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Izuzeci od primene Zakona o javnim nabavkama

i

“In house” nabavke

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EU Support for Further Improvement of
Public Procurement System
in Serbia

Selected list of cases of CJEU on exemptions from the Directives

C-337/05 European Commission v Italy (Agusta Bell Helicopter)

C-615/10 “Insinööritoimisto InsTiimi”

C-50/14 “CASTA”

C-296/15 “Medisanus”

C-9/17 “Tirkkonen”

C-187/16 European Commission v Austria



C-337/05 Commission v Italy (08.04.2008)

The problem:

- the Italian general practice of **direct** awards of contracts for purchase of Agusta and Agusta Bell helicopters for Italian public bodies (fire brigade, coast guard, state police, revenue guard)
- European Commission was of the opinion that those contracts should be subject of open or restricted procedure as contracts were covered by the Directive (93/36 at that period)

Arguments of Italy:

- procurement fall under the derogation related to procurement of military equipment; supplies were intended for the military corps and were covered by the exemption from the Treaty (currently Article 346 of the FEU Treaty) and Article 2 (1) (b) of Directive 93/36 because the helicopters were 'dual – use items' they may serve both military and civilian purposes



C-337/05 Commission v Italy...

Findings of the Court:

- the Treaty provides for derogations from its principles applicable in situations which may involve public safety but only **in exceptional and clearly defined cases** (for example, in Article 346); MS that relies on those exceptions should provide evidence that the exemptions do not go beyond the limits of those exceptional cases
- Italy relied on Article 346 claiming that purchase of helicopters meet the legitimate requirements of national interest on the ground that those helicopters are dual-use items: they may serve both military and civilian purposes but
- Italy admitted that helicopters were **certainly** for **civilian** use and **possibly** for **military** use - Article 346 cannot be properly invoked as ground for direct award because the exemption applies only to products „intended” specifically for military purposes



C-337/05 Commission v Italy...

Findings of the Court (2):

- Italy did not demonstrate that the confidentiality of information communicated with regard to production of helicopters would be less guaranteed if such production was entrusted to other companies (in Italy or other countries of EU)
- The requirement to impose an obligation of confidentiality in no way prevents the uses of a competitive tendering procedure for the award of a contract
- Recourse to Article 2 (1) (b) of the directive to justify direct award of a contract for helicopters seems to be disproportionate
- **Italy was found guilty of breaching EU public procurement rules**



C-615/10 “Insinööri-toimisto InsTiimi” (07.06.2012)

The problem:

- Defence forces of Finland conducted a procedure for supply of ***tiltable turntable for carrying out electromagnetic measurements***, value of contract: EUR 1 650 000, without publication in the OJEU: four economic operators were invited to tender
- Following the ‘negotiated procedure’ which did not satisfy the requirements of any of the procedures referred to in Directive 2004 the contract was awarded to one of the participants of the procedure, and **one of the losing companies (‘InsTiimi’) submitted a complaint that the procedure should be organized in accordance with the requirements of 2004/18**
- The first instance court came to the conclusion that the Directive was not applicable because the equipment was suited primarily for military purposes and that the contracting authority intended to use it only for such purposes – the ruling was appealed to the Administrative Court which in turn submitted a question to CJEU



C-615/10 “Insinööri-toimisto InsTiimi” ...

Question:

- is the Directive applicable to a procurement which otherwise falls within the scope of the directive, when according to the contracting authority the intended purpose of the object of procurement is specifically military, but there also exists largely identical technical application of that object in the civilian market?

Arguments of the concerned parties

Finnish government:

- This equipment is used to facilitate the ‘carrying-out of electromagnetic measurements and the simulation of combat situations’: **it was procured for military purposes.**

Ins Tiimi:

- the equipment could be used for civilian uses as well, the equipment is only a technical innovation from the civilian sector and **is not a war material**: it is based on combination of freely available material, components and assembly systems - the Directive should be applied



C-615/10 “Insinööritoimisto InsTiimi” ...

