Journal of Security and Sustainability Issues *www.lka.lt/index.php/lt/217049/*
ISSN 2029-7017/ISSN 2029-7025 online
2014 Volume 4(2): 147–158
http://dx.doi.org/10.9770/jssi.2014.4.2(4)

IN-HOUSE PROCUREMENT EXCEPTION: THREAT FOR SUSTAINABLE PROCEDURE OF PUBLIC PROCUREMENT?

Virginijus Kanapinskas[1], Žydrūnas Plytnikas[2], Agnė Tvaronavičienė[3]

[1,2,3] Mykolas Romeris University, Ateities st. 20, LT-08303 Vilnius, Lithuania

E-mails: [1]virginijuskanapinskas@yahoo.com; [2]zydrunas.plytnikas@hotmail.com; [3]a.tvaronaviciene@mruni.eu

Received 25 August 2014; accepted 20 October 2014

Abstract: The article analyses an in-house procurement concept in the contexts of scientific doctrine, substantive law and legal practice. The 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 is discussed in the part of provisions regulating cases where a public contract between public entities is not a subject to public procurement procedures. In addition, statistical data of in-house procurements in Lithuania are presented and threats of in-house procurement concept application as well as possibilities of improvement thereof are assessed.

Keywords: sustainability, corruption, in-house procurement, public procurement

Reference to this paper should be made as follows: Kanapinskas, V.; Plytnikas, Ž.; Tvaronavičienė, A. 2014. In-house procurement exception: threat for sustainable procedure of public procurement?, *Journal of Security and Sustainability Issues* 4(2): 147–158. DOI: http://dx.doi.org/10.9770/jssi.2014.4.2(4)

JEL Classifications: K10

1. Introduction

Sustainability issues in public procurement can be presented as well known and widely discussed topic. Most common approach to this issue can be disclosed by analysing three core aspects: the best meet of the contracting authority's needs, the lowest total cost over the lifetime of the product, the sensitivity to the environment, and use social impact tools through acquisitions (Vasiliūnaitė 2014). In general, the concept of sustainable public procurement may be defined as the acquisition most consistent with the needs of the contracting authority that is actively directed to ensure the economic, social and environmental balance (Tvaronavičienė 2012). Still sustainability issues in this field cannot be restricted by understanding public procurement as a tool for stimulation of some socially or environmentally oriented needs of society. Another side of sustainability in public procurement is a necessity to guarantee transparency and competition during the procedures of governmental procurements. It can be called sustainability in procurement procedure. Public sector concentrate in its hand huge purchasing power, what opens the questions of private and public interest conflict and corruption. Sustainable public procurement in this approach may be understood as a process which provides equal opportunities and high level of competition for all market players as well as preserves necessity of transparency and accountability of purchasing authorities decisions. This area in temporary world is a high-profile topic both in legal doctrine and economics. In this article, one of the most important component of sustainable procedure of public procurement, i.e. in-house procurement exception will be discussed.

The public procurement law is apparently one of the

most particularly regulated field in the legal system of the European law. Besides the provisions of substantive law, interpretation and equitable construction thereof that is commonly used by the ECJ in its practice, is also essential. Notably, in the event of in-house procurement, the first signs of such exception to public procurement were born out of ECJ case-law and their development and extensive use forced transferring them to the substantive law, i.e. directives on public procurement. It is to be noted that this was done as recently as in 2014. This topic continues to appear in the spotlight of public procurement law specialists scientists and theorists; and institutionalisation of this concept on regulatory level still has not eliminated its doubtfulness. In spite of the comprehensive case-law of the ECJ, in recent decades, criteria and conditions for exception to general public procurement procedures have been argued controversially within the EU authorities and member states. Application of each exception to public procurement is questionable as deviations from the general rules often create preconditions for violations of such procurement principles as transparency, accountability, openness, and equality of suppliers' rights. This also applies to in-house procurement exception, because its use may give rise to corruption, non-transparent purchasing, threaten procurement efficiency and fair competition. In-house procurement essentially eliminate competition which is among fundamental grounds of the EU public procurement law. Competition's necessity and benefits for public procurement is beyond doubt because only competition enables suppliers to emulate each other's strengths and to fight for the market, which means lower prices for goods and services and higher quality. Basically only competition within public procurement can ensure effective use of public funds.

