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Did the Bulgarian Minister of State Administration pay "Microsoft" Corporation out of his own pocket or was it public money?

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No, there is no mistake in the title. It came as a logical question after reading Decision No 6930 of the Five-member Panel of the Supreme Administrative Court (SAC) of Bulgaria as of 15 July 2005. The Decision was delivered on the case of Access to Information Programme (AIP) and two MPs versus the refusal of the Minister of State Administration to disclose the Bulgarian government contract with "Microsoft" Corporation.

In 2002 the Minister purchased from the mastodon company about 30,000 software licenses for the Bulgarian public administration and paid 13,650 million USD for them. He did not follow the public procurement procedure and DID NOT present the contract TO Parliament. Two MPs and AIP filed a request to the Minister and received a late response that the contract would be withheld in view of the lack of Microsoft Corporation consent.

The first instance court found the denial unlawful but after the Minister appealed, the five-member panel of SAC Court declared the initial complaint inadmissible and dropped the proceedings. SAC decision is final and cannot be appealed.

According to the SAC judgment, the law provides an opportunity to the responding authority to prolong the 14-days period for response up to 14 more days, when a third party is concerned. In that case Microsoft Corporation interests were concerned. The complainants were obliged to know, even if not informed, that a third party would be asked for consent. SAC found that the complainants challenged prematurely a deemed refusal1 instead of waiting for response within the prolonged time period. Consequently their complaint was declared inadmissible.

The case is similar to other access to information cases involving also state contracting for the customs reforms and highways concession. The common characteristics of all these REQUESTS FOR access to state contracts cases are: large amounts of money paid, avoiding public procurement, invoking access to information exemptions to withhold information.

Commentary

Besides the formalities dealt with, the SAC decision SAYS that the tax-payers have no right to see contracts between the state and private companies, even if the payments are from the state budget.

SAC decision is astounding in several ways, making the optimists, who believe in the consistency of the court decisions on access to information, look foolish and enthusiastic activists.

First

It came out that a requester for access to documents has the duty to foresee, without any notice any minister's intent to require the consent of a third party (in cases of public procurement this is usually the contractor) before disclosing the contract between his

company and the state.

It is a question then, what if a requester is confident that the contracts of the state with any company - paid by taxes – WOULD BE public under the law? These are, presumably the practices in democratic countries, especially with regard to contracts paid from the state budget. How could one predict whether a minister holds a different opinion and chooses to take his decision dependent on the third party consent? These different views on the matter were the reason to refer the case to the court, weren't they?

Second

The judges obviously believe that the Minister of State Administration did not deny information. He only gave it a bit later, because he was busy asking for the third party consent. In that case, the judges believed, the requesters have been inexcusably impudent to appeal the deemed refusal of the minister, instead of waiting for the written response. The latter was received on the late afternoon of the 28th day of the request submission (the last day for a possible appeal). This response in fact came after the complaint was sent to the court. Its content was a short summary of the contract.

It is a question then what happens if the requesters did not want to miss the deadline for the submission of a complaint against the refusal? Why do the legally stipulated timeframes exist, if not to enable the requester to know when to expect a response and when he has the right to appeal a refusal?

Third

The starting point of the court judgment is a long observation of the question whether the Minister of State Administration was a body obliged by (covered by) the Access to Public Information Act (APIA) as it could be **disputable**. At least the finding was that the minister was obliged. On another hand, it was **indisputable**, to the court, that "in the particular case, the information was about the activities of a private company, which was not obliged to provide access to public information since it was not financed through the state budget. Indeed, we would agree that it is INDISPUTABLE firstly, that Microsoft Corporation is a private business company and secondly, that this company is not financed by the state budget. It is unclear though, why this speculation was necessary when the requesters requested the information from the minister, not from the company and the subject of the case was precisely the contract with the state.

When the court proceedings started, there was a hope that it was INDISPUTABLE that the Minister of State Administration was an obliged body under the law. It was yet INDISPUTABLE that the Minister of State Administration was the institution responsible to the society for the APIA implementation. These indisputable facts are even written down in the law. 2

On the other hand, it was very much DISPUTABLE that the public and the MPs have no right to see a contract between the state administration and private company, moreover one that had been paid by citizens' taxes.

Several issues are important here:

If a public authority pays a private company, then we are usually talking about public procurement. If the tender procedure is avoided, a special public interest should stay behind the exception - national security or public order. When we are talking about private interest or a commercial interest, then again we are limiting all discussion to the scope of that interest. In democratic countries, the two interests are balanced against each other and if the public interest of disclosure overrides, the information should be released. In those countries it is apparent and INDISPUTABLE that the decision should be in favour of the public interest, not of a private one. This applies especially, when the tender procedure has been avoided.

Someone may say, "I beg your pardon, but Microsoft is the best company," why do we need to follow the formalities, which would

only make the process more expensive.
Maybe that is the reason why the society needs to know - to shape their own opinion on the high quality of services Microsoft Corporation provides to the Bulgarian administration presented by the Minister of State Administration. Why is the best quality so jealously kept out of public eyes?

The case is over now. The court delivered its decision. The second instance ruled in contradiction to its positive case-law on the Access to Public Information Act that the Minister was not obliged to give information to the requesters. First of all, because the disclosure of the contract would harm the interests of a private company.

And we are left to answer to several questions: Should not the Minister, who is the head of the state administration (and who is responsible by the law for several public registers of particular importance—that of the public procurements, the concessions, and the APIA), be the model of transparency and accountability to all administrations?

Or is it only the 150 to 500 euro procurements that would be really public?

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Footnotes

1 Under the Bulgarian legislation failure of public administration to decide on a matter within the prescribed time frames is considered a negative decision (refusal).

2 The Minister of State Administration reports annually on the implementation of APIA under art. 16 of the law.

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