Labour Relations as an Exemption from Public Procurement and Their Analysis in a Selected Case from Slovak Application Practice

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Abstract

This paper analyzes the possibility of applying an exemption from public procurement in the form of employment relations, focusing on the specific case of the City of Nitra. The analysis begins with the decision of the Public Procurement Office from April 14, 2023 (No. 12409-6000/2022-OD/6), which questioned the legitimacy of applying this exemption to public contracts. However, this decision was overturned on September 11, 2023 (No. 9766-9000/2023), when the Chair of the Office confirmed no deliberate circumvention of procurement rules. The article also explores relevant legal frameworks and principles surrounding exemptions under European Union law, examining their application in the context of employment relations. It further provides insights into how exemption rules align with European directives, analyzing their practical use in employment contracts.

Keywords: *public procurement, employment relations, Public Procurement Office, Court of Justice of the European Union*

Introduction

Decisions of the Public Procurement Office (hereinafter 'the Office or Authority') have a significant influence on both professional circles and contracting authorities, directly shaping their procedures and decision-making. For the purposes of this paper, the term 'contracting authority' will also encompass entities defined under Section 8 of Act No. 343/2015 Coll. on Public Procurement and its Amendments (hereinafter referred to as 'the PPA' or 'the Act'), unless the context specifies otherwise. These decisions play a crucial role in ensuring the uniform interpretation and correct application of the Act. By fostering a systematic and consistent decision-making practice, the Office enhances legal certainty and predictability, thereby minimizing the risk of legal disputes and misapplication of the law by contracting authorities, promoting the consistent application of legislation in practice.

The Office's consistent decision-making practice fosters a stable environment in which all participants in public procurement can reliably anticipate the consequences of their actions. This not only bolsters confidence in the public sector but also contributes to reducing corruption and enhancing the efficient use of public funds. Ultimately, the Office's decisions serve not

only as a tool to ensure legal compliance but also as a means to promote fair competition, which is vital for guaranteeing equal opportunities for all suppliers.

One of the Office's recent decisions, specifically Decision No. 12409-6000/2022-OD/6 of April 14, 2023, regarding the application of the exemption for concluding labour contracts, has garnered significant attention and raised concerns among contracting authorities. Questions have been posed about whether the current procedures for concluding employment contracts comply with legislative requirements and align with the Office's established decision-making practice.

1. Exemption from public procurement - employment relations

Current modern trends and the direction of global society gradually require changes in the functioning and approach of the state and public administration as a whole. In this context, we see the state as a guarantor of various economic, social and political certainties through a well-functioning public administration. Of course, we are aware that even today there is no unified model of public administration, not only in the European Union. This also applies to the legislative and standard-setting sphere, the introduction of new qualitatively adapted approaches towards the performance of the state's functions, with a challenge for the entire public sector to achieve the implementation of state policy in such a way that the public interest is highlighted by taking into account the reform processes in society. The fulfilment of these considerations must inevitably be followed by the fulfilment of an important task, i.e. the provision of a 'personnel substrate' that will be the fertile ground for the fulfilment of the objectives of public administration. In this context, it is essential that the legal arrangements for the employment of persons in the public service reflect flexibility and appropriate legal governance. Only in this way can we believe that the public administration will be competitive in producing qualified and professional experts in the various areas of public administration (Žofčinová, 2021, p. 23).

The conclusion of employment contracts, agreements for work performed outside the employment relationship or similar employment relationships constitutes one of the exemptions listed in Article 1(2)(e) of the PPA, to which the provisions of this Act do not apply. These legal acts do not qualify as public procurement because they concern individual employment relationships between an employer and an employee. Specifically, these are situations where the contracting authority directly concludes employment contracts or agreements with natural persons in accordance with labour law, and these contracts are not subject to the public procurement procedures applicable to the procurement of goods, services or works.

This legislative exemption provides employers with the necessary flexibility to enter into employment relationships, thereby avoiding these relationships being subject to formal and

time-consuming procurement processes that are otherwise binding on the use of public funds. The main reason for its implementation is the need for efficient and adaptable management of internal staff capacity, which allows for a prompt and effective response to the organisation's current staffing requirements.

2. Application of the exemption from public procurement in the form of employment relations in Slovak application practice

For a more detailed analysis of the application of the exemption from public procurement in the form of labour relations in the conditions of the Slovak Republic, it is necessary to point out the case of the dispute between the City of Nitra and the Public Procurement Office on the application of this exemption (Decision of the Office No. 12409-6000/2022-OD/6 and Decision of the Chair of the Office No. 9766-9000/2023).

