of above-mentioned Article 32:2:c) PPO for use even in COVID-19 emergency procurements. However, it prioritizes the usage of other procedures – those which restrict the competition in the lowest possible way, providing the possibility to substantially reduce the deadlines in order to accelerate open or restrictive procedures. Only if such flexibility is not sufficient, direct awarding can be envisaged. Commission to this regard approves direct awarding for satisfying the immediate and short-term needs. Their purpose is to fill the gap until more stable solutions will be applied. In the medium term, [competitive] procedures with shortened deadlines¹⁴ are considered to be “more reliable means” of getting the best quality at the best price, while ensuring the competition between bidders and greater choice of procured items.

For direct awarding, Commission requires the exceptional use applicable “if only one undertaking is able to deliver within the technical and time constraints imposed by the extreme urgency” (point 2.3). It also imposed a duty upon the contracting authorities to evaluate whether the conditions for direct awarding are met, and to justify the usage of this method in an individual report. In such report, contracting authority is obliged to clarify the unforeseeable event, extreme urgency, which makes compliance with general or shortened deadlines impossible, the causal nexus between the unforeseen event and the extreme urgency.

On the other hand, procurements to satisfy potential future needs or cover the needs not related to, or affected by, the pandemic “do not justify a direct award, unless there is, in each case, a demonstrable justification linked to emergency reasons”.¹⁵

Relevant case law of the CJEU relating to COVID-19 pandemic is not available yet. However, there is a pending case C-274/21 EPIC Financial Consulting v. Republik Österreich and Bundesbeschaffung¹⁶ – a preliminary question submitted by an Austrian Federal Administrative Court on 28 April 2021 relating, *inter alia*, to direct purchase of antigen tests by some Austrian contracting authorities in the autumn of 2020.

3. Case of Slovakia

Slovakia regulates public procurement in Public Procurement Act, which complies with the Public Procurement Directive. Therefore, conditions which need to be met when using the uncompetitive method of procurement are the same as

¹⁴ See part 2.2 of the COVID-19 Procurement Guidance.

¹⁵ OECD: COVID-19 Competition and emergency procurement, p. 1. Available: <https://www.oecd.org/competition/COVID-19-competition-and-emergency-procurement.pdf> [viewed 03.11.2021.].

¹⁶ Only the request for preliminary ruling from the Bundesverwaltungsgericht (Austria) lodged on 28 April 2021 is available: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=244552&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=39156653> [viewed 08.11.2021.].

the Union's ones. Thus, the research was focused on findings that helped to establish whether the real practise of procuring authorities follows those rules, as well. With this in mind, the author examined all public procurements with reference to "COVID-19", "coronavirus", or "pandemic" noticed in the Journal of Public Procurement provided by the Slovak Office for Public Procurement in the period from March 2020 (when the COVID-19 pandemic started) until October 2021. 104 results were found. The value of all these procurements in EUR without VAT was 288 489 908,56 EUR. Out of these, 36 procurements representing the 57% of the value (163 675 504,59 EUR) of all procurements, were procured without a prior publication, through direct award of the contract to a selected company. The rest of the tenders were procured through (more or less) competitive procedures, such as open procedure, restricted procedure or call for tenders (see Figure 1 below).

