

ELECTRONIC PERSON AS A PUBLIC PROCUREMENT ENTITY

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Abstract. It is now already possible to distinguish the phenomenon of electronicisation of the public procurement system, which must at the same time have its own, separately defined, existence in legal reality. The legal reality of the electronicisation of public procurement now focuses, in terms of subjective construct, on the categories of the natural person, juridical person and organisational unit without legal personality, whereas the legal reality of electronicised public procurement focuses in a very similar way on the natural person, the group of natural persons and the organisational entity. In the future, however, the electronicisation of the public procurement system should lead to the extension of the categories of procurement entity towards including an electronic person. The electronic person has recently been granted a legal status in the EU soft law system, but it is only at an early stage of development and therefore needs to be further refined. From a legal point of view, it should also be added that the category of electronic person must always be identified with an agent (electronic agent, smart agent, computer agent), as it turns out to be the most important substrate of the related artificial intelligence.

Keywords: electronicisation; electronic person; artificial intelligence; public procurement.

INTRODUCTION

The evolution of the public procurement system is linked to technological progress, which implies that it reaches increasingly sophisticated levels. Certainly, we are now witnessing the impact of digital technology on the public procurement system, which aims at the final conversion of the processes taking place in it to digital format. Undoubtedly, digital technology should then be understood as a technology based on both digital technology and information systems. It should also be assumed in this context that digital technology involves the use of digital systems. At the same time, an IT system can be considered to be a set of interrelated elements the function of which is the processing of data by means of computer technology. Digital technology is based on breaking down messages, signals or forms of communication between the creating device and the receiving device by means of a binary code string [De Sutter 2007, 37-38].

Virtually all modern electronics today is built as digital technology, while analog electronics is coming out of use. As a result, we have a variety of digital technology products, such as: electronic document, electronic signature, electronic mailbox, electronic services, electronic announcement, electronic transactions. In view of the above, the phenomenon of electronicisation of the public procurement system may be distinguished, which must naturally also have its own distinctly defined existence in the legal sphere [Gola and Bobkowski 2017, 261-70; Moras, Nuzzo, and Szostak 2019, 39-60].

1. CURRENT NATURE OF ELECTRONICISATION OF THE PUBLIC PROCUREMENT SYSTEM

This is why the electronicisation of the public procurement system was granted a clear legal basis, which belongs both to the EU legal order and the national legal order. From the point of view of the Union legal order, particular attention should be drawn to 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, as it permits the use of electronic means in public procurement procedures in particular as regards communication obligations, dynamic purchasing system, electronic auction, electronic catalogues, electronic notices, electronic documents, European Single Procurement Document.¹ However, the national legal order essentially requires reference to the Act of 11 September 2019, the Public Procurement Law,² since it also refers to: electronic statements, the obligation to communicate electronically, electronic auction, the tool of the European Single Procurement Document also in electronic version, dynamic purchasing system as a fully electronic process, electronic reporting, electronic notices, electronic invoicing, e-procurement platforms, electronic documentation and archiving.

The electronicisation of the public procurement system in this meaning is purely objective and functional in nature. From an electronic perspective, it always focuses on the subject matter of the public contract and the procedure for awarding a public contract. Consequently, it should also be noted that the electronicisation of the public procurement system is not yet aimed at achieving a subjective character. This is true mainly having in mind that a public procurement entity cannot be currently granted an electronic character. Under the legislation currently in force, we are dealing only with the traditional understanding of the public procurement entity, which was formally reflected in the structurally similar definitions of economic operator and contracting entity. This is so because, according to the dictionary of the Act of Public

¹ OJ L 94 of 28.03.2014 , p. 65 as amended.

² Journal of Laws of 2024, item 1320 as amended.

Procurement Law, whenever the term “economic operator” is mentioned in the national legal system, it means a natural person, a juridical person or an organisational unit without legal personality, which offers the execution of works or a structure, the supply of products or the provision of services on the market, or applies for the award of a contract, has submitted a tender or entered into a contract for public procurement; and whenever the term “contracting entity” is used – it means a natural person, a juridical person or an organisational unit without legal personality, obliged under the Act to apply it.