It should be noted that in spite of difficulty and relevance of the situation, threats of in-house procurement and the concept's improvement feasibility have not been extensively analysed in legal science. The following foreign scientists that analysed individual cases of the ECJ practice should be mentioned: Pedersen, Olsson (2010), Birkelund (2010), Cintioli (2014), Burgi and Koch (2012), Perin and Casalini (2009), Hausmann and Queisner (2013) etc. It should be emphasized that all these works for the most part describe and interpret the ECJ's case-law, but do not examine the necessity and the benefits of in-house procurement as well as the threat thereof to sustainability of public procurement procedures. As for Lithuanian law-scholars, doc.dr. Soloveičikas should be mentioned. The scientist investigated the concept of in-house procurement as early as in 2009 when the concept had not yet been accepted in Lithuanian and the EU substantive law. Dr. Soloveičikas proposed to introduce the concept of in-house procurement to the substantive law of the Republic of Lithuania; this was basically done in 2010. Although the concept has been continuously improved in order to prevent possible abuse of in-house procurement exception, however the related laws and application thereof in the Republic of Lithuania has not been considered so far. This study will deepen the awareness of the issue and complement the public procurement law science by the new knowledge and insights. From a practical point of view, the investigation could be used in the formulation and implementation of policy in the field of public procurement, as well as for the improvement of legal regulation of the concept of in-house procurement.

The aim of the study is to analyse the concept of in-house procurement in public procurement law as well as to determine feasibility of the improvement of its legal regulation in the Republic of Lithuania. The object of the study is an interface of the legal regulation of in-house procurement concept and the practical implementation thereof in the view of promotion of fair competition and rational use of public funds.

In the study, the theoretical research methods of systematic analysis, analysis of documents, observation, and generalisation as well as comparative methods have been applied. The method of document analysis was used in order to obtain the information, to qualitatively investigate scientific publications of social sciences, various laws, and legal practice documents relating to in-house procurements. The qualitative analysis of the documents is based on an intuitive understanding and summarising of the content of the documents as well as the logical conclusion. One of the authors worked for 4 years at the position of the director of Public Procurement Office of the Republic of Lithuania and gained extensive professional experience in the field of public procurement. The systematic analysis method was used for the complex (in the levels of scientific doctrine, substantive law and legal practice) examination of the problematic areas of in-house procurement concept within the

pubic procurement law. The comparative method was applied to compare different events of in-house procurement and case-law related to the study object. The generalisation method was used for summarising data collected and analysed as well as for defining of conclusions and proposals.

2. The Concept of In-house Procurement in European Union Public Procurement Law

In-house procurement is an exception to the general legal regulation of public procurement. Consideration shall be given to the fact that the concept of in-house procurement in the European public procurement law was developed by the European Court of Justice (hereinafter referred to as the ECJ), for instance, in its judgement of 18 November 1999 in the case Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (ECJ 1998) where the court determined the conditions for the relations between contracting authority and the supplier to be in-house relationship: first of all, the contracting authority exercises over a person (supplier) legally distinct from that authority a control which is similar to that which it exercises over its own departments; and, secondly, that person carries out the essential part of its activities with the controlling local authority or authorities, i.e. the activities of the internal entity are devoted principally to that authority and any other activities are only of marginal significance. In the EU public procurement law, these two conditions are broadly known as Teckal criteria. In order the contracting authority's contracts concluded with a legally independent entity to be recognised an an in-house procurement, it is necessary that both of the above conditions exist and are applied together. In interpreting identical nature of control and activities not only formal, but together estimation criteria shall be applied. Case-law of the ECJ explains that the Teckal criteria comprise an exception to the rules of public procurement law of the European Union (hereinafter referred to as the EU) and shall not be subject to extensive interpretation. There must exceptional circumstances exist justifying a deviation from the rules, and the proof of legitimacy thereof lies with the person seeking to use them.

As already mentioned above, for a long time, the rules under the concept of in-house procurement, and the criteria for its practical implementation have not been regulated neither in the EU public procurement law nor in the Law on Public Procurement of the Republic of Lithuania. The concept was developed by the ECJ, the decisions of which are considered sources of law in the broad sense in the EU Member States, the national courts must follow them. According to D.Soloveičikas, absence of regulation of in-house procurement exception in the LPP shall be considered a defect of the law. The ECJ jurisprudence on Teckal exception was sufficiently coherent and defined in order to establish this exception with national public procurement law (2009).

Transactions entered into by two legally independent entities - the contracting authority and the supplier - are recognized as a public contract. An exception to this legal regulation is made for the so-called in-house relationship, i.e. relationship, based on internal control. In-house procurement can be understood in two ways (Soloveičikas 2009). In the strict sense, the internal transactions include actions where a body governed by public law awards a contract to its unit having no independent legal status. In other words, the contracting authority is allowed to acquire goods, services or works without a public tender, if the supplier is not formally separated and independent from the contracting authority in decision-making. ECJ in its judgement of 11 January 2005 in the case Stadt Halle and RPL Lochau (ECJ 2005) stated 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. In a broad sense, in-house procurement may also include situations in which contracting authorities conclude contracts with companies having an independent legal status but controlled by the authorities. The ECJ names such situations as institutionalised or vertical cooperation that have to meet the above mentioned Teckal criteria. It means that contracts concluded with state-owned entity shall not be considered public procurement if the contracting authority controls the entity similarly as it controls its own departments and if the essential part of its activities is performed with the contracting authority (ECJ 1999).

