
Independence of the Office for Public Procurement*

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Summary: The regulation of public procurement fulfils an essential task for the proper functioning of states. Public procurement directly influences the efficient public spending within a state. No doubt that the process shall be supervised by an independent and qualified institution. However, is this the case? In order to answer the question, the article chooses the jurisdiction of the Slovak Republic and it explores whether the supervisory body, the Office for Public Procurement, is to be seen as independent. Due to the fact that the notion of independence is unclear, the article presents the understanding of this notion and the criteria encrypted therein, following which the notion is applied to the Office for Public Procurement and to its leadership in particular. Since it is established that there is room for improvement regarding independence of this institution, the article presents concrete proposals for improvement of independence of the Office for Public Procurement.

Keywords: Public procurement – Office for Public Procurement – De iure independence – De facto independence – Functional Independence – Political Independence

1. Introduction

The increasing mistrust of citizens towards their states is detectable all around the world. This problem is undoubtedly connected with the operating of states, i.e. with experience of citizens with state apparatus. It may be generalised that the

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functioning is not ideal, since the news are full of corruption scandals, non-transparent procedures, misconduct of state authorities etc. Significant affairs have been related to public spending.

Efficient public spending should be guaranteed by public procurement.¹ This highly complex set of rules prescribes the way how, at least in theory, to find the best offer for a particular project, either in terms of money or in terms of other relevant values, e.g. environmental protection, sustainable growth and so on.²

However, written rules tend to be ignored if there is no sanction for their infringement. This is the reason why the supervision is so crucial. Infringement of public procurement rules can be sanctioned within various fields of law, such as administrative sanctions within public procurement law³, competition law⁴, criminal law⁵, or even commercial law.⁶ In each case, the person/institution imposing the sanction is different. This article will focus on a public procurement authority. Public procurement authorities play vital role in procurement procedures. Their decisions are able to change the outcomes of public procurements.⁷

Since the notion of independence is not uniformly understood, the article will briefly present various concepts of independence and various factors which shall be fulfilled in order for an institution to be independent. As there are too many sources for this task, the article chooses, predominantly, the sources related to independence of regulators as presented by scholars and governmental and non-governmental organisations. Hence, other sources related to judicial independence, or independence as defined by judgements of European or national courts are deliberately omitted to great extent. This is justified by the fact that the definition of independence is not in the centre of interest for this article.

¹ Moreover, within the EU, it is important from internal market perspective. JEŽOVÁ, D. Public procurement in the view of the Court of Justice of the European Union decisions. *Ad Alta*, 2019, Vol. 9, No. 2, pp. 97–100.

² KOVÁČIKOVÁ, H. Uncompetitive practices in public procurement in EU/Slovak context. *European studies : the review of European law, economics and politics*, 2018, Vol. 5, pp. 283–294. KOVÁČIKOVÁ, H., BLAŽO, O. Rule of law assessment – case study of public procurement. *European Journal of Transformation Studies*. 2019, Vol. 7, No. 2, pp. 221–236.

³ See Act No. 343/2015 Coll. on Public Procurement, as amended (“*Public Procurement Act*”), Section 182.

⁴ See Act No. 136/2001 Coll. on Protection of Competition, as amended (“*Competition Act*”), Sections 38 et seq.

⁵ See, for instance, Section 266 of Act No. 300/2005 Criminal Code, as amended (“*Criminal Code*”).

⁶ One can imagine a contractual penalty to be imposed, or court proceedings based on action for damages to be started. See Act No. 513/1991 Coll. Commercial Code, as amended (“*Commercial Code*”), Sections 300–302, et Sections 373 et seq.

⁷ This flows from PATAKYOVÁ, M. T. Independence of Public Procurement Authority. In: BEV-ANDA, V. *EMAN 2019: Economics and Management: How to Cope with Disrupted Times*. Beograd: Association of Economists and Managers of the Balkans, 2019, p. 211–215.

Once the elements of independence are identified, they are applied to a chosen public procurement authority, the Office for Public Procurement which operates in the Slovak Republic (“*Office*”). Taking into account the various scandals which took place in the field of public procurement in Slovakia, one cannot deny the importance of such analysis.

Thus, the article asks which are the basic elements of independence of regulatory bodies, whether these are met by the Office and what might be done in order to improve the situation, focusing in particular on the leading persons within the Office. In order to deal with these issues, the article is organised as follows. First, the notion of independence and its elements are briefly presented. Second, the Office is described from the legal perspective and, when appropriate, from the perspective of its real functioning. Third, insufficiencies of the Office are identified, followed by proposals *de lege ferenda*. The main findings are summed up in the conclusion.

