https://doi.org/10.31743/ppe.10348

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Impact of the judgement of CJEU in case C-285/18 on in-house transactions in Poland

Wpływ wyroku TSUE w sprawie C-285/18 na zamówienia in-house w Polsce

Introduction

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 (Official Journal of the European Union, L 094, 28 March 2014, p. 65, later referred to as Directive 2014/24/EU) excludes in-house procurement from its application. According to Article 12 of the Directive, public contracts awarded by a contracting authority to a legal person governed by private or public law fall outside the scope of the Directive where all of the following conditions are fulfilled: the contracting authority exercises control over the legal person concerned, which is similar to the control it exercises over its own departments; more than 80% of the activities of the controlled legal person 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; and there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.

The above-mentioned Article reflects jurisprudence of the Court of Justice of the European Union (later referred to as CJEU) relating to in-house transactions. Starting with case C-107/98, Tikal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (so-called Teckal case), when CJEU determined for the first time that it may be possible to derogate from

the provisions regulating public contracts and freedom to choose a contractor (Horubski, 2006, p. 7), in so far as two cumulative criteria are fulfilled. Firstly, the contracting authority must exercise control over the economic operator (a subsidiary) similar to that which it exercises over its own departments. Secondly, the economic operator (a subsidiary) must carry out the essential part of its activities for the controlling contracting authority. The above-mentioned case was followed by other judgements in which CJEU further clarified criteria specified in the Teckal case, i.e. Judgment of the Court of 11 January 2005 in case C-26/03 Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall – und Energieverwertungsanlage TREA Leuna (2005/1/I-1, so-called Stadt Halle case)[1]; Judgment of the Court of 11 May 2006 in case C-340/04 Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio and AGESP SpA (2006/5A/I-4137, so-called Carbotermo case), and Judgment of the Court of 13 October 2005 in case C-458/03 Parking Brixen GmbH v Gemeinde Brixen and Stadtwerke Brixen AG (2005/10A/I-8585, so-called Parking case)[2].

However, incorporation of CJEU jurisprudence regarding in-house transactions into procurement directives has not removed all doubts related to this form of contract award. A whole series of ambiguities related to these procurements is reflected in a high number of cases submitted for resolution by national judicial authorities of the Member States and in requests for preliminary rulings submitted to the CJEU.

This article analyses the judgement of the Court of 3 October 2019 in case C-285/18 in relation to in-house procurement in Poland. The above-mentioned judgement is crucial for interpretation of the public procurement regulations in the Member States, especially in the Member States that implemented EU regulations regarding in-house procurement while introducing certain restrictions in comparison to the EU regulations (Article 12 of the Directive 2014/24/EU of the European Parliament and of the Council)[3].

[1] In this judgement, CJEU maintained its view that a public authority which is a contracting authority has the possibility of performing the tasks conferred on it in the public interest by using its own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own departments. In such a case, there can be no question of a contract for pecuniary interest concluded with an entity legally distinct from the contracting authority.

[2] More about this case: Wolska, 2018, pp. 113-114.

[3] It should be noted that Poland is not the only Member State which introduced limitations on the conclusion of in-house transactions. For example, Slovenia, besides three conditions for the conclusion of in-house transactions introduced by Directive 2014/24/EU, introduced a fourth condition which must be fulfilled, i.e. the value of the in-house transaction must be equal to or lower than the open market value. Article 28 of the Slovenian Public Procurement Act (ZJN-2, or PPA) lists the following conditions: a) the contracting authority exercises control over the legal

1. In-house procurement in Poland

In the Polish public procurement system, the in-house award of contracts is regulated by Article 4, item 13 (exclusions) and by Article 67, item 1.12 of the Public Procurement Law Act of 29 January 2004 (Polish Journal of Laws 2019, item 1843 as amended, later referred to as Public Procurement Law).