There is no doubt that the contracting authority controls a legally separate entity (company) as its administrative divisions, if it participates in such a company solely, i.e. it is the only shareholder of the supplier. In this case, interests of the contracting au-

thority, which owns all capital of the subsidiary, and the interests of the company are essentially the same. However, in the practice of in-house procurement, there are situations where a third private party participates, even in a small part, in the ownership of the company (supplier), share of which is owned by the contracting authority concerned. In its case-law, the ECJ states that any private capital investment in an undertaking follows considerations proper to private interests and pursues objectives of a different kind. According to the ECJ, the participation, even as a minority having no veto right, of a private undertaking in the capital of a company excludes the possibility of the contracting authority exercising over that company a control similar to that which it exercises over its own departments. In addition, 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, in particular in that such a procedure would offer a private undertaking with a capital presence in that undertaking an advantage over its competitors (ECJ 2005). The control is considered identical to the control over the own departments when the authority intends to impact the decisions of the entity (supplier) and such impact is decisive and aimed to strategic goals and significant decisions. The control identical to the control over the own departments is not necessarily individual. Where several public authorities decide to perform public services task by establishing joint undertaking, one of those authorities may exercise the management of a public service together with all other authorities, controlling the undertaking similarly to the control they exercise over their own departments when it is exercised by those authorities jointly. The Court has also noted that where several public authorities exercise identical control, the procedure used in adopting collective decisions and the share of the controlling authority are legally immaterial.

When analysing the control exercised by the authorities, there may appear a question concerning in-house procurement exception where the control is exercised indirectly, i.e. through another legal entity (e.g. holding). Following the ECJ case-law (e.g. European Court of Justice Judgement of 11 May 2006 Carbotermo SpA and Consorzio Alisei v Comune di Busto Arsizio, AGESP SpA), the mere fact of indirect control of the company (supplier) (without assessment of other criteria) does not mean the company (supplier) is controlled efficiently. Determining whether the contracting authority controls the company (supplier) as its own departments shall include reference to all legal provisions and essential circumstances. Such investigation shall indicate whether the company for which the contract was awarded is controlled in the manner where the contracting authority can decisively influence both strategic goals and essential decisions of the company. Therefore, the mere fact that the contracting authority, alone or together with other public authorities, owns all of the capital of the company with which the contract is concluded, reflects the probability, but does not ensure that the contracting authority controls the company the same way as its own divisions. On the other hand, indirect control over the company (supplier) can be recognised as similar to the control over own departments if such indirectly controlled company is required to carry out the orders given it by the public authorities and is not free to fix the tariff for its actions (ECJ 2007).

Contracting authority can not function without human, intellectual and material resources which are necessary for the operation of the organisation. In some cases, public procurement procedures may be waived if the company (supplier) operates its authorities in favour and for meeting the needs of the controlling authority. The ECJ has pointed out that for this condition to be met, it is necessary to evaluate all the circumstances, including quantitative (eg., turnover, income) and qualitative (eg., part of the activities carried out in favour of the contracting authority in the context of overall activity, the nature of the activity in the market) criteria (ECJ 2007).

The ECJ stated in its later judgements (eg. European Court of Justice judgement of 9 June 2009 Commission v Germany) that vertical cooperation shall not be the only way of public entities' cooperation not falling under the EU rules on public procurement, i.e. there could be cases where solely public authorities performing the public interest tasks in cooperation with other public authorities by using their own resources, pursuing common objective and based on mutual rights and obligations being of greater significance than performance of a task for remuneration. The ECJ calls such cases horizontal and (or) non-institutional cooperation.

Summarising the ECJ case-law in the field of in-

house procurement exception, it can be stated that public contracts between public entities shall not be subject to public procurement rules in a case all of the following conditions be fulfilled: a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments; b) 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 authorities or by other legal persons controlled by the same contracting authorities; c) 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 contracting authority is considered controlling a legal person similarly to the way it exercises over its own departments when it makes decisive impact to strategic goals and significant decisions of the entity under control. Such control may be carried out by another legal entity, which is itself in the same way controlled by the contracting authority.

In this respect it should be noted that the 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 (hereinafter referred to as the Directive 2014/24/EU) summarise the aforesaid ECJ case-law and clearly defines provisions for regulation of in-house procurement exception. Article 12 of the Directive 2014/24/EU contemplates another cases where general procurements procedures need not to be applied. Paragraph 2 of Article 12 of the Directive 2014/24/EU provides that the aforesaid rules also apply where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority, or to another legal person controlled by the same contracting authority, provided that there is no direct private capital participation in the legal person being awarded the public contract 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.