2. Independence and its Elements

There are different perspectives for the assessment of independence. First, we can distinguish between political independence and functional independence.⁸ The former refers to independence from politicians, e.g. from the government. The latter refers to independence from business. Companies and firms usually stands in the position of regulated subjects. The idea behind this aspect is that the business should not influence its own regulators.

Second, one may distinguish between *de iure* and *de facto* independence. The former looks into the set of legal rules, hence, it assesses the legislative framework based on which the institution operates. On the other hand, the latter focuses on functioning of the institution in practice. It may happen that *de iure* independence seems to be on a sufficient level, however, the real functioning of the institution is under influence of, for instance, the government.⁹

As a starting point it should be highlighted that independence does not mean a total separation between an institution on the one hand and other bodies and policies on the other. Independence can be understood as a possibility of the

⁸ ZEMANOVIČOVÁ, D. Protimonopolný úrad. In: PATAKYOVÁ, M. T. (ed.). *Efektívnosť právnej úpravy ochrany hospodárskej súťaže – Návrhy de lege ferenda. Zborník konferencie* (pp. 48–54). Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2017, pp. 48–54.

⁹ To this end, see HAYO, B., VOIGT, S. Explaining de facto judicial independence [online]. Available at: <https://www.uni-kassel.de/fb07/fileadmin/datas/fb07/5-Institute/IVWL/Forschungskolloquium/diskussionen/papier4603.pdf>

respective institution to collect the necessary information, to act when there is a need to act and in a manner that is appropriate.¹⁰

2.1. Independence in the View of OECD

In 2017, OECD issued a document dedicated to independence of regulators.¹¹ It presents 5 areas by which independence should be safeguarded, namely clarity and responsibility, transparency and accountability, financial independence, independence of leadership, and staff behaviour.

First, the document emphasises the role clarity and responsibility. Under this point, the institution should have clearly described objectives. Interactions with other government actors should be established as well.

Second, transparency and accountability should be safeguarded. The functioning of the institution should be understandable and the institution itself should present the necessary information. Timely and relevant information on the institution's performance is to be available.

Third, it is important to provide the institution with sufficient financial resources, in order to safeguard its proper functioning. We may talk about financial independence in this sense.

Fourth, the leadership of the institution cannot be overlooked. The importance of a good manager at the top of an entity does not have to be justified in great detail, since it is natural that a leader is entitled to shape the functioning of an entity to a great extent. The procedure of nomination, appointment and dismissal of the institution's leader is significantly important. Conflict of interests with both politicians and business sphere should be precluded.¹²

Last but not least, staff behaviour, as another aspect of an institution's independence, cannot be underestimated. It shall not be omitted that, at the end of the day, the performance of an entity depends on the people who form it. Therefore, the recruitment procedure for an institution's staff should be considered when an assessment of the institution's independence is at stake. Apart from the recruitment itself, ethical codes may also help to make the institution more independent.

¹⁰ ALVES, S., CAPIAU, J., SINCLAIR, A., 2015, Principles for the Independence of Competition Authorities. *Competition Law International*, 2015, Vol. 11, No. 1, pp. 13–27, p. 15.

WINTER, H. Regulatory Enforcement in the Netherlands: Struggling with Independence. In: COMTOIS, S., DE GRAAF, K. (eds.). *On judicial and quasi-judicial Independence*. The Hague: Eleven International Publishing. 2013, pp. 157–166, p. 160.

¹¹ OECD: Creating a Culture of Independence: Practical Guidance against Undue Influence. Paris: OECD Publishing, 2017.

¹² OECD: Creating a Culture of Independence: Practical Guidance against Undue Influence. Paris: OECD Publishing, 2017.

2.2. Independence in the View of an NGO

One of the well-established NGO within the Slovak Republic, INEKO Institute for Economic and Social Reforms, has recently published an analysis of independence and expertise of public institutions.¹³ The evaluating criteria were organised into four groups: creation of an institution's management and its position; removal of an institution's chief or members of management; sovereignty; co-decision making process, control and administrative procedure. Each group comprises of several elements which were indexed.¹⁴ The analysis has shown that the most independent institution is the Committee for Budgetary Responsibility which is even more independent than the Constitutional Court of the Slovak Republic. Interestingly, the least independent institution is the Financial Directorate.¹⁵

The main recommendations of INEKO consisted in evaluation of institutions' performance; open selection procedure; requirement for qualified majority voting in the parliament for the election of institutions' chiefs, or, alternatively, if simple majority is sufficient, then the President of the Slovak Republic should be materially involved, i.e. she should have right to decline the elected nominee on reasonable grounds; six-years term of the office for institutions' chiefs; partial replacement of members of collective bodies within institutions; separation of function of the chief of an institution and the appeal body's member of that institution; linking salary of key persons within institutions with the average month salary of an employee in the economy of the Slovak Republic.¹⁶

2.3. Independence in the view of scholars

Many scholars have conducted deep analysis of institutions selected by them, whereas they have paid attention to what may be a positive and what a negative

¹³ KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: <http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii>

¹⁴ KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: <http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii>, p. 13–16.