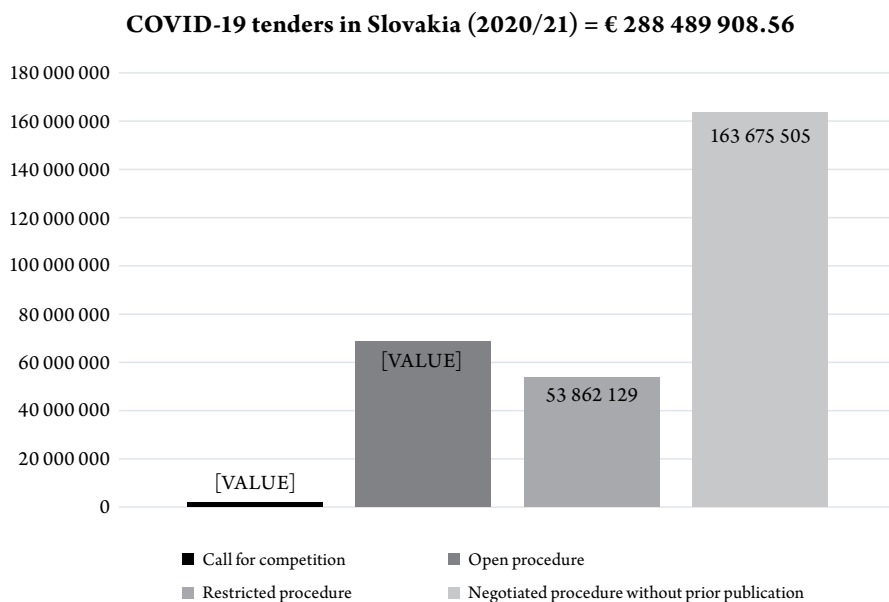


Figure 1. Public procurements related to COVID-19 from March 2020 to October 2021 in EUR

Source: processed by the author, data retrieved from <https://www.uvo.gov.sk/vyhľadavanie-zakaziek-4dd.html>

Such result was a surprise, yet, since it still could be explained by the urgency brought by unexpected situation brought on by the pandemic, further research was required. Justification of the direct awards due to an "extreme urgency" incurred by the "unexpected" pandemic situation surely might be applicable during the 1st wave of pandemic, which in Slovakia lasted from March 2020 to September 2020. However, the analysis proved that only 15 procurements from 36 of the total value of 27 654 568.33 EUR were realised during this period and therefore might comply with the COVID-19 procurement rules. The rest of procurements without

prior publication were realised during the 2nd wave or later (from October 2020 onwards).

The opinion of the author is, that after 6 months of pandemic, any reasonable contracting authority could not sufficiently prove that due to the ongoing pandemic situation there (still) exists a situation, which it could not foresee.

Worse yet, the total value of these procurements amounted to 136 020 936.26 EUR, i.e., 5 times higher than the value of the 1st-wave procurements (see Figure 2) and all central bodies (their representatives) were the members of Central Crisis Board, which decided on emergency situation in Slovakia.

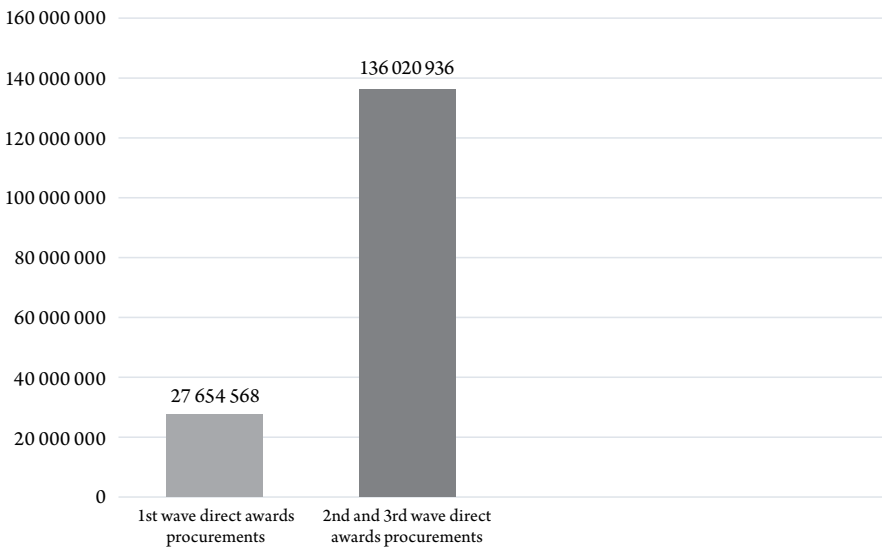
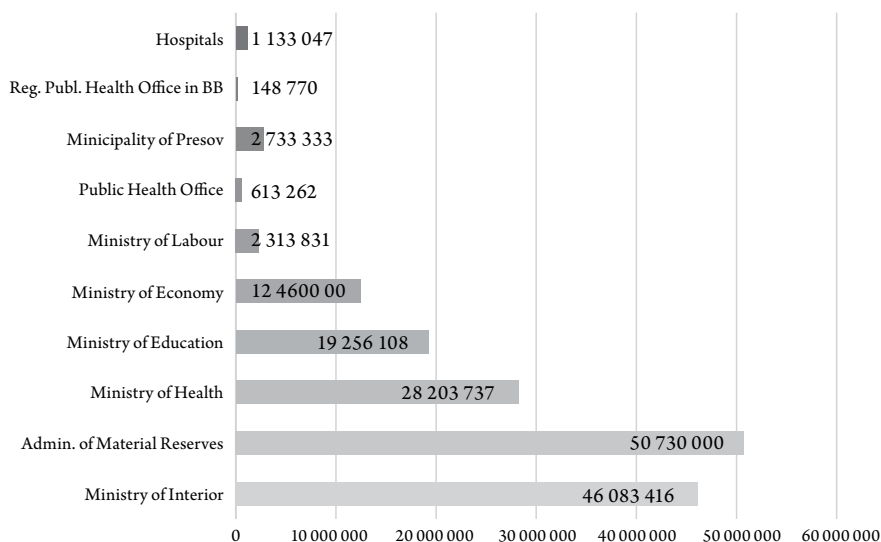