On 17.10.2019, pursuant to Section 7(1)(b) of the PPA, the contracting authority (hereinafter referred to as "the audited party", "the city" or "the municipality") concluded on the same day work performance agreements with three different natural persons, all of whom had identically defined work tasks. Simply put, the subject-matter of those agreements was the preparation of partial graphic and textual documents as instructed by the employer for the preparation of the single-stage design documentation for the construction project.

All three agreements were concluded for a fixed period of time, with the same duration, and provided for identical remuneration for the work performed. In concluding these agreements, the local authority applied the exemption from the PPA under Article 1(2)(e) of the Act. Prior to the conclusion of the agreements, a public procurement procedure entitled 'Preparation of project documentation for the Creative Industries Centre' was carried out. This was a subcontract aimed at providing services for the preparation of project documentation with an estimated value of EUR 217 333,00 excluding VAT (the invitation to tender was published on 30.07.2019 in the Public Procurement Bulletin No 152/2019 under reference 20410 - WYS. In November 2022, the Office notified the auditee of the initiation of the procedure for the review of its actions after the conclusion of the contract, on its own initiative. The aim of this procedure was to thoroughly assess the objective state of affairs on the basis of the documentation provided by the auditee and to verify the compliance of the auditee's procedure with the law.

In the first instance administrative proceedings, the Office concluded that the City of Nitra had unlawfully applied the exemption from the PPA by concluding work performance agreements with three natural persons without applying the prescribed procurement procedure under the provisions of the PPA, thereby violating the applicable legal standard. The Authority also found that this identified infringement had an impact on the outcome of the procurement procedure, as the unjustified application of the exemption did not result in the use of the

statutory procedures for the award of contracts, namely the procedure for sub-limit contracts, which allows for competition. This practice restricted competition as other potential tenderers and service providers were not able to participate or take part in the procurement process.

The City argued that it had concluded the work performance agreements with individuals in accordance with the Labour Code and Section 1(2)(e) of the PPA, which permit such contracts. The remuneration for the work was agreed in accordance with the Labour Code, on the basis of the tasks actually performed and was approved by the supervisor. Upon completion of the agreements, the City issued the relevant taxable income certificates and paid the remuneration from its own resources. For the sake of completeness, we would like to add that the Labour Inspectorate, as the competent authority, assessed the Agreements in question as compliant with the Labour Code.

The City supported its argumentation by reference to Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement (hereinafter referred to as "Directive 2014/24/EU"), recalled the conclusions of the judgment of the Court of Justice of the European Union (hereinafter referred to as "CJEU"), namely the Judgment of the CJEU of 25 February 2014, and the judgment of the Court of Justice of the European Union (hereinafter referred to as "CJEU") of 25 February 2014. 260/17 Anodiki Services EPE v. Oi Agioi Anargyroi, in which the CJEU addressed the application of Directive 2014/24/EU to the conclusion of fixed-term employment contracts in the first question referred for a preliminary ruling) and submitted a methodological guidance to the Authority. This strengthened its defence and provided a legal framework for its arguments. The local authority stressed that the agreements concluded did not serve to commission or provide the services of drawing up project documentation, but their object was to draw up partial graphic and textual documents according to the employer's instructions. The City explained that the decision to conclude these agreements was an internal management decision taken in response to the failure of the tender, as the successful tenderer's bid or its actions did not lead to the performance of the contract (the successful tenderer did not provide the necessary cooperation to sign the contract for the subject matter of the contract within the specified time limit). Therefore, the municipality decided to prepare the project documentation through its own staff in cooperation with the Department of Investment Construction and Development.

In view of the above, it can be concluded that the audited entity proceeded to the conclusion of three work performance agreements due to the need to provide supporting documents (project documentation for the reconstruction of buildings) within a specific timeframe. This deadline was affected by the cancellation of the tender for the provision of design documentation services due to the failure of the successful tenderer to provide assistance in concluding the contract. In view of the time pressure and the associated risk of

not meeting the deadline for completion of the single-stage design documentation, the City decided to take the solution in-house.

The management of the City of Nitra has decided to keep the consultation on the project details within the relevant departments of the Municipality and to maintain direct managerial influence on the completion of the project documentation. In their view, this would have been complicated when working with an external partner, especially given the timeliness of completing the documentation, which was no longer realistic with external processing. They therefore entrusted the processing of the project documentation to their own staff, who have the necessary qualifications and authorisations for such activities. The contracting authority stated that a similar procedure for the preparation of project documentation by in-house experts is also used by larger municipalities for major projects. As the processing of the project documentation was to be carried out within a few weeks, due to the need to submit it in the application for the grant of a non-repayable financial contribution (NFA), the City of Nitra employed the approached specialists for the preparation of certain graphic and textual documents in the form of a work performance agreement.

