Palacký University in Olomouc

Faculty of Law

Lucie Galvasová

# Protection Against Irregular Practices of Contracting Authorities

Master's Thesis

Olomouc 2023

I hereby declare that this Master's Thesis on the topic of Protection Against Irregular Practices of Contracting Authorities is my original work and I have acknowledged all sources used. I further declare that the text of this thesis including footnotes has 118 031 characters with spaces.

In Holasovice on the 15 May 2023 .....

I would like to thank my supervisor doc. JUDr. Michal Petr, Ph. D., for his patience, guidance and for inspiring me. I am also grateful to my family for their support during my studies and to my partner, who has always kept my spirits and motivation high.

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# Introduction

Public procurement is an important instrument for managing public investments worth up to 14% of the European Union's GDP[1]. Furthermore, it is an essential part of the internal market based on the relation between a contracting authority (public authority) and a contractor, where the authority demands goods, services or works. Within the legal framework of both the European Union and Member States, contracting authorities and contractors are burdened by obligations and acquire rights. When awarding public contracts, establishing these rights and obligations is an inherent part of the process and it becomes even more important in the review and remedies processes in case irregular practices arise. The review procedure and the subsequent remedies are essential parts of the whole public procurement award. From the legal perspective, this is key for the enforcement of the procurement regulation, on both European and Member States' level. From the contractors' point of view, it serves as a guarantee of a legitimate process, which may encourage potential suppliers to participate in the procurement process. Public procurement has long been a topical area, because of the amount of expenditure involved. At the same time, in light of the procurement development and the emergence of new requirements, it is important to consistently work towards improving the review process, always ensuring proper competition and sufficient tenderers' protection in case of incorrect actions were taken.

This thesis deals with the review procedure and aspects of the protection against irregular practises of the contracting authorities in the Czech Republic. The main goal of the thesis is to define the review procedure in the light of the European Union law and the Czech legal system, to subsequently analyse the Czech implementation of the minimum requirements set by the European Union and finally to ascertain how the European Union law and relevant case law affects the Czech regulation of the review procedure. Since the Czech Republic is the only chosen research environment, the whole process of contractor protection is viewed from the Czech legal perspective. The starting point of this research are thus the European and Czech laws and regulations, the case law of the Court of Justice of the European Union and the Czech administrative courts as well as the decisions of the Office for the Protection of Competition.

The thesis has four chapters. The first chapter overviews both European Union and Czech law and regulations affecting the review procedure, with particular attention paid to the key sources:

[1] Communication from the Commission to the Institutions: Making Public Procurement work in and for Europe, 3 October 2017, p. 2.

the review directives, the case law of the Court of Justice of the European Union and the Public Procurement Act. The second chapter concerns an optional but important element of the review process, namely the review with the contracting authority, which can effectively save public finance and prevent overburdening the review bodies. The third chapter focuses on the initiation of proceedings before the review body. The Review Directive introduces different types of instruments the most important of which is ineffectiveness. The chapter explains how these instruments are implemented into the Czech legal system. The fourth chapter then discusses procedural issues in the proceedings before the review body in the Czech Republic that lead to the termination of ongoing proceedings.

Chapters are structured into subchapters where the European regulation and the Czech implementation are discussed separately. Each chapter concludes with a summary of the implementation of a particular element.

# 1. Legal regulation

This chapter provides an overview of the remedies regulation on the European Union level and in the Czech Republic, the general regulation of contracts is also briefly mentioned in the context. It is necessary to add that the Union's regulation is also influenced by various sources. For example, since 2012, the European Union is bound by the Government Procurement Agreement (hereinafter GPA), which is a plurilateral international agreement aimed at opening up the international procurement environment to the parties to the GPA[2]. Regarding the review procedure, it determines some basic requirements (on the review body, access to the review procedure, ability to impose interim measures etc.).

## 1.1. European Union law

### 1.1.1. Primary Law and the General Principles of Law

Legal regulation of the public procurement has its basics in the primary law, specifically in the Treaty on the Functioning of the European Union (hereinafter TFEU, the Treaty). Although this Treaty does not provide any specific provisions regulating the public procurement explicitly, it is crucial, since it contains the fundamental principles of the EU and the internal market, which are as well necessarily applied for the public procurement. These principles are (I) prohibition of discrimination on grounds of nationality and (II) rule of "four freedoms"[3]. According to Fejø, the most relevant ones are freedom of establishment, freedom to provide services and free movement of goods but it is necessary to also consider other principles, such as the principle of mutual recognition[4].

These principles are complemented by the general principles of law developed by the decision-making practise of the Court of Justice of the European Union (hereinafter CJEU, the Court). By its decisions, the Court has extend the fundamental principles by the principles of equal treatment, transparency, and proportionality[5]. As an example of such a fundamental case law relating to the public procurement is the case C-324/98 *Teleaustria* in which the CJEU ruled

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[2] DRAGOS, D. C. Sub-dimensional public procurement in the European Union. In: BOVIS, Ch. (ed). *Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing, 2016, p. 179.
[3] Consolidated version of the Treaty on the Functioning of the European Union, OJ *C* 326, 26 October 2012, pp. 47—390.
[4] FEJØ, J. Social and Environmental Policies in EU Public Procurement Law. In: ARROWSMITH, S. (ed). *EU Public Procurement Law: An Introduction* [online]. Nottingham: The University of Nottingham, 2010 [viewed 9 August 2022], p. 304. Available from: https://www.nottingham.ac.uk/pprg/publications/downloads/eu-public-procurement-law-an-introduction.aspx.
[5] MARS DE, S. General principles in EU public procurement law. In: ZIEGLER, K. NEUVONEN, P. MONERO-LAX, V. (eds.). *Research Handbook on General Principles of EU Law*. Cheltenham: Edward Elgar Publishing, 2022. pp. 462–481.

that although a certain procurement contract does not fall within the scope of the procurement directives, contracting authorities are obliged to follow the fundamental rules of the Treaty[6]. Case law affecting the review procedure is referred to throughout the thesis.

### 1.1.2. Secondary law

Current general procurement legislation lays down in three procurement directives[7]. They all were adopted in 2014 and in contrast to the previous regulation from 2004, the concession works and services contracts were regulated separately for the first time[8]. The 2014 Directives were not only a reaction to the necessity of modernisation of procurement rules, but they also reflected ten years of the CJEU's case law that filled the gaps founded during the public procurement practise in the Member States[9]. It is also necessary to mention the directive 2009/81/EC which creates a special regime for procurement in the field of defence and security. The directives are supplemented by the other sources of secondary law – regulations and decisions, which contain more detailed provisions, e. g. Commission regulation on application thresholds for the procedures for the award of contracts[10] or regulation on the common procurement vocabulary[11].

As in the case of general procurement legislation, the most important sources of review procedure are directives. The existence of remedies directives is essential otherwise it would not be possible to take measures against violence of general procurement directives which regulating the public procurement area[12]. The first and long-lasted review directive was directive 89/665/EEC (hereinafter directive 89/665) and it regulated the review procedure of the award of supplies and works contracts. Review in the water, energy, transport and telecommunication sectors was firstly regulated by directive 92/13/EEC. These review

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[6] *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, C-324/98, CJEU, Judgement, 7 December 2000, paras. 59-60. The same conclusion was also reached, for example, in *Bent Mousten Vestergaard v Spøttrup Boligselskab*, C-59/00, CJEU, Judgement, 3 December 2001.

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

[8] Concession contracts were covered in Directive 2004/18/EU, Title III.

[9] RAFAJ, P. FRIČOVÁ, V. Vybrané instituty práva veřejných zakázek v judikatuře Soudního dvora EU a jejich úprava v nových zadávacích směrnicích. *Bulletin advokacie*, 2015, 9, pp. 39-44.

[10] Commission Regulation No 1177/2009 of 30 November 2009 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of their application thresholds for the procedures for the award of contracts.

[11] Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary, 16 December 2002.

[12] JURČÍK, R. *Veřejné zakázky a koncese*. 2nd ed. Praha: C.H. Beck, 2014. p. 67.

directives were adopted in reaction to the lack of review provisions – firstly, in the general procurement directives and secondly, in the legal orders of the Member States, which may have discouraged potential bidders. The major and the most recent amendment to the directives is directive 2007/66/EC[13] (hereinafter directive 07/66) and it has reflected both the legislative proposals of the European Commission and the case law of the Court[14]. The purpose of the remedies directives is the rapid and effective review of the decisions made by the contracting authorities *on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law*[15]. Furthermore, it should be noted that according to Art. 1(1) of the amendment directive 07/66, it is applied on the contracts referred to in directive 2004/18/EEC, which includes *public contracts, framework agreements, public works concessions and dynamic purchasing systems*[16] and in directive 2004/17/EEC, which includes *supply, works and service contracts, framework agreements and dynamic purchasing systems […] of entities operating in the water, energy, transport and postal services sectors*[17,18].

The amendment of 2007 brought some significant changes and rectified deficiencies of review procedure set by the directives 89/665/EEC and 92/13/EEC, as the postponement in conclusion of a contract or ineffectiveness. All the institutes set by the review directives are widely discussed below. The review directives provide minimum requirements on the review procedure in the Member States, thus their specific implementation varies from state to state, as well as the states are enabled to adopt measures and institutes beyond their scope[19].

For the purposes of this thesis, reference to a "Review Directive" or "Directive" is understood to mean the directive 89/665/EEC as amended by the directive 2007/66/EC.

## 1.2. Legal order of the Czech Republic

Certain legal regulation of the public procurement in the Czech Republic is codified in Act No. 134/2016 Coll., on public procurement (hereinafter also Act 134/2016 or PPA) and it

[13] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.
[14] KRČ, R. *Přezkum veřejných zakázek*. Praha: C. H. Beck, 2018. p. 147.
[15] Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, both Art. 1(1).
[16] Directive 2007/66/EC…, Art. 1(1).
[17] Ibid, Art. 2(1).
[18] The Directive 2004/18/EC has been replaced in its enternity by the Directive 2014/24/EU and the Directive 2004/17/EC has been replaced by the Directive 2014/25/EU, thus the remedies rules apply to these new acts.
[19] ŠEBESTA, M. et al. *Zákon o zadávání veřejných zakázek. Komentář*. 2nd ed. Praha: C. H. Beck, 2022, p. 6.

implements the European directives from 2014 as well as related case law of the Court. It is the fundamental source of public procurement, concessions, and the review procedure.

A particular form of review has been codified since the first procurement act and it has been practised by The Czech Office for Competition[20]. This Office, in current form of the Office for the Protection of Competition (hereinafter OPC), still performs this function today. Although some elements have remained, the review legal regulation went through rich amendments. Before the PPA from 2016, the review provisions were enshrined in two different acts – one for the review of procurement award of contracts and the other for concessions[21]. Nowadays, all the possibilities of protection for both public procurement and concessions are in the 134/2016. The review provisions do not apply to small-scale contracts and concessions[22]. Other laws of different legal force are also necessary for the proper functioning of the review procedure. One for all, with emphasis on the course of the review, can be mentioned the Administrative Procedure Code[23], which is supportively applied for the proceedings led by the OPC, however, it does not apply to the procurement procedure or the objections procedure[24].

## 1.3. Relation between Union and Czech legal regulation

The reason for the separation of the public procurement on "Union" and "national" is based on the presumption that the "national" procurement contracts are not capable (by their market value) to affect the EU internal market to the extent that they would have cross-border characteristics and would need to be dealt with on the EU level[25]. Even though they are under the cover of the national legislation, they need to follow certain standards. Those standards are represented by the principles enshrined in the TFEU, namely they are "four freedoms" and other derived principles as non-discrimination, equal treatment, transparency and proportionality[26].