This traditional understanding of public procurement entity is also widely accepted in the literature on the subject. At most, the emphasis is then placed differently, but still within a fundamentally institutional sphere. For example, it is emphasized that an economic operator, as a public procurement entity, is a specific natural person, a group of natural persons or an organisational unit which is formally qualified as an economic operator by the provisions of public procurement law and for which specific powers or obligations are or may be implemented – either directly by the provisions of public procurement law or by the acts of concretisation of the provisions of public procurement law – in the contract preparation phase in the contract award phase and in the contract implementation phase [Szydło 2014, 93-94]. At the same time it is assumed that the contracting entity, as a public procurement entity, is considered to be a specific natural person, a group of natural persons or an organisational unit which is formally qualified as a contracting authority by the provisions of public procurement law and in respect of which specific powers or obligations are or may be implemented, either directly on the basis of the provisions of public procurement law or on the basis of acts giving concrete expression to the provisions of public procurement law, during the phase of award of a public contract and during the implementation phase of a public contract [ibid., 49-50].

In any case, the construct of the public procurement entity, which applies equally to the economic operator and the contracting entity, covers categories that are actually identical from the formal point of view. The legal reality of the phenomenon of electronicisation of public procurement is focused on the categories of natural person, juridical person and organisational unit without legal personality, while the reality of legal practice related to the phenomenon of electronicisation of public procurement very similarly focuses on a natural person, a group of natural persons and an organisational unit. Hence, a public procurement entity must ultimately be categorised as a natural person or an organisational unit. A public procurement entity is often perceived in terms of attributes of a person, i.e. a legal being capable of acting, to which the entirety of rights and obligations can still be attributed. However, a public procurement entity may not be identified synonymously with a person [Kosik 1963, 24]. This is so because a person is always a public

contract entity, but it happens just as often that a public procurement entity does not mean a person at all. The most telling example of this is organisational units without legal personality [Frąckowiak 2005, 899-900].

Certainly, “natural person” is a technical classification of a human who becomes a separate entity for the purposes of legal transactions. Thus, a human becomes a natural person not because of his/her natural characteristics, but because of the consequences of the legal regulation attributed to them [Niczyporuk 2016, 161]. Therefore, the determination of the existence of a natural person always requires consideration to be given to the meaning of the legal norm and to other determinants allowed by it [ibid.]. This must undoubtedly be referred to a group of natural persons, such as e.g. civil-law partnership. Moreover, it is generally beyond doubt that “organisational unit” is the qualification of a certain organisation i.e. a separate entity which has a certain form [Frąckowiak 2005, 901]. The separate existence of an organisational unit must therefore take place where the legislature wants to link the effects of certain legal norms, usually certain rights and obligations, with the legal structure given to it [ibid., 902]. The existence of the organisational unit is also construed from the meaning of the legal norm and other determinants allowed by it, including declarations of will, administrative decisions and judicial decisions that may usually be found therein [ibid., 900]. In principle, when the criterion of the existence of legal personality is concerned, organisational units are divided into juridical persons and organisational units without legal personality.

2. FUTURE NATURE OF THE ELECTRONICISATION OF THE PUBLIC PROCUREMENT SYSTEM

In the future, the electronicisation of the public procurement system should lead to a formal extension of the categories covered by the construct of public procurement entity to include the electronic person. Moreover, it seems acceptable to assume that not only an economic operator may be an electronic person, but it is also possible to consider a contracting authority as such. Admittedly, a certain thing must be added in order to state that an electronic person becomes a contracting entity. First of all, the electronic person must also become a public entity, as this status has uniformly been given to the contracting entity, and it is therefore necessary to grant it all the public characteristics that are typical of it. Although this will of course not be an easy matter, it now seems acceptable, but will require the use of new constructs. In view of the above, in the legal reality, the categories of public procurement entity will include the following: natural person, juridical person, organisational unit without legal personality and electronic person. On the other hand, the categories of public procurement entity may

in the legal reality include at least the following: natural person, a group of natural persons, organisational unit and electronic unit.

First of all, it must now be stated that the category of electronic person already has a legal status, since a corresponding legal term has been introduced into the EU soft law system, first in the resolution of the European Parliament of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL) (2018/C 252/25).³ It has not yet been legally defined, however, which seems understandable, as the convention typical of legal persons has been replicated. Of course, it is rightly assumed then that the electronic person is at the initial stage of development, and it therefore needs to be further specified. Concurrently to the concept of electronic person, the related criterion of electronic personality has been distinguished. This is so because the legal term of electronic personality was developed within the system of EU soft law, although for similar reasons it was not granted the character of a legal definition, first under the abovementioned resolution of the European Parliament of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL) (2018/C 252/25). Nonetheless, the meaning of the electronic personality remains unclear, apart from imposing a specific link between it and the electronic person. It is therefore not yet known whether electronic personality will be a criterion of classification of electronic persons.

