KÖZBESZERZÉSI HATÓSÁG

GUIDELINE OF THE PUBLIC PROCUREMENT AUTHORITY

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Guideline of the Public Procurement Authority

on the enforcement of the prohibition on the splitting of public procurements

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The amendment to the Act on Public Procurement (PPA), which entered into force on 1 July 2013, has substantially changed the wording of Article 18(2), the so-called rule of aggregation.

According to the minister's statement of reasons, the aim of the amendment was to bring the rules on the calculation of the estimated value into line with the legal requirements of the EU.

According to the EU public procurement directives and the related case law, no public procurement contracts considered to be one single procurement may be split up - as regards its value - by the contracting authority. In the national law, during the past fifteen years, the obligation of aggregation has developed into a system of rules that follows an independent logic and goes beyond the prohibition on the splitting of procurements. The amendment to the PPA, which entered into force on 1 July 2013, aims to substantially change the previous regulation and practice.

What does the prohibition on splitting means?

Article 18(1) No person shall split up any procurement with the intention of avoiding the application of this Act or Part Two of this Act.

(2) Where a public works contract or a public service contract or the procurement of similar supplies is divided into lots and realised through more than one contract, the value of all lots shall be taken into account for the establishment of the estimated value.

Article 18(1) of the PPA stipulates that no person shall split up any procurement with the intention of avoiding the obligation of the conduct of a contract award procedure or the application of the EU procedural rules, which are stricter than the latter. **The splitting of a procurement shall mean** that **one single procurement is realized by way of more than one contract and the value thereof is taken into account separately when establishing the estimated value**, and as a result of this the contracting authority avoids applying the PPA or does not apply the procedural rules pertaining to higher value contracts in the course of the given contract award procedures.

Consequently, the splitting of public procurement contracts shall always mean an infringement committed in relation to the calculation of the estimated value. The execution of a public procurement contract by way of more than one contract at different times is only unlawful if the value of the contracts is not aggregated by the contracting authority when

calculating the estimated value. The violation of the prohibition on the splitting of procurements may also be established where the subjective intention or aim of the contracting authority to avoid the regulation may not be detected in its conduct.[1]

The provision set out in Article 18(2) of the PPA is actually the mirror image of the regulation concerning the prohibition on the splitting of public procurement contracts. Where one single public procurement is realized by way of more than one contract, the value thereof shall be aggregated when calculating the estimated value and the rules to be applied to each contract shall be determined in line with the total estimated value.

What should be considered one single procurement, in case of which the estimated value shall be the aggregate of the value of more than one contract?

- single economic and technical function
- correlation of time

The Court of Justice of the European Union (Court) applies a functional approach in its judgements - which give an interpretation of the directives to be followed by the MS's practitioners - to clarifying what shall be considered one single public procurement. The functional approach means that the existence of one single public procurement is established by the Court on the basis of certain criteria related to the contents, which criteria aim to enhance the objectives of the directives (irrespective of whether the public procurement in question has been concluded by the contracting authority in the form of more than one contract, e.g. due to reasons related to public finance).

Single economic and technical function

In its judgment in Case C-16/98, the Court declared that the single economic and technical function must be the decisive criteria for assessing the existence of one single public works contract. The Court stated that it will be necessary to determine whether the works included in different contracts serve one single economic and technical function. It follows from the judgement that, in the course of the planning process, the economic and technical purpose, function of the result of the works concerned shall be the starting point and it determines whether the public works are to be realized within one contract or more than one contract. According to the judgment of the Court of Justice in Case C-574/10, for assessing the existence of one single public procurement contract, the criteria of **a single economic and technical function** applied in case of public works shall also apply in case of other subject matters (see point 41 of the judgement).

It is important that the existence of one single procurement shall be assessed **in accordance with the specific circumstances of the given case**. In addition to the main criterion, i.e. a single economic and technical function, **other criteria** may also support the existence of one single procurement in a given case. Such factors may be in particular

[1] On the basis of the judgment of the Court of Justice in Case C-574/10.

- unified planning and decision-making
- the same person acting as contracting authority
- the same legal basis and conditions when concluding the contracts

Correlation of time

The correlation of time is also a highly important factor when establishing the existence of one single public procurement, but it does not necessarily mean simultaneity. With regard to the functional approach of one single public procurement, the period in which the procurements realized shall be aggregated may not be determined precisely as a general rule, without taking into account the subject matter and the conditions of the given public procurement. For instance, in case of the procurement of engineering services related to public works to be realized within a longer period of time, the fact that the contracts, which form part of a cohesive, continuous process, are concluded annually, does not compromise the single nature of the public procurement. However, if the public works project is abandoned for any reason and new contracts shall be concluded for its continuation several years later, it is not considered to be the same public procurement anymore.