Furthermore, except of those Treaties' provisions concerning public procurement area, the directives are the sort of legislation that gives a form to the procurement regulation. With focus

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[20] The Czech Office for Competition was established by the Act No. 173/1991., Coll. as an independent body ensuring, beside other things, protection of competition and supervision over public procurement.
[21] KRČ, R. Legislativní změny přezkumu veřejných zakázek. *Správní právo*, 2017, 6. pp. 338-343.
[22] If a tender finds a violation of public procurement principles during the award of small-scale public contract, it can be review before the civil court. In detail in KRČ, R. VANĚČEK, J. *Zákon o zadávání veřejných zakázek. Komentář*. Praha: C. H. Beck, 2022, p. 18.
[23] Act No. 500/2004, Coll., Administrative Procedure Code, as amended.
[24] 2 A 7/96, High Court in Olomouc, 12 December 1996.
[25] DRAGOS, D. C. VORNICU, R. Public Procurement below Thresholds in the European Union: EU Law Principles and National Responses. *European Procurement and Public Private Partnership Law Review*, 2015, 10(3), p. 188.
[26] DRAGOS, D. C. Sub-dimensional public procurement in the European Union. In: BOVIS, Ch (ed). *Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar, 2016, p. 195.

on the Remedies Directives, they target to provide an access to justice to those tenderers or other interested parties who are harmed by the wrongful or irregular decisions of contracting authorities and at the same time, they work in favour of the uniform and effective implementation of public procurement rules across the European Union[27]. According to the Dragos, there are three ways how the Member States deal with the remedies regulation; they are *(1) to expand the remedies regime of the above thresholds contracts to below the thresholds ones; (2) to devise less detailed remedies or rules for below thresholds regimes; or (3) to leave it altogether to the pre-existent national law, be it public or private*[28]. Although the Member States were given a procedural autonomy, they are limited by other two principles and these are the principle of effectiveness and procedural equality[29]. It means, that Member States can adjust the review proceedings to their national public procurement rules, but they are tight by the necessity of adoption of specific harmonisation remedies[30].

As mentioned above, public procurement is mainly codified in a form of directives therefore Member States are obliged to implement them into their legal orders. There is no exception to this rule for public contracts. The directives of 2014 should have been implemented by April 2016 thus Member States had two years to do so[31]. The amendment directive 07/66 then should have been implemented by December 2009. In the case of non-compliance, the European Commission is entitled to initiate proceedings according to the Art. 258 TFEU[32].

## 1.4. Beneficiaries of the review

General directives on the public procurement work with the terms "economic operator", "tenderer" or "candidate" based on the status of the entity but this subchapter aims at the determination of the person who is able to claim review proceedings both with the contracting authority and before the OPC. The Directive gives Member States the responsibility to adopt

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[27] BOVIS, Ch. *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing, 2007. pp. 61-62.
[28] DRAGOS, D. C. Sub-dimensional public procurement in the European Union. In: BOVIS, Ch (ed). *Research Handbook on EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing, 2016, p. 206.
[29] BOVIS, Ch. Access to Justice and Remedies in Public Procurement. *European Procurement and Public Private Partnership Law Review*, 2012, 7(3), pp. 195-202.
[30] More on the principles of procedural autonomy, effectiveness and procedural equality in BOVIS, Ch. Access to Justice and Remedies in Public Procurement. *European Procurement and Public Private Partnership Law Review*, 2012, 7(3), pp. 195-202.
[31] VALENZA, A. et al. *Assessing the implementation of the 2014 Directives on public procurement: challenges and opportunities at regional and local level*. Luxembourg: Publications Office of the European Union, 2019, p. 4.
[32] Author Arrowsmith indetifies also other breaches that may be proceeded under the Art. 258 TFEU in relation with public procurement, such as individual breaches of the national authorities. In more detail in ARROWSMITH, S. *The Law of Public and Utilities Procurement: Regulation in the EU and UK*. Volume 2. 3rd ed. London: Sweet & Maxwell, 2018, pp. 900-925.

measures ensuring the review procedure is accessible to *any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement*[33]. In a view of the procedural autonomy of Member States, the CJEU has allowed national law to extend the scope of persons entitled to review at its discretion, as long as the aim of this provision is not fully harmonised[34]. Nevertheless, the CJEU has provided many interpretations that Member States must follow. An example of a more specific requirement is the case C-355/15, in which the Court ruled that Art. 1(3) of the directive 89/665 does *not precluding a tenderer who has been excluded from a public procurement procedure by a decision of the contracting authority which has become final from being refused access to a review of the decision awarding the public contract concerned and of the conclusion of the contract where only that unsuccessful tenderer and the successful tenderer submitted bids and the unsuccessful tenderer maintains that the successful tenderer's bid should also have been rejected*[35]. The Court set boundaries within which Member States are free to implement the rule in question.

The relatively broad meaning of the word "person" in the Article 1(3) may raise questions as to whether there are any requirements, such as legal form or status, on the standing to bring proceedings, since the directive does not contain any further definition. That is also one of the reasons why the national courts refer to the CJEU with preliminary ruling regarding the interpretation of such a person. For example, the CJEU has ruled that Member States may only consider an consortium (which participated as such in the award of the public contract and to which that contract was not awarded) as a whole, and not the individual members of such an consortium, to be such a person[36]. Following the judgement C-129/04, *Espace Trianon SA*, the OPC made use of those loosely defined limits, and although the Court ruled that Member States could require the filing of a petition only by all the members of the consortium, the Office itself subsequently ruled that the Court had not ordered such a practice, and that it is therefore possible

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[33] Directive 2007/66/EC…, Art. 1(3).

[34] *Symvoulio Apochetefseon Lefkosias v Anatheoritiki Archi Prosforon*, C-570/08, CJEU, Judgement, 21 October 2010, paras. 36-37. Nevertheless, all decisions must be based on the fundamental right of individuals to effective judicial protection of their rights (see case C-50/00, *Unión de Pequeños Agricultores v Council of the European Union*).

[35] *Bietergemeinschaft 1. Technische Gebäudebetreuung GesmbH, 2. Caverion Österreich GmbH v. Universität für Bodenkultur Wien a VAMED Management und Service GmbH & Co KG,* C-355/15, CJEU, Judgement, 21 December 2016, para. 36.

[36] *Espace Trianon SA and Société wallonne de location-financement SA (Sofibail) v Office communautaire et régional de la formation professionnelle et de l'emploi (FOREM)*, C-129/04, CJEU, Judgement, 8 September 2005, par. 29.

under Czech law for the contracting authority's procedure to be challenged by individual members of the consortium[37].

Another European personal scope is defined by the general public procurement directive 2014/24/EU. European legislator considers that the improperly awarded contracts may concern not only persons connected to the certain public procurement but also other persons, e.g. citizens, because since they are the taxpayers, they may have an interest in proper public procurement[38]. It is therefore necessary to give them the opportunity to point out breaches of directives of which they are aware, through other means than the standard review procedures for which they do not have usually standing. Member States should thus ensure that such persons have access to the supervisory authorities[39].

In the Czech Republic, the review procedure is structured into three phases, in which the person concerned may seek remedies, and it is the review with the contracting authority, the first instance review and the second instance review before the OPC. The requirements for the person concerned differs at each phase. In a case of the review with the contracting authority, this person may be a tenderer who is a participant in the tendering procedure as well as the person who is not such a participant[40]. The difference between them is in the specified matters on which a person may seek review[41]. Naturally, the participant has wider range of these matters than the non-participating tenderer. Protection of tenderer "non-participant" aims primarily at those situations when tenderer cannot even submit a tender because of the setting the terms of reference by the contracting authority[42]. The OPC also commented on the definition of the complainant by which the active legitimation is determined by two requirements – status of a tenderer and the occurrence or threat of harm arising in connection with the contracting authority's procurement process[43]. Regarding the first instance review, the range of potential claimants is considerably narrower. In simply terms, the right to file a petition to the OPC lays down into the hands of the complainant who has filed proper and in time objections and has been unsuccessful with the decision on the objections or the objections have been rejected since the proceedings initiated upon a petition is conditioned by the review with the contracting

[37] S141/2011/VZ, OPC, Decision, 8 August 2011, paras. 21-22.
[38] Directive 2014/24/EU…, rec. 122.
[39] Ibid.
[40] Participation is based on different conditions depending on the type of procurement procedure – expression of preliminary interest (Art. 58(5) or Art. 129(4)), submission of a request to participate or commencement of negotiations within the procurement procedure (Art. 47(1)).
[41] KRČ, R. VANĚČEK, J. Zákon o zadávání veřejných zakázek. Komentář. Praha: C. H. Beck, 2022, p. 847.
[42] ŠEBESTA, M. et al. *Zákon*…, p. 1396.
[43] S456/2019/VZ, OPC, Decision, 21 February 2020, para. 91.

authority (with the only exception discussed below). Finally, the second instance review is only accessible to the person who has been unsuccessful with their petition at the first instance.

## 1.5. Requirements on the review body

Neither the Review Directive nor any other legal act requires a certain form (judicial or administrative) or kind (already existing or newly established, specialized or generally oriented) of review body. Member States are able to freely decide which body is empowered to review the procurement procedure or whether the review is divided into parts allocated to the different bodies[44]. However, some general requirements on those bodies are set, mainly in the Art. 2 of the Review Directive. The first says that *where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given*[45]. Furthermore, such decisions taken by non-judicial bodies must be reviewable by judicial body or by other independent body which is considered to be a court or tribunal under Article 267 TFEU (it is enabled to refer a preliminary ruling to the CJEU)[46]. The question of the status of competition authorities has been addressed by the CJEU several times. In its case law, it has identified various criteria that authorities have to meet in order to fulfil these requirements[47]. Among the fundamental characteristics of the bodies in the light of the Art. 267 TFEU is: *statutory origin, permanence, inter partes procedure, compulsory jurisdiction, the application of rules of law, independence of the body making the reference*[48]. In any case, the independence of such a body from the contracting authority is of great importance, that is why the directives lay down more detailed conditions for the existence of such non-judicial bodies. The appointment and removal of members of this independent body must be made by the same authority that appoints and removes members of the judiciary, and the length and termination of their terms of office must coincide with those judiciary members. In addition, the chairman of such an independent body must be legally and professionally capable of carrying out the work of a member of the judiciary. Last requirement of the Art. 2(9) states that *the independent*

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[44] 2007/66/EC…, Art 2(2). This option can be seen as a consideration of the diversity of review procedures in the Member States.
[45] Ibid, Art. 2(9).
[46] This requirement shall be a guarantee of an „adequate review" (see *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v Gemeindeverband Bezirkskrankenhaus Schwaz*, C-103/97, CJEU, Judgement, 4 February 1999, para. 29). At the same time, Member States are not obliged to grant the contracting authority an automatic right to apply for judicial review of the decision of such an independent body (see *Symvoulio Apochetefseon Lefkosias v Anatheoritiki Archi Prosforon*, C-570/08, CJEU, Judgement, 21 October 2010, para. 38).
[47] More on the development of the requirements by the CJEU in STEHLÍK, V. *Řížení o předběžné otázce v komunitárním právu*. Olomouc: Univerzita Palackého v Olomouci, 2006, pp. 50-56.
[48] WOODS, L. WATSON, P. COSTA, M. *Steiner & Woods EU Law*. 13th ed. Oxford: Oxford University Press, 2017. pp. 228-229.

*body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding*. Regarding the bodies' competences, they shall be able to react at the earliest opportunity, especially to take necessary interim measure to correct the alleged infringement or to prevent further damage, to set aside unlawful decision and to award damages. Decisions taken for the purpose of these competences should be effectively enforced[49]. Within the Member States of the European Union, the number of independent administrative bodies prevails over the clearly judicial systems, as well as the majority of the States's executes the two-stage review rather than single-stage[50].

The Czech Republic is the country with the two-stage review, which takes place before the OPC (petition, remonstrance) and may be followed by an action before the administrative judicial body. The OPC is defined by the Act 273/1996, Coll. containing also the scope of competences, namely – creation of the *conditions for maintenance and protection of competition*, supervision of the *public procurement award procedure*, and performance of the *other competences defined by special acts*[51]. This special act is, besides others, the PPA, which in its Art. 248 specifies particular award procedures over which the OPC exercises its supervision. In particular, they are below-threshold and above-threshold public contracts, concession contracts (with the exception of the small-scale concessions), framework agreements, dynamic purchasing systems, design contests and under certain conditions also small-scale public contract (Art. 4(4)). In general, it can be stated that the OPC supervises the compliance with the law[52] by the contracting authority during the award or the procedure leading to the award of a public contract, imposes corrective measures and checks the legality of the contracting authority's procedure from the point of view of Act No. 255/2012 Coll., on inspection (Inspection Code). Lastly, the OPC hears administrative delicts and imposes fines, but only in ex officio proceedings, thus the petitioner cannot launch the proceedings for the imposition of a fine[53].