Paragraph 3 of Article 12 of the Directive 2014/24/EU states that a contracting authority, which does not exercise over a legal person governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract to that legal person without applying the Directive. In such a case all of the following conditions shall be fulfilled: a) the contracting authority exercises jointly with other contracting authorities a control over that legal person which is similar to that which they exercise over their own departments; b) 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 authorities or by other legal persons controlled by the same contracting authorities; c) 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. Following the Directive 2014/24/EU, for the purposes of point (a) of the first subparagraph, contracting authorities exercise joint control over a legal person where all of the following conditions are fulfilled: 1) 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; 2) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person; 3) the controlled legal person does not pursue any interests which are contrary to those of the controlling contracting authorities.

Paragraph 4 of Article 12 of the Directive 2014/24/EU regulates relations exclusively between two or more contracting authorities where their contracts fall outside the scope of the Directive. For this purpose, all of the following conditions shall be fulfilled: a) the contract establishes or implements a cooperation between the participating contracting authorities with the aim of ensuring that public services they have to perform are provided with a view to achieving objectives they have in common; b) the implementation of that cooperation is governed solely by considerations relating to the public interest; c) the participating contracting authorities perform on the open market less than 20 % of the activities concerned by the cooperation. Paragraph 5 of Article 12 of the Di-

rective 2014/24/EU states that for the determination of the percentage of activities concerned, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration. Where, because of the date on which the relevant legal person or contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover, or alternative activity based measure such as costs, are either not available for the preceding three years or no longer relevant, it shall be sufficient to show that the measurement of activity is credible, particularly by means of business projections etc.

Mentioned provisions of the Directive 2014/24/EU are welcome because they provide greater legal clarity to the application of procurement rules for public sector entities' contracts, as well as precondition EU Member States, as well as contracting authorities for a uniform interpretation of the ECJ case-law in this area. The evaluation of the said provisions leads to the conclusion that procurement rules should not restrict the freedom of public authorities to carry out public service tasks assigned thereto by using their own resources, including the ability to cooperate with other public institutions. On the other hand, it is necessary to ensure that public-public cooperation does not distort competition in respect of private economic operators and the relevant service provider is not placed in a privileged position over its competitors. Taking in consideration the above, further analysis of the threats of in-house procurement is appropriate.

3. The Threats of In-house Procurement

Public procurement is intended to enable the contracting authorities to buy the necessary goods, services or works making a rational use of the state budget. Part 3 of Article 46 of the Constitution of the Republic of Lithuania provides that the State shall regulate economic activity so that it serves the general welfare of the Nation (Constitution of the Republic of Lithuania 1992). Considering that, it can be said that the liberalisation of public procurement must be coordinated with the constitutional duty of public authorities to defend public financial interests, to limit the opportunities for corruption and to ensure a transparent and rational use of state budget funds in public procurement.

The concept of in-house procurement was introduced to the Lithuanian substantive legislation on 11 February 2010 by the Law No. XI-678 supplementing Article 10 of the Law on Public Procurement with Paragraph 5 which stated that the requirements of this Law should not apply to procurement where the contracting authority awards a contract to an entity holding a separate status of a legal person which it controls as its own service or structural division and in which it is the sole member (or exercises the rights and duties of the state or a municipality as the sole member) and where the controlled entity derives at least 90% of the turnover from the activities intended to meet the needs of the contracting authority or to perform the functions of the contracting authority (the Law of the Republic of Lithuania On Amendment of Articles 2, 6, 7, 8, 10, 13, 15, 18, 22, 23, 24, 31, 32, 39, 41, 54, 58, 78, 85, 89, 90, 91, 92, 93, 94, 95, 96, 97, Title of Chapter V and Annex, Supplementing by Articles 21(1), 94(1), 95(1), 95(2) and Repealling Articles 98, 99, 100, 2010).

Paragraph 5 of Article 10 of the current LPP sets the following mandatory conditions for in-house procurement: 1) the contracting authority controls an entity (supplier) holding a separate status of a legal person as its own service or structural division; 2) the contracting authority makes impact to essential and strategic decisions of the company (in this case supplier); 3) the contracting authority shall own 100 per cent of controlled company shares; 4) the controlled entity derives at least 80% of the turnover from the activities intended to meet the needs of the contracting authority or to perform the functions of the contracting authority; 5) it is obligatory to get the consent of the Public Procurement Office, which shall be issued within 15 working days. Under these conditions procurement procedures can be avoided and goods, services or works can be purchased by in-house method.

