Will the government succeed in overcoming the vicious in-house contracting practices in Bulgaria?

The Ministry of Justice has recently announced its intention to propose an amending bill to the Public Procurement Act (PPA) and, more specifically, amendments concerning in-house transactions.

The Ministry has set itself the objective to further restrict this option for awarding procurement contracts, which falls outside the scope of the PPA. The proposal is to use it where the contracting authority has the requisite human and technical resources to ensure performance of at least 80 % of the activities which are the subject-matter of the contract.

In-house contracting has been introduced in the national legislation through the full transposition of 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 and its specific exemption from the scope of the Directive as set out in Article 12.

This exemption should be used in a way which ensures that the public-public cooperation does not result in distortion of competition in relation to private economic operators. Therefore, the Directive provides for a number of cumulative conditions to be fulfilled for a public contracting authority to make use of the exemption.

In fact, in-house contracting is an expression of the freedom of public entities to perform the task of providing the public services entrusted to them by using their own resources. This includes the possibility for cooperation with other entities within the public sector on which the contracting authority exercises a control which is similar to that which it exercises over its own departments provided that more than 80 % of the activities are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority, regardless of who the beneficiary is.

This is precisely the legislative logic underlying the exemption, i.e. the option for the public entity to use own resources instead of seeking the services of private operators on a mandatory basis. However, when the application of the exemption turns into a distortion of the original intention, it becomes necessary to enforce a legislative measure of the type proposed by the Ministry of Justice so as to ensure that the awarding of a public contract through in-house contracting will not be a way to circumvent the law by re-assigning all or some of the activities to economic operators who are third parties.

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It is only natural to ask the question whether it would be admissible to introduce an additional condition further to those which have already been set out in the PPA with a view to applying the exemption from the scope of the law and the answer is definitely positive.

The Court of Justice of the European Union (CJEU) gave a positive answer in its judgment of 3 October 2019 in Case C-285/18 on a reference for a preliminary ruling under Article 267 TFEU from the Supreme Court of Lithuania. In its judgment, the Court ruled on the question whether "*Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions (in comparison with EU law and the case-law of the Court of Justice interpreting that law) but can implement that discretion only by means of specific and clear provisions of substantive law governing public procurement*".

That particular case refers to the existing provisions in the Lithuanian national legislation in accordance with which in-house transactions could be carried out only in an exceptional case where all conditions are satisfied and a public procurement contract cannot ensure the continuity, good quality and availability of the services concerned. In other words, the Lithuanian lawmakers have introduced additional criteria for the applicability of in-house transactions further to those laid down in Article 12 of Directive 2014/24/EU as follows: existence of an exceptional case and impossibility for a public procurement procedure to ensure continuity, good quality and availability of services. Similar to that legislation, the intention of the legislative initiative announced by the Ministry of Justice refers to an additional criterion further to those under Article 12 of Directive 2014/24/EU and, for that reason, the issue of its admissibility is raised.

The CJEU judgment underlines that the additional limitation to an in-house transaction under the Lithuanian laws is not precluded, provided that the choice made in favour of one means of providing services was made at a stage prior to that of public procurement and it has due regard of the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

The Court refers to Recital 1 of Directive 2014/24/EU which reads that the objective is to coordinate national procurement procedures above a certain value, concluding that Article 12(1) of Directive 2014/24/EU has to be interpreted in the light of that recital and recognising

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that it does not have the effect of depriving Member States of the freedom to give preference to one means of providing services, performing work or obtaining supplies to the detriment of others.

At the same time, the Court found it necessary to state explicitly that the freedom of the Member States as to the choice of the management method that they judge to be most appropriate for the performance of works or the provision of services cannot be unlimited. That freedom must, on the contrary, be exercised with due regard to the fundamental rules of the Treaty on the Functioning of the European Union (TFEU), in particular the free movement of goods, the freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency (by analogy to judgments of 9 July 1987, *CEI and Bellini*, 27/86 to 29/86, EU:C:1987:355, paragraph 15; of 7 December 2000, *Telaustria and Telefonadress*, C-324/98, EU:C:2000:669, paragraph 60; and of 10 September 2009, *Sea*, C-573/07, EU:C:2009:532, paragraph 38).

Therefore, it is necessary to consider whether these important provisions of the TFEU would be violated in case of introducing a specific additional condition for the applicability of in-house contracting in Bulgaria. It should be emphasized right from the outset that this type of awarding contracts is an exception to the general rule of awarding public procurement contracts under the conditions of free competition among the participants.

In fact, the new limitation proposed by the Ministry of Justice for would-be contractors under in-house conditions could not be conceived as a limitation of the fundamental rights as set out in the TFEU, free competition in particular, insofar as it is excluded from the scope of in-house arrangements. Free competition is present in public procurement procedures, whereas the awarding of in-house contracts under this exemption limits competition in the first place in exchange for the opportunity for the contracting authority itself to organise the performance of the relevant activity under the contract with own resources.

It would be unacceptable to claim that the free provision of services and the free movement of goods or the right of establishment would be restricted since the additional limitation would actually produce the opposite effect, i.e. restricted opportunities for in-house

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contracting. This, in turn, would bring about enhanced safeguards for these freedoms, including equal treatment of all market participants (taking into account the fact that the legal person on whom control is exercised by the contracting authority is not hindered to take part in a public procurement procedure as long as the legal person engages in economic activity).

However, if we consider the practical consequences of the introduction of that new limitation and the way compliance will be controlled, it will become clear that the introduction of the limitation would not result automatically in reducing the notorious practices of re-assigning the activities to third parties under most in-house contracts. Of course, the legislative proposal and the way in which the limitation will be introduced are not definitive yet but, insofar as contracting would not follow a well-defined procedure which could be appealed under the law, it would be difficult to control whether the relevant entity has proved the availability of the requisite technical and human resources to carry out at least 80 % of the contracted activities.

On the other hand, where such a situation is identified and it exists at the time when the in-house contract is concluded, there should be explicit provisions on the consequences of a possible re-assignment of the contracted activities by the contractor. First and foremost, it should be clear whether such re-assignment would entail nullity of the existing in-house contract since the application of Article 119 PPA would not safeguard the intended effectiveness of the proposed measure.

Furthermore, it should be noted that in order for the upcoming legislative amendment to be effective, there should be a ban on the conclusion of subcontracting agreements for activities which are beyond the scope of the initial statement by the contractor and subject to re-assignment within the 20-percent limitation of the in-house contract. Thus, it would be possible to ensure that the parties would refrain from concluding a contract in contravention of the law, which would lead to its nullity.

Finally, following the example of the Law on Public Procurement of the Republic of Lithuania, it would be appropriate the consider a possible introduction of a preliminary procedure of giving consent with the conclusion of such contracts to ensure that a third party rather than

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the contracting authority which is about to conclude an in-house contract with a controlled entity will assess whether the conditions for in-house contracting are met or not.

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