Although the OPC is a central government body whose independence is reflected in the chairman's limited term of office (6 years with one possible re-election) and the impossibility

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[49] 2007/66/EC…, Art. 2(8).
[50] European Commission. National review systems in the area of public procurement, 1 January 2019, pp. 1-14.
[51] Act No. 273/1996, Coll., Act on the Scope of Competence of the Office for the Protection of Competition, Art. 2.
[52] In this case, the OPC supervises the compliance with the PPA only (see VZ/S20/03, OPC, Decision, 16 April 2003).
[53] PODEŠVA, V. SOMMER, L. VOTRUBEC, J. FLAŠKÁR, M. HARNACH, J. MĚKOTA, J. JANOUŠEK, M. *Zákon o zadávání veřejných zakázek. Zákon o registru smluv. Komentář*. Praha: Wolters Kluwer ČR, 2016, p. 907.

for the chairman to be a member of a political party, and whose decisions are based on administrative rules providing procedural guarantees, there is still an imaginary question mark over its nature from the point of view of Article 267 TFEU[54]. The question of whether the preliminary question raised by the OPC would indeed be accepted by the Court will thus probably remain unanswered until the OPC raises it and the CJEU decides[55].

[54] STEHLÍK, V. *Řížení o předběžné* otázce…, pp. 76-77.
[55] BOBEK, M. KOMÁREK, J. PASSER, J. M. GILLIS, M. *Předběžná otázka v komunitárním právu*. Praha: Linde, 2005, pp. 44-45.

# 2. Review with the contracting authority

In this chapter, the individual elements of the review with the contracting authority, as the first stage of review, are discussed. Following aspects are then ordered chronologically according to the time of their use, in the light of the Czech review procedure. This first tool of the tenderer's defence, by which any disagreement with the actions taken by contracting authority, can be addressed and rectified without the need of supervisory body's intervention. Moreover, this review brings variety of advantages, e.g., resolution of a mere irregularity quickly and the related relieve of the courts or administrative bodies that would ordinarily deal with it or earning the costs of the proceedings[56].

## 2.1. Article 1(5) of the Review Directive

Art. 1(5) gives the Member States an opportunity to require the review with the contracting authority first, before the initiation of a review on an administrative or judicial level. Thus, the use of the review varies in each Member State, depending on the conditionality (of continuing review), designation or conditions of use[57]. If the Member State decides to require seeking this review first, the directive set a special requirement, by which the Member States *shall ensure that the submission of such an application for review results in immediate suspension of the possibility to conclude the contract*[58]. This is the so-called automatic suspension, which is considered in the European law an interim measure preventing the contracting authority from sudden conclusion of a contract, thus supporting the effectiveness of the review procedure[59]. Then the subparagraph determines minimum time periods, during which the suspension lasts, in regard to the means of communication. From a general point of view, periods determined by the Member States should ensure rapid and effective review where the element of rapidity cannot jeopardize the requirement of legal certainty, which can be achieved by the precise and predictable limitation periods[60]. Minimum length of the suspension shall be set in relation to the sending of a response by the contracting authority or to the receiving of a response by the tenderer. Such periods are following: (I) in a case of fax or electronic means, the period is at least 10 days, and (II) in a case of other means of communication the period takes at least 15 days *with effect from the day following the date on which the contracting authority has sent a*

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[56] Organisation for Economic Co-operation and Development. *Sigma Papers No 41. Public Procurement Review and Remedies System in the European Union, GOV/SIGMA(2007)5*. 6 April 2007, pp. 15-16.
[57] Ibid, p. 15.
[58] Directive 2007/66/EC…, Art. 1(5).
[59] ARROWSMITH, S. *Law of Public*…, p. 993.
[60] *Uniplex (UK) Ltd v NHS Business Services Authority*, C-406/08, CJEU, Judgement, 28 January 2010, paras. 38-39.

*reply,* or (III) *at least 10 calendar days with effect from the day following the date of the receipt of a reply*[61]. This provision does not contain any specific requirements for this type of review and the case law of the CJEU interpreting this institution is focused primarily on the time aspects of the filed submission. However, the Court did lay down an important rule, enshrining the complainant's obligation to defend itself against the contracting authority's irregular practises at the current stage of the procedure and not to wait until later stages of the procedure to challenge it[62].

Although the directive 89/665 contains only one paragraph regarding the review with the contracting authority, it seems to be a very important aspect of review procedure occurring in Member States in various forms. The EU legislator gives Member States a fairly wide margin to set their own rules and even gives them a choice whether to make this institute conditional or not.

## 2.2. Objections

Implementation of this kind of review into the PPA is relatively extensive. The institute of so-called objections is an obligatory prerequisite before filing the petition for the initiation of review before the OPC[63]. Title I of the book thirteen contains the whole "life" of the objections. By the words of the OPC, objections provide *primary mean of protection* and they are a part of a coherent procedure consisting of successive steps[64]. The objection can be filed by a complainant described in the subchapter 1.4., against the irregular practices of the contracting authority where the practices cover broad range of *all actions or omissions during the procurement procedure as well as against a specific procedure under Book Six, including the setting of the award criteria*, *the selection of the type of the procurement procedure or the regime of the public contract or the practise aimed at awarding the public contract outside the procurement procedure* contrary to the Act 134/2016[65]. Art. 241 expands the boundaries of the situations, on which an objection may be raised but at the same time, it reduces the number of potential complaints stating that objections, which do not concern above mentioned practises can be filed by the participant of the award only[66]. These practises are for instance the exclusion

[61] Directive 2007/66/EC…, Art. 1(5).
[62] *Grossmann Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v Republik Österreich*, C-230/02, CJEU, Judgement, 12 February 2004, paras. 36-37.
[63] STAŇO, R. § 241. In: JELÍNEK, K. (ed.). *Zákon o zadávání veřejných zakázek: Praktický komentář*. Praha: Wolters Kluwer, 2022, pp. 642.
[64] R0206/2020/VZ, OPC, Decision, 2 February 2021, para. 35.
[65] Act 134/2016, Coll, Art. 241(2).
[66] R0052/2019/VZ, OPC, Decision, 27 May 2019, para. 36.

of a tenderer or the decision to select a tenderer[67]. The objection is defined by obligatory elements, such as identification of the complainant, determination of the infringement, the aim sought by the objections, the day the tenderer became aware of a violation or pinpointing the tenderer's harm, and in a specific cases defined in the Art. 244(1), the objections must contain a description of the corrective measures on regaining tenderer's qualification. Failure to fulfil any of the obligatory elements leads to rejection of the objectives by the contracting authority[68].

Regarding time limits for filing the objections, it is appropriate to highlight two general rules. The first rule states the possibility to file an objection only before the conclusion of a contract, since the review with the contracting authority is a pre-contractual remedy[69]. The second rule was already mentioned in the previous subchapter and it is that CJEU considers inconsistent with the purpose of the Review Directive for a tenderer to wait until later stages of the procurement procedure to seek review of the current practises[70]. In simple terms, it expresses the necessity to file the objections at the correct stage of the procurement procedure, which corresponds with the principle of legal certainty for all parties to the procedure[71]. General limit is set to 15 days from the date on which the economic operator found out the supposed violation of law or on which the economic operator received a data that needs to be announced in a form a document, thus this general limit may differ in specific situations or type of tendering procedure as it is set in Art. 242. The participant may also waive the right to file an objection, which must be done in a writing form[72]. The time limit is then considered to be expired.

Last but not least provision codifying filing of objections is Art. 245 that contains the settling of objections. Contracting authority may accept or reject them. In both cases, the settling must be done within 15 days limit in a form of a decision, must contain reasoning and must deal with all the points of the objections[73]. If the objection is accepted in its full entirety, contracting authority informs the complainant about the taken corrective measure. Contracting authority may reject the objective in its full entirety or in its part from the reason stated in Art. 245(3). This procedure is accompanied by an obligation to inform the complainant about the possibility *to file* [...] *a petition with the OPC to launch proceedings to review the actions of the contracting*

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[67] KRČ, R. *Přezkum*…, p. 6.
[68] Art. 134/2016, Coll., Art. 245 (3)(c).
[69] 62 Ca 83/2008-98, RC in Brno, Judgement, 24 November 2010.
[70] *Grossmann Air Service…*, C-230/02…, paras. 36-37. The regional court expressed itself in the same vein in 2013 in a case 29 Af 25/2013-76.
[71] STAŇO, R. § 242. In: JELÍNEK, K. (ed.). *Zákon*…, pp. 646-647.
[72] Act 134/2016, Coll., Art. 243.
[73] Ibid, Art. 245(1).

*authority as well as of the duty to submit a duplicate of the petition to the contracting authority*[74]. As a rejection is also viewed a situation when the contracting authority takes a remedial measure other than one relating to the objections lodged. In a situation, when a contracting authority does not provide any kind of reaction, it is considered as the rejection of the objections and the complainant is capable to file a petition. Regarding the non-compliance with the Art. 245, the PPA brings two relatively strict remedies. In the case of non-reaction of the contracting authority, the OPC is able to cancel the *action against which the objections were aimed, as well as all subsequent actions made by the contracting authority during the procurement procedure,* or to cancel the entire procurement procedure[75]. In the case of incomprehensibility or a lack of grounds of the contracting authority's decision on the objections, the OPC may set aside such a decision and moreover, the complainant has a right to file new objections that would not be considered belated[76]. Contracting authority may also commit an administrative delict by acting contrary to the provisions on the settling of objections and may be fined by the OPC for such acts or omissions. The OPC is responsible for hearing and deciding on the offence and it determines the amount of the fine[77].

Objections have been present in the Czech legal system since the very beginning of public procurement regulation and serve as an important condition for the submission of a petition for review. They have also become a subject to the rich review practise of the OPC but also to the case law of the administrative courts[78]. Czech legal regulation dedicates to the automatic suspension a special Article named "Ban on conclusion of a contract" but this institute is usually called "blocking periods" in Czech. The purpose of this institute is to protect the tenderer who files an objection or a petition to launch review proceedings by the imposing of a ban on the contracting authority, through which the time period for effective review and possible correction of the infringement is created[79]. Furthermore, the blocking periods are linked in such way that the contracting authority cannot conclude the contract until the parties can launch appeals. Violation of this blocking period (e.g., by the conclusion of a contract during this period) is fined as a delict according to the Art. 268(1)(a)[80]. The only blocking period that runs

[74] Ibid, Art. 245(4).
[75] Ibid, Art. 263(6).
[76] Ibid, Art. 263(5).
[77] Ibid, Art. 270(9).
[78] More on the related case law in RAUS, D. *Zadávání veřejných zakázek: Judikatura s komentářem*. Praha: Wolters Kluwer, 2011.
[79] ŠEBESTA, M. et al. *Zákon…*, p. 1434.
[80] Previous legal regulation (public procurement act from 2006) contained specific fact of the administrative offence regarding the violation of the blocking period but in a recent regulation the provision is more general and

always and automatically is the one enshrined in Art. 246(1)(a), the rest blocking periods in Art. 246(1)(b) - (d) are dependent on the time limits of the objections or the petition. In the chronological order, first blocking period runs during the period for filing the objections that takes 15 days. If the objections are filed properly and in time, the second blocking period is activated and it lasts another 15 days during which the contracting authority must settle the objections. Third blocking period provides 10 days to the complainant, who receives contracting authority's decision on objections, to decide whether to file a petition to launch the proceedings to the OPC or not. The last blocking period is applied in a case when the proceeding is initiated and lasts 60 days from the day of the initiation. The contracting authority may conclude such a contract before the expiry of fourth blocking period if the proceedings is discontinued or the petition is dismissed by the OPC[81]. At the same time, the duration of the last mentioned period may be accompanied by the interim measures imposed by the OPC[82]. The OPC should prevent the expiration of the blocking period by rapid decision-making process including adoption of the interim measures aiming at the opportune elimination of the contracting authority's unlawful conduct[83].

