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THE MAIN PROVISIONS OF THE LEGAL REGULATION OF THE PUBLIC PROCUREMENT SYSTEM IN THE EUROPEAN UNION

The article presents the general characteristics and peculiarities of the legal regulation of public procurement within the European Union. Public procurement is extremely important both for European integration and for states as a whole due to the fact that it is a significant sector of the economy. To date, the issue of legal regulation of public procurement is relevant throughout the world, and the direct subject is the state itself, which is interested in their maximum efficiency. The purpose of the authors is to conduct a legal analysis of the EU Directives, as well as international treaties to which this integration association is a party, establishing common standards and norms in the field of regulation of public procurement. While carrying out this research the authors used such general scientific methods as method of scientific abstraction, qualitative expert assessment, quantitative assessment and structural analysis. The theoretical significance of the study consist of the fact that the work provides theoretical conclusions that can be used in scientific and practical developments on the problematic issues raised. In conclusion, the authors notes the effectiveness of the European system of organization of public procurement, implemented on the basis of its principles and approaches, which make it possible to form effective national systems of public procurement, corresponding to the world standards.

Key words: public procurement, legal regulation, efficiency of public procurement system, European Union, World Trade Organization.

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Еуропалық одақтағы Мемлекеттік сатып алу жүйесін құқықтық реттеудің негізгі ережелері

Мақалада Еуропалық одақ шеңберіндегі мемлекеттік сатып алуды құқықтық реттеудің жалпы сипаттамасы мен ерекшеліктері қарастырылады. Мемлекеттік сатып алу еуропалық интеграция үшін де, жалпы мемлекет үшін де өте маңызды, өйткені олар экономиканың ауқымды секторын құрайды. Бүгінгі күні мемлекеттік сатып алуды құқықтық реттеу мәселесі бүкіл әлемде өзекті және тікелей субъект мемлекеттің өзі болғандықтан, ол олардың барынша тиімділігіне мүдделі. Жұмыстың мақсаты – ЕО директиваларына, сондай-ақ мемлекеттік сатып алуды реттеу саласында бірыңғай стандарттар мен нормаларды белгілейтін осы интеграциялық бірлестік қатысушысы болатын халықаралық шарттарға құқықтық талдау жүргізу. Осы зерттеуді жүргізу кезінде авторлар ғылыми абстракция әдісі, сапалық сараптамалық бағалау, сандық бағалау және құрылымдық талдау сияқты жалпы ғылыми әдістерді қолданды. Зерттеудің теориялық маңыздылығы жұмыста көтерілген проблемалық мәселелер бойынша ғылыми және практикалық әзірлемелерде қолдануға болатын теориялық қорытындылар берілетіндігінде. Қорытындылай келе, авторлар мемлекеттік сатып алуды ұйымдастырудың еуропалық жүйесінің әлемдік стандарттарға сәйкес келетін тиімді ұлттық мемлекеттік сатып алу жүйесін қалыптастыруға мүмкіндік беретін оның қағидалары мен тәсілдері негізінде іске асырылатын тиімділігін атап өтті.

Түйін сөздер: мемлекеттік сатып алу, құқықтық реттеу, мемлекеттік сатып алу жүйесінің тиімділігі, Еуропалық одақ, Дүниежүзілік сауда ұйымы.

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Основные положения правового регулирования системы государственных закупок в Европейском союзе

В статье представлена общая характеристика и особенности правового регулирования государственных закупок в рамках Европейского союза. Государственные закупки чрезвычайно важны как для европейской интеграции, так и для государств в целом в силу того факта, что они составляют существенный по объему сектор экономики. На сегодняшний день вопрос правового регулирования государственных закупок является актуальным во всем мире, и непосредственным субъектом является само государство, которое заинтересовано в максимальной их эффективности. Целью статьи является проведение правового анализа Директив ЕС, а также международных договоров, участником которых является данное интеграционное объединение, устанавливающих единые стандарты и нормы в области регулирования государственных закупок. При проведении данного исследования авторы использовали такие общенаучные методы, как метод научной абстракции, качественные экспертные оценки, количественные оценки и структурный анализ. Теоретическая значимость исследования заключается в том, что в работе даются теоретические заключения, которые могут быть использованы в научных и практических разработках по поднимаемым проблемным вопросам. В заключении авторы отмечают эффективность европейской системы организации государственных закупок, реализуемой на основе ее принципов и подходов, которые дают возможность сформировать эффективные национальные системы государственных закупок, соответствующие мировым стандартам.

Ключевые слова: государственные закупки, правовое регулирование, эффективность системы государственных закупок, Европейский союз, Всемирная торговая организация.