¹⁵ KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: <http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii>, p. 6–18.

¹⁶ KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: <http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii>, p. 17–18.

element of their independence. Due to limited scope of this article, we will focus on work of few particular academics.¹⁷

Zemanovičová assessed the independence of Antimonopoly Office of the Slovak Republic, which is the national competition authority in Slovakia. She focused on several aspects, such as: position of the institution; position, election and removal of the leading persons; decision-making process; appeal body; judicial review; financing. She was not satisfied with lack of requirements for a transparent selection procedure for the leader of the institution or members of the appeal body of the institution. She also pointed out the possible risks connected to the re-election for the position and monocratic decision making on the first instance of the institution. It was also proposed by her that an announcement mechanism for meeting with persons from political or business environment should be introduced.

Authors Alves, Capiau, Sinclair¹⁸ conducted a comparison of various institutions. They concentrated on regulators in the field of telecommunication, energy, railway and competition law. They observed it is important to discuss both the functional and the political independence. As to the concept of independence, they basically concluded that it means that the institution at stake acted (only) when it was necessary and by a proper remedy. The analysis of independence was related to appointment procedure for leaders of the institutions as well as rules on conflict of interests.¹⁹ Accountability and transparency of the procedures conducted by the institutions was supposed to be safeguarded for instance by reports issued by the institution and discussed in the parliament. Hearings by the parliament may be supportive as well.

Ottow²⁰ discussed the issue of independence too. She recognised that there is a tension between policy considerations, which may be legitimately set by legislator, on the one hand, and need for sufficient discretion for the institution on the other. Different criteria might be imposed for the ordinary employees and for the politico-administrative leadership of the institution. In relation to the

¹⁷ Naturally, there are many other works available, such as: VAN DE GRONDEN, J. W., DE VRIES, S. A. Independent competition authorities in the EU. *Utrecht Law Review*, 2006, Vol. 2, No. 1, pp. 32–66; LAVRIJSSEN, S., OTTOW, A. Independent Supervisory Authorities: A Fragile Concept. *Legal Issues of Economic Integration*, 2012, Vol. 39, No. 4, pp. 419–445.

¹⁸ ALVES, S., CAPIAU, J., SINCLAIR, A., 2015, Principles for the Independence of Competition Authorities. *Competition Law International*, 2015, Vol. 11, No. 1, pp. 13–27.

¹⁹ For conflict of interest, see KOVÁČIKOVÁ, H. Directive (EU) 2019/1 as Another Brick into Empowerment of Slovak Market Regulator. *YEARBOOK of ANTITRUST and REGULATORY STUDIES*, 2019, Vol. 12, No. 20, pp. 149–171, p. 161 et seq.; KOVÁČIKOVÁ, H. CONFLICTS OF INTEREST – CASE OF THE PUBLIC PROCUREMENT. *Journal Strani pravni život (Foreign Legal Life)*, in publishing.

²⁰ OTTOW, A. The different levels of protection of national supervisors' independence in the European landscape. In: COMTOIS, S., DE GRAAF, K. (eds.). *On judicial and quasi-judicial Independence*. The Hague: Eleven International Publishing, 2013, pp. 139–155.

functional independence, an attention should be paid also in relation to the job rotation between institution and business, since the former shall control the latter. Independence regarding gathering and analysing of information and adopting of appropriate measures should be secured.

3. The Office of Today

Although the elements which are necessary for an independent institution vary from one source to another, the main points remain the same. Institutions should have an independent leadership, elected in a transparent procedure. They should be accountable to a democratic assembly, yet separated from government. Their decision making procedure should be collective and institutions should have enough staff and financial resources for proper functioning. The conflict of interest should be prevented.²¹ These elements will be applied to the Office below, paying particular attention to the leadership of the Office.