In this context, it should be stressed that it is unacceptable for exemptions to be used purposely in order to avoid transparent and competitive procurement procedures without objective reasons. It is an administrative offence to abuse exemptions or to avoid the application of the law in cases where it should have been applied. The use of exemptions must therefore be treated restrictively, with the burden of proof on the contracting authority invoking them to justify their use. This means that the contracting authority which, by reason of the use of an exemptions, has not acted in accordance with the law, has the burden of proving the justification for such action (see, for example, judgment of the CJEU in Case C-340/02 Commission of the European Communities v French Republic). In the light of the above, it is essential that the contracting authority carefully considers the use of any exemptions to the procurement process in the light of the specific factual circumstances. The Authority has stressed that labour law constitutes a separate branch of law with specific rules concerning the conclusion of employment contracts, the establishment and termination of employment relationships, changes in working conditions or remuneration. It is clear that there is a substantial substantive difference between an employment relationship and a contract. An employment relationship is a relationship between an employee and an employer, the object of which is the performance of dependent work. That dependent work may be performed exclusively in an employment relationship or a similar employment relationship, and only exceptionally, under the conditions laid down by law, in another employment relationship. The employment relationship shall be established on the basis of an employment contract. It follows that dependent work cannot be performed in a contractual civil or commercial relationship. On

the contrary, a contract within the meaning of the PPA is predominantly a commercial (in some cases civil) relationship between two independent contractual partners.

According to the reasoning of the first instance authority, there is an improper use of the exemption when contracting authorities enter into special purpose employment relationships in order to circumvent the obligation to comply with the law. In such cases, it is legitimate for the Authority to address the question of whether the legal prerequisites for the application of the exemption have been met. Although this exemption does not have financial limitations, in practice, the Authority considers that it is often abused in a way that violates the principle of the prohibition of circumvention of the rules under Article 1(15) of the TFEU. According to that provision, the contracting authorities and contracting entities may not award a contract, concession or use a design contest pursuant to paragraphs 2 to 13 with a view to avoiding the application of the procedures and rules under this Act. An example would be a work performance agreement at an hourly rate significantly above the employer's normal standard, which is more in line with the market prices of external suppliers.

The Authority considered that the individual activities, although they are partial graphic or textual works on documents (e.g. summary technical report, general situation of the building, fire safety project, water and gas connection, storm water drainage, photovoltaics, interior design, etc.), ultimately form a single whole - the project documentation of the building. Staff was required to prepare this design documentation in accordance with the relevant legislation, including the Building Act. According to the Office, in the case of agreements on work performed outside the employment relationship, the Labour Code does not specify what specific activity may be covered by the type of work defined in these agreements. However, this possibility must be seen in the context of the principle of exceptionality of the use of such agreements. Although the Labour Code does not define the criteria of exceptionality, this does not mean that an employer may use agreements on work performed outside the employment relationship on a standard and regular basis.

For the sake of comprehensiveness, it should be added that the City of Nitra concluded not only a performance agreement but also an employment contract with the employee. This employment contract was intended for broader professional activities, such as consultation and coordination of the completion of the documentation. The aim of the contract was to ensure the efficient completion of the project in cooperation with other departments of the municipality. It is interesting to note, however, that the first-instance administrative authority expressed doubts as to the real reason for the conclusion of the performance agreements, which related to the cancelled tender and the time delay in the outsourcing of the project documentation. This situation should have been linked to the need for a timely submission of the application for a non-reimbursable financial contribution (NFA), which should have justified the need to conclude these agreements. However, the Authority was not satisfied with the deadlines and

the timing of the sequence of steps, which raised questions about the justification for this procedure (the City of Nitra stated that the deadlines given by the Authority were not correct and disagreed in principle with the assessment).

In the context of the agreed remuneration, the decision states that the City, by entering into the work performance agreements, has fully entered into the position of an employer, which obliges it to fulfil all the obligations arising therefrom. At the same time, it must comply with the principle that it is not possible to agree on a more favourable remuneration for such an employee than that which results from the employment relationship. In the Authority's view, the fulfilment of these obligations, as well as all other obligations connected with the employment relationship, may be a decisive indication of the real intention of the audited entity.