According to the Court's case law, no reasons related to the budget planning of the contracting authority may undermine the single functional nature of the public procurement. For instance, the fact that the contracting authority concludes two contracts for the execution of a given task in two consecutive years, because the financial cover which is necessary for the subtask to be realized later will only be available in the second year, does not justify the separate calculation of the contracts' value.

How can the single nature of the economic and technical function be examined?

The single nature of the economic and technical function may always be examined in conjunction with **the subject matter and the conditions of the given public procurement**. There is no specific rule; in each case the public procurement in question shall be considered.

Public works contracts

With regards to public works contracts, according to the practice established in several European countries, if an element of a project divided into several stages is suitable for fulfilling an independent technical and economic function in its own right, such an element may be considered to be a separate public works contract (e.g. road sections to be built successively fulfil independently their technical function as well as their function in transportation).

According to Article 2(2) of the Government Decree 306/2011 (23 December) on the detailed rules pertaining to public works contracts a public works contract broken into sev-

eral execution phases in the building permit shall be considered the same public works contract. This rule is helpful in assessing the existence of one single public works contract; the same building permit indicates the single nature of the procurement. Whereas the existence of more than one building permit shall not exclude the existence of one single public works contract.

Public supply contracts

Article 18(2) of the PPA lays down expressly that the similarity of the goods is a decisive factor when establishing the existence of one single public procurement. According to the statement of reasons in the proposal for the amendment to the PPA, in case of public supply contracts the single nature of the economic and technical function may principally be detected in the fact that the goods serve the same purpose, as well as they are similar as regards their content or they fulfil their function as interrelated parts working together.

As regards public supplies, similar goods shall mean goods that are to be used for the same or a similar purpose, for instance various foodstuffs or different office furniture. Economic operators operating in the given field of activity would typically have such goods in their stock. Unfortunately, as regards prohibition on the splitting of public procurements, no judgement is available, which would especially concern goods. The public procurement directives as well as the PPA emphasize that in case of public supplies **the similarity of the goods is** in principle **an important factor when establishing the existence of one single public procurement**. It is apparent from the abovementioned definition of similar goods that the term 'similar' in the legislative text may be assessed taking into account the intended use, function. Consequently, in case of goods, these two aspects of assessment are not always separated from each other and in many cases similarity corresponds to a single function, provided there are no objective reasons which definitely prove the functional independence of such procurements. For instance, if the contracting authority, for the fulfilment of its tasks, procures office furniture in a manner closely linked in time, the value of such contracts may not be separated from each other on the grounds that the office furniture in question will be used by its several different regional offices. In certain cases, some objective circumstances may justify the independence of public procurement contracts related to similar goods. For instance the procurement of certain goods is realized through international co-financing, in relation to a specific purpose and subject to different conditions.

Public service contracts

While in case of goods - on the basis of the wording of the legislation - similarity also means the single nature of the technical function, in case of services similarity is not the main aspect of the assessment. As regards services, in its judgment in Case C-574/10, the Court declared that the planning and engineering services broken into several stages constituted a unit, taking into consideration that they were related to the same public works

contract and they had similar contents. Consequently, the public procurements are primarily linked by their common purpose - which was, in the case referred to above, the fact that they were related to the same public works contract - and, in this context, the similar content of the services may have an important role when establishing the existence of the single nature of the public procurement, if applicable. According to the statement of reasons issued by the lawmaker, the criteria which support the single nature of services aiming at the fulfilment of the same purpose may include the fact that they fulfil their function as interrelated parts working together (e.g. the drafting of a study and the survey on which the study is based). On the basis of the judgment, it should be noted that if the preliminary sketch, the draft design as well as the detailed design are ordered by the contracting authority for the same public works contract, such services shall be considered one single public procurement with regard to the estimated value - except where specific circumstances suggest the contrary -, from the time of ordering the first planning task by which the process is launched.

In case of services which are linked to several, clearly different fields (e.g. training activities which have substantially different vocational topics or provision of advice in different professional areas), the public procurements to be considered a unit with regard to their content are basically the ones related to the same professional area or trade, however, the assessment may also involve the issue of the education/qualification needed, and the question whether an entrepreneur would typically be able to perform such services. For instance, if an organization responsible for training concludes contracts for language teaching and training for certified public accountants, such contracts shall not be considered one single public procurement.

Consequently, in case of public service contracts, as regards the single nature of the economic and technical function, the contracting authority shall assess in the first place whether or not the services serve the same purpose. If they do so, then further criteria supporting the single nature of the services shall also be assessed.

