

Briefing on the Act on the Contract Register Open Contracting in the Czech Republic¹

Open contracting is a global movement dedicated to making public contracts available and accessible, while enhancing citizen participation in the contracting process and thus allowing for effective monitoring, accountability, public trust, and ultimately better results.² More specifically, it refers to “norms and practices for increased *disclosure* and *participation* in public contracting including tendering, performance and completion”.³ While it originally focused on large scale concession deals in land, extractive industries or infrastructure, it now covers a variety of contracts. The ongoing discussion about open contracting, however, almost exclusively revolves around the issue of public procurement.

In this briefing, we provide information about the newly adopted Czech Act on the Contract Register⁴, which had been inspired by similar existing legislation in neighbouring Slovakia. According to the new Act, any public contract worth CZK 50,000 or more will have to be published online in a central Contract Register, in full text in a machine-readable format, in order to take effect. The new legislation which has been a part of the Czech Government’s Action Plan on the Fight against Corruption for 2015⁵ and has also been recommended and repeatedly required by the European Commission, will come into force on 1 July 2016. Below we summarize the main features of the new Act, its anticipated benefits and costs, how it fits within the current European and global discussion on more transparent public procurement, and how it therefore may serve as an inspiration for other member states.

Summary

On 24 November 2015, the Czech Parliament adopted the Act on the Contract Register. It was signed by the president a week later on 2 December 2015 and will take effect on 1 July 2016.⁶ The original draft was inspired by a similar measure in Slovakia where it has been a part of the Freedom of Information Act since 2011.⁷

¹ The briefing is current as of 8 December 2015. It was prepared by the public-interest law organization Frank Bold as part of the project “Inviting stakeholders to the process of monitoring anti-corruption legislation and policies in Poland, Czech Republic and Slovakia”, co-funded by the Prevention of and Fight against Crime Programme of the European Union. Further information about Frank Bold may be found at the end of this briefing.

The Act on the Contract Register was adopted by the Czech Parliament on 24 November 2015 and signed by the president on 2 December 2015. See the history of the draft, amendments and votes (only available in Czech) at: <http://www.psp.cz/sqw/historie.sqw?o=7&T=42>.

² See, for example, <http://www.opengovpartnership.org/blog/laura-bacon/2013/10/28/open-contracting-game-changer-opening-governments-busting-silos> or <http://wbi.worldbank.org/boost/tools-resources/topics/promoting-open-budgets/open-contracting>.

³ Emphasis added. For more details, see the Open Contracting Partnership website: <http://www.open-contracting.org>.

⁴ The unofficial English translation of the Act is attached to this briefing; available for reference only.

⁵ <http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2015-2017/Akcni-plan-boje-s-korupci-na-rok-2015.pdf>

⁶ The sanction mechanism (see below) will become effective a year later, on 1 July 2017.

⁷ The Czech legislation differs from the Slovak one in several significant ways which we will describe later in this briefing. For more information on the Slovak contract register, including the first assessment of its upsides and benefits as well as

The Bill on the Register of Contracts had been in the Czech legislative process since June 2012 and was thus debated by two different Parliaments. Since 2013, the adoption of the central Contract Register has been advocated by the anti-corruption NGO coalition “Reconstruction of the State”⁸ and it became a part of the Czech Government’s Action Plan on the Fight against Corruption for 2015⁹ as well as the Government’s Plan on the Fight against Corruption for 2015–2017¹⁰. Although the requirement was eventually dropped, the Contract Register was initially required by the European Commission as a conditionality for drawing EU funds in early 2015, and was among the country-specific recommendations issued by the Council in May 2015.¹¹ Also note that the Commission announced a plan to introduce contract registers to improve the transparency and quality of national procurement systems in its recent communication entitled “Upgrading the Single Market: more opportunities for people and business” (part 3.2 of the communication).¹²

The key features of the Czech Contract Register under the new Act include the following:

- **“Not in force until published” principle:** The key principle of the Act is the sanction mechanism under which any contract concluded between the State and another party (public or private) only enters into force after it has been disclosed online in the Contract Register.
- **Open data format:** Metadata, i.e. several basic data about the contract, as well as the full text of the contract in a machine-readable format must be published in the Register. Publishing contracts in an open data format is another key principle of the new legislation and allows for easy and effective monitoring, analysis and reuse of the data. Personal information and trade secrets remain protected under relevant acts and may therefore be blackened out.
- **Public money made public:** In principle, any contract in which the State, municipality, state-funded or state-owned institution is one of the contractual parties must be disclosed in the Contract Register.¹³ This includes contracts on the provision of subsidies or repayable financial assistance. There are several exemptions from the list of public institutions obligated to disclose their contracts, such as municipalities with a population of

downsides and costs, please refer to the study by Transparency International Slovakia (2015):

<http://www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf>.

⁸ A coalition of 18 anti-corruption NGOs and other partners aiming at the adoption of nine key anti-corruption laws. For more information see www.rekonstrukcestatu.cz/en. Frank Bold, author of this briefing, is an initiator and main coordinator of the coalition.

⁹ <http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2015-2017/Akcni-plan-boje-s-korupci-na-rok-2015.pdf>

¹⁰ <http://www.korupce.cz/assets/protikorupcni-strategie-vlady/na-leta-2015-2017/Vladni-koncepcce-boje-s-korupci-na-leta-2015-az-2017.pdf>

¹¹ See par. 11 and recommendation no. 2: http://ec.europa.eu/europe2020/pdf/csr2015/csr2015_council_czech_en.pdf.

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 28.10.2015, COM(2015) 550 final. *Upgrading the Single Market: more opportunities for people and business*. Available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-550-EN-F1-1.PDF>.

¹³ Other examples of entities which are obligated to disclose the contents of their contracts include: territorial self-governed units including city districts, state funds, state-funded organizations, public research institutions, public-benefit organizations set up by self-governed territorial units, state- or municipality-owned enterprises, including legal entities in which the State holds a majority stake. For the complete list, refer to the Act on the Contract Register, § 2 par. 1.

approx. 5,000 or less, the energy company ČEZ, or selected institutions such as the Chamber of Deputies, Senate, and the Supreme Audit Office.¹⁴

- **Financial limit of CZK 50,000:** The above applies to contracts where the value of their object is equal to or less than CZK 50,000 before value added tax (approx. EUR 1,850 according to the current exchange rate). This potentially poses a risk of circumventing the law by dividing contracts and creates legal uncertainty for certain types of contracts (e.g. long-term contracts). However, it significantly enlarges the space for public participation and monitoring which exceeds current disclosure requirements for public procurement contracts.

What is the Contract Register?

The Contract Register is a public-administration information system, i.e. a single electronic database, which serves for the purpose of disclosing contracts under the Act on the Contract Register. In the Register, contracts shall be published online in an open, machine-readable format, including specified metadata. The Register shall be accessible in a manner enabling remote access free of charge. In the Czech case, the metadata mandatorily disclosed in the Register include: identification of the contractual parties, subject matter of the contract, the price or the value of the subject of the contract, and the date of signing.

As already mentioned, the Contract Register does not contain only public procurement contracts, but covers a much larger part of contracts entered into by public institutions.¹⁵ In principle, the scope of information disclosed via the Contract Register is the same as one can obtain on demand via the Freedom of Information Act (which also means there is no increased risk of disclosing classified information, personal data, or a trade secret). The main difference, however, lies in the **shift from passive transparency guaranteed by the Freedom of Information Act to active transparency required by the new Act.**

The fact that under the new Act contracts will be automatically proactively disclosed in an open data format allowing instant, free of charge, remote access allows for much wider and active public oversight of the usage of public resources and dealings of public institutions. This should not only have a preventive anti-corruption effect but should also lead to more effective public spending and better service delivery, increased citizen trust in public administration, as well as potentially innovative ways of analyzing and reusing the data from the Register by both public and private actors.

¹⁴ For the complete list of exemptions, refer to the Act on the Contract Register, § 3 par. 2.