Thus, there was in fact a “legal discovery” of the electronic person, which is very reminiscent of the “legal discovery” of the juridical person by the German Pandectics of the 19th century [Dölle 1959, 1-22]. On the other hand, the concept of an electronic person is rejected in legal terms, as it is not yet possible to refer to an independent legal personality of artificial intelligence, even though it would constitute a practical and even necessary solution [Chłopecki 2018, 14; Biczysko-Pudółko and Szostek 2019, 12-14]. It is then fair to say that the electronic person is not referred to in Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act),⁴ Although this was to be expected, given the fundamental importance of artificial intelligence for distinguishing the electronic person. The Polish national legal system does not refer to the electronic person either, but there already is a regulation on artificial intelligence in Act of 17 January 2019 on The Industry of the Future Platform Foundation.⁵

³ See OJ C 252/239 of 18.07.2018, p. 11.

⁴ OJ L. 2024/1689 of 12.07.2024.

⁵ Journal of Laws of 2019, item 229.

From the juridical point of view, it is worth adding that the category of electronic person should be inextricably identified with the agent (electronic agent, intelligent agent, computer agent), as it turns out to be the most important substrate of artificial intelligence [Jankowska 2015, 177]. The use of the term “agent” refers to Anglosphere literature (*Agent*), which does not fit well with Polish realities, because the meaning of this word in Polish is closer to attorney or plenipotentiary than it meets the criteria of an agent under the agency agreement as set out in the Civil Code [Chłopecki 2018, 20]. We are already dealing with a legal definition of artificial intelligence, because according to the glossary of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), from the perspective of an AI system, the term “AI” refers to a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.⁶

In general, we can then establish that the agent is an existing entity whose actions are still subject to appropriate classification. It is sometimes equated with an automated message system, which is usually a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person, as defined by the UN Convention on the Use of Electronic Communications in International Contracts (2005).⁷ A similar definition is also found in US law, most notably in the Uniform Electronic Transactions Act (UETA) proposed by the National Conference of Commissioners on Uniform State Laws, where it has been assigned to the Electronic Agent) [Chłopecki 2018, 20]. At the same time, as part of the model of a rational agent exhibiting intelligent behaviour, the intelligent agent is distinguished [Turing 1950, 433-60]. Finally, there is also the software agent, i.e. a computer program equipped with some kind of decision-making autonomy, operating without supervision or intervention from anyone outside, most often goal-driven (i.e. having some freedom to choose the means adequate to achieve the goal) [Russell and Norvig 2010, 34].

⁶ OJ L. 2024/1689 of 12.07.2024.

⁷ United Nations Convention on the Use of Electronic Communications in International Contracts, https://uncitral.un.org/en/texts/e-commerce/conventions/electronic_communications [accessed: 01.12.2024].

CONCLUSION

The agent was thus shaped by the world of digital technology, and it is usually embodied as: a robot (in the sense of a carrier) which is often equipped with physical sensors and actuators (starters, servomechanisms); an expert system supplied by a human with information to carry out the task; software when operating in a purely computational environment (so-called *softbot*) [Jankowska 2015, 177-78]. Regarding robots, these are devices that automatically perform certain tasks, most often in the form of drones, exoskeletons, androids, autonomous vehicles, while expert systems are categorised as computer programmes that support the use of knowledge and decision-making at expert level, which originally included: Dendral, Mycin, Prospector. Finally, there is also the so-called software bot in software project management and software engineering, which today includes, for example: blockchain, smart contracts, distributed ledger technology (DLT), decentralised autonomous organisation (DAO). Therefore, the legal system must keep up with such a manner of understanding the agent so that it can ultimately be recognised as a subject of law, i.e. formally allow a new category of subjects of law in the form of electronic person. This way of understanding the agent also leads to the legal distinction of the electronic entity on its basis. This proposal is most likely to be implemented in the most electronicised components of the legal system, which currently include especially public procurement.

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