For this reason, the Authority compared the amount of remuneration paid to employees (so-called 'contingent workers') on the basis of agreements with the average tariff salary of a professional officer in the Chief Architect's department or a separate professional officer - architect. It concluded that the remuneration agreed for one staff member was disproportionately high in relation to the duration of the contract and the tasks carried out, and was clearly out of proportion to the average salary of an internal staff member in the same or a similar position, or far above the normal market standard in the relevant field. The Authority also noted that the price of EUR 127 000 for the preparation of the design documentation submitted by the successful tenderer in the previous procurement procedure was almost the same as the total remuneration paid under the three agreements concluded. It concluded that the City had entered into special purpose employment relationships, thereby circumventing the obligation to award the contract for the provision of design documentation services for the reconstruction of selected buildings under the procedure laid down in the PPA.

In the conclusion of the decision, the Office finds that the contracting authority has not fulfilled the conditions for a justified use of the exemption, as the purpose of its use has not been fulfilled. The audited entity only formally concluded the agreements, while its action was not directed towards the conclusion of employment relationships with the aim of implementing active labour policy.

In view of all the above, the Office finds that the procedure followed by the audited entity in concluding the agreements in question did not fulfil the purpose of the application of the exemption, thereby de facto avoiding the rules and procedures laid down by law. In the present case, the Authority has not established that the controlled entity has legitimately used the chosen exemption, since the City has not borne the burden of proof and has not demonstrated the legitimacy of its use pursuant to Article 1(2)(e) of the PPA in accordance with the legis lata. This conduct infringed Article 10(1) of the PPA, resulting in a restriction of competition (which did not take place) and, according to the findings of the first instance

authority, had an impact on the outcome of the procurement procedure. The Authority's decision became final on 25.04.2023.

One of the objectives of the application of the PPA is to promote effective competition in the award of contracts. The Authority generally states that opening up to the widest possible competition is in the interest not only of the EU objective of free movement of goods and services, but also in the self-interest of the contracting authority concerned, which will thus have a wider choice of the most advantageous tender that best meets the needs of the public concerned (CJEU, SECAP and Santorso, C-147/06 and C-148/06, paragraph 29). The objective of the principle of equal treatment is to promote the development of healthy and effective competition between entities participating in public procurement. Compliance with this principle must ensure an objective comparison of tenders and applies at all stages of the procurement procedure. The principle of transparency is reflected in a fair and transparent procurement procedure which ensures that the objective of free undistorted competition and the principle of equal treatment are respected, in particular by avoiding that one competitor obtains an undue advantage over the others. The CJEU has also specified the scope of the transparency obligation in Telaustria and Telefonadress, C-324/98 and Parking Brixen, C-458/03. According to the CJEU, the aim of this obligation is essentially to ensure that there is no risk of preference and arbitrariness on the part of the contracting authority. This obligation consists in ensuring an adequate degree of publicity for each potential tenderer to enable the tender to be made available to tenderers and to check its impartiality.

Review of a final decision of the Authority

At the outset of the legal assessment of the issues related to the decision under review, the Chairman of the Office pointed out that the audited entity did not raise any legally relevant objections to the Office's findings concerning the infringement of the FVO during the proceedings before the Authority as the first instance administrative authority. Moreover, it did not even avail itself of the possibility to lodge an appeal against the Authority's decision as a proper remedy, although it had been duly informed of this right. Consequently, the Authority's decision became final.

In general, therefore, if the audited entity sought protection of its rights and legally protected interests for the first time only by means of an application for review of a final decision of the Office pursuant to Section 177(1) of the PPA, in the opinion of the Chairman of the Office, it should not have been granted legal protection in this extraordinary remedy procedure. The legally relevant way of contesting infringements of the PPA in the procedure for the review of post-contractual acts of the inspected party is the statement of the inspected party on the facts established in the procedure for the review of post-contractual acts of the inspected party before the decision pursuant to Section 173(1) of the PPA is issued. If, in the circumstances,

the auditee only raised its claims by lodging a complaint for review of a final decision, such a procedure should not generally have led to the facts set out in the complaint (which it could have already raised in the proceedings before the Authority or on appeal) justifying a change in the Authority's decision, which was already final.

In this context, the Chairman of the Office appropriately emphasises that the instrument provided for in Section 177 of the PPA should not be used as a normal means of challenging decisions of first instance, nor should it replace the ordinary remedies which the inspected party has not availed of during the review of its actions. This extraordinary remedy is not intended to remedy omissions or inaction on the part of the party subject to review at earlier stages of the procedure. In support of this approach, the Chairman of the Office referred to the principle of vigilantibus iura scripta sunt, which has been in force since Roman law, which means 'rights belong only to the vigilant'-that is, to those who take active care to protect and exercise their rights and exercise their procedural rights in a timely and diligent manner. In a free society, it is above all the responsibility of rights-holders to protect and take care of their rights; otherwise, by undervaluing or neglecting them, they may forfeit their property, personal or other rights. This is similarly true when using the procedural provisions of the law, as stated in the resolution of the Supreme Court of the Slovak Republic of 8 November 2011, Case No 1Sžr/38/2011. Following this, it can be argued that it is necessary to interpret the wording of Section 177(1) of the PPA in such a way that the Chairman of the Office is obliged to review a final decision of the Office on his/her own initiative, especially in cases where the illegality of the Office's decision is evident or at least highly probable (Košičiarová, 2013).