3.1. The Office as an Important Institution

Before jumping into details regarding independence of the Office, let us contemplate on the powers of the Office. The powers suggest the significant influence which this institution may have on the proper functioning of public spending. It should be highlighted that the Office does not provide all public procurement procedures in Slovakia. As a rule, public procurement shall be done by an institution (contracting authority) which is in need for goods or services. It usually needs the goods or services for conducting its public tasks. However, the Office is an important supervisory authority, i.e. it observes the fulfilment of public procurement rules. In relation to the over-limit contracts, it conducts *ex ante* assessment.²² In other words, the Office controls the fulfilment of the rules even before the public procurement procedure per se starts. Apart from this special type of procurement, the Office is entitled to conduct *ex post* assessment, i.e. after a public procurement procedure takes place. It is worth mentioning that such control may be initiated not only based on a complaint of e.g. unsuccessful tendered, but also from the Office's own initiative.²³ Apart from being a “watchdog”,

²¹ In relation to application of this criteria to Antimonopoly Office of the Slovak Republic, see PATAKYOVÁ, M. T. Independence of National Competition Authorities – Problem Solved by Directive 2019/1? Example of the Antimonopoly Office of the Slovak Republic. *YEARBOOK of ANTITRUST and REGULATORY STUDIES*, 2019, Vol. 12, No. 20, pp. 127–148, p. 132–134.

²² Section 168 of the Public Procurement Act.

²³ Sections 163 et seq. of the Public Procurement Act.

the Office is also responsible for issuing guidelines, methods and even certain regulatory acts.²⁴ All in all, it may be concluded that the Office plays vital role in the public procurement field in Slovakia.

3.2. The Office and its Legislative Framework under Scrutiny

Although the significance of this public procurement authority is not open to any questions, it is interesting to note that there is no explicit legal provision which would designate the Office as an independent body. This is so in relation to the Public Procurement Act as well as Directive on public procurement²⁵, Directive on the award of concession contracts²⁶, Directive on procurement by entities operating in the water, energy, transport and postal services sectors²⁷.

As indicated above, we will mainly focus on the leadership aspect of independence provided in Sections 140–146 of the Public Procurement Act. The head of the Office is the President of the Office, which is nominated by the government, however, he or she is elected by the National Council of the Slovak Republic, i.e. the Slovak parliament. It is undoubted that the appointment by the parliament is to be seen as a positive factor, especially due to the fact that it is a collective body. However, it cannot be omitted that the Slovak Republic is a parliamentary democracy, hence, as a rule, the government has the support of the majority of the parliament. Therefore, if the government is in stable coalition of parties (or if one party has the majority in the National Council all by itself), it can basically push its favourable candidate through. The leading position of the government is supported by the fact that the government adopts a regulation based on which the details of the election procedure are established.

None the less, independence of the President of the Office is supported by the fact that the publicity of the call for “registration” of the candidates for the function is provided in law. This means that at least 90 days before the end of the term of the President in office, the government announces the call for registrations. This announcement is made public on the website of the governmental office and at least in one state-wide daily news.

The independence is also put on a higher level due to the public hearing of candidates for the office. This means that the government can be controlled

²⁴ Section 147 of the Public Procurement Act.

²⁵ 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.

²⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

²⁷ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

by civil society in the process of picking the candidate. However, all the other particularities are to be set in a governmental regulation. The provision of the Section 143 para 1 of the Act on Public Procurement, which is related to the Members of the Council of the Office, is referred to. Pursuant to this provision, the regulation of the government shall establish publication of CVs' of candidates with designation of place where they were exercising their professional practice in the field of public procurement and what entity proposed the candidate. The governmental regulation shall also establish the manner in which the reasons why a particular candidate was chosen are announced.

The term of the presidency of the Office is set to five years. As the election to the National Council (therefore arguably the change of government) occurs at least every four years, it may be assumed that the position of the President and his political independence is strengthened, since his or her term in the office is longer than the term of those who nominated and appointed him.²⁸ On the other hand, independence of the President is undercut by the fact that he may be re-elected for the function.²⁹ It may be assumed that, if the same person wants to be re-elected, he or she may act in line with the interests of people who elects them, i.e. the government and the parliament. This might be particularly true once his or her first term reaches its end.³⁰

The independence is supported by the fact that there are clearly stated reasons for the dismissal of the President. Basically, these reasons are related to committing of intentional crime, losing of legal capacity, non-performing of the function for more than 6 consequent months, or beginning of performing of an activity which is incompatible with the function of the President. As these reasons are clearly stated, the political independence of the President of the Office is strengthened, since he or she cannot be removed from the Office anytime he or she acts contrary to political interests.

As far as the requirements for the person of the President of the Office are concerned, one has to admit that these requirements are fairly brief. The legislation prescribes his or her separation from the political parties. None the less, there are no explicit requirements for work experience or formation of candidates for the position of President of the Office, apart from the requirements for the

²⁸ ZEMANOVIČOVÁ, D. Protimonopolný úrad. In: PATAKYOVÁ, M. T. (ed.). *Efektívnosť právnej úpravy ochrany hospodárskej súťaže – Návrhy de lege ferenda. Zborník konferencie* (pp. 48–54). Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2017, pp. 48–54.