## 2.3. Implementation

The Directive's provision "*Member States may require…*" shows that the review with the contracting authority is an optional institute to implement. Czech Republic is one of the six Member States, which has introduced it as an obligatory step preceded the proceedings before the review authority[84]. Furthermore, this review necessarily entails an immediate suspension of the possibility to conclude the contract. In the light of the review directive, this is a fundamental interim measure (suspension), which is automatic, i.e. that it follows directly from the law and is applicable without the need for a decision of review body. This suspension should last at least 10 or 15 days depending on the means of communication and also in relation to the sending of the reply by the authority or the delivery of the reply to the complainant. The suspension is implemented to the PPA relatively extensively, since the authority must give the complainant discretion to file the objections and after the reply, to proceed to a formal review. The PPA

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comprises other offences either. In more detail in: KRČ, R. VANĚČEK, J. *Zákon o zadávání veřejných zakázek. Komentář*. 1. ed. Praha: C. H. Beck, 2022, s. 863.

[81] Act 134/2016, Coll., Art. 246(1)(d).

[82] ŠEBESTA, M. et al. *Zákon…*, p. 1434.

[83] 10 As 219/2016-51, Supreme Administrative Court, 18 January 2018, para. 45.

[84] European Commission. *European Commission. Economic efficiency and legal effectiveness of review and remedies procedures for public contracts. Final Report. MARKT/2013/072/C.* Luxembourg: Publications Office of the European Union, 2015, p. 53.

imposes an obligation to communicate electronically[85], so only the 10 day period is relevant for this purpose. Nevertheless, the PPA sets a period of 15 days for the settling of objections and 10 days for the submission of a petition for review (notwithstanding the time limit of 60 days for the OPC's decision), which goes well beyond the requirements of the review directive. Regarding the CJEU rule on the time and content adequacy of the objection, Czech decision-making practice respects this rule and fully applies it in this wording[86]. Procedural issues are then entirely in the hands of the Member States.

[85] Act 134/2016, Coll., Art. 211.
[86] See 29 Af 25/2013-76, Regional Court in Brno, Judgement, 23 June 2015, para. 35.

# 3. Initiation of the proceedings before the Office for the Protection of Competition

Review procedure with a judicial or administrative body is a mandatory and main step towards the protection of proper award of public contract, thus the protection of the tenderers. In contrary to the review with the contracting authority, European law provides more extensive regulation and requires introduction of more measures within the process. Although the Advocate General Jääskinen considers the protection in public procurement to be *substantially harmonised*[87], the procedure may differ in its very foundations in each Member State considering their traditions and systems of law, but the proper implementation of the remedies directives still ensures the minimum protection standards within the European Union. The amendment of 2007 brought many significant institutes that has proven to be necessary, with regard to the long experience with the review directive 89/665 (e.g., standstill period, automatic suspension, ineffectiveness etc.)[88]. Art. 12a also sets a goal to review the effectiveness of the directive by the Commission. It can be said that Commission considers the Review Directive to be effective by stating that *the benefits of the Remedies Directives outweigh their costs*[89].

According to the settled case-law of the Court, the Directive does not preclude national legislation laying down a time limit for bringing an action for review of the contracting authority's decision, which may, moreover, constitute a time-bar rule[90]. Such a time limit must still balance the fundamental objectives of the review directive (i.e. rapidity and effectiveness) with legal certainty, which emphasises clarity, precision and predictability[91]. Subsequently, the time limits for filing the petition were reflected in the Directive itself, stating in its Article 2c that the time limit must be at least 10 calendar days with effect from the day following the date on which the contracting authority's decision is sent to the tenderer or of the receipt of the contracting authority's decision, then the time limit shall be at least 15 days in a case of other means of communication. Form, requirements and other details of the submission are determined by the Member States, therefore, subchapters 3.1. and 3.2. define the ways of initiating proceedings under the Czech law. Subchapter 3.3 then focuses on the important

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[87] *Consorci Sanitari del Maresme v Corporació de Salut del Maresme i la Selva*, C-203/14, Opinion of Advocate General, 7 July 2015, para. 16.
[88] ARROWSMITH, S. *Law of Public*…, p. 929.
[89] Report from the Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as Modified by Directive 2007/66/EC, Concerning Review Procedures in the Area of Public Procurement, SWD (2017) 13 final, 24 January 2017.
[90] *Lämmerzahl GmbH v Freie Hansestadt Bremen*, C-241/06, CJEU, Judgement, 11 October 2007, paras. 50-53.
[91] *European Commission v Ireland*, C-456/08, CJEU, Judgement, 28 January 2010, paras. 60-61.

measure of ineffectiveness, which is implemented as the initiation of special proceedings. Review procedure before the OPC is in this thesis discussed according to the Title II of the Act 134/2016 and is held in two instances, i.e. that the decision taken by the first instance (Public Procurement Section within the OPC) may be reviewed by the second instance (led by the chairman of the OPC).

The proceedings may be initiated by the petitioner (the complainant whose objections have been rejected) or ex officio[92]. There are several basic differences between these two options. First, there is a distinction in participation in the proceedings and the rights associated with it. Second, the filing of the petition, unlike ex officio proceedings, involves an obligation to pay a deposit (more on deposit in subchapter 3.4.). Third, in order for certain corrective measures to be imposed, the proceedings must be initiated by the petition[93].

## 3.1. Motion and initiation ex officio

Ex officio proceeding is initiated either on the own initiative of the OPC or on the basis of a motion[94]. Submission of a motion is advantageous because it can be done in any stage of the procurement process, the submitter does not pay a deposit[95] and has a right to know whether the proceedings have been initiated. On the other hand, it comes with several disadvantages. Submission of a motion does not guarantee a real launch of the proceeding because the launch is up to the will of the OPC, the submitter has no participant's rights and the OPC is not able to impose a ban on the performance of a contract[96]. However, the OPC's own will should not be confused with willfulness, which would allow the OPC to violate the principle of discretion, even in cases where proceeding must be initiated, but still this fact does not confer a legal entitlement of the submitter to initiate proceeding ex officio[97]. The ex officio proceeding is launched by the date on which the participant of the proceedings (contracting authority) receives the notice of initiation.

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[92] Act 134/2016 Coll., Art. 249.
[93] KRČ. VANĚČEK. *Zákon…*, p. 879.
[94] Such a motion is subject to the provisions of the Administrative Procedure Code and it meets the requirements set by the Directive 2014/24/EU, rec. 122.
[95] The issue of the deposit for filing a motion was addressed by the Constitutional Court in 2019, which abolished the controversial provision on charging CZK 10 000 for filing such a motion. More in: CHMELA, O. Zrušení poplatku za podnět k ÚOHS lze považovat za správné. *epravo.cz* [online]. 18 February 2020 [viewed 2 April 2023]. Available from: https://www.epravo.cz/top/aktualne/ondrej-chmela-zruseni-poplatku-za-podnet-k-uohs-lze-povazovat-za-spravne-110666.html.
[96] BALÝOVÁ, L. *Veřejné zakázky*. Praha: C. H. Beck, 2015, p. 170.
[97] II. ÚS 586/02, Constitutional Court of the Czech Republic, Resolution, 8 October 2002.

## 3.2. Petition

The petition procedure is initiated by the date when the OPC receives the petition and the only entitled person to file it is the one who has filed proper and timely objections to the contracting authority. The objections must be then followed by the content of the petition. If the petitioner departs from the content of the objections, the grounds for the discontinuance of the entire proceedings shall be constituted[98]. The only exception to this rule is a petition to impose a ban on the performance of a contract discussed in the subchapter 3.3. On the other hand, the OPC is not limited by the content of the petition and is capable to review even those acts that are not challenged in the petition[99]. In general, the grounds for bringing the petition are the acts and omissions of the contracting authority concerning, for example, the tender documentation, the exclusion of a tenderer or the choice of tendering procedure[100].

The whole communication among the OPC, petitioner and lately also contracting authority (petition, opinion) should be done in an electronic form to the data box or in a form of data message signed by a recognised electronic signature (with the exception of non-textual parts that can be sent in a paper form) and should meet the requirements laid down by law. The general requirements on the petition are based in the Art. 37 of the Code of the Administrative Procedure (hereinafter also CAP) and then are supplemented by specific demands of the PPA. Among these specifics is the appellation of the contracting authority, determination of the law infringement and what the petitioner seeks, the giving evidence of the delivery of the objections and of deposit payment (full listing of the necessary requirements can be found in Art. 251(1)). The petition needs to be sent to the OPC as well as to the contracting authority in duplicate. The authority is then obliged to send the opinion together with the tenderer documentation to the OPC[101]. Failure to comply with certain requirements of the application may lead to the discontinuance of the proceedings under Article 257.

The fundamental time limit linked to the filing a petition is set to 10 days running from the date when the complainant has received the decision on filed objections. The 10 days time limit is applied in the relation to the OPC as well as to the contracting authority and the failure to serve the petition to one of the parties shall be regarded as an insuperable obstacle and shall lead to the discontinuation of the proceedings[102]. If the contracting authority does not settle the

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[98] KRČ, R. *Přezkum*…, p. 25.
[99] 29 Af 74/2012-80, Regional Court in Brno, Judgement, 28 October 2014, par. 35.
[100] A demonstrative list of acts is given in Act 134/2016, Coll., Art. 250.
[101] Act 134/2016, Coll., Art. 251(2) and Art. 252(1).
[102] Ibid, Art. 257(e).

objections, the time limit expands up to 25 days from the date of sending the objections by the complainant. The OPC may provide additional time limit for the removal of deficiencies in the petition. The same 10 days time limit running from the date of receiving the petition applies also on the contracting authority who has an obligation to serve its opinion to the OPC. By the receiving of the opinion to the OPC, the time limit of 60 days for the OPC's decision starts to run. This time limit may be suspended in a case when the OPC needs to get a specialist opinion or a sworn expert opinion[103].

## 3.3. Exception to the petition

The provisions relating to the initiation of the proceedings contain an institute specific, both in the conditions of its application and its effect, and it is the ineffectiveness. This remedy is the most weighty, since it limits the fundamental contraction principles such as pacta sund servanda, legal certainty or legal expectations[104] through the retroactive intervention in rights. It is a tool through which the Member States protects the internal market because they cannot maintain the public contracts contrary to the EU law[105]. The basic principles of ineffectiveness laid down by the Directive brought an important change, since the remedies against contracts already concluded were in many Member States insufficient (apart from damages, there were no or almost no means of protection), mainly in failure to advertise a contract at all or to notify the tenderers of the outcome[106]. The Court also has passed across the compensation of damage as the only remedy and admitted that these contracts cannot be considered compatible with the Communities' law[107].

The ineffectiveness is implemented in the PPA in the form of a petition to impose a ban on the performance of a public contract.

### 3.3.1. Ineffectiveness

Art. 2d of the Directive containing ineffectiveness is relatively extensive. Nevertheless, the Union regulation does not enjoin the precise methods and thus the ineffectiveness as an important element, is not fully harmonised. The most serious breaches of public procurement rules should be, according to the explanatory memorandum, sanctioned effectively,

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[103] Act 134/2016, Coll., Art. 261(2).
[104] BLAŽO, O. Nullity and ineffectiveness of contracts as a consequence of violation of EU competition and public procurement rules. *Strani pravni život*, 2020, 4, p. 76.
[105] Ibid, p. 77.
[106] ARROWSMITH, S. *Law of Public*…, p. 1016.
[107] *Commission of the European Communities v Federal Republic of Germany*, C-503/04, CJEU, Judgement, 18 July 2007, para. 33.

proportionately and dissuasively and ineffectiveness, as an example of such a sanction, should be then imposed by the decision of the independent body, not automatically[108]. According to the Art. 2d(1), the independent review body shall decide on ineffectiveness in case of (I) prior non-publication of contract notice (so-called direct award), (II) violation of rules on standstill or automatic suspension and (III) unlawful call-offs under framework agreement. The directive's provisions do not require the unconditional ineffectiveness or absolute nullity in every case, thus the Member States are able to determine the effect of the ineffectiveness, such as the cancellation of all obligations or obligations, which have to be performed[109]. Minimum requirements are then set on the time limits, specifically determined by the Art. 2f. The minimum period of 30 days shall be linked to the publishing of the contract award notice or to the provision of the information about the concluded contract to the tenderers by the contracting authority. Then the minimal 6 months period shall be applied always and without distinction, with effect from the day following the date of the conclusion of the contract.