Article 4, item 13 of the Public Procurement Law states that the Law does not apply to contracts awarded to a budget economy unit by the public authority performing the functions of a founding body of that unit if the following conditions are met jointly: more than 80% of the activity of a budget economy unit concerns performing of public functions for that public authority; the public authority exercises control over the budget economy unit, corresponding to the control exercised over its own units without legal personality, involving the impact on strategic goals and important decisions concerning the management of affairs of the unit; the subject-matter of the contract falls within the scope of the basic activity of the budget economy unit determined in accordance with Article 26, item 2.2 of the Public Finance Act of 27 August 2009 (Polish Journal of Laws of 2019, item 869 as amended). A budget economy unit is defined as a unit of the public finance sector established for the purpose of performing public tasks that are carried out for consideration, and which covers its obligations and costs of its activities from the obtained revenue (Koralewska & Wołowicz, n.d.).

Based on the above-mentioned regulation, it could be said that the legislator allows a public authority to exempt a budget economy unit from the scope of the application of the Public Procurement Law. However, the above exemption may be introduced only if all conditions set out in Article 4, item 13 of the Public Procurement Law are met. Moreover, a public authority must perform the functions of a founding body of the budget economy unit and the subject-matter of the contract must fall within the scope of the basic activity of the budget economy unit (Nowicki & Nowicki, 2010, pp. 122-123).

Moreover, Article 67, item 1.12 of the Public Procurement Law lists in-house procurement as a premise for contract award by single-source procurement. According to the above-mentioned article, the contract is awarded by the con-

person concerned which is similar to that which it exercises over its own departments; b) more than 80% of the activities of the controlled legal person 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; c) there is no direct private capital participation in the controlled legal person; and d) the value of the subject-matter of the procurement is equal to or lower than the price of such subject-matter on the market.

tracting authority referred to in Article 3, item 1.1-3a to a legal person, if the following conditions are jointly met: 1) the contracting authority exercises control over that legal person, equivalent to the control exercised over its own units, involving dominant influence on the strategic goals and important management decisions relating to the affairs of that legal person; this condition is also fulfilled where such control is exercised by another legal person controlled by the contracting authority in the described manner; 2) more than 90% of the activity of the controlled legal person involves the execution of tasks entrusted to it by the contracting authority controlling it or by another legal person controlled by the contracting authority; 3) no private capital is directly involved in the controlled legal person.

Article 12 of Directive 2014/24/EU was implemented into Polish public procurement law in a different way than provided for in the Directive[4]. The Polish legislator did not exclude contracts referred to in Article 12 of the Directive 2014/24/EU from the Public Procurement Law. Instead, they provided for using the single-source procurement procedure. Article 67, item 1.12 of the Public Procurement Law lists the same conditions for awarding contracts by a single-source procurement procedure as stated in Article 12, item 1 of the Directive 2014/24/EU, however, some other conditions set out in this Article 67, item 1.12 meet the requirements of the Teckal test. Though, it needs to be noted that the Polish legislator introduced stricter requirements than the European Union legislature. A legal person may perform on the open market less than 10%, not 20%, of the activities concerned by the cooperation as provided for in Article 12 of Directive 2014/24/EU. Moreover, as noted by H. Nowicki, Article 67, item 1.12 of the Public Procurement Law limits private capital involvement by limiting direct involvement of private capital in the controlled legal person (Nowicki, 2017, p. 161). Moreover, before awarding a contract by the single-source procurement procedure, and after such a contract is awarded, the contracting authority, on

[4] It should be noted that some Member States have directly implemented the EU regulations on in-house procurement. For example, Article 12 of Directive 2014/24/EU is reflected in § 108 items 1-5 and 7-8 of the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkung – GWB). § 108.1 of the GWB does not apply to the award of public contracts that are awarded by a public contracting authority within the meaning of § 99, par. 1-3 to a legal person under public or private law where: 1. The public contracting authority exercises control over the legal person similar to that exercised by it over its own departments; 2. More than 80% of the activities of the legal person are carried out in the performance of tasks entrusted to it by the public contracting authority or by other legal persons controlled by that public contracting authority; and 3. There is no direct private capital participation in the legal person with the exception of non-controlling and non-blocking forms of private capital participation that are required by national legislative provisions and that do not exert a decisive influence on the controlled legal person.

the basis of Article 67, item 11-13 of the Public Procurement Law, must announce the intention to conclude such a contract at least 14 days before the date of its conclusion. These requirements are aimed at enabling other operators present on the market to question the validity of application of this procedure. Moreover, the conclusion of a contract must also be announced.