Conclusions of the CJEU:

- Article 346 TFEU only applies to products ‘intended for *specifically* military purposes’.
- Dual - use goods (goods which can have a civilian and a military purpose such as helicopters and trucks) do not fall under the exemption if those goods are ‘certainly for civilian use and possibly for military use’
- Whether material is intended for **specifically military purposes** must be assessed on the basis of an **objective determination** of the material itself



C-615/10 “Insinööri-toimisto InsTiimi” ...

Conclusions of the CJEU (2):

- whether or not a product is intended for **specifically military purposes** depends on **an objective test** and is not dependent on use by the military, but by the characteristics of the product. Pencils procured and used by the military do not qualify and neither does the fact that the military intends to use personal computers solely for cyber warfare matter either. **What matters is that the products ‘must, in objective terms, have a specifically military nature.’**
- the tiltable turntable equipment which the contracting authority intends to use only for military purposes, can be considered to be intended specifically for such purposes (within the meaning of Article 346 FEU Treaty) only if it is established that, unlike the similar material intended for civilian uses, that equipment, by virtue of its intrinsic characteristics, may be regarded as **having been specially designed and developed, also as a result of substantial modifications, for such purposes**



C-187/16 European Commission v Austria

The problem:

- Compatibility with the EU law of award of public service contracts related to printing of official documents: chip passports, emergency passports, residence permits, identity cards, driving licences and other documents
- In accordance with the Austrian provisions printing of documents was entrusted to Österreichische Staatsdruckerei (ÖS), a company governed by public law, without publication of contract notice and without following of public procurement rules
- The European Commission was of the opinion that it was violation of public procurement rules: printing services were covered as the services listed in Annex IIA to the directives ('priority services') by the full public procurement regime above the EU thresholds
- Relevant directives: 92/50 and 2004/18



C-187/16 European Commission v Austria...

Austria's arguments:

- Service contracts in question protect Austria's **essential security interests** and in consequence do not fall within the scope of either EU directives or the Treaty on the functioning of EU (FEU Treaty)
- **Security policy** is an essential element of State sovereignty and it is for the MS to define their essential security interests and to determine whether security measures are necessary; the MS have wide discretion in that regard
- Direct award of contracts only to ÖS was justified by the need to **protect secret information**, to safeguard the **authenticity and veracity** of those documents, to ensure provisions (**guarantee delivery**) of those documents and to guarantee the **protection of sensitive data**
- Provisions relied on by Austria: **Article 4(2)** of 92/50 Directive (**Article 14** of 2004/18) and **Article 346** of FEU Treaty



C-187/16 European Commission v Austria...

Commission's claims and arguments:

- The estimated value of contracts in questions exceeds the EU thresholds - contracts fall within the material scope of Directives: the procurement procedures should have been applied
- The derogations relied upon Austria should be interpreted strictly: MS may not disregard provisions of the Directive by **simply invoking its essential security interests**; the **mere assertion** that services in question require special security measures or that derogation from the EU directives is necessary is **not sufficient**
- Guaranteed supply of those documents (which is by the way not a security interest) may be achieved by **conclusion of framework contracts**
- Objectives claimed by Austria could be achieved by an obligation of **confidentiality** of a service provider



C-187/16 European Commission v Austria...

Conclusions of the CJEU:

- Publishing and printing of relevant documents is performed on a fee or a contract basis, value of services exceeds the relevant EU thresholds, they are services listed in Annex IIA: **public procurement procedures from the Directives are, in principle, to be applied**
- Measures adopted by MS in connection with the legitimate requirements of national interests are not excluded in their entirety from the application of EU law solely because they are taken in the interests of public security
- The **derogations** relied on, being derogations from fundamental EU principles **should be interpreted strictly**
- Exemptions related provisions (Article 4 and 14) afford MS **discretion** in deciding the measures considered necessary for the protection of its essential security interests but cannot be interpreted as allowing MS to simply invoke those interests: **MS should show that such derogation is necessary in order to protect its essential security interests**



C-187/16 European Commission v Austria...