Special attention is paid to the situation where the elements necessary to decide on ineffectiveness are met, but the contracting authority is protected against this faith. Art. 2d(4) determines three cumulative conditions for application of such a protection to the situation described in the Art. 2d(1)(a). Art. 2d(5) then set another three cumulative conditions regarding the dynamic purchasing system and framework agreements. This thesis will briefly focus on the first mentioned exception only. The conditions of paragraph 4 are as follow: (I) contracting authority has not published contract award and incorrectly (but in a good faith) considered that it has not been necessary, (II) contracting authority has published a notice for voluntary ex ante transparency (hereinafter VEAT), and (III) the contract in question has been concluded after the minimum time limit of 10 days from the day following the date of the publication of this notice. The authority's good faith should be assessed by the review body, which should take into consideration arguments presented in the notice for the VEAT[110]. According to Arrowsmith, it means that the review body should *genuinely holds the belief that there are grounds not to publish a call for competition, but also that this belief is an objectively reasonable*[111]. Regarding the publication of the notice for VEAT, the Directive requires specific information to be provided and besides fundamental ones as the identification of the contracting

[108] Directive 2007/66/EC..., rec. 13.
[109] Ibid, Art. 2d(2).
[110] *Ministero dell'Interno v Fastweb SpA*, C-19/13, CJEU, Judgement, 11 September 2014, paras. 50-51.
[111] ARROWSMITH, S. *Law of Public*…, p. 1020.

authority, *a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice* is very substantial[112].

The exception from the ineffectiveness lays down in the third paragraph of the Article in question, which introduce the "overriding reasons relating to a general interest" (hereinafter also "general interest"), and thus although there are ground for the ineffectiveness, the review body cannot consider the contract to be ineffective. The Directive's provision specifies economic interests, but they cannot be considered the only overriding reasons and can be applied in exceptional circumstances, which are not those, where the interests are connected to the procurement award in question, especially *the costs resulting from the delay in the execution of the contract, the costs resulting from the launching of a new procurement procedure, the costs resulting from the change of the economic operator performing the contract and the costs of legal obligations resulting from the ineffectiveness*[113]. Reasons presented by the contracting authority in particular case are assessed by the bodies responsible for the review procedure.

### 3.3.2. Alternative penalties

Last but not least requirement linked to the ineffectiveness is institute of alternative sanctions. If the general interest prevails and demands continuation of the contract performance, Member States shall provide the alternative sanctions to be applied instead of the ineffectiveness. The Directive introduces two specific penalties, namely the imposition of a fine on the contracting authority and the shortening of the contract performance period[114]. By the very name, these sanctions replace the use of other remedies that are not sufficient or available in a particular case[115]. Review bodies get a wide range of discretion, since the Directive does not specify the exact amount or range within which the financial penalty should be determined, nor does it require the performance of the contract to be shortened by a specific time limit. In addition, review bodies may be empowered to assess separately all factors relevant to the determination of the sanction, including the seriousness of the acts and conduct of the contracting authority[116]. The Commission's report on the effectiveness of the Directive shows that the majority of the Member States has implemented both types of alternative sanctions[117]. At the same time, review

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[112] Directive 2007/66/EC..., Art. 3a(c).
[113] Ibid, Art. 2d(3).
[114] Ibid, Art. 2e(2).
[115] ARROWSMITH, S. *Law of Public*…, pp. 1034-1035.
[116] Directive 2007/66/EC…, Art. 2e(2).
[117] European Commission. *European Commission. Economic efficiency and legal effectiveness of review and remedies procedures for public contracts. Final Report. MARKT/2013/072/C.* Luxembourg: Publications Office of the European Union, 2015, p. 65.

bodies should ensure that all sanctions are sufficiently effective, proportionate and dissuasive. Some authors argue that a combination of sanctions is necessary for such a real sanctioning effect, i.e. that a financial penalty should be automatically imposed in addition to any contract shortening[118].

### 3.3.3. Petition to impose a ban on a performance of a public contract

As it was mentioned before, Member States have been given a relatively free hand in implementation of the ineffectiveness and the Czech legislator has given it the form of a petition to impose a ban on performance of a contract. This institute is perceived as a corrective measure following the Directive's objectives, especially *restoring competition and creating new business opportunities*[119]. The OPC itself highlights that this ban aims at the ineffectiveness as defined in the Review Directive[120].

The first reference in the PPA is in the Art. 250(2) (provision containing subject of the petition), which says that *after the conclusion of a public contract or a framework agreement, it shall be possible to file only a petition to impose a ban on the performance of the contract specified in Section 254, even without a prior filing of objections.* Thus, it can be sum up that the petition of the ineffectiveness depends on three conditions. First, this kind of petition is used after the conclusion of a contract; second, it must legally include a proposal to impose a ban on the performance and third, it repeals the condition of previous objections procedure. According to the Art. 254(1), the petitioner is able to file such a petition if the contracting authority concludes a contract and (I) does not public a contract notice, information notice or an invitation to submit tenders in a simplified below-threshold procedure with the exception contained in the Art. 212(2)[121], (II) has a ban on concluding contract imposed by the law or by interim measure of the OPC, (III) this contract was concluded outside the procurement procedure even the OPC imposed a ban on such a procedure, or (IV) the time limit for objections to the selection of a supplier in a dynamic purchasing system or framework agreement has not yet expired. The enumeration of the Art. 251 is exhaustive, which means that any other grounds for filing a petition to impose a ban would have resulted in a dismission of the petition because OPC would

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[118] ARROWSMITH, S. *Law of Public*…, p. 1038.
[119] R253,257,258,264/2013/VZ, OPC, Decision, 18 December 2013, paras. 224-225.
[120] Ibid, rec. 226.
[121] This exception contains a case when the contracting authority sends the voluntary notice on the intention to conclude a above-threshold public contract instead of the contract notice. This voluntary notice according to the Art. 212(2) is considered proper publication and such conduct cannot be the subject of the proceeding on ban on the performance of the contract. This voluntary notice may be challenged by the objections. More detail in: KRČ. VANĚČEK. *Zákon*…, p. 896.

found no basis for imposing a remedy[122]. All the grounds also aim at the stage of the contract conclusion, which is not coincidence. The filing of objections and petition is considered to be sufficient mean of protection during the course of the procurement procedure, whereas for the purpose of the proceedings on the imposition of a ban, the course itself does not play a decisive role[123]. Regardless of the reasons for filing petition to impose a ban on performance of the contract, the effect is always the same and it is void ab initio[124].

The OPC is not capable to impose this ban in the ex officio proceedings, thus the petitioner, who is afterwards together with the parties to the contract in question a participant of the proceedings, is necessary[125]. The fundamental limit is set up to one month since the *contracting authority published the contract award notice in the manner specified in Section 212(2)*[126]. The latest and always applicable time limit is up to 6 months and starts to run by the date of the conclusion whereas, the one-month limit runs from the date of publishing the contract notice according to Article 212(2)[127]. The petition itself should meet the requirements of a submission under the Administrative Procedure Code, a proposal to initiate proceedings under the Public Procurement Act and, in addition, it must contain information on when the petitioner became aware of the conclusion of the contract[128]. The petition should be delivered to the OPC and to the contracting authority as well.

The authority then fulfils duties enshrined in the paragraphs 5 and 6, i.e. delivers the award criteria documents and procurement procedure documentation[129], opinion on the petition, other information or evidence necessary to clarify the contracting authority's procedure, all within ten days. The evidence cannot be changed or extended after the given time limit, which reflects the concentration of the proceedings (concentration itself discussed in subchapter 4.1.). Failure to comply with these time limits shall be considered an administrative delict and may lead to the imposition of a fine pursuant to Article 268.

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[122] Act 134/2016, Coll., Art. 265(a).
[123] 31 Af 9/2019-83, Regional Court in Brno, Judgement, 5 August 2020, par. 11.
[124] Act 134/2016, Coll., Art. 264(1).
[125] JURČÍK, R. *Veřejné zakázky*…, pp. 900-901.
[126] Act 134/2016, Coll., Art. 254(3).
[127] MACEK, I. DERKOVÁ, R. BARTOŇ, D. KOŠŤÁL, K. MAREČKOVÁ, E. ZATLOUKAL, P. *Zákon o zadávání veřejných zakázek. Praktický komentář s judikaturou*. Praha: Leges, 2017, pp. 762-763. Time limits in more detail in OPC's decision-making practise, e.g. S0076/2017/VZ, OPC, Decision, 12 March 2017, para. 112. A separate, but similar in content, regulation of time limits for dynamic purchasing systems and framework agreements is contained in paragraph 4.
[128] Act 134/2016, Coll., Art. 254(2).
[129] Definition of this term can be found in Art. 216(1).

The Czech regulation also follows the provision of the overriding reasons contained in the Directive, for which the imposition of a ban on performance (or ineffectiveness) may be waived and according to the PPA, they are the grounds which merit particular consideration in relation to public interest[130] and following alternative penalties. Although the Directive states that the *Member States may provide* such an exception, Czech provision follows the wording of Article 2d in its implementation into Art. 264. The use of public interest is the last possibility for the contracting authority to avoid an imposition of a ban, respectively, the contracting authority seeks to persuade the OPC that there are grounds for which it is necessary to continue in the performance of the contract. If the OPC accepts such an argument, it may, pursuant to Article 264(3), set a time limit of not more than 12 months, at the end of which the ban on the performance of the contract takes effect. Simply put, if the OPC rules on the authority's breach, it will postpone the effectiveness of the ban itself. The second option is that, although the OPC decides that all the requirements for imposing a ban have been met, the public interest is so strong that it does not impose a ban at all (Art. 264(4)). The OPC evaluates such facts on the basis of the proposals and evidence presented by the authority, following the procedure discussed above, with the burden of proof resting solely on the contracting authority. Regarding the grounds, the Act 134/2016 follows the directive while specifying the economic reasons to be used in exceptional circumstances[131]. OPC decides separately in particular proceedings whether the grounds of public interest exist or not. For example, the public interest may lay in waste disposal in the municipality. In a case from 2014, the contracting authority concluded a contract, under which the OPC could have imposed a ban on the performance of the contract. The authority provided as evidence the fact that the municipality could not stop disposing of the waste because it would violate the Waste Act, which also establishes a presumption of environmental endangerment without the need to support that fact with other evidence. The OPC assessed this evidence as a failure to carry the burden of proof, which would have led to the imposition of the ban. Lately, the OPC took into account a communication from the Ministry

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[130] Interesting note regarding the translation of this term can be found in JURČÍK, R. *Veřejné zakázky*…, pp. 901-902. The author points on the phrases „overriding reasons" that was translated into the Czech version of the Directive with the meaning of "urgent, pressing", whereas this meaning is in the PPA specifically to the time urgency. For the purpose of non-imposition of a ban it is not only time urgency, thus the legislator has chosen grounds which merit particular consideration in relation to public interest, which includes the other reasons mentioned below.

[131] Public Procurement Act adds a special provision Art. 264(5) containing grounds in fields of defence and security. The OPC does not impose a ban *where, simultaneously, the consequences of such ban would seriously endanger the existence of a broader defence or security programme that is of fundamental importance for the security interests of the Czech Republic*. However, directive 2009/81/EC does not require implementation such a specific ground. More on the interpretation of the paragraph 5 in the OPC's decision R0180/2020/VZ, OPC, Decision, 13 November 2020.

of the Environment, which thoroughly described the consequences of failing to ensure waste collection in detail, and on the basis of which the OPC ultimately decided to impose the ban after the expiration of the five-month period[132].