In the light of the above, we submit that the decisive reason for initiating proceedings for review of the final decision of the Authority was not the arguments set out in the complaint of the audited entity, but the manifest illegality of the decision itself, as identified by the Chairman of the Office. In the review of the decision in question, the facts set out in the inspected party's complaint were not taken into account, since, as we have already mentioned above, the inspected party had the opportunity to put forward its arguments earlier in the proceedings before the Office or in the appeal proceedings which it could have initiated. For the sake of completeness, however, we will take the liberty to set out some of the arguments put forward by the auditee.

In its submission, the City of Nitra stated that, similarly to the decision of the Council of the Authority to cancel the tender for cleaning services (Decision of the Council of the Authority No 1829-9000/2021), it had to cancel the tender due to the lack of cooperation of the successful tenderer and the time delays incurred. The City further criticised the procedure followed by the Office, in particular its questioning of the amount of remuneration paid under the performance agreements and the comparison of these remunerations with the competitive bids, which included taxes and levies. In the City's view, such a comparison was not objective,

as the tenderers' offers represented total prices which were not directly comparable to the gross salaries of the employees. The City also stressed that the decision whether to provide the services by in-house staff or to outsource them through a competitive tender process was entirely within the contracting authority's discretion. The city authority underlined that it acted as a good economic operator and rejected legal formalism.

Furthermore, the City of Nitra objected to the fact that the Procurement Office examined the amount of remuneration agreed between the employer and the employee, while the Labour Inspectorate in Nitra did not raise any objections to these remunerations. The city considered the authority's action to be an excess of its powers under section 167(1) of the PPA and section 3(1) of the Administrative Procedure Code. It also argued that the Authority's procedure was contrary to the Constitution of the Slovak Republic. The City further argued that it saw no reason why an employee could not be remunerated at an amount comparable to the remuneration charged by successful bidders in commercial relationships and that the PPA did not set any limits on the conclusion of employment contracts or on remuneration per hour of work.

It was also apparent from the above that there were divergent views among the professional community on the application of the exemption and it was therefore necessary for the Chairman of the Office to provide a clear conclusion in order to stabilise interpretation and decision-making practice. According to Mr Tkáč and Mr Griga, the legislator did not set a maximum financial limit for the application of this exemption. Thus, a contracting authority may conclude a work performance agreement even for large sums of money, while such a procedure would not be contrary to the PPA. Nevertheless, in practice, other laws, such as the Financial Regulation Act, may apply which limit such conduct in the interests of efficiency and economy. Thus, such a procedure might not contravene public procurement rules if it complies with other relevant regulations, while in the public sector, for example, salary scales prevent exceeding reasonable remuneration (Tkáč, Griga, 2016). On the other hand, J. Azud, L. Plaváková and P. Bartoš point out that the absence of a financial limit may lead to incorrect application of the exemption. Contracting authorities may abuse the exemption to enter into employment relationships for the purpose of circumventing the obligation to award contracts through public procurement. Particularly problematic are situations where the remuneration for the arrangement is significantly higher than normal standards, leading to unreasonable hourly rates. The above-mentioned authors stress the need for a restrictive interpretation of the exemption and recommend that controlling authorities carefully examine whether the law is being circumvented (Azud, Plaváková, and Bartoš, 2019).

Application of the public procurement exemption in the case under analysis according to the case law of the CJEU

A number of legally binding EU acts have been transposed into the PPA, which are directives that, although they do not have direct effect at national level (as is the case with regulations as sources of EU law, none of which, however, directly affect the area of public procurement), EU Member States have an obligation to adapt their national legislation to the principles and principles contained in the directives and, through it and its application, to achieve the objectives expressed in the directives. In disputed situations, the provisions of the PAA must always be interpreted in such a way as to respect the fundamental principles and principles which derive precisely from the individual EU Directives, which are such principles as to lead to an efficient, economically justified, transparent and non-discriminatory award of any public contract. The principles of efficiency of the whole process, economically justified selection of the winner of the tender, transparency and non-discrimination are principles derived from EU law which can be argued and practically used in the interpretation of the individual provisions of the PPA.