²⁹ Ibidem, pp. 48–54.

³⁰ For the sake of completeness, it shall be noted that this observation is true not only for the re-election. Therefore, if a person whose term is reaching the end is promised another position in another institution, he may act in favour of the government or anyone capable to install him or her to a new function.

members of the Council, i.e. five years of experience with public procurement and accomplished university education of second degree.³¹ Moreover, the functional independence is not secured, because there are no limits on previous links of the President with the business sphere. Nowadays, the current President of the Office was active as an attorney also in the field of public procurement. Hence, it may be assumed that he may still be under influence of the business, at least indirectly. On the other hand, it is difficult to imagine that there could be a person who would be completely independent from the political sphere as well as business sphere. Such person might be a pure academic, however, in that case it might be argued that he or she lacks practical experience with the field for being its chief. To find an ideal candidate is a utopia. Yet, it may be argued that virtually no legal criterion in sense may be seen as insufficient.

In relation to the two Vice-Presidents of the Office, similar provisions take places. The major difference is in proposing and appointing of them. As oppose to the President of the Office, the proposal from candidates comes from the President of the Office and the Vice-Presidents are appointed by the government instead of the parliament. The President of the Office also determines the issues which each of the Vice-Presidents shall be responsible for, as well as the order in which they substitute him.

Regarding Vice-Presidents, it is important to note that currently the only Vice-President, Juraj Bugala, is being called to resign by the President of the Office. The reason for his unfitness in the eyes of the President of the Office is the fact that, before he took his position within the Office, he had allegedly breached law in his attorney's practice. The first-instance court decisions were issued and fines were imposed on the law office.³² However, since the government is the body entitled to remove a Vice-President from his position, the decision of the government needs to be taken. The government hesitates with the removal, since the Vice-President is one of the members of the Council of the Office and, the Prime-Minister claims that he does not want to make the Council of the Office dysfunctional.³³ The Prime-Minister wants to wait till the vacant position in the Council of the Office are filled in.³⁴

³¹ Section 144 para. 1 of the Public Procurement Act.

³² TASR: Podpredseda Úradu pre verejné obstarávanie: Nie sú dôvody na moje odvolanie [online]. Available at: <https://spravy.pravda.sk/domace/clanok/538891-podpredseda-uradu-pre-verejne-obstaravanie-nie-su-dovody-na-moje-odvolanie/>

³³ Currently, the Council of the Office misses two regular members and one Vice-President, i.e. it has 6 out of 9 members. See: ÚVO: Členovia rady úradu [online]. Available at: <https://www.uvo.gov.sk/o-urade/rada-uradu/clenovia-rady-uradu-373.html>; and ÚVO: Vedenie úradu [online]. Available at: <https://www.uvo.gov.sk/o-urade/vedenie-uradu-36a.html>

³⁴ TURČEK, M., BARIAK ml., L. *Pellegrini*: Čoskoro odvoláme podpredsedu ÚVO Bugalu [online]. Available at: <https://www.aktuality.sk/clanok/757756/pellegrini-coskoro-odvolame-podpredsedu-uvo-bugalu/>

Apart from the leadership of the Office itself, there is also another body which plays a vital role in the functioning of the Office. The Council of the Office is the appeal body against first-instance decisions of the Office. It consists of the President, the Vice-Presidents and six other members. The President is also the president of the Council, and the same applies to the Council's vice-presidents. Let us now zoom in on the appointment procedure of these other members.

The procedure is to great extent similar to the appointment of the President or the Vice-Presidents. The other members are appointed by the government. The manner of selection of them is specified in the regulation of the government pursuant to Section 143 para 1 of the Act on Public Procurement mentioned above. It should be taken positively that the other members cannot be employees of the Office. This means that two-thirds of the Council are occupied by persons outside of the Office. The term of the other members is for five years.

As to the personal requirements, the other members shall be citizens of the Slovak Republic, have full legal capacity and, in general, no crime record. Moreover, they shall have a university master degree and at least five years of practice in the public procurement sector.

4. The Office of Tomorrow

After analysing the current position of the Office in light of the elements of independence, we may now look into what can be improved from *de iure* perspective. We will follow the insufficiencies suggested in the previous part and we will suggest various proposals *de lege ferenda*. As this article is devoted to independence with a special attention given to the leading persons of the Office, we will divide our proposals to four groups: independence in general; position of the President and Vice-Presidents of the Office; position of the Council; and appointment process.