It is more difficult to describe the limits of one single public procurement in general than to recognize them reasonably in a specific situation. Indeed, the contracting authority shall decide on the existence of one single public procurement by considering the circumstances, applying the legislative measures to the specific case. In this respect, we would like to draw the practitioners' attention in particular to the principle of **due enforcement of rights**. The main role of public procurement shall be the ensuring of competition in the purchases made by the public sector. In particular, special attention shall be devoted to public procurements using EU support, where the separate handling of public procurements will be difficult to justify in the course of the ex post control, if, within one single project, the contracting authority concludes several contracts which have the same or a similar subject matter, with the same undertaking and the conclusion of the contracts in question do not respect the procedural rules based on their estimated aggregate value.

Precedent in the European Court of Justice case law

In the ECJ judgment in Case **C-16/98**, in relation to public procurements divided geographically, started at the same time and concerning public works to be realized on the electricity supply and street lighting networks, the Court found - on the basis of the criteria for the single nature of the economic and technical function - that those public procurements which concerned the works related to electricity supply networks should have been aggregated. By contrast, the splitting of the works related to the street lighting networks was not found unlawful, considering the fact that the street lighting networks of the different municipalities are not necessarily linked to or depend on each other and in the case in question - although such networks have otherwise the same economic and technical function - the Court has not confirmed that in this specific case these networks *serve the same, common function*. The Court stated that "the question whether there is one single work must be assessed in the light of the economic and technical function fulfilled (.)" [paragraph 38]. In the case of each procurement, this "must be assessed according to its context and its particular characteristics" [paragraph 65].

In the case which gave rise to the judgment in Case **C-271/08**, certain local authorities entered into framework agreements with one or more service providers - which had been designated in a collective agreement by the local authority employer associations and the unions - in respect of occupational old-age pensions, and the framework agreements in question specified the conditions under which the employees could contact the service providers for the conclusion of their individual insurance contract. The Court held that the local authorities should have taken into account the aggregate value of all the framework agreements concluded separately with each service provider, because in cases where the contracts inherently concern a single subject matter, the calculation of the estimated value depending on the number of the contracts would result in an artificial splitting of the contract.

In Case **C-574/10**, in relation to the renovation of a sports and event hall, a local authority awarded to the same agency in each year between 2008 and 2010 several tasks related to planning, technical supervising and selecting certain specialized engineers for the next execution stage. The Court declared that all the contracts concluded for the planning and engineering services relating to the same work constituted a technical and economic unit, even if the contracts for each stage were concluded separately in the course of the execution. The Court emphasized that each service was related to the same project of renovation of the same building, and all the tasks to be carried out were substantially typical engineering tasks with the same method of remuneration, even if there were some differences between the tasks relating to each stage. Consequently the services in question have internal coherence and functional continuity from a technical and economic point of view, which may not be broken by the fragmentation of the services.

Is there any precedent for the obligation to consider the value of contracts concluded for different subject matters as a unit?

Former ECJ case law has dealt with the issue that similar subject matters require the aggregation of the value of several contracts. The national practice has hitherto considered the public procurement contracts concerning different subject matters to be separate public procurement contracts. The approach which highlights the criteria for the single nature of the economic and technical function within one single public procurement contract also suggests that the value of contracts with different subject matters shall not be aggregated. Thus, in this respect, the former practice shall be followed as a general rule.

However, the PPA itself refers expressly to some cases where contracts having different subject matters are so closely linked to each other with regard to their functionality that they may not be considered individual procurements; they constitute one single public procurement. Such cases include the case expressly referred to in Article 13(3) of the PPA, where the estimated value of installation and putting into operation shall also be taken into account in the estimated value of the supplies.

The relationship between the concept of one single procurement and that of projects carried out using support

The concept of one single public procurement shall be defined according to **individual criteria** developed by the Court, **in line with the purpose of the public procurement directives**. The same criteria shall be applied where the contracts at issue are parts of a project under the EU state aid policy (hereinafter referred to as 'project'). Consequently, the aid project is not in any event equivalent to the framework of one single public procurement.

The fact that certain procurements are realized in the framework of one project may, however, be relevant when establishing the single functional nature of contracts which are part of one single public procurement under the public procurement law. The statement of reasons to the Act amending the PPA also refers to the importance of projects in relation to the same function, purpose. According to the statement of reasons 'the amendment also enhances swifter and more efficient spending of EU funding by not requiring the aggregation of similar services related to different projects, on condition that there are no special indications – e.g. the fact that the procurement is carried out in the aggregate, at the same time by the contracting authority - which would clearly establish the single nature of the contracts.'

If a contracting authority faces a situation in which it cannot firmly decide whether or not the given contracts shall be considered one single public procurement, it is advisable to take into account in the balancing exercise that in case of projects carried out using EU

support, the ex post controls examine one project as well as the public procurements realized within the project in question and the decision not to conduct a contract award procedure may result in the obligation to repay the full amount of the support, among other legal consequences.