Conclusions of the CJEU (2):

- MS which wishes to rely on derogation must show that such derogation is **necessary in order to protect its essential security interests** (the same requirement applies also in the case when MS, in addition relies on Article 346 of FEU Treaty)
- Accordingly, MS must establish that the protection of such interests could not have been attained within a competitive tendering procedure as provided in the Directives
- official documents could have been safeguarded by imposing on an undertaking selected in competitive and transparent procedure **confidentially and security arrangements**, requirement to accept security controls, visits or inspections in premises of the company - sensitive information could be protected **by less restrictive measures** than the exemption from the competitive and transparent rules, for example by duty of secrecy
- **Austria was found guilty of breaching EU public procurement rules**



C-9/17 “Tirkonnen” (01.03.2018.)

The problem:

- In Finland farmers can have access to the list of consultants/advisors providing support related to some environment protection issues. Consultants are freely chosen by farmers from the list created for this purpose by the Environment Agency and remunerated for their services from the state budget
- The list of consultants was created in the following way: anyone interested in being a consultant could submit application before the expiry of a time period
- The only requirements applied were related to the experience and expertise of candidates. Anyone who fulfilled those minimum requirements was automatically accepted. There was no comparison of offers, just their examination in the light of those conditions.
- Ms Tirkonnen applied for this post but her application was rejected as she did not complete one of the points of application form – she complained then that in accordance with public procurement rules she should be allowed to supplement her application; the court reviewing the complaint decided to ask the CJEU whether EU public procurement rules are applicable



C-9/17 “Tirkonnen” ...

Conclusion of the Court:

the Finnish scheme as presented above is not public procurement because:

- it is open to everybody interested in providing consultancy services and satisfying the minimum requirements
- it does not matter that the access to the list of consultants is open for applicants for limited time only, what matters is that it is open to anyone fulfilling minimum requirements
- there is no evaluation and comparison of tenders but only examination of applications in order to check whether they satisfy minimum requirements
- for public procurement it is characteristic: competition, selection and selectiveness - in this specific case, in fact, there was no selection of consultants but only approval of those applicants who satisfied the minimum requirements
- No selection = no procurement



List of selected cases of CJEU on public – public cooperation (‘in house’ procurement)

C-107/98 “Teckal”

C-26/03 “Stadt Halle”

C-458/03 “Parking Brixen”

C-29/04 European Commission v Austria

C-340/04 “Carbotermo”

C-410/04 “ANAV”

C-295/05 “Asemfo”

C-480/06 European Commission v
Germany (‘Hamburg’)

C-324/07 “Coditel Brabant”

C-196/08 “Acoset”

C-215/09 “Mehilainen and Terveystalo
Healthcare”

C-182/11 and 183/11 “Econord”

C-159/11 “Azienda Sanitaria Locale”

C-386/11 “Piepenbrock”

C-15/13 “Technische Universitat
Hamburg”

C-574/12 “Centro Hospital de Setubal”

C- 553/15 “Undis Servizi”



C-107/98 “Teckal” (18.11.1999)

- In general, where a contract is concluded, in writing, for pecuniary interest, between a contracting authority and an entity which is formally distinct from it and independent of it in its decision – making, that contract would be subject to the procurement directives.
- It would be, though, otherwise when two conditions were satisfied:
 - where the contracting authority exercises over the separate entity a control that is similar to the control exercised over its own departments (**the control condition**);
 - where the separate entity carries out the essential part of its activities with the controlling public authority or authorities (**the activity condition**)

C-26/03 “Stadt Halle” (11.01.2005)

- If the contracting authority intends to conclude a contract for pecuniary interest relating to services within the material scope of the Directives with a company legally distinct from it, in whose capital it has holding together with one or more private undertakings, the procedures from the Directives must be applied
- For in house relation to be relied on there may be no private participation, regardless how small it is, in the controlled entity
- Private participation – first ‘Teckal condition’ not satisfied

C-410/04 “ANAV” (6 April 2006)

- The municipality of Bari had arranged for public transport services to be delivered by *AMTAB Servizio*, a company that was wholly owned and controlled by the municipality
- This arrangement had been made under Italian legislation, which provided the possibility for local municipalities to award, without any competition, contracts to companies belonging entirely to the public sector
- This provision had been made on condition that i) the public authority or authorities holding the share capital exercised control over the company that was comparable to the control exercised over their own departments, and ii) the company carried out the essential part of its activities with the controlling authority/authorities



C-410/04 “ANAV”...