In practice, the normative text of the law must always be used as a basis, but its interpretation cannot be disregarded in the light of the rules arising from the directives, which leads to the so-called Euroconform interpretation. The focus of the PPA itself is on the precise procedure for awarding public contracts, i.e. the set of mandatory steps constituting the legal procedure for awarding public contracts. In general, these are the steps to be followed during the period in which the acts leading to the conclusion of a contract are carried out, on the basis of which performance is to be made against payment from public funds. The main purpose of such highly formalised but still private law contracting, which is supervised by the Authority under the public law regime, is the efficiency of the use of public funds and their direct or indirect saving and the assurance of effective competition." (Judgment of the Regional Court in Bratislava, Case No. 2S/250/2009 of 08.02.2012).

At the outset of the analysis of the issue which is the subject of the Authority's decision under review, it is necessary to refer to recital 5 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 (hereinafter also referred to as the Directive), which states, quote, "It should be recalled that nothing in this Directive obliges Member States to outsource or outsource the provision of services which they wish to provide themselves or to organise by means of non-public contracts within the meaning of this Directive. This Directive should not apply to the provision of services resulting from laws, regulations or employment contracts. In some Member States, this could be the case for certain administrative and governmental services, such as executive and legal services, or the provision of certain public services, such as foreign affairs services, justice services or compulsory social security services.

This recital is fundamental to the interpretation of the exemptions to the Directive, as it confirms that employment relationships, such as employment contracts or performance agreements, are excluded from public procurement under the PPA. This means that if a Member State chooses to carry out its tasks through in-house staff, it is not obliged to apply public procurement procedures under the PPA. This approach is based on the principle of subsidiarity and respect for national legal frameworks relating to labour relations. Professional publications and sources often stress that this article of the Directive is intended to ensure that public authorities have flexibility in organising the provision of their services. The second instance decision is also based on the judgment of the Court of Justice of the European Union in Case C-260/17, the conclusions of which are briefly summarised below.

In accordance with the settled case-law of the CJEU, the requirement of uniform application of Union law implies that if a provision of Union law does not contain any reference to the law of the Member States in relation to a concept, that concept requires, in principle, an autonomous and uniform interpretation throughout the European Union. That interpretation must take account of the wording of the provision in question, as well as its context and the objective pursued by the legislation in question (see, in particular, the judgments of 19 December 2013, Fish Legal and Shirley, C 279/12, EU:C:2013:853, paragraph 42, and of 19 June 2018, Baumeister, C 15/16, EU:C:2018:464, paragraph 24, to that effect). In this context, on the one hand, it follows from recital 5 of Directive 2014/24 that that Directive does not oblige Member States to supply or outsource the provision of services which they wish to provide themselves or to organise by means of non-public contracts within the meaning of that Directive, and that that Directive should not apply to the provision of services resulting from laws, regulations or employment contracts.

It follows that the conclusion of employment contracts constitutes a means for the public authorities of the Member States to provide services themselves and is therefore excluded from the public procurement obligations laid down by that Directive. Contrary to what Anodiki Services states in its written observations, this possibility for public authorities to provide themselves with some of their needs by concluding employment contracts is not limited to the cases referred to in the last sentence of the above recital. In this connection, the fact that the recital specifies, in relation to this possibility that the public authorities should have, that 'this could be the case' for the services which it exhaustively lists after this part of the sentence, is sufficient to show that this definition is not intended to be exclusive.

On the other hand, it must be stated that the conclusion of an employment contract by its nature establishes an employment relationship between the employee and the employer. In the broader context of European Union law, it is settled case-law that the characteristic feature of an employment relationship is the fact that a person carries out, for a certain period of time, for the benefit of and under the direction of another person, activities for which he

receives remuneration (see, in particular, judgments of 3 July 1986, Lawrie Blum, 66/85, EU:C:1986:284, paragraph 17, and 19 July 2017, Abercrombie & Fitch Italia, C 143/16, EU:C:2017:566, paragraph 19, and the case-law cited above). It follows from those considerations that the concept of 'contracts of employment' within the meaning of Article 10(g) of Directive 2014/24 covers all contracts under which a public authority employs natural persons for the provision of its own services and which create an employment relationship under which those persons carry out, for a specified period, activities for the benefit of and under the direction of that public authority, for which they receive remuneration. For the purposes of this definition, the manner in which those persons are employed is therefore irrelevant.