First and foremost, there is a lack of explicit legal provision which would describe the Office as an independent institution. It is true that a mere proclamation in the Public Procurement Act may not have a direct impact, however, we believe that such important institutions as public procurement authorities, which have public spending supervision in their agenda, should be described as independent authorities.

Second, it is appalling that the criteria which should be met by the future chief of the Office are so brief. In fact, we may imply that there are only two professional requirements – to have a professional experience in the field of public procurement for at least five years, and to have a Master or Engineer degree.³⁵

³⁵ These requirements flow from Section 144 para. 1 of the Public Procurement Act, i.e. they are related to members of the Council. Since the President is also a member of the Council, it is

We propose that these criteria should be more elaborated. It is true that the Slovak Republic, having only few millions of citizens, cannot set the threshold in such way that virtually two persons will them. However, it is doubtful that more precise requirements cannot be implemented. For instance, the professional experience with public procurement might be elaborated on. Practical as well as academic experience should be accepted. Moreover, other capabilities and skills should be required, such as managerial skills, language skills, personal integrity and so on.

Drifting away from professional criteria, the Public Procurement Act requires that the President and the Vice-Presidents of the Office are neither members of political parties nor act in their name or in their benefit.³⁶ It is advisable to insert a “vacant” period, during which a candidate should not be member of a political party. This would prevent last-minute resignations from political parties. What is even more urgent is to safeguard functional independence of the chiefs of the Office. For instance, the current Vice-President was claimed to have strong connections with influential entrepreneurs.³⁷

Regarding the possibility of re-election, it is advisable to change the current possibility to hold two consecutive five year terms to one longer term of, for instance, seven years. In such way, political independence of the President and the Vice-Presidents will be increased.

Third, in relation to the Members of the Council, apart from the President and the Vice-President, four out of six members currently hold the position. It is interesting to point out that each member has been employed in a public body such as a Ministry. One of them is even now the head of the department for public procurement on the Ministry of Education.³⁸

There are several propositions which should be considered. Firstly, the inter-connection between the Council and the leadership of the Office bears several disadvantages.³⁹ It is proposed to have maximum of one person of the leadership

possible to interpret the provision in such way that the President of the Office himself or herself should meet the criteria too.

³⁶ Section 141 para. 3 of the Public Procurement Act.

³⁷ TREND.SK: ÚVO má nového kontroverzného podpredsedu, Juraj Bugala robil s Kmotrikom [online]. Available at: <https://www.etrend.sk/ekonomika/uvo-ma-noveho-kontroverzneho-podpredsedu-juraj-bugala-robil-s-kmotrikom.html>

³⁸ ÚVO: Členovia rady úradu [online]. Available at: <https://www.uvo.gov.sk/o-urade/rada-uradu/clenovia-rady-uradu-373.html>

³⁹ The negative consequences of this constellation are seen nowadays, when one of the Vice-Presidents should be removed from his office, however, only six out of nine members of the Council will be present after his removal. Therefore, as mentioned above, the Prime-Minister proposed to first elected the remaining members of the Council and only subsequently removed the Vice-President from his position.

of the Office involved also in the Council. Secondly, the separation of the Office as the supervisory body from the contracting authorities which it is supposed to supervise is blurred. This should be changed and a balance between representation of people from private sector and public sector should be observed. Thirdly, more requirements for the field of specialisation of the Members of the Council should be presented. For instance, pursuant to Competition Act, the Council of the Antimonopoly Office shall consist of at least two persons with legal education and at least two persons with economic education.⁴⁰ Even this may be considered as insufficient.⁴¹ Fourthly, it is open to consideration to change the possibility to serve for two consequential terms of five years to only one term of, for instance, seven years. Fifthly, partial change of the members should be established, in order to make the practice of the Council more consistent.⁴²

Fourth, the involvement of the parliament in the nomination process of the President of the Office is undoubtedly appropriate. However, a simple majority may not be sufficient to safeguard a separation of the nominee from the government, hence, political independence may not be completely safeguarded. It is interested to point out the propositions presented by INEKO. Pursuant to them, members of parliament will choose from all the candidates which fulfil the criteria. The election is done in two rounds⁴³, whereas if no candidate is chosen in the first round⁴⁴, the two candidates with the highest number of votes will continue to the second round. If the candidate is chosen by a simple majority, the President will be entitled to refuse the appointment of the candidate based on significant reasons.⁴⁵ However, if the candidate receives more than qualified majority of all members of parliament, the President will have no option but to appoint the nominee.⁴⁶

This is undoubtedly an interesting proposition. It is questionable whether the procedure should be so complex. It might be sufficient if a qualified majority for

⁴⁰ Section 19 para 3 of the Competition Act.

