Information material for the Bill on the Registry of Contracts and on amendment of Act no. 137/2006 Coll. on Public Contracts, as amended, **Document of the Chamber no. 42.**

rekonstrukce státu

# Information and arguments

## Bill on the Registry of Contracts

**Why a new law?**
Why a new law is necessary and what the benefits are.

**Current bill**
What the bill contains and what its history is.

**Practice abroad**
How the law functions in other countries.

**Most common objections**
What objections do critics of the act have?

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Questions, ambiguities, disinformation, and what the reality is.

# What changes will the new act bring and why are they necessary?

There is no reason for not making all contracts of the state and public institutions easily accessible to everyone—it is the best prevention of overpriced contracts, unnecessary purchases or unprofitable sales of assets. Although citizens can now request these contracts through the Freedom of Information Act, the requests are often declined with reference to trade secrets, or on other pretexts. This simplest and most effective measure has already been implemented in Slovakia: each contract becomes effective only after it is published online in the so-called "registry of contracts". Several town councils in the Czech Republic have also voluntarily adopted this practice.

What are the benefits of the registry of contracts?

**It will allow all public contracts and investments, amounting to hundreds of billions of crowns, to be under public control.** Public control represents the most efficient and the cheapest defence against overpriced contracts, needless purchases, or bad property sales.

*"Every contract concluded between the Bata Company and the town of Zlín shall be printed at the company's expense and distributed in a sufficient number so that everybody can express their opinions on the contract."*

**Tomáš Baťa,**
the first promoter

**It will solve numerous imperfections in providing information upon request** in compliance with the Freedom of Information Act: protracted provision of contracts, including lawsuits, and ineffective sanctions for not providing information.

*"The three-year waiting period in combination with the cost of 9,000 CZK means that most applicants just give up and the information will never become public."*

**Jan Boček,**
iHNED.cz

**It will allow contracting authorities to compare the prices of similar contracts**, get to know the prices of products and services, obtain references and contacts of contractors, and have examples of contracts and contacts of ordering authorities dealing with similar contracts.

*"The Registry of Contracts is not just a notice board, but also 'marketplace' of information. It may be used for comparing the price levels of similar contracts and learning the prices of products and services, obtaining references of companies and contractors, and examples of contracts and contacts of ordering authorities dealing with similar contracts."*

**Doubravka Fišerová,**
Vyskeř mayoress

**It will reduce the administrative expenses related to the submission of requests for information**, since publishing one contract only takes a couple of minutes.

*"I consider the Registry of Contracts to be a brilliant idea and a simple solution. No more challenging what a certain contract hides, no more Act 106 related requests. Contracts will simply be uploaded onto the Registry and the job is done."*

**Michael Canov,**
Chrastava mayor

**It will increase the confidence that the public has in their elected representatives**, as has been proven by the experience of those mayors who have already started publishing their contracts.

*"Our town has been publishing every contract for a long time, and our citizens look favourably on it. It has created an atmosphere of confidence in which it is much easier for us to work."*

**Filip Kořínek,**
Černošice mayor

*The quotes of mayors come from a leaflet prepared by Jan Farský for a workshop held in April 2013.*

# Current bill

A bill on the Registry of Contracts, meeting the parameters given in the Pledge of Support for Reconstruction of the State, has passed its first reading in the Chamber of Deputies: **A bill on the Registry of Contracts and on the Amendment of Act no. 137/2006 Coll. on Public Procurement, as amended, Document of the Chamber no. 42.**

### Who will be liable to publish contracts according to the bill?

The state, regional and municipal authorities, legal entities established by law, legal entities controlled by the state or regional/municipal authorities including their subsidiaries.

### What contracts need not be published according to the bill?

Publication is not required for employment contracts, contracts concluded with natural entities within the ordinary course of business (e.g. energy supplies), implied contracts (such as the use of the public transport), grave lease contracts, all contracts not published in compliance with the Freedom of Information Act, and other contracts.

### Will orders and invoices be also published according to the bill?

The bill has been submitted in two versions. In the first version, orders and invoices should not be published at all; in the second version, they should be published only from a certain financial limit specified by the government.

### How will a contract be published?

The contract-publishing process includes filling-in seven fields ("metadata") and uploading the text of the contract, including annexes and amendments.

### How does the so-called "sanction of invalidity" work?

This means the ineffectiveness and subsequent invalidity of an unpublished contract. Until a contract is published, it is invalid, thus the contractual parties may not be forced to start implementing the contract. Only if neither of the contractual parties publishes the contract within three months from its conclusion, a sanction – the contract becoming invalid – occurs from its outset (ex tunc).

### Which contractual party will be liable to publish a contract?

Both parties. Thus, both contractual parties shall be guilty if the contract is not published. If both the parties agree that one of them will publish the contract, the other party is obliged to check this fact, including the accuracy of the seven obligatory points, before commencing execution of the contract.

## From the Pledge of Support for Reconstruction of the State

### I shall support an act that will

- condition the validity of all contracts concluded by the state, regional and municipal authorities, and other public institutions (e.g. state-owned enterprises), by their publication on the internet,
- introduce a central register of contracts available to the public that will include complete texts of the contracts and metadata in a machine-readable format, with the exception of information protected by Act No. 106/1999 Coll. on Freedom of Information, and Act No. 137/2006 Coll. on Public Procurement (e.g. personal data, trade secrets).

# Practice abroad

**In 2011, Slovakia introduced the obligatory publication of contracts in a central register of contracts, under the sanction of invalidity.** Later, the act was amended with the introduction of a financial limit for invoices and orders; however, all contracts must be still published.