Issues of in-house procurement are raised in Lithuanian courts as well. For instance, in 2011, Supreme Administrative Court of Lithuania ruled that if the transaction meets the criteria for the in-house procurement, the purchase without a tender can not be considered a breach of the Law on Competition (SACL, 2011). In this ruling, the Court enable validation of the previous practice, when the munici-

pal, transport and energy companies in some cases voided to purchase goods or services in the market using public procurement, and purchased them from controlled companies. Municipalities often buy from their established companies the products which other suppliers on the market can offer as well. Absence of competition in such purchases may lead to improper product quality and price ratio, while the competition is one of the most important objectives of public procurement regulations. Purchases of public utilities sector's contracting authorities from associated companies may also be ineffective, since in some cases, the price of goods, services or works purchased can be higher than prices in the market. In this regard, it should be noticed that Paragraph 2 of Article 9 of the Law on Local Self-Governments sets a right for a municipality to establish new providers of public services only in cases when other providers are not rendering public services or cannot render the said services to residents economically and of good quality (Law on Local Self-Governments 1994, 2008). Thus, the legislature established its will to prevent local governments from setting up new businesses so influencing market processes, when in the market, there are other efficient operations. Meanwhile, according to the current situation, a large number of companies controlled by municipalities function in Lithuania, while other entities also provide the services in the market, as confirmed by the Competition Council research on infringements of Article 4 of the Law on Competition. Thus, the application of in-house procurement can eliminate operating in a competitive environment, that surely is a threat for the contracting entities not be offered the appropriate market price, and the end-user will be forced to pay for it.

The next section of the article presents the statistics of in-house procurement, showing that in most cases the entity subject to in-house procurement being the contracting authority itself or such entity, which should be regarded as a contracting authority, in line with contracting authority's attributes as provided in Article 4 of the LPP, i.e. it is subject to control (management) by the state or local authorities and its activities are intended for meeting the needs of general interest, not having an industrial or commercial character. As regards to contracting authorities acting in the field of water, energy, transport or telecommunication, usually the entity subject to in-house procurement is established for the activity identified in paragraph 2 of Article 70 of the LPP. The definition of the subject to in-house procurement given by the ECJ - 'person carrying out the essential part of its activities with the controlling local authority or authorities, i.e. the activities of the internal entity are devoted principally to that authority and any other activities are only of marginal significance' (ECJ, 2006) - supposes that its activities are intended to satisfy the public interest, regardless of its commercial nature. On the other hand, some entities subject to in-house procurement deny being consistent with the characteristics of the contracting authority and do not consider themselves a contracting authority, and hence acquire goods or services or render subcontactors required to implement the in-house procurement deal without applying public procurement procedures. Thus, public procurement in general fail and an environment for corruption-related activities is created which in democratic society should be avoided at all levels.

In-house procurement exception supposedly predetermines the presence of uncompetitive companies. Such entity under control has a greater advantage over the other players in the market because it is guaranteed for orders and income from its shareholder. In such a case, the contracting authority does not search for cheaper alternatives existing in the market and buys goods or services from the controlled entity at higher prices, and the additional costs to be covered later by the end-users. In addition, the activities of the controlled entities are not required to respond to market conditions, such as wages to personnel higher than the average in the sector regardless of costs. Therefore often local government-controlled entities employ people close to local politicians and civil servants. Besides that, such entities can influence the whole market segment concerned as they can also participate in tenders of other contracting authorities and offer unreasonably lower prices thus putting other tenderers into unfourable position.

Hence, it follows that validation of in-house procurement in Lithuania without an effective control mechanism and additional safeguards threatened and continues to threaten the procurement efficiency, transparency, competition between service providers and consumer protection. Having evaluated the foregoing, it is advisable to amend Paragraph 5 of Article 10 establishing that the provisions of Law on Public Procurement shall not apply to contracts where the contracting authority enters into a contract with

another contracting authority, which is under its control the same way as its own service or structural division, and in which it is the sole member, and and where the controlled entity derives at least 80% of the turnover from the activities intended to meet the needs of the contracting authority or to perform the functions of the contracting authority. Such amendment would not eliminate the possibility of in-house procurement, and would constitute a preventive measure and encourage entities that meet the contracting authority attributes, but negating its status of the contracting authority, to take responsibility and approve the status. It should be also noted that for the procurement of the contracting authorities operating in the fields of water, energy, transport and postal services, which are necessary for commercial activity but not for the activity under Paragraph 2 of Article 70, the Law on Public Procurement does not apply pursuant to subparagraph 1 of paragraph 3 of Article 10, so after the amendment those entities for their commercial activities will be able to enter into contracts with companies under their control gaining no contracting authority status. Another potential threat is insufficient external control of in-house procurement. Although in-house procurement contracts may be concluded only with the permission of the Public Procurement Office, but due to the large number of purchasing (in 2011-2013, 831 in-house procurements were carried out), there is a good chance that the PPO may perform the verification formally, without going deep into the in-house procurement conclusion and execution context. Secondly, the legislation does not impose mandatory obligations to the contracting authority to publish all information about the conclusion or performance of in-house procurement and conduct thereof. In addition, the part of the entities controlled by the contracting entities are not the contracting authorities themselves and perform purchases in accordance with their internal rules, so both procurement and contract performance are totally out of the control.