¹⁵ It is worth mentioning here that the mandatory disclosure of the public procurement contracts is often problematic due to ineffective oversight and sanction mechanism and a high error rate in the disclosed contracts. In the case of the Czech Republic, for example, approx. 25% of public procurement contracts concluded by Czech regions (higher territorial self-governed units) with a total value of approx. 4.3 billion CZK were not published in accordance with the Act on Public Procurement in the period between April 2012 and April 2013 (see <http://www.hodnocenikraju.cz/cz/sets/kraje-2012/compare>). Also the number of errors in the Czech public procurement is enormous. According to EconLab—a Czech NGO analyzing, among else, data on public procurement—99% of the contracting authorities' profiles where the data on public procurement contracts shall be published contain formal or other types of errors such as missing identification number and missing information on the price or suppliers (see <http://blog.aktualne.cz/blogy/jiri-skuhrovec.php?itemid=26355>).

Anticipated costs and benefits of the Contract Register

The final total value of the contracts disclosed under the new Act will be more than CZK 300 billion annually (approx. EUR 11 billion). According to conservative estimates, the Czech Act on the Contract Register could have led to the disclosure of the contracts concluded by Czech public institutions worth CZK 960 billion annually (approx. EUR 35.5 billion)—not including the public procurement contracts already published in the Bulletin of Public Procurement or small-scale public contracts.¹⁶

More importantly, the anticipated benefits include more effective public spending and thus savings in public budgets. Although it is impossible to assess the effects of the Contract Register in isolation from other transparency measures, research from Slovakia estimates to 30% decreased state expenditure on public procurement since the introduction of contract disclosure. In Slovakia, the Contract Register helped discover several cases of overpriced or rigged contracts¹⁷; it is also believed to be beneficial for the media and civil society by strengthening their ability to perform a watchdog role vis-à-vis public institutions. We expect similar positive effects in the Czech Republic.

Regarding the expected costs and anticipated risks, the Slovak experience again offers some relevant data. Although it is difficult to isolate the effects of the Register of Contracts itself, public procurement results in Slovakia do not suggest any collusion. On the contrary, a study by Transparency International Slovakia concluded that the average number of bidders has increased and the share of single-bid contests halved since the introduction of the reform.¹⁸

For obvious reasons, the administrative costs have been another big concern frequently used by critics of the measure. In Slovakia, this has led to several exemptions additionally introduced into the legislation—some of which have been considered in the Czech version of the Act. Results of the Slovak study, as well as the Czech experience with voluntary contracts disclosure, show that the human costs of uploading contracts in the Register are negligible (despite some critics claiming otherwise). The administrative and IT costs are of course real but not particularly large. In Slovakia, the initial cost of the central register was approx. EUR 20,000 and the maintenance costs are estimated to be max. EUR 3,000 per year.

The Czech Act on the Contract Register

The story of the Czech Bill on the Register of Contracts started in June 2012 when it was first tabled, inspired by the Slovak example where similar legislation has been in place since 2011. In Slovakia, it had been a couple of municipalities that provided an inspiration for the wider national contract transparency.

The Czech draft, which originated as an MP's initiative, failed to be enacted into law before the fall of the government in summer 2013. However, after the snap parliamentary elections in October 2013, it was introduced again by a group of deputies from several different parties and quietly passed through the first reading in January 2014. In summer 2014, the Ministry of Interior was

¹⁶ For more details, see the study prepared and published by EconLab: http://cae.zindex.cz/wp-content/uploads/2015/05/2015-05-18_registr_objem-smluv.pdf

¹⁷ See <http://www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf>, p. 12 and http://frankbold.org/sites/default/files/publikace/public_money_and_corruption_risks.pdf, pp. 56–58.

¹⁸ See <http://www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf>, p. 16.

given the responsibility to finalize the bill, finding an acceptable compromise with other ministries. Despite declared coalition support, it then took more than a year for the bill to be finally passed by the Chamber of Deputies: in September 2015, after more than three years since its original introduction, 116 out of 157 present deputies voted in favour of the bill in the third reading.

Although the draft had the support of the coalition (as well as part of the opposition), the Senate ended up returning the bill, proposing numerous changes including a complete rejection of one of the main principles of the bill mentioned above, according to which all public contracts need to be published automatically online in order for them to come into effect. In the Senate version, this principle was replaced with an ineffective system of financial sanctions, in which the oversight would have been performed by the Office for the Protection of Competition (ÚOHS)—the same office which already faces criticism for not being able to satisfactorily ensure publishing of public procurement contracts.¹⁹ The Senate draft contained additional unnecessary exemptions, some of which would lead to legal uncertainty for state- and municipality-owned enterprises.