In which case shall the annual purchasing value be taken into account for the calculation of the estimated value?

Article 13 of the PPA stipulates that

13(1) In the case of regular contracts or of contracts which are to be renewed periodically, the estimated value of the supply or service contract shall be:

***(a)* either the actual value of the contract or contracts having the same or similar subject matters, concluded within the preceding calendar year, adjusted according to the anticipated changes in quantity and value in the following calendar year, or**

***(b)* the estimated consideration following the first delivery, during the 12 months following the initial contract or during the term of the contract(s), if it exceeds 12 months.**

Contracting authorities usually have to procure certain supplies and services in order to be able to fulfil their task or ensure their organizational functioning, and such needs for procurement arise in a foreseeable way, regularly and are to be renewed periodically (e.g. office supplies, food needed for catering provided on a continuous basis, regular transportation or cleaning, etc.). In such cases the annual purchasing value pursuant to Article 13(1)(a) or (b) shall be taken into account, even if the duration of the contract in question does not exceed one year.

However, the abovementioned rule does not rule out the individual procurement of goods or services, if a separate procurement need arises, contrary to the regular procurements, in an unforeseeable way. By way of example, if an institution places a large annual order for books in its library every year, in a foreseeable way, the value of the annual orders may not be split. But if, for a particular occasion (e.g. for a conference) - independently from the procurements foreseen for the given year - some books would be purchased in a lower value, Article 18(2) of the PPA shall apply instead of the rules of calculating the estimated value in case of the regular procurement of similar goods, and the value of the procurement shall be established individually, taking into consideration the lack of a single functional nature of the procurements. Another example: if the contracting authority concludes contracts annually for the provision of cleaning services in the properties managed by it, such needs arising regularly in a foreseeable way shall be the subject of a public procurement where the annual aggregated value of the cleaning services are taken into account, except if the duration of the contract to be concluded by it exceeds 12 months. But if, in the given year, in an unforeseeable way, the contracting authority becomes responsible for the

management of a property whose cleaning shall be subject to a separate contract, Article 13 of the PPA shall not apply when establishing the value of such procurement.

As regards the application of Article 13 of the PPA, it shall be noted that if a purchase is subject to the public procurement obligation according to any rule of calculating the estimated value stipulated by the PPA, the contracting authority cannot argue that under another rule of calculating the estimated value the estimated value would not reach the public procurement threshold (Article 11(3) of the PPA).

How to construe Article 18(3) of the PPA?

Article 18(3) of the PPA provides for the possibility of separating low-value contracts from a public procurement, thus enchances market access of small enterprises, as well as eases the situation of contracting authorities. This provision shall be construed as covering only public procurement contracts reaching EU thresholds, since the separable, low-value contracts are subject to public procurement obligation under the national procedural rules. According to this rule, one or more contracts which are separated from the EU public procurement contract and do not reach the threshold set by law may be concluded pursuant to the national procedural rules, however, it is limited by the fact that the aggregated value of the parts separated in this manner shall not exceed 20% of the total value of the whole public procurement.

Article 18(4) provides guidance on the rule that the value of the parts separated in this manner may be handled separately when establishing the type of national procedure to be applied. Nevertheless, pursuant to Article 11(1) and Article 18(1) and (2) the estimated value of the share of the public procurement contract from which the parts were separated shall be considered the estimated value of the whole public procurement by the contracting authority. Consequently, in such cases a contract award procedure under the EU procedural rules shall always be conducted as well.

We would, however, like to draw the contracting authorities' attention to the principle of due enforcement of rights, also with regard to the establishment of the estimated value of the contracts separated. If, in the framework of a public procurement, there are purchases which have a value not exceeding 20% and are separable as regards their subject matter, Article 18(3) of the PPA may be applied; but the contracting authority may not intend to artificially split up a contract which is clearly of a single nature as regards its subject matter. Firstly, the estimated value of the contracts separated according to their subject matter shall be established by the contracting authority, instead of adjusting the estimated value to the procedural system.

As regards procurements carried out using EU support, it is particularly important to draw attention to the fact that the transparency requirements laid down in the Treaty shall be

complied with in the case of public procurement contracts below EU thresholds as well.[2] Consequently, it constitutes a significant risk in the course of EU related controls if, on the basis of Article 18(3) of the PPA, a contracting authority artificially splits up certain elements of a public procurement contract which is above EU threshold - thus has a cross-border importance - in order to perform those elements in a procedure without prior publication of a contract notice.

[2] See in this respect Commission interpretative communication:
http://www.kozbeszerzes.hu/static/uploaded/document/Ertekhatar_alatti_HU.pdf