Considering the risks, it is advisable to set such a legal regulation in the LPP under which the contracting authorities could perform in-house procurement and exempt from public procurement procedures solely in cases where deal with contracting authorities, and in cases where the contracting authorities acquire goods, services or works from non-contracting authorities engaged in commercial or industrial activities, the public procurement procedures should always be applied. Furthermore, it is proposed to supplement paragraph 5 of Article 10 of the LPP with a provision stating that the contracting authority can benefit from the exception of in-house procurement exclusively in the case where due to objective reasons there is no possibility purchase works, goods or services in the market competition conditions. In our opinion, these proposals would expand the range of procurement open to the EU operators, as well as create the preconditions for effective implementation of the fundamental principles of the EU law on public procurement principles (equality, non-discrimination, mutual recognition, proportionality and transparency).

4. Statistics of In-house Procurement in Lithuania

In order to illustrate the problems analysed in the previous sections of the study, an overview of the in-house procurement statistics is appropriate. Municipalities, energy and transport companies perform in-house procurement most frequently. Municipalities awarded in-house contracts to companies under their control, mostly related to the provision of utility and transportation services. 22 contracting authorities presented information on their in-house procurement in 2011. In 2011, the total number of in-house procurement cases amounted to 512 and the value thereof totalled to 728.3 million Litas. Lithuanian Railways (AB "Lietuvos geležinkeliai", 110053842) performed the largest amount of in-house procurement. The total value of in-house procurement of the company in 2011 amounted to 379.4 million Litas and accounted for 51.6 per cent of the total in-house procurement value in 2011 (728.3 million Litas). With regard to the controlled entities of the contracting authorities, the in-house procurement contracts of the biggest value were awarded to Vilnius Locomotive Repair Depot (UAB 'Vilniaus lokomotyvų remonto depas', 126280418). The total value of in-house procurement contracts awarded to this company (285.3 million Litas) accounts for 39.2 per cent of total amount of in-house procurement in 2011 (728.3 million Litas). Railroad centre (UAB "Geležinkelio tiesimo centras", 181628163) held the first position in regards of the quantity of contracts in 2011. 115 in-house procurement contracts were concluded with this company, it accounted for 23 per cent of total in-house procurement cases in 2011 (512) (Table 1).

Table 1. Contracting authorities filed the biggest amount of requests for in-house procurement in 2011

Contracting authority	Number of in-house procurement cases	In-house procurement value (in Litas)	Quantity percentage	Value percentage
Lithuanian Railways	**264**	**379,435,896.9**	**51.6**	**52.1**
Vilnius City Municipality	144	22,157,998.9	28.1	3.0
Vilnius District Municipality	48	87,873,434.4	9.4	12.1
LITGRID	10	117,387,096.8	2.0	16.1

Source: Public procurement (annual) reports accumulated in the Central Information System of Public Procurement

19 contracting authorities presented information on their in-house procurement in 2012. In 2012, the total number of in-house procurement cases amounted to 131 and the value thereof totalled to 278.3 million Litas. In 2012, Kelmė District Municipality (1188768730) concluded the biggest value in-house procurement contracts, i.e. 160.1 million Litas, it accounted for 570.5 per cent of total in-house transactions value in 2012 (278.3 million Litas). Lithuanian Railways (49) performed the largest amount of in-house procurement in 2012. It accounted for approximately 37.4 per cent of total in-house procurement performed in 2012 (Table 2).

With regard to controlled entities of the contracting authorities, the in-house procurement contracts of the biggest value were awarded to Kelmė Local Utilities (UAB "Kelmės vietinis ūkis", 162732556). Kuršėnai Public Utilities (UAB "Kuršėnų komunalinis ūkis", 175606358) held the first position in regards of the quantity of contracts in 2012. 23 in-house procurement contracts were concluded with this company, it accounted for 17.6 per cent of total in-house procurement cases in 2012 (131).

Table 2. Contracting authorities filed the biggest amount of requests for in-house procurement in 2012

Contracting authority	Amount of in-house procurement cases	In-house procurement value (in Litas)	Quantity percentage	Value percentage
Lithuanian Railways	**49**	**76,867,971.1**	**37.4**	**27.6**
Šiauliai District Municipality	23	1,618,986.6	17.6	0.6
Vilnius District Municipality	18	5,359,969.7	13.7	1.9
Klaipėda City Municipality	8	2,893,917.3	6.1	1.0
Kelmė District Municipality	2	160,141,978.7	1.5	57.5

Source: The information is prepared following the data of public procurement (annual) reports accumulated in the Central Information System of Public Procurement

19 contracting authorities presented information on their in-house procurement in 2013. In 2013, the total number of in-house procurement cases amounted to 206 and the value thereof totalled to 641.2 million Litas. Lithuanian Railways (110053842) performed in-house procurement to the largest scale (value, amount) in 2012. The total value of in-house procurement of the company in 2013 amounted to 589.8 million Litas and accounted for 92.0 per cent of the total in-house procurement value in 2013 (641.2 million Litas). With regard to controlled entities of the contracting authorities, the in-house procurement contracts of the biggest value were awarded to Vilnius Locomotive Repair Depot (126280418). The total value of in-house procurement contracts awarded to this company (473.3 million Litas) accounts for 74 per cent of total amount of in-house procurement in 2013 (Table 3).