Introduction

The history of the formation of European law in the field of regulation of public procurement is about 60 years old. The development and deepening of economic integration between the member states of the European Economic Community (EEC) caused the emergence of legal norms in the field of public procurement regulation. The beginning of the formation of the public procurement system in this region begins with the political decision of six European states (Belgium, France, Germany, Italy, Luxembourg, the Netherlands) to start building a common market. This decision was reflected in the Treaty establishing the European Coal and Steel Community of 1951 (Treaty establishing the European Coal and Steel Community, 1951) and later in the Treaty establishing the European Economic Community of 1957 (Treaty establishing the European Economic Community, 1957), where Article 2 stated one of the main objectives of the Community – the creation of a common market. The common market was understood as a space in which the freedom of movement of production factors was guaranteed (Articles 48 and 67) (Entin 2005).

Each state procurement is an opportunity for the state to influence the market and competition in it, including protectionist policies to protect national producers and limit the rights of participants in procurement from other countries. In order to avoid such scenarios, the need to regulate procurement at a pan-European level has become evident. It should be understood that, although public procurement can be used as a means of restricting competition and creating non-tariff restrictions, but with a properly built system of legal regulation of this sphere they can become an effective tool for implementing a common economic policy, creating a transparent system of spending of budgetary funds and stimulating economic development as a whole (Puchkova, 2018: 4). Indeed, the improvement of the system of public procurement of goods, works and services is the main factor to improve the efficiency of the state budget expenditure.

In order for public procurement to become an effective tool for the growth of economic development, it was necessary to create uniform principles, norms and approaches to the organization of public procurement in all member states of the EEC. Since public procurement is an important area of economic policy for each state, European legislators took the path of harmonization of national public procurement systems. This was the most convenient way of bringing the legislation of national states in this area into conformity with common European standards (Puchkova 2018: 5).

Relevance

One of the determining factors in the development of market relations and the creation of competitive economic potential is the intensification of financing activities through the use of opportunities for state support. The main task of the national system of public procurement is to ensure the purchase of goods, works and services for state needs.

Disposing of financial resources, the state body acts as the authorized representative of the state, and therefore the expenditure of taxpayers' funds should be carried out in such a way as to ensure the maximum realization of state interests. As the world practice shows, the effective use of financial resources of the state for implementation of its activities is carried out through public procurement.

Public procurement represents a specialist yet important area of practice in the European and international business and commercial legal environment (Christopher 2006). In the implementation of trade between the member states of an integration association, it is necessary to find a balance between the interests of the state, on the one hand, and the interests of economic entities in the European Union and the entire domestic market as a whole, on the other. Especially important is the search for such a compromise in certain sectors of the economy, such as gas, water and energy supply, postal communications and telecommunications, as well as in public procurement in the field of defense and security (Kamaljan 2018 a: 6).

Methodology

The methodological and empirical basis of the research consists in applying general methods of scientific knowledge: historical, comparison, analysis, synthesis, classification; special methods: formal-legal, structural-functional, comparative-legal. The application of the above methods has led to a deep, qualitative analysis of the normative acts of foreign and domestic law concerning the legal regulation of public procurement.

In particular, on the basis of historical-legal method of cognition the study of genesis and subsequent evolution of the acts of harmonization of the EU in the field of public procurement has been carried out.

The comparative legal method has been used for the identification of similarities and differences in certain aspects of EU Member States legislation on public procurement in the context of harmonization with the similar rules of law on the subject of regulation.

Discussion and results

The scope of public procurement in the EU countries is regulated at three levels: international, regional and national.

For the effective growth of the economy, the states need to adhere to the basic principles of its implementation when making public procurement. The main source of EU law in the field of public procurement is the Treaty establishing the EEC of 1957 and the EU Directives. When considering the legal framework for public procurement, it is necessary to analyze not only the Directives governing them, but also the context in which they were adopted. Along with the Directives, the general provisions contained in the 1957 Treaty are used, which characterize the basic principles of legal regulation of public procurement (Kradinov, 2013a: 38). Within the framework of this Agreement, the EEC member States have identified the main steps for the creation of a common market. It enshrines four fundamental freedoms: the freedom of movement of goods, services, capital, and persons.

In addition to these fundamental principles of the 1957 Treaty, some general principles of law emerged from the case law of the European Court. These general principles are important because they are often used in the European Court of Justice when there are gaps in the law and present options for solutions to difficult situations. The most important ones in the context of procurement are:

- equality of treatment (equality of treatment);
- transparency;
- mutual recognition;
- proportionality (Kradinov, 2013b: 39).

The special feature of the principles is that they can be applied to the public procurement process regardless of the Directives.