2. Judgement of the Court in case C-285/18

On 7 February 2014, the Administration of the Municipality of the City of Kaunas (the contracting authority) published a notice of the contract for the supply of services relating to the maintenance and management of plantations, forests and parks in the city of Kaunas. The contract was awarded to Irgita. It led to signing, on 18 March 2014, of a contract to provide mowing and cutting services for a period of three years. However, the contracting authority did not commit to order all the services, nor the entire quantity of services, provided for in that contract. On 1 April 2016, the contracting authority requested the consent of the Lithuanian Public Procurement Authority (Viešųjų pirkimų tarnyba) to the conclusion of an in-house transaction with Kauno švara concerning services that were essentially the same as those for which Irgita had been made responsible for by the contract of 18 March 2014. On 20 April 2016, the Public Procurement Authority consented to the conclusion of a contract between Kauno švara and the contracting authority, and the contracting authority was bound to comply with Article 4.2 of the Lithuanian Law on Competition of 23 March 1999 (*Lietuvos Respublikos konkurencijos istatymas*). Therefore, the contracting authority decided to conclude the contract for the supply of mowing services with Kauno švara. The contract was concluded on 3 May 2016 for the duration of five years[5].

In regard to the contract concluded between the contracting authority and Kauno švara, on 20 May 2016, Irgita brought an action before the Lithuanian Court of First Instance challenging the contested decision, claiming that the contracting authority was not in a position to conclude the contract with Kauno švara. That claim was dismissed at first instance. However, Irgita's legal action was then upheld by the Court of Appeal of Lithuania. The court stated that the right to conclude an in-house transaction, provided for in Article 10.5 of the Lithuanian Law on Public Procurement (*Lietuvos Respublikos viešųjų pirkimų įstatymas*), cannot be an exception to the prohibitions on undermining com-

[5] More: Kiraga, 2019, pp. 41-42.

petition between economic operators, on granting privileges to one economic operator, and discriminating against others, as laid down in Article 4.2 of the Lithuanian Law on Competition. The contested contract, according to that court, was unlawful, in particular on the grounds that it entailed a reduction in the quantity of services ordered from Irgita and, by concluding an in-house transaction, with no objective necessity, the contracting authority had granted to the undertaking that it controlled privileges liable to distort the conditions of competition between economic operators.

The contracting authority brought the appeal on a point of law with the Supreme Court of Lithuania (Lietuvos Aukščiausiasis Teismas). In light of the uncertainties arising from the application of Community law on in-house transactions, the Supreme Court of Lithuania decided to refer the following questions to the CJEU for a preliminary ruling:

- Whether a situation where a public contract has been awarded by a contracting authority to a legal person over which it exercises control similar to the control it exercises over its own departments, as part of the procedure initiated when Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Official Journal of the European Union, L 134, 30 April 2004 , p. 114) was still in force, which led to the conclusion of a contract after the repeal of that directive, falls within the scope of Directive 2004/18/EU or within the scope of Directive 2014/24/EU.
- Must the provisions of Article 12 of the Directive 2014/24/EU be interpreted as meaning that the concept of an "in-house transaction" comes within the scope of EU law, and that the content and application of that notion are not affected by the national laws of the Member States, inter alia, by limitations on the conclusion of such transactions, for example, by the condition that public procurement contracts cannot ensure the quality, availability, and continuity of the services to be provided?
- Should the provisions of Article 12 of Directive 2014/24/EU be interpreted as meaning that the Member States have a discretion to establish limitations or additional conditions for the conclusion of in-house transactions but they can implement that discretion only by means of specific and clear provisions of substantive law governing public procurement?
- Is the conclusion of an in-house transaction that satisfies the conditions laid down in Article 12, item 1.a-c of Directive 2014/24/EU, as such, compatible with EU law? (Skibińska, 2019).