Table 3. Contracting authorities filed the biggest amount of requests for in-house procurement in 2013

Contracting authority	Amount of in-house procurement cases	In-house procurement value (in Litas)	Quantity percentage	Value percentage
Lithuanian Railways	**137**	**589,847,191.7**	**66.5**	**92.0**
Šiauliai District Municipality	25	5,064,290.7	12.1	0.8
Vilnius District Municipality	7	83,892.0	3.4	0.0
Kaunas City Municipality	5	13,331,296.5	2.4	2.1
Kaunas City Municipality	4	6,791,005.8	1.9	1.1

Source: The information is prepared following the data of public procurement (annual) reports accumulated in the Central Information System of Public Procurement

General dynamics of in-house procurement value and quantity in 2010-2013 is presented in pictures 1 and 2. It can be seen that in 2010, 247 procurements were performed for 203.6 million Litas, in 2011, - 512 procurements for 728.3 million Litas, in 2012, - 131 procurements for 278.3 million Litas, in 2013, - 206 procurements for 641.2 million Litas. According to the wording of the LPP enforced on 13 October 2011, PPO permission is necessary in order to carry out a purchasing provided for in Paragraph 5 of Article 10. Decrease of in-house procurement amount in 2012 can be related to the mentioned amendment of the law which strengthened the external control of in-house procurement conclusion (Figure 1 and 2).

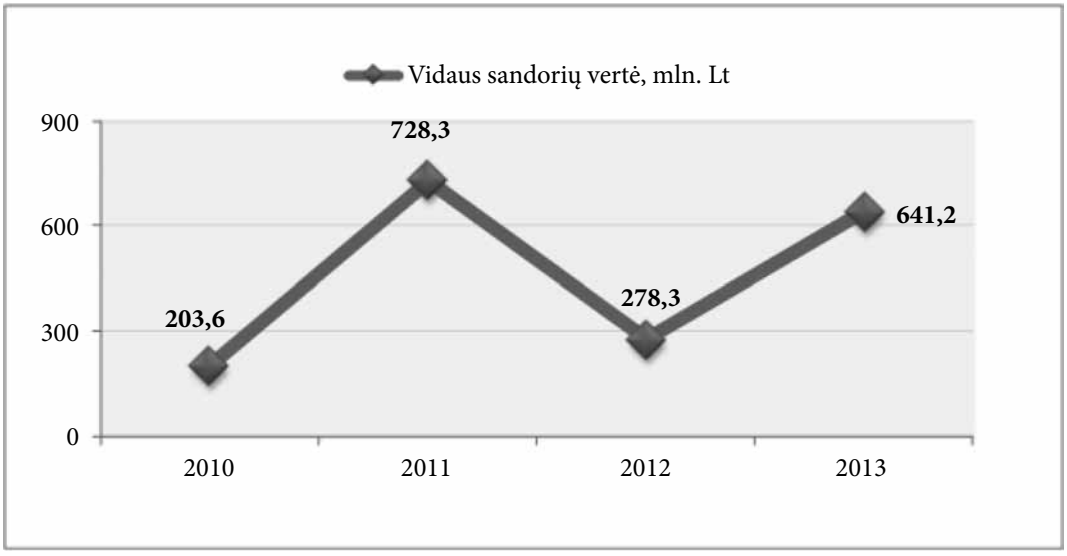

Fig.1. Dynamics of in-house procurement value in 2010-2013

Source: The information is prepared following the data of public procurement (annual) reports accumulated in the Central Information System of Public Procurement.