In particular, although an employment relationship may undoubtedly be based, as Anodiki Services submits in its written observations, on a special confidential relationship between employer and employee, it cannot be inferred that only contracts concluded on the basis of subjective criteria in relation to persons recruited, with the exemption of contracts resulting from a selection made on the basis of purely objective criteria, constitute 'contracts of employment' within the meaning of that provision. Moreover, in so far as, in accordance with the definition of 'employment relationship' recalled in paragraph 28 of that judgment, the employee provides activities for the benefit of the employer, under the direction of the employer, 'for a fixed period', fixed-term employment contracts cannot be excluded from the concept of 'contracts of employment' within the meaning of Article 10(g) of Directive 2014/24, on the ground that the duration of the employment relationship which they create is limited in time.

Examination of the case of the dispute between the City of Nitra and the Office for the Application of the Exemption

In his review decision, the Chairman of the Office confirmed that the application of the exemption under Section 1(2)(e) of the PPA requires strict adherence to the rules, while it is important that the exemption is not abused to circumvent the public procurement procedure. The exemption allows employment relationships, such as employment contracts or performance agreements, to be concluded without the obligation to follow the public tender rules. He also stressed that the application of the exemption must be based on objective circumstances.

In his assessment, the Chairman of the Office analysed in detail whether the audited entity (the City) fulfilled the legal prerequisites for the application of the exemption from the PPA, stating that it was necessary to examine whether the case was not a case of purposeful conduct aimed at circumventing the public procurement obligation. The Chairman agrees that the Authority was entitled to examine whether the law was circumvented by the fact that the

auditee entered into formal employment relationships with natural persons with the intention of circumventing the obligation to award a contract for the preparation of project documentation by means of a public procurement procedure.

The key issue was whether the employment agreements were validly concluded under the Labour Code or whether they were formal relationships designed to circumvent the law. In this respect, the Chairman of the Office stressed that the Office was not entitled to assess labour relations in the light of the Labour Code, as this area fell within the competence of the Labour Inspectorate. The Chairman of the Office stated that the Labour Inspectorate Nitra, which was competent in the matter, did not find any violation of labour law in its report. This protocol was to be binding on the Office and there was therefore no reason for the Office to further examine the validity of these employment relationships from the point of view of the Labour Code.

In paragraph 55 of the decision, the Chairman of the Office expressed doubts about the legal approach applied by the Office in this case, since the Office, while respecting the conclusions of the Labour Inspectorate, did not take them into account when assessing the lawfulness of the inspected party's procedure under the LIA. In his decision, the Chairman literally stated that this was an "unsustainably created legal context", since the Office, on the one hand, respected the findings of the Labour Inspectorate but, on the other hand, did not use them as relevant in assessing the amount of remuneration and the compliance of the employment contracts with the public procurement procedure. As a result, the Authority found a breach of the PPA on the basis of alleged non-compliance with labour law, which the Chairman found to be unjustified.

The Chairman of the Office also pointed out that the examination of labour relations in the context of the PPA does not fall within the competence of the Office. The Authority's Interpretative Opinion No 3/2016 clearly states that the Office is only to assess compliance with the PPA and not with the Labour Code or other legislation governing labour relations (according to which the examination of the compliance of contractual terms with commercial, civil or other public law falls under the protection of other specialised state authorities and according to which the Office interferes to a limited extent with the contractual freedom and freedom of contract of the contracting authority, contracting entity or person under Section 8 of the Public Procurement Act. It is true that the above interpretative opinion refers to the absence of the Authority's power to review the contractual terms and conditions laid down in the public procurement procedure (in the draft contract which is to be the result of the public procurement procedure), but in the present case it is also applicable per analogiam to the present case, where the Authority has reviewed the terms and conditions laid down in the work performance agreement, even though that power is conferred on other specialised bodies of the public administration, or on the courts in labour disputes.

If the interpretative opinion, which has long been accepted by the Authority and the Council of the Authority,[1] should not be applicable in the present case, according to the Chairman of the Office as well as to us, absurd situations would arise where the same body (the Authority) would not assess the contractual terms and conditions set out in the public procurement from the point of view of specific regulations, but in other cases of assessment of private law relations (e.g. The Authority should limit itself to examining whether an exemption has been applied in accordance with the PPA and not interfere in labour law issues which fall within the competence of other specialised state authorities.

In conclusion, the Chairman of the Office stated unequivocally that there was no reason for the Office to examine the validity of the employment agreements from the point of view of the Labour Code, as this issue had been assessed and concluded by the competent authority - the Labour Inspectorate Nitra. The only objective criterion that had to be demonstrated was the valid conclusion of the employment relationship, which was fulfilled in the present case. Therefore, there were insufficient grounds for concluding that the auditee had attempted to circumvent the public procurement rules by formally concluding an employment relationship.

Following a review of the Office's decision by the Chairman of the Office, it appeared that insufficient grounds had been established to find that the auditee had deliberately circumvented the rules and procedures of public procurement in order to favour a particular economic operator. In his assessment, the Chairman of the Office concluded that it had not been established that there had been a purposeful circumvention of the procedures under the PPA in this particular case.