⁴¹ PATAKYOVÁ, M. T. Inštitúcie vystupujúce v prípadoch týkajúcich sa súťažného práva a ich nezávislosť. *ACTA FACULTATIS IURIDICAE UNIVERSITATIS COMENIANAE*, 2019, Vol. 38, No. 2, pp. 256–269.

⁴² Similar partial change is well-established in relation to, for instance, judges in the Court of Justice of the EU.

⁴³ This proposition took inspiration from Act No. 532/2010 on Radio and Television of Slovakia, as amended.

⁴⁴ It means that no candidate receives simple majority of votes from the presented members of parliament.

⁴⁵ Nowadays, it is not clear how much discretion the President has in her decision not to appoint a candidate. See, for instance, PATAKYOVÁ, M., PATAKYOVÁ, M. T. New challenges to democracy: Slovakia. *European review of public law*, 2015, Vol. 27, No. 1, pp. 483–496.

⁴⁶ KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: <http://www.ineko.sk/clanky/analyza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii>, pp. 28, 29.

the election is required, provided that high level of transparency is guaranteed in the selection of the candidate. In this regard, taking inspiration from nomination of candidates for constitutional judges, candidates for the position of the President of the Office could come not only from the government⁴⁷, but also from other subjects, such as individual members of parliament; the President of the Constitutional Court of the Slovak Republic; the President of, or five members of, the Judicial Council of the Slovak Republic; the President of the Supreme Court of the Slovak Republic; the Public Defender of Rights, i.e. the Slovak ombudsperson; bar associations and scientific institutions active in the field of law.⁴⁸ If so many persons are entitled to propose candidates, there is a higher chance that candidates will be outside of political sphere.

Plus, not only the election of the President of the Office, but also the election of the Vice-Presidents should be improved. Currently, the candidates come from the President of the Office and they are appointed by the government. It is advisable to extend the number of subjects which may propose candidates. Public hearing should also be held.

In relation to the members of the Council, the involvement of the parliament should be considered, as the Council is a crucial body which serves as appeal body. Although the process should be relatively transparent, it is still fully up to the government who will or will not be a member of the Council. Bearing in mind that the Council is the appeal body of the Office and that the Office controls public spending, this constellation might be seen as insufficient. The public hearing should be held and this requirement should be explicitly stated in the Public Procurement Act.

5. Conclusion

This article dealt with several questions. Firstly, it asked what are the basic elements of independence of regulatory bodies. It was established that, although independence may comprise various elements, the main elements are: independence of leadership, financial independence, independence from politicians/government, independence from regulated subjects, accountability of the institution. Secondly, focusing on the first mentioned element, we analysed whether leadership of the Office is sufficiently independent. We spotted several insufficiencies. To sum them up, the statutory requirements are brief. The *de iure* independence

⁴⁷ The government is currently the only subject entitled to make the proposition. See Section 141 para 1 of the Public Procurement Act.

⁴⁸ Section 15 of the Act No. 314/2018 Coll. on Constitutional Court of the Slovak Republic, as amended.

would be supported by more precise educational and professional requirements for the President and Vice-Presidents of the Office, as well as requirements towards functional independence. The latter may be secured e.g. by making relationships of the leaders of the Office with the business sphere more transparent. This leads us to, thirdly, proposals *de lege ferenda*. These may be divided into four groups: proposals regarding independence in general; proposals regarding position of the President and Vice-Presidents of the Office; proposals regarding position of the Council; and proposals regarding appointment process.

The Office is of crucial importance for proper functioning of the Slovak Republic as a democratic state governed by rule of law. Bearing in mind the extensive amount of scandals related to public procurements, the legislator should do as much as possible to improve *de iure* independence of the Office. This would undoubtedly help the Office to be seen as an objective supervisor over complex procedures of public procurements. It remains to be seen what the future brings in this regard.