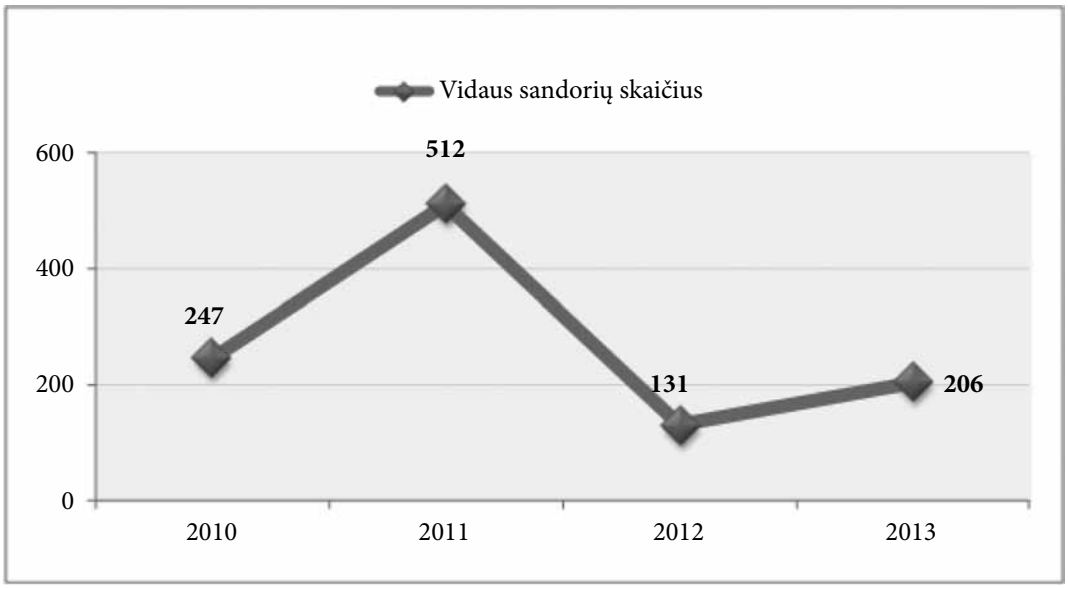

Fig.2. Dynamics of the amount of in-house procurement cases in 2010-2013

Source: The information is prepared following the data of public procurement (annual) reports accumulated in the Central Information System of Public Procurement

In summary, it appears that looking retrospectively at the in-house procurement statistics in past three years, it is clear that during all of the periods such purchasing was carried out basically by the same subjects. Notably, the number and amount of such purchases changed (decreased) after the substantive law provisions entered into force in this field. This may be largely related to the preventive effect of normative regulation, which enables to assume that such a regulation was necessary and identify the guidelines for further development.

Conclusions

Although the concept of in-house procurement as an exception to the general public procurement regulation in the EU public procurement law was developed by the ECJ, over the last decade, the normative regulation was introduce to both the national law of the member states and the EU law. In Lithuania, in-house procurement exception was established in the Law on Public Procurement in 2010. However, it can be stated that the legalisation of in-house procurement in the substantive Lithuanian law in the absence of effective control mechanism and additional safeguards, threatens the procurement efficiency, transparency, competition between service providers and consumer protection.

At present, contracting authorities can perform in-house procurement without applying the public procurement procedures either with the contracting authorities or non-contracting authorities engaged in the commercial or industrial activity, if they comply with paragraph 5 of Article 10 of the Law on Public Procurement criteria. Such legal regulation implies space for some threats of abuse of this exemption. In particular, the absence of the competition for such purchases may lead to improper product quality and price ratio. Procurement from associated companies may also be ineffective, since in some cases, the price of goods, services or works purchased can be higher than prices in the market. In-house procurement suppliers often challenge their status as a contracting authority. However, the systematic evaluation of provisions of the Law on Public Procurement that govern the in-house exemption and requirements for gaining the status of contracting authority, shows much parallelism, which would entail the conclusion that the vast majority of in-house suppliers should be the contracting authorities. Another important threat is that due to in-house procurement, there are certain companies in Lithuanian economy that receive high profits, but in general are non-competitive and could not otherwise exist at free market conditions. Such companies often pay higher wages, they become an excellent employer for protegees of public officials, which should be regarded solely negative in a democratic society.

It is advisable to improve the current legal regulation by setting that the contracting authorities could perform in-house procurement and exempt from public

procurement procedures solely in cases where deal with contracting authorities, and in cases where the contracting authorities acquire goods, services or works from non-contracting authorities engaged in commercial or industrial activities, the public procurement procedures should always be applied. Furthermore, having assessed all the threats reviewed in the article, it is proposed to supplement paragraph 5 of Article 10 of the LPP with a provision stating that the contracting authority can benefit from the exception of in-house procurement exclusively in the case where due to objective reasons there is no possibility purchase works, goods or services in the market competition conditions. These proposals would expand the range of procurement open to the EU operators, as well as create the preconditions for effective implementation of the fundamental principles of the EU law on public procurement principles (equality, non-discrimination, mutual recognition, proportionality and transparency). Therefore we recommend for the legislature to consider these proposals transferring provisions of Article 12 of the Directive 2014/24/EU to the national law of Lithuania.

In-house procurement is an important concept and its appropriate regulation and interpretation thereof in practice can help ease the administrative burden to certain contracting authorities in the cases where by objective evaluation the procurement procedures are not appropriate, but on the other hand it can create a legal vacuum, which could be used by unscrupulous market players, and thus distort the free market. Legislator should aim to find a balance between the ideological purpose of the concept and the scope of fuses to protect competition in the market.

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