## 3.4. Deposit

The analysis of the Review Directive shows that a large degree of discretion is left to the Member States, which especially applies to the determination of the review formalities. For this reason, no provision for any costs related to the review can be found. The European Commission comments on fees in its report on the effectiveness of Directive, in which it expresses the need to take into account both the right of the State to impose fees covering the costs of proceedings and the right of persons entitled to effective protection and remedy. More details on fees must then be sought in the case law of the CJEU. In the case *Orizzone Salute*, the CJEU ruled that the court fees may thus be set according to the value of the contract (taking into account the reasonableness of their amount) and at the same time may not exceed 2% of the value of the contract in question[133]. At the same case, the Court also dealt with the cumulation of the fees paid within the same administrative judicial proceedings relating to the public procurement. The levying of multiple and cumulative fees in the same administrative judicial proceedings does not contravene EU law as it may discourage the bringing of unfounded actions[134]. Shortly thereafter, the Court held in *Star Storage SA* that national legislation may make the launching of any petition for review conditional upon the payment of the deposit, provided that such payment is linked to the return of such deposit to the petitioner, irrespective of the outcome of the proceedings[135]. Nowadays, the procedural fees are set by the Member States themselves and their determination and amount vary from State to State depending on the form of the review. Some States either set fixed amounts irrespective of the nature of the contract, while others adapt the amount of the fee depending on the value or type of contract, for example by setting a minimum and maximum limit for such a fee[136].

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[132] R35,37/2013/VZ, OPC, Decision, 24 March 2014, para. 50.
[133] *Orizzonte Salute - Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino – Città di Levico Terme and Others*, C-61/14, CJEU, Judgement, 6 October 2015, paras. 58-63.
[134] Ibid, para. 72.
[135] *SC Star Storage SA and Others v Institutul Național de Cercetare-Dezvoltare în Informatică (ICI) and Others*, C-439/14 and C-488/14, CJEU, Judgement, 15 September 2016, para. 63.
[136] According to data from 2013, the Czech Republic ranks among the countries with higher fees and their level is comparable to Hungary. More information on procedural fees within the EU in European Commission. *European Commission. Economic efficiency and legal effectiveness of review and remedies procedures for public contracts. Final Report. MARKT/2013/072/C.* Luxembourg: Publications Office of the European Union, 2015, pp. 66-70.

In the Czech legal order, the payment of a deposit also serves as a prevention against unjustified and purposive submissions[137]. The petitioner is obliged to proof the deposit payment before the time limit for the petition runs out. Failure to provide such evidence, even after the additional time limit subsequently set by the OPC, shall be ground for discontinuance of the proceedings according to the Art 257(1)(a). However, the PPA does not prohibit the initiation of proceedings ex officio in response to a discontinuance of proceedings due to the filing of a petition without payment of a deposit[138]. The methods for calculating the amount of the deposit are set out in Article 255(1) and (2), and the value of the deposit may be 1% of the petitioner's tender price and at the same time somewhere between CZK 50 000 and CZK 10 000 000. The petitioner may obtain the deposit back if the petition is successful in the first or second instance (if unsuccessful in the first instance, a remonstrance must be filed and succeeded in order to reclaim). Article 255(3) lists the cases where the deposit is forfeited to the State and cannot be reclaimed and it is if (I) the petition is dismissed or (II) the petition has been withdrawn after a non-final decision on dismissal of the petition and the OPC decides to discontinue proceedings. The last case concerning the recovery of the deposit is the withdrawal of the petition before decision on the merits is issued, in which the 35% of the amount of the deposit forfeits, but this amount must be at least CZK 30 000[139].

## 3.5. Implementation

As regards the general rules for initiating proceedings, European law leaves the methods, conditions and requirements for initiating proceedings to the Member States (again, it is worth to recall the diversity of review procedures from one country to another, the unification of which would entail a major interference in national rules). The case-law of the CJEU shows that Member States may set the time limit for bringing an action but does not specify the length of that period. This is then enshrined in the Directive itself, which specifies a minimum time limit of 10 or 15 days depending on the means of communication. According to the PPA, the communication takes place only in electronic form, thus the shorter time limit of 10 days from the date of receipt of the negative objection decision is relevant for implementation. If the contracting authority fails to settle the objections within the 15-day period, the time limit for the submission of the proposal is 25 days from the date of sending of the objections (i.e. 15

[137] 10 As 331/2017-104, Supreme Administrative Court of the Czech Republic, Judgement, 29 August 2018, para. 18.
[138] ŠEBESTA, M. et al. *Zákon*…, p. 1493.
[139] 134/2016, Coll., Art. 255(4).

days for dealing with the objections and 10 days for the submission of the proposal). The time limits set by the Directive and case law are thus fully respected.

The ineffectiveness was implemented in the Czech legal system in the form of a petition to impose a ban on the performance of a contract. Here, the Review Directive is considerably more specific and at the same time does not give the Member State chance to consider the implementation, so ineffectiveness is mandatory. The grounds for imposing a ban on performance of a contract under Article 254(1) of the PPA are substantively the same as those for ineffectiveness under Article 2d(1) of the Directive. It is only in the case of time limits breaches, which are specifically mentioned in the Directive (Articles 1(5), 2(3) and 2a(2)), that Article 254(1)(b) opts for the formulation of a breach of any prohibition to conclude a contract and adds a breach of an interim measure. The Directive further provides that the consequences of ineffectiveness shall be determined by national law. The Czech legislator has opted for a stricter sanction and thus considers the contract void ab initio (ex tunc). An exception is made in cases where reasons of special consideration apply (which overlap in the content with the Directive), in which it is possible to apply limitations to obligations performed in the future, i.e. to shorten the duration of the contract (ex nunc). Such a shortening in the future is in accordance with the so-called alternative sanctions introduced by the Directive, which must come after if the ineffectiveness is not fully applied. In addition to the shortening of the duration of the contract, the imposition of a fine on the authority is also considered an alternative sanction. The PPA introduces both possible alternatives, under which the OPC may shorten the performance of the contract to a period no longer than 12 months and may also impose a fine of up to CZK 20 000 000.

Last but not least, this chapter is devoted to the deposit paid at the phase of filing the petition. Again, this is rather detailed procedural matter, which is not mentioned at all in the Directive and only the CJEU's interpretation provides insight into the fees associated with the review procedure. The deposit, as understood by the Czech legal order, can be considered to be in accordance with such an interpretation, with regard to its proportionality and reasonableness. The deposit is not fixed, since its amount is set at 1% of the petitioner's tender price, accompanied by the minimum and maximum possible limits of such a deposit, which is fully in conformity with the maximum 2% limit set by the CJEU in *Orizzone Salute* case.

# 4. The course of the proceedings and the decision of the Office for the Protection of Competition

As mentioned above, the review procedures of each Member State unite elements of the minimum requirements laid down in the European law, otherwise they may be fundamentally different. This is particularly applied in the procedural matters. Every process still must follow the basic elements of procedure, such as the right to effective judicial protection (remedy) or the right to a fair trial[140]. The procedure itself, rather than its course, is determined by the specific institutes that European law introduces in order to increase the effectiveness of the review. Member States thus must ensure that review bodies are able to (I) adopt interim measures that may suspend the procurement procedure or the performance of the contracting authority's decision, (II) set aside or ensure the setting aside of unlawful decisions, and (III) award damages to the persons harmed[141]. For this purpose, the Directive also recalls that decisions of review bodies must be capable of being effectively enforced[142]. This chapter discusses measures leading to the correction of the alleged infringement and the possibility of setting aside the unlawful decision of the contracting authority. Due to the extent of the thesis, it does not deal with award of damages.

The following subchapters also address the institutes of dismissal of the petition and discontinuance of the proceedings. Both are regulated by the PPA but do not have a specific basis in the Review Directive or case law of the CJEU. They are so internal to the administrative procedure that they are not further specified by the EU law. Nevertheless, it is necessary to cover them in the thesis as they are the foundations of the review procedure in the Czech Republic. In fact, if the OPC does not issue a decision on the merits, the OPC dismiss the application or discontinue the proceedings.

## 4.1. Concentration of the proceedings

It is appropriate to briefly mention the principle of concentration which pass through the whole proceedings. This principle has its basics in the Art. 82(4) of the Act 500/2004 and states that no account shall be taken of new facts and proposal for taking new evidence on appeal or during the appeal proceedings. The form of the principle may vary in different administrative proceedings but the obligation of the administrative bodies to protect the legality and public

[140] Charter of Fundamental Rights of the European Union, OJ C 326/391, 26 October 2012, Art. 47.
[141] Directive 2007/66/EC…, Art. 2(1).
[142] Ibid, Art. 2(8).

interest must be observed every time[143]. The elements of this principle are visible in the Art. 251(4 and 5), according which the petitioner is not able to supplement or additionally alter the parts of the petition and *the parties to the proceedings may propose evidence, allege facts and make other proposals not later than within 15 days from the date on which the notice of the commencement of the proceedings was delivered, provided that restrictions specified in subsection (4) do not apply to such cases*[144]. The only exception to this rule is the possibility to propose those facts that could not be presented in the objections because were not known at the time.

## 4.2. Corrective measures

Regarding the corrective measures, the Directive's main requirement is setting aside or ensuring the setting aside of decision taken unlawfully[145]. The provision specifies *the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure*. It is another way how to protect the tenderers against unlawful decision taken by authority even before the termination of the contract award procedure. Member States were able to replace the combination of interim measures (suspensions) and setting aside measure by dissuasive penalty payments but this has been applied by only three states – Denmark, France and Luxembourg[146].

The OPC may impose a whole range of corrective measures. The petitioner is obliged to state what it is sought in the proceedings but at the same time, the OPC is not bound by the petition while imposing such a corrective measure. In addition, the OPC is not limited by the scope or the reasons of the petition, since it can review the facts which exceeds such a petition[147]. Almost all corrective measures in the Czech legal system are aimed at eliminating the undesirable situation before the contract is concluded. Only one measure - the ban on performance of the contract - is intended to remedy the situation after the conclusion of the contract (in detail discussed in subchapter 3.3.3.). If the grounds for imposing more than one measure are met, the OPC is entitled to impose them cumulatively or, on the contrary, to impose only one remedy because the others are considered to be redundant[148]. Departure from the proposed measures

[143] KOPECKÝ, M. STAŠA, J. et al. *Správní řád. Komentář*. Praha: Wolters Kluwer, 2022, p. 458.
[144] Act 134/2016, Coll., Art. 251(5).
[145] Directive 2007/66/EC…, Art. 2(1)(b).
[146] BOVIS, Ch. *EU Public Procurement Law*. 2nd ed. Cheltenham: Edward Elgar Publishing, 2012, p. 234.
[147] This fact is not expressly enshrined in the PVV but emerges from the case law, e.g. 62 Af 52/2010-89, Regional Court in Brno, Judgement, 10 November 2011.
[148] ŠEBESTA, M. et al. *Zákon*…, p. 1526.

shall not be esteemed to be a rejection of the petition or a ground for considering the petition unsuccessful and thus forfeiture of the deposit[149].

The grounds for imposition of the corrective measures and their descriptions are set out in Article 263 and are developed by the case law of the courts and the decision-making practice of the OPC. The grounds, which are listed in order of the Art. 263 (paragraphs 2-7), are following:

*a) Failure to comply with procurement rules with impact on the selection of the tenderer*

In this case, contracting authority has violated rules on public procurement procedure or on specific procedure (framework agreement, dynamic purchasing system and design contest) with the impact on the selection of the tenderer. The impact may be real or potential, but in the latter needs to be sufficiently proven by the OPC[150]. While imposing the corrective measure, that is the cancellation of a particular authority's decision or cancellation of the whole procurement procedure, the OPC shall ensure that the measure is proportionate. The OPC has a wide possibility of discretion and its decision must be always sufficiently substantiated.

