EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP AND SMES
Single Market Enforcement
E.2 – Enforcement II

Brussels, 13 January 2023
GROW.E.2/VF/kr(2023)227877

Ms Leona Gergelová Šteigrová,
Ph.D.
Deputy Minister
Ministry of Regional Development
Staroměstské náměstí 6
110 15 Prague
Czech Republic

Leona.Steigrova@mmr.cz

Dear Deputy Minister,

I refer to your request for an opinion followed by a meeting held on 9 December 2022 with DG GROW's services. We appreciate your quest for a correct transposition of Directive 2014/24/EU on public procurement into Czech law. However, please note that the opinion below is only informal, since the binding interpretation of the EU law can be given only by the Court of Justice of the EU (hereafter the Court).

We understand that your question concerns two main issues: (1) the changes in the definition of the contracting authority under the Czech law and (2) possible scenarios under which the future purchases of the ICT services at State level could be executed by a single public entity, preferably without organisation of public procurement procedure. In this regard, we would like to outline the following.

1. We understand that the amendment of Czech Law No. 134/2016 on Public Procurement (hereafter LPP) seeks to clarify the existing definition of the contracting authority in the way that your Member State, as such, would be considered as a single contracting authority by itself (per se)[1]. We believe that

([1]) See the proposed amended version of Section 4(1) of LPP:
(1) Contracting authority means
(a) the Czech Republic; in the case of the Czech Republic, organisational units of the State shall be considered as ~~separate contracting authorities~~ ***operational units with functional autonomy for award of public contracts*** *(…)*
(b) the Czech National Bank,
(c) an organisation funded by the State;
(d) a local government unit or an organisation funded thereby;
(e) *another legal person (…)*

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË – Tel. +32 22991111
Office: N105 06/104 – Tel. direct line +32 229-83666

Vitezslava.FRICOVA@ec.europa.eu

such a change in definition would comply with the definition of contracting authority for the purposes of Directive 2014/24/EU[2]. The new definition as such does not seem to go against the interpretation of contracting authority in functional terms, as required by the Court[3].

2. As for the future purchases of ICT services at the State level, we understand that the preferred variant would be the use of an independent entity in one of the situations analysed below that would not require organisation of public procurement procedures.

   Generally speaking, Member States are free to decide to provide public services with their own resources and with the resources that are quasi internal. The EU procurement law does not interfere with their discretionary powers. The freedom of Member States according to which the EU must respect national identities, inherent in their fundamental structures, political and constitutional, including local and regional self-government is guaranteed by Article 4(2) of Treaty on the EU.

   Please find here below a short analysis of the most important aspects of solutions discussed at the meeting on 9 December 2022, notably in relation to applicable case-law of the Court that provides valuable guidance in application of all concepts.

   a. Instrument or technical service

   As clarified in Recital 34 of Directive 2014/24/EU, "[*c*]*ertain cases exist where a legal entity acts, under the relevant provisions of national law, as an instrument or technical service to determined contracting authorities, is* ***obliged to carry out orders*** *given to it by those contracting authorities and has* ***no influence on the remuneration*** *for its performance. In view of its non-contractual nature, such a purely administrative relationship should not fall within the scope of public procurement procedures*" (emphasis added).

   The judgement of the Court in case C-295/05 *Asemfo*[4] gives some light with regard to the situation of a relationship between an entity carrying out orders for a public authority, without being obliged to launch public procurement procedures. The key element is that such entity has to be internal, dependent and subordinate to the public authority, has to act upon its orders and has no choice on the determination of the tariffs for its services to the public authority. In short, such entity just delivers orders based on the list of services provided at a given price imposed by the public authority.

   b. Transfer of competences

([2]) See Article 2(1) of Directive 2014/24/EU:

'contracting authorities' means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law (…)

([3]) See mainly cases C-31/87 *Beentje*, paragraph 11, C-323/96 *Commission v. Belgium*, paragraph 28.

([4]) See paragraphs 49-54.

Another situation falling outside the sphere of public procurement law is commonly known as transfer of competences. The Court clarified this concept in its judgement in case C-51/15 *Remondis* (and subsequently, in the one concerning case C-328/19 *Porin kaupunki*). As stated by the Court, an agreement concluded by two authorities to set up a special-purpose association with its own legal personality, governed by public law and receiving the **transfer** to that new public entity of certain **competences** previously held by those authorities and henceforth belonging to that special-purpose association, does not constitute a 'public contract'. Such a transfer of competences exists only if it concerns both the responsibilities associated with the transferred competence and the powers that are the corollary thereof, so that the **newly competent public authority has both decision-making and financial autonomy**.[5]

c. Vertical cooperation (in-house) with a joint control

A public contract falls outside of the scope of the public procurement law if all the conditions of a vertical cooperation (*in-house*) as set out by Article 12 of Directive 2014/24/EU are fulfilled.