The Bill was eventually adopted in the original “coalition” version passed by the Chamber of Deputies in September. The final vote took place on 24 November 2015 when 110 of the present deputies voted in favour of the bill, with only 26 lawmakers being against. The new Act was then signed by the president on 2 December 2015. It shall take effect on 1 July 2016, except for § 6 and 7 on the legal consequences of non-/disclosure, which are to take effect on 1 July 2017.

Which public institutions will disclose their contracts?

According to Art. 2 of the Act on the Contract Register, the entities obligated to disclose the contents of their contracts include the State, territorial self-governed units (municipalities), state-funded organizations, state funds, public universities and research institutions, state-owned enterprises including national enterprises, municipally-owned enterprises, public-benefit organizations, health insurance companies, Czech television, Czech radio, and other legal entities that are governed or owned by the State or a territorial self-governed unit including those where the State or a municipality has a majority stake.

All of these subjects already have a duty to provide information on demand under the Freedom of Information Act. However, some of the entities which are obligated to provide information under FOIA have been exempted from the automatic disclosure requirement under the Act on the Contract Register. These include most of the small municipalities (with a population of approx. 5,000 or less), the Office of the President of the Czech Republic, the Office of the Chamber of Deputies, and the Supreme Audit Office.²⁰

¹⁹ See for example http://ekonomika.idnes.cz/urady-neumi-transparentne-zverejnovat-zakazky-ftp-/ekonomika.aspx?c=A151123_101736_ekonomika_rts.

²⁰ The opposition against the Act from the municipalities was strong enough to win an exemption from the mandatory publication. In the original draft, all municipalities had a duty to publish their contracts without regard to their size or extend of their powers. See for example <http://zpravy.aktualne.cz/domaci-poslanci-vykostili-registr-smluv-male-obce-snemovna-ani-prez/r~ab5cb28a5dd511e5b605002590604f2e/>.

Which contracts must be disclosed in the Contract Register?

The amount of written contracts made by the public institutions which should be disclosed in the Contract Register has been narrowed down by a number of exemptions enumerated in the Art. 3 par. 2 of the Act. Most of these exemptions have been justified by the need to reduce excessive administrative burden related to the disclosure of contracts, or by the need to protect trade secrets and competitive advantage of state-owned enterprises and other entities.

Therefore, for example, contracts concluded with a natural person who is not an entrepreneur and is acting outside the framework of their business have been exempted. Similarly, contracts between the public institutions and authors or performing artists (e.g. in connection with copyrighted work), or “standard-form contracts” concluded by the state-owned enterprises or other specified institutions²¹ do not need to be disclosed via the Contract Register. Some other exemptions include contracts of intelligent services and the General Inspectorate of the Security Corps, and selected contracts of the bodies participating in criminal proceedings. The exemption of contracts on the provision and remuneration for healthcare services paid by public health insurance has been justified by the fact that these contracts shall already be disclosed in another public database under Act no. 48/1997 Coll. Importantly, contracts of joint-stock companies trading on a regulated market do not have to disclose their contracts in the Register—a provision which earned an exemption from disclosure for Czech energy company CEZ.

Despite the above list, the number of exemptions included in the Czech Act is relatively smaller compared to the Slovak legislation.

Financial limit for disclosure of contracts in the Register

Unlike in Slovakia where there is no financial limit for mandatory disclosure, the Czech Act only requires contracts with a value equal to or higher than CZK 50,000 before value added tax (approx. EUR 1,850) to be disclosed via the Contract Register.

The reasoning behind the introduction of the financial limit was to avoid unnecessary publishing of contracts of negligible value. In practice, however, this may cause several problems well known from public procurement contracting:

- the need to have the subject of the contract evaluated in certain types of contracts, leading to additional administrative costs;
- difficulties with estimating the total value of the contract in the case of framework agreements and indefinite contracts;
- deliberate dividing of larger contracts into several smaller contracts with a value just below the threshold.