*b) Setting the award criteria contrary to the PPA*

This paragraph is short and clear – authority violates the law by setting the award criteria contrary to the PPA and the OPC cancels the entire procurement procedure regardless on the stage of the procedure. The award criteria may comprise a huge amount of documentation, thus the room for a fault is wide. Regardless on the seriousness or the impact of this fault, according to the PPA the OPC has no discretionary competence and cannot call on the contracting authority to correct such a fault. On the other hand, the courts' and the OPC's practise shows the practical approach while deciding that the cancellation of the entire procurement is *the most intensive intervention into the course of the procurement procedure* (measure ultima ratio) and should be used when no other mean to rectify the infringement is available[151]. The regional court holds this approach and appeal to the proportionality in regard to the seriousness of the infringement's impact on the rights of the subject concerned[152]. No change to this provision is planned in the forthcoming draft law; the amendment should allow the imposition of a lighter

[149] Ibid.
[150] PODEŠVA, V. et al. *Zákon…*, pp. 956-957.
[151] S0612/2016/VZ, OPC, Decision, 25 October 2019, para. 90.
[152] 29 Af 46/2019-56, Regional Court in Brno, Judgement, 29 May 2020, par. 25.

measure only in the case of a negotiated procedure without publication[153]. Additionally, this infringement is considered to be also an administrative delict (Art. 268(1)(b)) and the contracting authority may be fined up to 10% of public contract price.

*c) Failure to deliver the procurement documentation to the OPC in the requested cases*

This paragraph specifies two cases, in which the authority is obliged to deliver the documentation to the OPC, namely the Art. 252(1) – as a reaction on the filed petition, and Art. 254(5) – as a reaction on the filed petition to impose a ban on the performance of a public contract (both are 10 days periods). The OPC may provide five additional days to fulfil this requirement (these five days immediately follow, thus the time limit is 15 days in total) and after the vain expiry of this time limit, the OPC cancels the action requested to be review or the entire procurement procedure. Again, the cancellation of the entire procedure is measure ultima ratio and this provision should be viewed as the preventive measure motivating the contracting authority to cooperate[154]. Furthermore, the OPC may assess what kind of documentation is lacking and whether it impedes the review by the OPC[155]. As well as in the previous ground, this failure is considered to be an administrative delict with a fine up to CZK 10 000 000 (Art. 268(e)).

*d) Incomprehensibility of the authority's decision*

According to the Art. 245(1), the contracting authority *shall express, in a detailed and comprehensible manner[156], its opinion on all the facts stated by the complainant*. In the case, when the authority's reasoning is unreviewable due to incomprehensibility or a lack of grounds, the OPC may cancel the decision, by which the objections had been rejected. Since the decision on the cancellation has entry into force, such objections filed in the procurement procedure shall be esteemed to be resubmitted (identical in content), and the contracting authority may not assess such objections as late. It should be mentioned that this is the only paragraph that does not contain the possibility of cancelling the entire procurement procedure. Rather it strengthens the authority's will to deal with the objections properly and the institute of objections as a mean of resolving the dispute directly between the contracting authority and the tenderer[157].

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[153] Chamber of Deputies Parliament of the Czech Republic. Government bill amending Act No. 134/2016 Coll., on public procurement, as amended. *psp.cz* [online]. 17 June 2022 [viewed 3 March 2023]. Available from: https://www.psp.cz/sqw/text/tiskt.sqw?O=9&CT=249&CT1=0.
[154] 2 As 300/2020-44, Supreme Administrative Court of the Czech Republic, Judgement, 19 May 2021, para. 55
[155] Ibid, paras. 56-57.
[156] Specified by OPC, e.g. S0273/2018/VZ, OPC, Decision, 21 August 2018, paras. 51-52.
[157] PODEŠVA, V. et al. *Zákon…*, p. 958.

*e) Failure to settle the objections*

The PPA is more strict in the situation, in which it arises, that the authority has not settle the objections at all. The OPC may decide on the cancellation of the action challenged by the objections and at the same time of all the following actions taken by the authority or cancellation of the entire procurement procedure. The provision mentions Articles 245(1) and (5) that covers both situations, when contracting authority does not decide at all and when contracting authority decides on the certain objections but does not send it to the complainant, and those two situations are equate[158]. Failure to settle the objections is also an administrative delict according to the Art. 268(1)(d) and may be fined up to the CZK 20 000 000.

*f) Contracting authority proceeds public contract outside the procurement procedure*

The last ground for the imposition of the corrective measure is based on a proposal, in which the complainant challenge the award of a public contract outside the procurement procedure. The award of a public contract, in the light of Art. 2(1) of the Act 134/2016 means *the conclusion of a contract for pecuniary interest between a contracting authority and an economic operator which establishes the economic operator's obligation to supply supplies, provide services or execute works*. This procedure is considered to run outside in those cases when the proper procurement procedure should take place but the contracting authority has not opened the procedure at all (e.g., the authority may consider not being a public contracting authority or the demand not being a public procurement etc.)[159]. If the OPC ascertains such conduct, it imposes ban on continuance of the conduct by the authority. This provision also specifically determines the necessity of the initiation of the proceedings by the petition, in which the petitioner challenge the award outside the procurement procedure. It follows, that the filing of objections is necessary prerequisite (since the only exception from filing the objections is the petition to impose a ban on the performance of a contract) and also that this corrective measure cannot be imposed on the small-scale contracts and concessions (since, it is not possible to file the objections against these special types of procedure)[160]. The last paragraph of Art. 263 supplements the measures described above by imposing a prohibition to conclude a contract that is a mandatory element of the decision imposing a corrective measure. This prohibition (or suspension) lasts until the final decision in the proceedings (with effect by the date of issue) and the remonstrance against this decision does not have suspensive effect. Both

[158] S0512/2018/VZ, OPC, Decision, 16 January 2019, para. 21.
[159] PODEŠVA, V. et al. *Zákon*…, p. 959.
[160] KRČ. VANĚČEK. *Zákon*…, p. 934.

the ban to conclude the contract and the suspensive effect prevents the contracting authority from circumventing such a measure[161].

## 4.3. Dismissal of the petition

The OPC may decide on the dismissal of the proceedings in three clearly defined cases contained in Art. 265. In all the situations, the OPC examines the submission and, after assessing it, concludes that it meets the requirements for termination of the proceedings.

The first reason is the failure to establish grounds for the imposition of a corrective measure. Namely, situations where the OPC found no violation or found a violation that did not or could not have affected the selection of the contractor, or where the OPC found grounds to impose a ban on performance of the contract but the contracting authority substantiated its actions with evidence of special considerations related to the public interest[162]. The OPC may reach the same conclusion in an ex officio proceeding, but in this case there is no petition to dismiss, so it simply discontinues the proceedings under Article 257(f). Furthermore, as it is mentioned above, the dismissal of the petition is one of the three cases when the deposit forfeits.

The second reason lays in the filing of the petition by an unentitled person. The filing of the petition is necessarily linked to the filing of proper and timely objections in the procurement procedure. Therefore, the first situation that comes to mind is the breach of this obligation, i.e. the filing of the petition without prior objections. The only appropriate one is the petition to impose a ban on the performance of a contract, for the submission of which the entitled person has been breached or under threat of being breached his rights under Article 251(1). Active legitimation is then usually exercised by the OPC within the petition proceedings.

The third reason is lack of jurisdiction, where the petition challenges a procedure, which the contracting authority is not required by PPA to follow. In other words, the petitioner is challenging a contracting authority's practice that is not regulated by the PPA at all. It is therefore other action of the authority in which the OPC has no jurisdiction. These other acts may be, for example, the sale of the contracting authority's assets[163]. It also includes small-scale contracts or concessions as listed in Article 248.

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[161] S0308/2019/VZ, OPC, Decision, 24 September 2019, paras. 71-72.
[162] JELÍNEK, K. § 265. In: JELÍNEK, K. (ed.). *Zákon o zadávání veřejných zakázek: Praktický komentář*. Praha: Wolters Kluwer, 2022, pp. 702-703.
[163] Ibid.

## 4.4. Discontinuance of the proceedings

Art. 257 of the PPA provides exhaustive list of the grounds of procedural nature. Some of them has been already discussed, but this subchapter provides a summary of all thirteen grounds for such a discontinuance. The ongoing proceedings may be discontinued, if:

*a) The petition lacks general elements for filings*

Those general elements are determined by the Art. 37(2) of the CAP (general requirements of a motion) and by the Art. 252(1) of the PPA (specifics of the procurement procedure petition). It is evident from this paragraph that petitioner has a possibility to remove such deficiencies, but if he fails, the proceeding is discontinued. The paragraph explicitly mentions also requirement to attach the evidence of the deposit payment, which can be also rectify by the additional attachment. It is necessary to distinguish to attachment of the document attesting to the payment (para. (a)) and the payment of the deposit (para. (c)). The latter mentioned cannot be rectified, since the deposit must be paid in time[164].

*b) The petition lacks infringement specification*

Another requirement on the petition is the specification of the law infringement and the right that have been breached or are threat of being breached. This infringement should be identical in content to the facts set out in the objections and should not be additionally altered or supplemented (see subchapter 4.1.). Contrary to the previous ground, it is not possible for the OPC to call upon the petitioner to rectify this deficiency[165].

*c) The petitioner fails to pay the deposit*

This ground was discussed above more than once, thus here, it is only appropriate to remind that the payment must already be deposited on the OPC's account within the time limit, and the interpretation of this paragraph also implies that a deposit of less than the required amount is considered to be a failure to comply with the obligation leading to the discontinuance without the possibility to call upon the rectification[166]. On the contrary, the overpayment is always returned to the petitioner[167].

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[164] MACEK, I. et al. *Zákon o zadávání…*, pp. 762-763.
[165] R324/2015/VZ, OPC, Decision, 18 April 2016, paras. 21-23.
[166] R0154/2018/VZ, OPC, Decision, 8 November 2018, para. 25.
[167] R0126,0128/2020/VZ, OPC, Decision, 9 September 2020, para. 59.

*d) The petitioner fails to attest the delivery of the objections to the contracting authority*

The filing of objections is a form of the review with the contracting authority. An essential part of the petition submitted to the OPC is the document attesting the delivery of the objections to the contracting authority, the non-delivery of which leads to the discontinuance of the proceedings. Although the petitioner is obliged to deliver a copy of the petition to the contracting authority within the same time limit, the discontinuance of the proceedings is not linked to the failure to deliver the petition to the contracting authority, but only to the OPC. This is an irreparable defect of the proceedings, but some authors have interpreted the provision to mean that if the OPC received document attesting the objections delivery from the authority as part of the mandatory tender documentation, the proceedings should not be discontinued solely for the failure of the petitioner to deliver the document (on formalistic grounds)[168]. However, OPC's decision-making practice indicates that this proof forms an integral part of the petition and cannot be relied upon a mere statement in the tender documentation unless it forms part of the petition. The OPC also bases this approach on the fact that the time limits for delivery of the tender documentation follows the deadline for delivery of the petition with all the requisites, thus the OPC has the opportunity to assess the timeliness and required requisites of the petition[169].

*e) The petitioner fails to meet the time limits for filing a petition*

The time limit for filing a petition is 10 days from the delivery of the negative decision on the objections to the complainant, and in the case where the contracting authority does not decide on the objections (within the time limit of 15 days), the time limit is 25 days from the delivery of the objections to the contracting authority. In the case of a petition to impose a ban on the contract's performance, the time limit shall be 1 month from the publication of the prior notification or 6 months from the conclusion of the contract without such publication. It is not possible to forgive such time limits because of their substantive nature, which is characterised by the impossibility for the addressee to influence their course and by the time-bar rule (the extinction of the right in a case of missing the time limit)[170].

[168] KRČ. VANĚČEK. *Zákon*…, p. 912.
[169] R0098/2019/VZ, OPC, Decision, 25 July 2019, paras. 33-37.
[170] 9 As 114/2011-58, Supreme Administrative Court of the Czech Republic, Judgement, 11 September 2012.

*f) No grounds for imposition of a corrective measure are found in the ex officio proceedings*

In this case, the proceedings shall be discontinued if the OPC finds no grounds for imposition of a corrective measure under Article 263 or a fine for an administrative delict under Articles 268 and 269 in the ex officio proceedings.

*g) The procurement procedure in cancelled by the contracting authority*

This ground for discontinuance is one of the few very specific points in the review procedure that is covered by EU law. Thus, all Member States are obliged to provide a review of a contracting authority's decision on cancellation of a procurement procedure and even to allow such a decision to be set aside if it violates EU law or national law implementing EU rules[171].