Conclusions of the CJEU:

- national legislation that reproduced the wording of the *Teckal* conditions theoretically complied with EU law but the interpretation of that legislation would also have to comply with the requirements of EU law
- the two *Teckal* conditions had to be strictly interpreted; the burden of proving the circumstances justifying the derogation lay with the person seeking to rely on the derogation
- there should be no participation by a private undertaking in the capital of a company in which the concession-granting public authority was also a participant: even minority participation by a private undertaking in such a company excluded the possibility of satisfying the *Teckal* control condition



C-410/04 “ANAV”...

Conclusions of the CJEU (2):

- some factual information in relation to the ownership of the company and the potential for private sector involvement in the company: it was a matter for the referring court to decide, based on the facts, whether the municipality of Bari intended to open the capital in *AMTAB Servizio* to private shareholders
- a problem would arise if, for the duration of the contract, the capital of *AMTAB Servizio* were open to private shareholders
- The result would be the award of a public services concession to a semi-public company without any call for competition, which would “interfere with the objectives pursued by [EU] law”



C-340/04 “Carbotermo” (11.05.2006)

Detailed analysis of ‘Teckal conditions’

1. Control condition:

- when determining whether the control condition is satisfied, it is necessary to take account of all of the legislative provisions and relevant circumstances
- the controlled body should be subject to control, enabling the contracting authority to influence that controlled body’s decisions
- the contracting authority should have a power of “decisive influence” over both strategic objectives and significant decisions of the controlled body
- the contracting authority should hold, alone or together with other public authorities, all of the share capital in the controlled body

The Directive does not allow direct award of a contract to a joint stock company having i) a board of directors with ample managerial power that could be exercised independently, and ii) share capital held entirely by another joint stock company, with the contracting authority as the majority shareholder



C-340/04 “Carbotermo” ...

Detailed analysis of “Teckal conditions”

2. activity condition:

- in establishing whether the activity condition was satisfied, all of the activities carried out by the body on the basis of an award by the contracting authority had to be taken into account
- this requirement is valid regardless of whether those activities were paid for by the contracting authority itself or by the user of the services provided
- the territory in which the activities were carried out is irrelevant

C-324/07 “Coditel Brabant”

- EU principles do not preclude a public authority from awarding a public service concession without calling for competition in the following circumstances:
 - an award is made to an inter-municipal co-operative society of which all of the members are public authorities
 - public authorities exercise control over that co-operative society that is similar to the control exercised over their own departments; and
 - that society carries out the essential part of its activities with those public authorities
- the public authorities had to have a power of decisive influence over both the strategic objectives and the significant decisions of the concessionaire
- the *Teckal* control condition is satisfied also in a situation where the control over the concessionaire is exercised jointly by a number of public authorities
- this control had to be similar to the control that the authority exercised over its own departments, but it did not need to be identical in every respect
- the control exercised over the concessionaire had to be effective



C-196/08 “Acoset” (05.10.2009)

The problem:

- an arrangement for service provision made by *ATO*, which was a body established by various public authorities in the province of Ragusa to assume responsibility for the province’s water service
- *ATO* had published a notice in the official journal for the recruitment of a partner that would become a minority shareholder in a new company (mainly publicly owned) that was to be entrusted with management of the water service. The partner in the new company would also undertake related work



C-196/08 “Acaset” ...