In relation to the first question, CJEU determined that a situation where a public contract has been awarded by a contracting authority to a legal person over which it exercises control similar to the control it exercises over its own departments, as part of a procedure initiated when Directive 2004/18/EC was still in force, which led to the conclusion of a contract after the date of repeal of that directive, namely 18 April 2016, falls within the scope of Directive 2014/24/EU, where the contracting authority definitively resolved the question whether it was obliged to initiate a prior competition procedure for the award of a public contract after that date.

In response to the second question, CJEU stated that Article 12, item 1 of Directive 2014/24/EU must be interpreted as not precluding a rule of national law whereby a Member State imposes a requirement that the conclusion of an in-house transaction should be subject, inter alia, to the condition that public procurement fails to ensure that the quality of the services performed, their availability or their continuity can be guaranteed, provided that the choice made in favour of one means of providing services in particular, made at a stage prior to that of the public procurement, has due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. Moreover, Gerard Hogan, Advocate General to the Court of Justice, also stated that such an action does not interfere with EU legislation. As Gerard Hogan emphasises:

- (…) "The purpose of that directive is not compromised if the Member States are allowed to apply more stringent rules that further limit the right to enter into in-house transactions" (Opinion of Advocate General Hogan delivered on 7 May 2019, case C 285/18, part of point 45);
- (…) "The fact that a Member State decides to limit the possibilities of entering into in-house transactions, and thus extends the area of application of the rules on public procurement, is in line with the objectives of the public procurement directives" (Opinion of Advocate General Hogan delivered on 7 May 2019, case C 285/18, part of point 49);
- (…) "It is, generally, up to the Member States to determine whether they wish to provide for additional criteria limiting public authorities' choice as to whether they can enter into in-house transactions" (Opinion of Advocate General Hogan delivered on 7 May 2019, case C 285/18, part of point 56).

In answer to the third question, CJEU stated that where a Member State introduces rules under which one of such means of providing services, performing work or obtaining supplies is given preference over others, as has been done with respect to the conditions subject to which Lithuanian law permits

the conclusion of in-house transactions for the purposes of Article 12, item 1 of Directive 2014/24/EU, the introduction of those rules cannot be covered by the transposition of this directive. However, where the Member States decide to proceed in that way, they are still required to respect various principles, including the principle of transparency. The principle of transparency requires, like the principle of legal certainty, that the conditions to which the Member States subject the conclusion of in-house transactions should be made known by means of rules that are sufficiently accessible, precise, and predictable in their application to avoid any risk of arbitrariness. Therefore, Article 12, item 1 of Directive 2014/24/EU, read in the light of the principle of transparency, must be interpreted as meaning that the conditions to which the Member States subject the conclusion of in house transactions must be made known by means of precise and clear rules of the substantive law governing public procurement, which must be sufficiently accessible, precise, and predictable in their application to avoid any risk of arbitrariness.

In answer to the fourth question, CJEU stated that the conditions laid down in Article 12, item 1a-c of Directive 2014/24/EU stipulate that a public contract awarded by a contracting authority to a legal person governed by private or public law does not fall within the scope of that directive where the contracting authority exercises control over that legal person which is similar to that which it exercises over its own departments; where more than 80% of the activities of that legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by the latter, and where there is no direct private capital participation in that legal person. However, that provision concerns solely the scope of Directive 2014/24/EU and cannot be construed as establishing the conditions governing whether a public contract is to be awarded in the form of an in-house transaction.