Of the two main types of European legislation provided by the constituent documents of the EU (regulations as a European «law» of direct action and directive as a European «framework legislation» to be implemented in national law) in the field of legal regulation of public procurement, mainly the second (directive) is used.

Thus, in this area the main method of legal regulation of the EU is the method of harmonization, which leaves room for independent rulemaking of member states (in the part that does not contradict the EU directives). This situation is due to the fact that the single internal market, within which the EU

acts on public procurement are issued, is recognized by the constituent documents as the sphere of joint competence of the EU and member states (Kamaljan 2018 b: 12).

In order to reinforce the principles of the Treaty in the field of public procurement and to provide the necessary guidance to the Member States, the EEC has adopted a number of Directives on procurement.

In the European law, the regulation of public procurement has been carried out in accordance with two basic directives: Directive 2004/18/CE on the coordination of procedures for awarding public works, goods and services contracts (Directive 2004/18/EC, 2004) ("classical public sector directive") and Directive 2004/17/CE on the coordination of procedures for awarding public contracts in the field of water, energy, transport and postal services (Directive 2004/17/CE, 2004) ("utilities directive").

Over time, the question arose about the need to update the old Directives with new ones that would simplify and improve all public procurement procedures. Thus, the Directives adopted in 2004 contributed to the development of e-procurement, cooperation between the public and private sectors, and the liberalization of public procurement in the public sector. In accordance with their provisions, the subjects must comply with the requirement of transparency in the procedures for placing orders, which, in turn, is aimed at preventing discrimination, as well as ensuring competition within the EU. All this ensures the formation of an open public procurement market and the improvement of the functioning of the internal market.

The EU Public Procurement Directives state that all contracts must comply with all the above-mentioned principles of their implementation and restrict the freedom of movement of goods, works and services. The provisions of the Directives should not prohibit the use of measures that establish the protection of public order and State security, the health and well-being of the nation, the conservation of flora and fauna, provided that such measures do not contradict the norms of the Treaty of 1957.

In 2004, the European Commission issued a report on the functioning of public procurement markets in the EU (Report of European Commission, 2004). The report states that the EU directives on public procurement adopted in the 1970s have contributed considerably to improving competition and transparency and also to increasing cross-border activity through the requirement of invitations to tender and contract award notices above a certain threshold. The report also suggests that direct cross-border procurement remains low, at approximately 3% of the total number of bids. The rate of indirect cross-border public procurement—that is, bids won by foreign firms through their local subsidiaries—is higher, constituting close to 30% of the total bids. Application of the EU rules also contributed to:

Reducing prices paid by national, regional and local authorities for supplies, works, and services by around 30%; and

Increasing intra-EU competition and prices paid by public authorities for goods traded between Member States have been less. For example, regarding small iron and steel rails traded between EU countries, export prices dropped from around 21% in 1988-92 to over 7% in 1998-2002 (Papademetriou, 2010).

On 26 February 2014, the Council of the European Union and the European Parliament adopted two directives aimed at simplifying public procurement procedures and making them more flexible. EU countries had until April 2016 to transpose the new rules into national law (except with regard to e-procurement where the deadline was October 2018) (EU Public Procurement Directives). By this date, the EU member States were required to adopt national legislation in line with the new directives.

The old directives (directive 2004/18/EC – the 'classical public sector directive' – and directive 2004/17/EC – the 'utilities directive') were replaced with the following:

Directive 2014/24/EU on public procurement (Directive 2014/24/EU, 2014), and

Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (Directive 2014/25/EU, 2014).

The new rules seek to ensure greater inclusion of common societal goals in the procurement process. These goals include environmental protection, social responsibility, innovation, combating climate change, employment, public health and other social and environmental considerations (EU Public Procurement Directives).

The new rules that have come into force have made it easier and cheaper for small and medium-sized enterprises to bid for government contracts, ensured the best value for money in public procurement, and respected the EU's principles of transparency and competition. To encourage progress towards particular public policy objectives, the new rules also allow for environmental and social considerations, as well as innovation aspects to be taken into account when awarding public contracts.

But the success of the new legislation also depends on its effective enforcement in EU countries and the readiness of the 250 000 public buyers in the EU to capitalise on the benefits of the digital revolution, cut red tape, and make procurement processes more efficient and business-friendly for the benefit of citizens (Legal rules and implementation).

These new rules simplify public procurement procedures and make them more flexible. This will benefit public purchasers and businesses, particularly small and medium businesses. Specifically:

Simpler procedures for contracting authorities will open up the EU's public procurement market, prevent "buy national" policies and promote the free movement of goods and services. As a result, contracting authorities will obtain better value for money.