The conditions of an in-house procurement are the following: a) the control that the contracting authority exercises over the legal person concerned is similar to that which it exercises over its own departments; b) a certain percentage of activities are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and c) absence of direct private capital participation (with exceptions).[6]

As for the **control criterion**, the Court ruled that it can be exercised also jointly with other contracting authorities.[7] The possibility of a joint control is reflected in Article 12(3) of Directive 2014/24/EU that specifies, in line with the applicable case-law of the Court, that contracting authorities exercise a joint control if all the following conditions are fulfilled:

(i) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;
(ii) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; and
(iii) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

The Court recently provided an important clarification[8] as for the requirement of the participation of all participating contracting authorities in the managing

---

([5]) See C-51/15 *Remondis*, paragraphs 49-54.

([6]) See Article 12(1) of Directive 2014/24/EU and applicable case-law of the Court.

([7]) C-324/07 *Coditel Brabant*, paragraphs 47-50, C-573/07 *Sea*, paragraph 59, joined cases C-182/11 and C-183/11 *Econord*, paragraphs 27-33, or joined cases C-89/19 to C-91/19 *Rieco*.

[8]) See joined cases C-383/21 and C-384/21 *Sambre & Biesme SCRL and Commune de Farciennes*, paragraphs 69 - 72.

bodies of a controlled entity, as required before the adoption of Directive 2014/24/EU ([9]). Article 12(3) now sets the conditions of the joint control independently of the control requirements as applicable under "normal" in-house (as set out in Article 12(1) of Directive 2014/24/EU). One contracting authority can thus represent more participating contracting authorities in the managing bodies of the controlled entity. However, the participating contracting authorities still have to be able to together exert a decisive influence.

As for the activity criterion (see under b) above) in the situation of a joint control, Article 12(3) of Directive 2014/24/EU says that more than 80 % of the activities of that legal person have to be carried out in the performance of tasks entrusted to it by **the controlling contracting authorities** or by other legal persons controlled by the same contracting authorities. As specified by Recital 32 of Directive 2014/24/EU, it is not important who is the beneficiary of the contract performance.

d. Vertical cooperation with a control of a controlled entity

As far as the control criterion (under a) above) is concerned, *[s]uch control may also be* ***exercised by another legal person, which is itself controlled in the same way by the contracting authority***[10].

Therefore, if in a simple in-house relation (A-B), the controlling contracting authority A has to exercise a decisive influence over both strategic objectives and significant decisions of the controlled entity B, in a "cascade" in-house relation (A-B-C), the controlling contracting authority A has to exercise decisive influence over both strategic objectives and significant decisions of the controlled entity B, which has to exercise decisive influence over both strategic objectives and significant decisions of the controlled entity C.

As for the activity criterion in a situation of a "cascade" in-house, Article 12(1)(b) of Directive 2014/24/EU applies: more than 80 % of the activities of the controlled entity C have to be carried out in the performance of tasks entrusted to it by the controlling contracting authority A or by other entities controlled by that contracting authority (this covers also controlled entity B).

There is no available case-law of the Court where the questions of a "cascade" in-house questions would be raised.[11] Therefore, in order to fulfil the conditions of a "cascade" in-house, we believe that a particular attention must be paid to the control criterion that need to be fulfilled at both levels.

e. Horizontal cooperation

As for the horizontal cooperation, we understand that it would be the least preferred option by your authorities. Nevertheless, we would like to draw your attention to the judgments of the Court in the following landmark cases on horizontal cooperation: C-480/06 *Commission v Federal Republic of Germany*

([9]) See the above mentioned Court case-law on joint control.

([10]) See Article 12(1) *in fine* of Directive 2014/24/EU

([11]) With the exception of paragraph 50 of C-295/05 *Asemfo* in the description of the roles of the national authority whose activities were questioned.

(Hamburg), C-159/11 *Ordine degli Ingegneri della Provincia di Lecce*, C-796/18 *Informatikgesellschaft für Software-Entwicklung* and C-429/19 *Remondis*, which provide important interpretation guidelines for Article 12(4) of Directive 2014/24/EU.

Finally, we would like to stress that while the present letter addresses a different although similar topic, it remains consistent with a previous letter of 1st August 2017 addressed to the Slovak Public Procurement Office, that you can find also enclosed.

Yours faithfully,

Electronically signed

Mary Veronica Tovšak Pleterski
Director

Contact:
Vítězslava FRIČOVÁ, Vitezslava.FRICOVA@ec.europa.eu

Enclosure: DG GROW opinion of 1st August 2017 addressed to the Slovak Public Procurement Office

c.c.: Javier PALMERO ZURDO, Salvatore D'ACUNTO (GROW E.2), Jean-Yves MUYLLE, Jan SALONI and Jana JÍCHOVÁ (GROW C.2)