In relation to the entire reasoning of the Office's decision, the Chairman of the Office critically assessed that the Authority tried to "force" the audited party to provide the performance by means of an external contractor through public procurement. However, the fact that the auditee had previously attempted to procure the project documentation through public procurement and that it had subsequently made use of the employment relationship was not a sufficient reason to consider that the use of the exemption was unlawful. The Chairman of the Office made it clear that the auditee had every right to decide whether to secure the project documentation internally or externally and was under no obligation to re-tender.

On the basis of the above, the Chairman of the Office decided that the decision of the Office lacks a convincing and sufficiently reasoned finding of a breach of the PPA. He therefore reversed the Authority's final decision pursuant to Section 177(3) of the PPA. The key reason

[1] See, e.g., Authority Council Decision No 7929-9000/2019 of 17.06.2019, Authority Council Decision No 8543-9000/2021, 11316-9000/2021 of 20.09.2021, Authority Council Decision No 6733-9000/2020 of 02.06.2021, Authority Council Decision No 6733-9000/2020 of 02.06.2021, Authority Council Decision No 6733-9000/2020 of 02.06.2019. 18010-9000/2017 of 21.02.2018, Authority Council Decision No. 13114-9000/2021 of 23.12.2021 or Authority Council Decision No. 14105-9000/2021, 14265-9000/2021 of 18.03.2022.

for this change was that the decision did not contain reviewable and objective reasons that would prove the illegality of the use of the exemption by the audited party.

This conclusion in the decision emphasizes the respect for the legal autonomy of public procurement entities in deciding how to fulfill their needs. The Office cannot force the procuring entity to outsource if it has legitimate reasons to use its internal capacity, which in this case was adequately justified and justified.

Conclusion

The decision of the Chairman of the ÚVO dated September 11, 2023 (No. 9766-9000/2023) represents a key legal analysis regarding the application of the exemption pursuant to § 1 par. 2 letters e) PPA. The subject of this decision was the examination of the legality of using this exemption when concluding work performance agreements with natural persons for the preparation of project documentation. Chairman of the Office changed the decision of the first-instance body and stated that it was not proven that the audited entity had committed a violation of the law, nor that it was a purposeful circumvention of procurement rules. At the same time, the decision emphasizes the importance of legal certainty and a clear definition of the competences of the Public Procurement Office when investigating labor relations, which are primarily the competence of labor inspectorates. This case thus provides a precedent for the interpretation and application of exemptions in the context of public procurement and emphasizes the need for transparent and objective assessment of public procurement.

Also in view of the above, when analyzing the case of the dispute between the city of Nitra and the Public Procurement Office regarding the application of the exemption, we come to the conclusion that the possibility of applying the exemption from the PPA must always be interpreted restrictively, and that the conditions for using the exemption according to § 1 par. 2 letters e) PPA should be assessed with a view to preventing circumvention of public procurement rules. As we analyzed in detail, the head of the office came to the conclusion that the key issue is the validity of the conclusion of labor relations. The only objective criterion when examining the legality of the application of this exemption was the confirmation that the labor relations were concluded validly according to the labor law regulations.

Moreover, even if the public contracting authority used labor relations to secure a specific work, for example project documentation, the mere fact of concluding these relations cannot automatically be evidence of purposeful circumvention of the Public Procurement Act. The argument that the amount of the agreed remuneration for the creation of the work can be evidence of circumvention of the law was also marked as unfounded, because the similarity of the value itself does not prove the expediency of this procedure. We consider it important and appropriate that the head of the office drew attention to the fact that if the Nitra Labor

Inspectorate, which is the competent authority in the field of labor regulations, did not find any violations of the Labor Code in the concluded agreements, the office did not have the authority to review and cancel these agreements only on the basis of presumed non-compliance with labor regulations. It is wrong for the office to examine issues beyond its competence and at the same time ignore the opinion of other competent authorities.

A similar opinion is taken by the Public Procurement Office contained in its Interpretive opinion no. 3/2016, which confirms that the office does not have the authority to examine the compliance of labor relations with labor law. The office should only monitor compliance with the obligations arising from the Public Procurement Act. This conclusion is in accordance with the principle of the rule of law, where each institution has its own specific authority and competences (in accordance with the principle of ultra vires). Considering the interpretation of the jurisprudence of the Court of Justice of the EU and the previous decision-making practice, it is therefore clear that the use of employment contracts in such cases is not unjustified, as long as the contracting authority can prove that these relationships were concluded properly and in accordance with legal regulations.

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