On the other hand, the requirement to establish the real value of the contract's subject prevents parties from circumventing the law by concluding nominal value contracts.

²¹ The exemption from the requirement to disclose “standard-form contracts” via the Contract Register only applies to the entities enumerated in the Art. 2 par. 2 letters e), k), l) and n) of the Act.

Legal consequence of disclosure: sanction mechanism

As mentioned above, the key feature of the Act on the Contract Register —included in both Czech and Slovak legislation—is the “automatic enforcement” of the disclosure based on the principle that a contract does not enter into force until it is published in the Register. This assumes that all contracting parties have the same vested interest in publishing the contract, which any of the contracting parties is allowed to do. In practice, this means that the contracting parties shall not start implementing the contract until its disclosure in the Register. Contracts that are not disclosed in the Register within 3 months of their signing date are deemed void from inception.

Compliance with the EU law

The Czech Act on the Contract Register respects the principle that no information is disclosed via the Register that would not be provided on the basis of the Freedom of Information Act (which transposed the corresponding EU directives²²). As such, the Act is in accordance with the EU law. In fact, in the case of Slovakia, the Contract Register is a part of the Freedom of Information Act itself.

The Act further guarantees protection of trade secret and know-how of state-owned enterprises, thereby exceeding the protection afforded by the Freedom of Information Act, which does not sufficiently provide for situations when specific information can be derived from large amounts of contracts (e.g. lists of clients or price policies). Such information is exempted from mandatory disclosure via the Contract Register. Further exemptions include some typical annexes which could be considered a trade secret, such as technical artwork, drawings, calculations, and project documentation.²³

Implementation of the Contract Register

The technical implementation of the Contract Register, which is not described in detail in the actual Act, is crucial for the ultimate success of the reform. A big advantage for the Czech administrators of the Register is the fact that there is already significant experience with voluntary publishing of contracts particularly by municipalities.

In contrast to the Slovak solution which allows for some of the contracts to be disclosed outside the central register (e.g. municipalities published their contracts on their respective websites), the Czech Register shall be one single electronic database into which contracts will be submitted through already existing data mailboxes to ensure reliable sender's identification. In practice, the act of disclosure will thus involve completing and submitting an electronic form with metadata together with the attachment with the full text of the contract (either in a text document or as a machine-readable pdf file).

In the Czech Republic, the Register of Contracts will be practically and technically implemented by the Ministry of Interior. The discussion on the best possible implementation, using the existing open data publication standards, is already ongoing with the aim of making the Contract Register

²² Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003, on the re-use of public sector information; and Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013, amending Directive 2003/98/EC on the re-use of public sector information.

²³ See § 3 par.2 letter b) of the Act on the Contract Register.

user-friendly and useful for both the institutions required to disclose their contracts and the concerned public.

References

Council of the European Union (2015). *Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of the Czech Republic and delivering a Council opinion on the 2015 Convergence Programme of the Czech Republic (2015/C 272/09)*. Available at:

http://ec.europa.eu/europe2020/pdf/csr2015/csr2015_council_czech_en.pdf.

Reconstruction of the State (2015): *Information and arguments. Bill on the Register of Contracts*.

Available (in Czech) at: http://www.rekonstrukcestatu.cz/na-stazeni/infolist_registr-smluv.pdf.

Transparency International Slovakia (2015): *Not in force until published online. What the radical transparency regime of public contracts achieved in Slovakia*. Available at:

<http://www.transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf>.

Background

Frank Bold is a public-interest law organization with offices in the Czech Republic, Poland and Brussels, Belgium. At the EU-level, we are a steering group member of the European Coalition for Corporate Justice, which promotes corporate responsibility within the EU; a member of ALTER-EU, promoting lobby transparency across Europe; and a founding member of the Justice & Environment network. In the Czech Republic, Frank Bold is a main coordinator and a steering committee member of the anti-corruption NGO coalition Reconstruction of the State.

Reconstruction of the State is a joint national programme of Czech anti-corruption organizations, politicians, independent experts, business partners, and active citizens, aiming at the adoption of transparency and anti-corruption legislation. Professional and independent civil service is one of the nine issues the initiative monitors and advocates. More information is available upon request and at www.rekonstrukcestatu.cz/en.



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