- The CJ proceeded on the assumption that the arrangement involved was a services concession (thus public procurement directives were not applicable)
- The CJ concluded that a single award procedure compatible with the Treaty (including its rules on transparency, equal treatment and competition) could be used to
 1. select a private partner that would become a shareholder in the public-private company and also
 2. be entrusted with work related to the company’s tasks

C- 285/18 “Irgita” (pending case, referred to CJEU in April 2018)

Problems raised:

- may MS restrict or even prohibit the use of in – house arrangements?
- may the in - house exemption be applicable where the same goods or services can be delivered by the market? in other words may the contracting authority buy in house where there is already available supply on the market?
- The case is related to the Lithuanian public procurement legislation which prohibits use of in - house by governmental authorities or companies directly controlled or owned by the State
- other contracting authorities may use in house only if: 1) there is no supply available at the market or 2) there is no possibility to buy good quality products/services or 3) the awarded entity is a contracting authority itself



Summary and conclusions

- A contract for pecuniary interest concluded in writing between an economic operator and a contracting authority and having as its object provision of services (supply of goods, execution of works) **is a public contract**, even if the that operator is himself a contracting authority
- It is immaterial whether the body awarded a contract is primarily profit making, whether it is structured as undertaking or whether it has continuous presence on the market
- The contract cannot fall outside of the public contract concept merely because the remuneration of the awarded body remains limited to the expenditure incurred to provide the agreed service

Summary and conclusions (2)

- Only two types of contracts entered into by a public body do not fall within the scope of the EU public procurement law:
 1. Contracts that are concluded by a public entity with a person who is legally distinct from that entity, where at the same time:
 - a) that entity exercises over the person concerned **a control** that is similar to the control which it exercises over its own departments and
 - b) where that person carries out the **essential part of its activities** with the entity which controls it (two eckal conditions)

Summary and conclusions (3)

2. Contracts which establish **cooperation between public entities** with the aim of ensuring that a public task that they all have to perform is carried out, in so far as, in addition:
- such contracts are concluded exclusively by public entities
 - without a participation of a private party
 - no private provider of services is placed in a position of advantage vis – a - vis his competitors and
 - implementation of that cooperation is governed solely by considerations and requirements relating to the pursuit of objectives of public interest



Summary and conclusions (4)

first Teckal condition (based on C-181/12 and 183/11 „Econord”)

- contracting entity or entities should not only hold capital in the contract awarded entity but **also play role in its managing bodies**
- contracting authority/ies should exercise over the body which is awarded a contract a **control which is similar** to the control it/they exercises/exercises over its/their departments
- there is similar control where the body in question is subject to control which enables the contracting authority/ies to influence the body's decisions
- it must be a power of decisive influence over both strategic objectives and significant decisions of that body
- the contracting authority must be able to exercise a structural and functional control over that entity
- control must be effective



Summary and conclusions (5)

first Teckal condition ...

- If a public authority **becomes a minority shareholder** in a company limited by shares with wholly public capital the control that the public authorities which are members of that company exercise over its may be categorised as similar to the control they exercise over their own departments when it is exercised jointly but it is not necessary that each of those authorities should have an individual power of control over that entity
- For the joint control not to be meaningless the control exercised over the controlled body cannot be based solely on the controlling power of a public authority with a majority holding in the entity concerned



Summary and conclusions (5)

second Teckal condition – essential part of activity

- the aim of the requirement is to prevent distortions of competition which could occur when a public undertaking receives favourable treatment in the award of public contracts but also does other work for other persons and has to compete with other undertakings on the market
- condition is fulfilled only when the other work is of „marginal” significance
- in evaluation whether the other part is marginal account must be taken of all the facts both qualitative and quantitative

Summary and conclusions (6)

second Teckal condition – essential part of activity

- it is necessary to take into account the total turnover of the undertaking awarded the contract that it obtains from the work for the controlling authority, regardless of who is the beneficiary of the work (the authority directly or users of the services), whether the work is paid directly by the controlling authority or by users of service or in which territory the works is done
- in the event there is more than one controlling authority the condition is satisfied if the undertaking awarded contract carries out the essential part of its activities with all those authorities together

Hvala na pažnji