CJEU determined that in-house transactions, within the meaning of Article 12, item 1 of Directive 2014/24/EU, do not fall within the scope of that directive and cannot relieve the Member States or the contracting authorities of the obligation to have due regard to the principles of equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. Moreover, recital 32 of the Directive in regard to cooperation between entities within the public sector stipulates that it should be ensured that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators.

CJEU noted that the Lithuanian Supreme Court had the task to assess whether, by concluding the in-house transaction at issue in the main proceedings, whose

subject matter overlaps with that of a public contract still in force and performed by Irgita, the contracting authority has not acted in breach of its contractual obligations arising from that public contract, and of the principle of transparency. Also, the court assessed whether the contracting authority failed to define its requirements sufficiently clearly, in particular by not guaranteeing the provision of a minimum volume of services to the party to whom that contract was awarded or, further, whether that transaction constitutes a substantial amendment of the general structure of the contract concluded with Irgita.

In answer to the last question, CJEU stated that the conclusion of an in-house transaction that satisfies the conditions laid down in Article 12, item 1a-c of Directive 2014/24/EU is not as such compatible with EU law.

3. CJEU judgment in case C-285/18 in light of the in-house transactions in Poland

The source literature points to the fact that the judgment in case C-285/18 Irgita has shaken the foundation of the in-house procurement (Janssen & Olson, p. 2). This statement could be agreed with only in reference to the specific arguments formulated by the Court in the discussed judgment, especially in view of the fact that the CJEU underlined the possibility to introduce new restrictions (terms) for the in-house transactions, which are not specified in Article 12 of Directive 2014/24/EU. The above statement only confirmed the already existing possibilities in this regard that had previously been allowed in the case law. In the judgment of 6 February 2020, in joined cases from C-89/19 to C-91/19 Rieco, in point 42 (ECLI:EU:C:2020:87) the Court ruled that the provision of Article 12, para 3 of Directive 2014/24/UE should be interpreted as not in opposition to the state regulations, which state that in-house procurement may be awarded in the case of lack of a public procurement, and in any case it requires that the ordering party demonstrates how applying the internal procurement procedure would benefit the particular local community.

As aptly pointed out by P. Nowicki (2020, chapter III), what is especially important in the Irgita judgment is the Court's opinion that executing an in-house transaction in compliance with the provisions set forth in the relevant directives might not always be in line with other values of the European Union. This could be true especially in terms of respecting equality, non-discrimination, proportionality, and transparency by the Member States and the ordering parties.

Moreover, in case C-285/18 Irgita, the Court stressed that the cooperation of the public entities exempted from the procurement directives' provisions must not interfere in the competition in relation to private contractors. In this regard, the C-285/18 Irgita judgment constitutes a novum, as such approach is to some extent contrary to the CJEU's notions formulated in other decisions. For example, in item 51 of Stadt Halle judgment, the Court claims that

> the award of a public contract to a semi-public company without calling for tenders would interfere with the objective of free and undistorted competition and the principle of equal treatment of the persons concerned, referred to in Directive 92/50, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors.

The literature (Nowicki, 2020, chapter III) also points to the fact that it is not entirely clear whether, despite meeting all requirements defining in-house transactions, the ordering party should every time ensure that executing of the transaction does not disrupt competition in regard to private contractors, or whether this should be the case only when an in-house contract overlaps with a deed entered into as part of the public procurement procedure by the same entity. Assuming that it is always necessary to ensure free competition in relation to private contractors questions the entire in-house exception in terms of the rights of the ordering parties to self-organise.

It seems however that such interpretation would need to be supported by specific requirements arising from the national law, which would restrict the application of in-house transactions by the ordering parties. One could claim that this is the case when it comes to the provisions of the Polish procurement law. Article 67, para. 1, item 12-15 of the Public Procurement Law defines in-house procurement as a prerequisite for applying the negotiated procurement procedure. In-house transactions are not entirely excluded from the scope of the Public Procurement Law, as in the case of Directive 2014/24/UE on public procurement. The provisions of the Polish Public Procurement Law apply to public transactions of value exceeding 30 000 EUR.