List of references

- ALVES, S., CAPIAU, J., SINCLAIR, A., 2015, Principles for the Independence of Competition Authorities. *Competition Law International*, 2015, Vol. 11, No. 1, pp. 13–27.
- HAYO, B., VOIGT, S. Explaining de facto judicial independence [online]. Available at: <https://www.uni-kassel.de/fb07/fileadmin/datas/fb07/5-Institute/IVWL/Forschungskolloquium/diskussionen/papier4603.pdf>
- JEŽOVÁ, D. Public procurement in the view of the Court of Justice of the European Union decisions. *Ad Alta*, 2019, Vol. 9, No. 2, pp. 97–100.
- KOVÁČIKOVÁ, H., BLAŽO, O. Rule of law assessment – case study of public procurement. *European Journal of Transformation Studies*. 2019, Vol. 7, No. 2, pp. 221–236.
- KOVÁČIKOVÁ, H. CONFLICTS OF INTEREST – CASE OF THE PUBLIC PROCUREMENT. *Journal Strani pravni život (Foreign Legal Life)*, in publishing.
- KOVÁČIKOVÁ, H. Directive (EU) 2019/1 as Another Brick into Empowerment of Slovak Market Regulator. *YEARBOOK of ANTITRUST and REGULATORY STUDIES*, 2019, Vol. 12, No. 20, pp. 149–171.
- KOVÁČIKOVÁ, H. Uncompetitive practices in public procurement in EU/Slovak context. *European studies: the review of European law, economics and politics*, 2018, Vol. 5, pp. 283–294.
- KUŠNIRIK, A. *INEKO Analýza. Ako posilniť nezávislosť a odbornosť verejných inštitúcií* [online]. Available at: <http://www.ineko.sk/clanky/analiza-ako-posilnit-nezavislost-a-odbornost-verejnych-institucii>
- LAVRIJSEN S., OTTOW A. Independent Supervisory Authorities: A Fragile Concept. *Legal Issues of Economic Integration*, 2012, Vol. 39, No. 4, pp. 419–445.
- OECD: *Creating a Culture of Independence: Practical Guidance against Undue Influence*. Paris: OECD Publishing, 2017.

- OTTOW, A. The different levels of protection of national supervisors' independence in the European landscape. In: COMTOIS, S., DE GRAAF, K. (eds.). *On judicial and quasi-judicial Independence*. The Hague: Eleven International Publishing, 2013, pp. 139–155.
- PATAKYOVÁ, M. T. Independence of Public Procurement Authority. In: BEVANDA, V. (ed.). *EMAN 2019: Economics and Management: How to Cope with Disrupted Times*. Beograd: Association of Economists and Managers of the Balkans, 2019, pp. 211–215.
- PATAKYOVÁ, M. T. Independence of National Competition Authorities – Problem Solved by Directive 2019/1? Example of the Antimonopoly Office of the Slovak Republic. *YEARBOOK of ANTITRUST and REGULATORY STUDIES*, 2019, Vol. 12, No. 20, pp. 127–148.
- PATAKYOVÁ, M. T. Inštitúcie vystupujúce v prípadoch týkajúcich sa súťažného práva a ich nezávislosť. *ACTA FACULTATIS IURIDICAE UNIVERSITATIS COMENIANAE*, 2019, Vol. 38, No. 2, pp. 256–269.
- PATAKYOVÁ, M., PATAKYOVÁ, M. T. New challenges to democracy: Slovakia. *European review of public law*, 2015, Vol. 27, No. 1, pp. 483–496.
- TASR: Podpredseda Úradu pre verejné obstarávanie: Nie sú dôvody na moje odvolanie [online]. Available at: <https://spravy.pravda.sk/domace/clanok/538891-podpredseda-uradu-pre-verejne-obstaravanie-nie-su-dovody-na-moje-odvolanie/>
- TREND.SK: ÚVO má nového kontroverzného podpredsedu, Juraj Bugala robil s Kmotříkom. [online]. Available at: <https://www.etrend.sk/ekonomika/uvo-ma-noveho-kontroverzneho-podpredsedu-juraj-bugala-robil-s-kmotrikom.html>
- TURČEK, M. BARIÁK ml., L. Pellegrini: Čoskoro odvoláme podpredsedu ÚVO Bugalu [online]. Available at: <https://www.aktuality.sk/clanok/757756/pellegrini-coskoro-odvolame-podpredsedu-uvo-bugalu/>
- ÚVO: Členovia rady úradu. [online]. Available at <https://www.uvo.gov.sk/o-urade/rada-uradu/clenovia-rady-uradu-373.html>
- ÚVO: Vedenie úradu. [online]. Available at <https://www.uvo.gov.sk/o-urade/vedenie-uradu-36a.html>
- VAN DE GRONDEN, J. W., DE VRIES, S. A. Independent competition authorities in the EU. *Utrecht Law Review*, 2006, Vol. 2, No. 1, pp. 32–66.
- WINTER, H. Regulatory Enforcement in the Netherlands: Struggling with Independence. In: COMTOIS, S., DE GRAAF, K. (eds.). *On judicial and quasi-judicial Independence*. The Hague: Eleven International Publishing. 2013, pp. 157–166.
- ZEMANOVIČOVÁ, D. Protimonopolný úrad. In: PATAKYOVÁ, M. T. (ed.). *Efektívnosť právnej úpravy ochrany hospodárskej súťaže – Návrhy de lege ferenda*. Zborník konferencie (pp. 48–54). Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2017, pp. 48–54.