The new rules, including a new electronic self-declaration for bidders (ESPD), pave the way for the digitalisation of public procurement, which will considerably increase the efficiency of the public procurement system. For instance, only the winning company needs to submit all the documentation proving that it qualifies for a contract. This will drastically reduce the volume of documents needed for selecting companies.

Through the limiting of turnover requirements and the option of dividing tenders into lots, SMEs will gain easier access to public procurement.

Public procurement is becoming a policy strategy instrument. Under the new rules, public procurement procedures will also help public purchasers to implement environmental policies, as well as those governing social integration and innovation (Legal rules and implementation).

Thus, the regulation of public procurement in the EU is carried out by the Treaty establishing the EEC of 1957 and the Directives, which allow the EU member states to apply norms of national law that do not contradict the basic principles of public procurement contained in these documents. EU countries have the right to maintain or adopt substantive and procedural rules governing public procurement, but adapted to the provisions of the Directives.

In order to produce their effects within the Member States, the Directives need to be implemented or "transposed" into national law. Member States are therefore required to take the measures necessary to give full effect to the provisions of the Directives in national law and to ensure that no other national provisions undermine the applicability of the Directives' provisions. These measures normally take the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions (Public Procurement in the EU, 2016).

One of the main instruments of international regulation of public procurement in the EU is the documents adopted in the framework of the World Trade Organization (WTO) aimed at liberalization of public procurement markets, namely the WTO Agreement on Government Procurement of 1994 (Revised Agreement of WTO), which has had a significant impact on the development of EU public procurement law.

The European Union has been an independent participant of the WTO since its creation on January 1, 1995, but the 27 member states of the EU continue to be independent members of the organization, since not all issues discussed within the WTO refer to the exclusive competence of the EU.

Each State wishing to join the WTO accepts a package of documents that are binding on all WTO members. However, there are also non-binding agreements, including the WTO Agreement on Government Procurement, which is a very significant international document in the field of public procurement. It is up to the States to decide whether or not to join this agreement.

WTO Agreement on Government Procurement is relevant to states seeking to reform their procurement regimes and promote trade and economy. The norms of this agreement not only establish the general principles and rules of the public procurement system and its regulation, but also include obligations to expand access of companies from partner countries to public tenders.

It should be noted that the international rules of this type of trade began to develop only towards the end of the last century, since public procurement was specifically excluded from the GATT in 1947 when it was concluded. Nevertheless, as international economic relations developed, government procurement became part of the global trading system. Therefore, there was a need to develop common rules that would ensure transparency, competitiveness and non-discrimination in this market segment and would not contradict the interests of the states themselves.

Conclusion

Procurement system for the needs of the state – the system of public procurement in European countries, which has gone quite a long way of formation and development. In it, everyone is equal in relation to public procurement, the state is not considered as a separate entity that has its own needs, different from the needs of the entire population.

The European Union, using the previously accumulated experience of economic integration on various issues, was one of the first in the world to develop its own approaches in this area. Currently, the EU is one of the few regional integration organizations in the world, whose governing bodies (institutions) are authorized to issue legally binding acts on public procurement, which for entry into force do not need to be ratified by member states and can even be adopted without the consent of some of them. Moreover, the main European Union directives on public procurement also apply to the three states of the European Free Trade Association (EFTA), namely Iceland, Liechtenstein and Norway, by virtue of the 1992 agreement between the EU and EFTA establishing the European Economic Area (EEA). Nevertheless, the acts issued by the institutions of the European Union in the field of public procurement require implementation in the national legislation of each member state, as they are the acts of harmonization, not unification (Kamaljan 2018 c: 6).

The legislation of the EU countries has been developing for a long time and currently can serve as one of the best practices in this area. For example, in Great Britain (not a member of the EU since January 31, 2020) and France integral national contract systems, which include the mechanisms of management of the whole life cycle of the state order (planning – placement – execution) are formed and functioning (Kradinov 2013 c: 38).

At the same time, states, integration associations and international organizations treat differently the problems of cross-border public procurement. The general idea with which more or less all scholars agree is that public procurement is too important and requires special treatment, which cannot be strictly regulated at the transboundary level. The simplest form of regulation, including in the World Trade Organization, is the principle of non-discrimination. However, often public procurement at the transboundary level within individual organizations and associations is not regulated at all.

The main purpose of EU laws in the field of public procurement is to create equal conditions for its implementation among the member states of this integration association, which establishes minimum agreed rules for public procurement. The EU rules are incorporated into national legislation and apply to tenders whose value exceeds a certain amount in accordance with EU Directives. At the same time, the national legislation of the member States of the organization must comply with its general principles of legislation.

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