Moreover, in Poland, interpretation of Article 67, item 1.12 of the Public Procurement Law resulted it the approach that meeting all of the conditions stipulated by the above-mentioned Article automatically means that the contracting authority may award an in-house contract by single-source procurement procedure to its own subsidiary even if other entities on the market are

interested in participating in a given contract. The above was confirmed by the judgement of the National Appeals Chamber of 7 February 2017, in which the National Appeals Chamber determined that:

> The Public Procurement Law does not entail an obligation for the contracting authority to demonstrate before the intended contract award by single-source procurement procedure that it does not distort competition in any way other than by fulfilment of conditions stipulated in Article 67, item 1.12 of the Public Procurement Law. The legislator did not intend the contracting authority to terminate the single-source procurement procedure initiated under Article 67, item 1.12 of the Public Procurement Law if other entities become interested (after the information on the intended contract conclusion has been announced) in the in-house procurement. Such an intention would have been determined in a provision requiring termination of such a procedure or as a ground for termination of the procedure. Since the contracting authority is required to announce its intention (...), the legislator ensured the protection of competition and transparency and allowed all potential contracting authorities to verify compliance with Article 67, item 1.12 of the Public Procurement Law. If such non-conformity is suspected, the potential contracting authorities have the right to lodge an appeal (KIO 96/17).

Conclusions

Having analysed the judgement of the Court of 3 October 2019 in case C-285/18, in can be concluded that Article 12 of the Directive 2014/24/EU only lists minimal (normative) requirements for the purposes of assessing whether the in-house transactions are acceptable. The Member States (including Poland) have the discretion to establish additional conditions for the conclusion of such procurement procedures. However, such conditions must have due regard to the principle of transparency and must be regulated by provisions which are accessible, precise, and predictable. This conclusion is also confirmed by recital 31 of Directive 2014/24/EU stipulating that any exempted public-public cooperation does not result in a distortion of competition in relation to private economic operators in so far as it places a private provider of services in a position of advantage vis-à-vis its competitors.

The contracting authority, after the judgement of the CJEU in case C-285/18 was issued, should assess the impact of its contract on other market participants prior to awarding an in-house contract based on Article 67, item 1.12 of the Public Procurement Law, i.e. whether it has the effect of distorting competition or abusing a dominant position by the contracting authority (Hartung, 2019, p. 266). This will be particularly significant for public contracts involving a market consisting of a big number of economic operators who are interested in the contract and able to carry it out. Consequently, it might result in moving a number of contracts without a call for tenders to tender procedures and it could have the effect of reducing the number of in-house procurement procedures in Poland.

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Summary

This Article analyses the judgment of the Court of Justice of the European Union of 3 October 2019 (case C-285/18). This judgment plays an important role in the interpretation of the public procurement rules in the countries of the European Union. In particular, in those countries that have implemented the EU rules on the in-house procurement, while at the same time introducing restrictions compared to the EU rules. Current Polish regulations on in-house procurement in this area are also discussed.

Keywords: in-house procurement, Directive 2014/24/EU, judgement of the CJEU, Irgita Case.

Streszczenie

W przedmiotowym artykule dokonano analizy prawnej wyroku Trybunału Sprawiedliwości Unii Europejskiej z dnia 3 października 2019 r. (Sprawa C 285/18). Wyrok ten odgrywa istotną rolę w interpretacji przepisów dotyczących zamówień publicznych w krajach Unii Europejskiej. W szczególności w tych, które wdrożyły unijne przepisy dotyczące zamówień wewnętrznych, wprowadzając jednocześnie ograniczenia w stosunku do przepisów unijnych. Omówiono również aktualne polskie przepisy dotyczące zamówień wewnętrznych w tym obszarze.

Słowa kluczowe: zamówienia in-house, dyrektywa 2014/24/UE, wyrok TSUE, sprawa Irgita.

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