This rule has been implemented into the Czech legal order in a form of the ground for the discontinuance of the proceedings. The OPC is obliged to discontinue the proceedings if it becomes aware of the cancellation of the procurement procedure by the contracting authority. It is not possible to correct the unlawful action of the authority by the OPC's decision and thus fulfil the objective pursued by the procedure. When the previous legislation was in force, this situation was dealt with by dismissal of the proceedings under Article 66(1)(g) of the CAP on the ground that they were irrelevant[172]. Furthermore, it was possible to impose a penalty for the administrative delict of unlawful cancellation of a procurement procedure, which was punishable by a fine of up to CZK 20 000 000[173]. Under the current PPA, the procedure cannot be assessed as an administrative delict and the solution to the situation is the imposition of corrective measures aimed at setting aside the decision on the cancellation of the procurement procedure, moreover, only on a petition challenging the unjustified cancellation of the procedure or in proceedings initiated ex officio for this purpose[174].

*h) The objections have not been filed properly and in time*

Last but not least ground for the discontinuance reflecting the objections stage is failure to file the objections properly and timely (with the exception of proceedings on the petition to impose a ban on the performance of a public contract). Related to this point is the aforementioned concentration of proceedings, whereby the parties must make all submissions and evidence

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[171] *Hospital Ingenieure Krankenhaustechnik Planungs-Gesellschaft mbH (HI) v Stadt Wien*, C-92/00, CJEU, Judgement, 18 June 2002, paras. 54-55.
[172] MACEK, I. et al. *Zákon o zadávání…*, p. 764.
[173] Act No. 137/2006, Coll., on public procurement, as amended by Act No. 40/2015, Coll., Art. 120(2)(b).
[174] MACEK, I. et al. *Zákon o zadávání…*, p. 764.

within the time limit, with later submissions being taken into account only in exceptional circumstances. In this context, the OPC may decide to partially discontinue the proceedings where the petition contains new facts compared to the objections which could not have been alleged in the review with the contracting authority.

*i) The contracting authority cancels the reviewed actions or adoption of the requested corrective measures*

This procedure can be called as an autoremedial action of the contracting authority. The authority's primary obligation is to take the necessary remedial action whenever it becomes aware that it has infringe the PPA. In the context of the review procedure, these breaches are then also set out in the proposal, which further includes the form of remedy that the petitioner seeks in the procedure. If the contracting authority takes the measures requested or reverses the challenged actions, and the points of the petition are granted in full, the procedure is discontinued as its objective is fulfilled[175].

*j) The contracting authority concludes the contract during the administrative procedure[176]*

A contract for the performance of a public contract may be concluded during the administrative procedure even without a breach of the law. However, the contracting authority must always make sure that at the time of the conclusion, the blocking period is not running or an interim measure under Article 61 of the CAP is not imposed[177]. The OPC shall discontinue the proceedings, and thus the petitioner has the only possibility of protection against the unlawful action, and it is the filing a petition to impose a ban on the performance of the concluded contract. The award of a contract in contrary to the law constitutes an administrative delict for which the contracting authority may be fined[178].

*k) The petition was filed after the conclusion of the contract in question (with exception of a ban on the performance of the contract)*

Article 250(2) explicitly states that after the conclusion of a public contract or framework agreement, only a petition to impose a ban on the performance of a public contract may be

[175] JELÍNEK, K. In: JELÍNEK, K. (ed.). *Zákon…*, pp. 689-690.
[176] The Constitutional Court of the Czech19epublic recently decided on a constitutional complaint, in which the abolition of this paragraph was requested (Pl. ÚS 24/21, Constitutional Court of the Czech Republic, Judgement, 2 November 2021, paras. 75-88).
[177] 10 As 219/2016-51, Supreme Administrative Court of the Czech Republic, Judgement, 18 January 2018, para. 16.
[178] Act 134/2016, Coll., Art. 268(1).

submitted. It follows that other petitions challenging the acts and omissions of the authority seek remedy before the conclusion of such a contract. The situation here is the same as in some other grounds for discontinuance, namely the impossibility for the OPC to impose a corrective measure. This provision cannot be breached even in exceptional cases, e.g. where a participant becomes aware of coordination between the contracting authority and another participant after the conclusion of the contract, thus the aggrieved participant then has to resort to instruments other than a submission to the OPC[179].

*l) The contract's subject-matter is fulfilled before the filing of the petition*

The discontinuance of proceedings on this ground is not exceptional given that under Article 254(7) no corrective measure may be taken in proceedings for a petition to impose a ban on the performance of a contract, which would prevent the subject-matter of the proceedings from being implemented during the course of the proceedings. Since OPC cannot take any steps to remedy the illegal practices in this situation, the proceeding becomes irrelevant.

*m) The contracting authority cancels the reviewed actions or adoption of the requested corrective measures in the ex officio proceedings*

This provision coincides in substance with para. i), with the only difference being that para. i) refers to autoremedial action in the context of a petition procedure, whereas para. m) refers to autoremedial action in an ex officio procedure.

## 4.5. Remonstrance

The administrative proceedings before the OPC leads to the OPC's decision, by which it may decide on the merits, on the discontinuance or dismissal of the proceeding. Since the OPC is one of the central administrative bodies in the Czech Republic[180], the only protection against its decision is co-called remonstrance. The remonstrance is enshrined in the Art. 152 of the CAP and together with the provisions of the PPA implies that it is used against the decision in the first instance of the OPC review procedure and its draft is referred to the chairman of the OPC by the remonstrance commission.

The party to the proceedings may submit a remonstrance within 15 days from the date of delivery of the decision and may claim the cancellation or alteration of the decision if no harm may arise therefrom to any of the parties, unless all of those concerned express their consent

[179] 31 Af 10/2019-84, Regional Court in Brno, Judgement, 5 August 2020, para. 19.
[180] Act No. 2/1969, Coll., of the Czech National Council, on establishment of ministries and other bodies of central government of the Czech Republic, as amended, Art. 2.

therewith[181]. The PPA contains three specifics that exclude the possibility to submit the remonstrance and it is against a procedural resolution of the OPC which *(I) regulates the conduct of the administrative proceedings, (II) has set the time limit for performing an action, or (III) has corrected obvious incorrectness, unless such correction concerns the statement contained in the decision*[182]. This resolution then becomes legally binding by the date of the delivery to the last party of the proceedings[183]. All these exceptions share the procedural character, thus cannot be or have impact on the decision on merits[184].

If the remonstrance is not upheld, it is dismissed and the party then has the only possibility to defend itself in the framework of a judicial review, the prerequisite of which the remonstrance is. This framework is composed of administrative courts – the Regional Court in Brno and the Supreme Administrative Court. The applicant in this case defends against the remonstrance, thus the OPC is always a party to such proceedings.

## 4.6. Implementation

A fundamental requirement of the Directive on the decisions of review bodies is the ability to impose interim measures and to set aside unlawful decisions of the authority. These two elements of review are interlaced in the PPA's provision setting out the corrective measures. The OPC is able to set aside the authority's decision and in most cases, the OPC has the possibility to annul the whole procurement procedure. However, this ultima ratio measure should reflect the principle of proportionality. Thus, in accordance with Article 2(1) of the Directive, the OPC aims to correct the alleged infringement before the contract is concluded. Although the grounds for imposing a corrective measure are precisely defined by law, the OPC has a large extent of discretion in applying them, which is not precluded by the European law. The imposition of corrective measures is closely linked to the suspension of the possibility to conclude a contract (the fundamental interim measure under EU law). Suspension automatically accompanies every measure and cannot be overcome even by an appeal - in the case of the Czech review procedure, a remonstrance.

The subsequent possible review by an administrative court then fulfil the Directive's requirement on a review body, when it says that if the review body is not a court, the Member State must *guarantee procedures whereby any allegedly illegal measure taken by the review*

[181] Act 500/2004, Coll., Art. 152(6)(a).
[182] Act 134/2016, Coll., Art. 262.
[183] PODEŠVA, V. et al. *Zákon*…, p. 953.
[184] ŠEBESTA, M. et al. *Zákon*…, p. 1523.

*body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review*[185].

[185] Directive 2007/66/EC…, Art. 2(9).

# Conclusion

The main goal of this thesis was to analyse the implementation of the minimum requirements of the Review Directive, namely Directive 89/665/EEC as amended by Directive 2007/66/EC, into the Czech legal system, specifically into Act No. 134/2016, Coll. The results of the thesis can be divided into three parts.

First, the thesis always defines the European and Czech review regulations separately. This shows what boundaries have been set by European law and subsequently, since the Czech Republic is the only review environment this thesis is concerned with, the review procedure is delineated in the light of the Czech Act on public procurement. This section serves as the basis for the analysis of the implementation. Second, the thesis analyses the method and extent of the implementation of the Directive's requirements into the Czech legal system. The observation made in this part of the thesis shows that the Directive leaves a relatively wide discretionary power in the hands of the Member States and it does not regulate a large number of particularly procedural issues at all. On the contrary, the European regulation pays special attention to the efficiency and rapidity of the review procedure and the accessibility of the procedure to any person having or having had an interest in obtaining a contract. The Review Directive thus focuses primarily on specific review institutes, such as ineffectiveness, setting the decision aside and the imposition of interim measures in the form of suspension of the possibility to conclude a contract. As can be seen in the thesis, the Czech Republic has implemented all the elements of the review properly. In the case, where the Member States have a choice of optional implementation of a specific element, the Czech Republic makes use of all the possibilities of the Directive (e.g. implementation of the review with the contracting authority). When given the choice, the Czech legislator always opts for more extensive and stricter implementation options (e.g. implementation of both possible alternative penalties). Third, the thesis shows the extensive structure of the review procedure in the Czech Republic. There are parts of the review procedure that are not regulated by European law or by the case law of the Court of Justice of the European Union at all or are regulated only moderately (e.g. dismissal of the petition, discontinuance of the proceedings). However, such parts must be taken into account when analysing the review procedure too, and they are thus included in the thesis as well.

Due to limits given by the maximum allowed word count, the thesis focuses only on the most essential parts of the review procedure from the point of view of the Office for the Protection of Competition. In order to cover the full scope the review, the author recommends looking at the topic of damages to persons harmed by an infringement.

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## Summary

This master's thesis focuses on the Protection Against Irregular Practises of Contracting Authorities and analyses the public procurement review procedure in the Czech Republic from the perspective of European Union law. The thesis aims to define the framework of the Review Directive 89/665/EEC as amended by Directive 2007/66/EC, which sets out the fundamental requirements for a review procedure in the Member States. Subsequently, the implementation of the Review Directive (i.e. its form, scope and conformity) into the Czech legal system is discussed. Apart from the scope of the Review Directive, the thesis also describes the other institutes of the review procedure in the Czech Republic, as they are an inherent part of the whole procedure. The thesis analyses the legal acts of the Czech Republic and the European Union and also the case law of the Court of Justice of the European Union and Czech courts, and the decision-making practice of the Office for the Protection of Competition.



Key words: public procurement, review, Directive 2007/66/EC, implementation, Act No. 134/2016, Coll.



## Abstrakt

Tato diplomová práce se zaměřuje na Ochranu proti nesprávnému postupu zadavatele a analyzuje přezkumné řízení veřejných zakázek v České republice z pohledu práva Evropské unie. Cílem práce je vymezit rámec přezkumné směrnice 89/665/EHS ve znění směrnice 2007/66/ES, která obsahuje základní náležitosti a požadavky na přezkumné řízení ve všech členských státech Evropské unie. Následně je diskutována implementace přezkumné směrnice (tzn. její podoba, rozsah a soulad) do českého právního řádu. Diplomová práce zahrnuje také části přezkumného řízení, jež působí nad rámec přezkumné směrnice, ale tvoří neodmyslitelnou součást přezkumu v České republice. Práce je založena na právních předpisech České republiky a Evropské unie, judikatuře Soudního dvora Evropské unie, českých soudů a rozhodovací praxi Úřadu pro ochranu hospodářské soutěže.



Klíčová slova: veřejné zakázky, přezkumné řízení, směrnice 2007/66/ES, implementace, zákon č. 134/2016, Sb.