Figure 2. Procurements without prior publication in Slovakia from March 2020 to October 2021 in EUR

Source: processed by the author, data retrieved from <https://www.uvo.gov.sk/vyhľadavanie-zakaziek-4dd.html>

The substantiation behind the procedure was therefore analysed, too. Under the principle of proportionality, the contracting authority should prove that no other suitable and less competition-restricting possibility to obtain the procured goods or services was available. However, none of the analysed procurements contained such justification and almost all of them just briefly stated that such procedure was applied due to the emergency situation related to COVID-19. Further analysis was aimed at finding out the character of contracting authorities which used this uncompetitive method. The aim was to establish, whether such disputable action could be attributable to lower-level authorities, or, worse still, even to the central administration. The structure of contracting authorities together with the total value of procured tenders are presented in Figure 3 below:



COVID-19 Direct awards (2020/21) = € 163 675 504.59

Figure 3. Structure of contracting authorities using direct awarding in EUR

The analysis proved that the most valuable tenders were directly awarded by the ministries and the Administration of the State Material Reserves, i. e., the authorities on the central level of administration, which simultaneously are the members of Central Crisis Board¹⁷.

Therefore, it will be interesting to follow, whether Slovak Public Procurement Office will dare to hold a survey on these tenders to verify whether they comply with the rules for uncompetitive tendering, or will it remain passive, not daring to open this Pandora's box of dubious governmental purchases.

Conclusion

The uncompetitive tendering should remain the last option for obtaining goods, services or works by public contractors. Even in the true absence of competitive alternative of procured commodity, the contracting authority must approach this purchase with the due care and remember to apply the principles of transparency, proportionality and non-discrimination, as well as follow the relevant procedural rules. Such approach guarantees gaining of the best value for money by contracting authority, preservation of functional and transparent

¹⁷ Under Article 2 of the Statute of Central Crisis Board, it is composed also from the representatives of Ministries of Health, Economy, Interior, Labour, Education, as well as State Material Reserves Administration.

business environment and, at the same time, compliance with the Internal Market rules, of which the public procurement is an integral part.

The COVID-19 pandemic strongly affected public procurement. Release from strictness of competitive procedures surely helped states to handle the pandemic situation. On the other hand, it opened the door to undesirable space for misusing the situation to achieve other [barely legal] purposes. Therefore, for contracting authorities it is crucial to stay disciplined, strictly and objectively assessing, whether there exists a situation of extreme urgency, which has been unforeseeable and has not been caused by themselves, and even minimum time limits necessary for competitive procurement cannot be kept. Guidance of the Commission, despite its soft-law character, presents not only a helpful tool but, furthermore, the best practice to this regard.

However, the situation in Slovakia shows, what happens when contracting authorities do not follow the rules for uncompetitive regulations and best practice, or follow them just ostensibly. Obviously, COVID-19 situation can be misused. Despite the protracted duration of the pandemic, Slovak authorities still frequently procured goods and services through direct awarding, barely providing substantiation for such actions. The usual formula – “because it is COVID time” is no longer acceptable, since the claim that after almost 2 years of COVID-19 presence, it is still an “unforeseeable” event, is no longer plausible. Especially when the most valuable direct procurements are realised by contracting authorities which simultaneously are the members of Central Crisis Board. The results of the analysis has proved that Slovakia does not comply with the EU’s COVID-19 procurement rules. The initially advanced hypothesis therefore has not been confirmed.

However, final recommendation does not call for new legislation. The existing one is sufficient. The need for change lies in approach of contracting authorities towards purchasing goods and services and in exercising effective control by regulatory bodies.

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