**Experience from Slovakia:**

- As reported by Transparency International SK, thanks to the obligatory publication of contracts, the number of public contracts commissioned in open tenders has increased from 58% to 73%, the number of the least transparent tenders dropped from 30% to 20%, and the number of tenderers increased.
- According to the former Slovak Prime Minister, Iveta Radičová, thanks to the obligatory publication of contracts, the State saves around 30% compared to the time when contracts had not been published.
- The publication of contracts did not cause a non-manageable increase of bureaucracy, the legal certitude of contractual parties did not decrease, and leaks of confidential information did not occur.
- Only a very few contracts have been cancelled due to their non-publication.

**500,000**
contracts published

**400,000**
visits to the register per year

**1.4 trillion**
CZK in the contracts published online

**Thanks to the register, the following facts came to light:**

- The state-owned agency SARIO ordered eight tickets to a charity ball for over 600,000 CZK, while only around 100,000 CZK was contributed to charity at the ball.
- The Slovakian University of Agriculture purchased furniture for a residence hall 4 to 13 times more expensive than the other Slovakian universities, from a contractor who has oftentimes participated in overpriced contracts.
- The director of the state-owned lottery company Tipos concluded a 150,000 € contract in a non-public tender with a company he had previously co-owned; after this fact was disclosed he resigned.
- Large Slovakian hospitals purchase electricity for a price 1/3 higher than smaller institutions; according to a calculation made by Transparency International SK, purchases for common average prices would bring savings sufficient to provide annual salaries for thirty new nurses.
- When purchasing common office equipment (such as toner cartridges), some public institutions pay as much as double the price for identical goods as the other authorities.
- During the Christmas holiday, the Ministry of Defence concluded an unfavourable contract for the purchase of aircraft through middlemen without a tender.
- Numerous contracts awarded by mayors to their own companies have been discovered.

*"This is the strongest anti-corruption measure of the present government. It has a powerful preventive effect on clerks and officials through the publication, as well as its automatic character."*

**Gabriel Šípoš,**
Transparency International SK director

# Most common objections

**Should the obligatory publication apply only to contracts from a certain financial limit? This would significantly reduce the administrative load related to the publication of frivolous contracts.**

Reconstruction of the State advocates the introduction of a financial limit for invoices and orders as specified in one of the two versions of the bill on the Registry of Contracts, but does not recommend such a limit to be introduced for contracts. We believe that the introduction of a financial limit for contracts would lead to numerous problems, administrative complications, and, paradoxically, to increased financial and time costs:

Contracts may be intentionally divided to smaller, just below-the-threshold contracts (as the Public Procurement Act is often circumvented), and things may be sold for a symbolic 1 CZK.

There is the issue of gratuitous contracts (e.g. donation agreements, pledge agreements, and contracts establishing servitude), all of which will either not be published at all or their subject of execution will have to be evaluated, which is administratively more demanding (experts' opinions) and obviously disputable (incorrectly determined values).

Further, there is the issue of contracts for indefinite duration or below-the-threshold contracts which, for example due to unexpected increase in prices, may become over-the-threshold contracts. Thus, it is simpler to publish all written contracts.

If the main concern is an excessive administrative load for the smallest municipalities, a more suitable solution appears to be the temporary exclusion of municipalities up to a certain population size.

**The sanction of invalidity is a strict measure and may cause a number of practical problems. A better solution might be sanctioning the non-publication of a contract with a fine instead.**

Reconstruction of the State considers the sanction of invalidity to be the fundamental principle of the bill, and so far no valid objection has been raised pointing out significant risks related to the introduction of the sanction of invalidity. The Slovak experience with the sanction of invalidity is strongly positive, too. Further, the sanction of invalidity has been in existence in the Czech Republic in relation to the non-publication of intensions for handling a municipal real property, and hasn't caused any problems. The sanction of invalidity is a cheap and elegant self-enforcing mechanism, being observed by contractual parties, as well as rivals and the public. On the contrary, the introduction of financial sanctions causes numerous problems:

Imposing fines may lead to further requirements on public finances related to the establishment of the sanctioning body that would control the observation of law and impose sanctions. Such a body would require sufficient staffing and would not be able to perform blanket control, only random control.

There would have to be the possibility of a judicial review of decisions made by the sanctioning body, which would bring further burden to the already overloaded courts. The efficiency of the bill on the Registry of Contracts amended in such a way would be very low because many entities would calculate on the low probability of an administrative offence being revealed.

In order to make the sanction effective, it must be sufficiently deterrent, i.e. sufficiently high, most likely determined according to the value of the subject of the unpublished contract. In the case of contracts worth millions of Czech crowns, fines amounting to tens of thousands to hundreds of thousands of crowns would not be very efficient. Imposing the fine would further burden public finances.

**Could the publication of a contract concluded with a company partially owned by the State or a municipality affect its competitiveness on the market? Could trade secrets included in contracts be endangered? Should these companies, or at least those fully-owned by the State or a municipality, be excluded from the obligatory publishing of contracts?**

There is no reason to exclude state/municipality-owned companies. Quite the opposite, the public should have the possibility to control how state-owned enterprises manage public funds because these amount to 600,000,000,000 CZK every year. The current bill protects trade secrets and requires that no information be published that is not already obligatorily available in compliance with the Freedom of Information Act. Thus, the bill will not worsen the current standing of these companies.

The Freedom of Information Act protects information containing trade secrets. A trade secret in a contract is usually the price calculation (not the total price itself), or a technical solution of the subject of the contract, usually included in an attachment (design documents). However, such information is expressly excluded from publication in the bill on the Registry of Contracts since it is not considered to be part of the contract. The bill on the Registry of Contracts protects the trade secret, because the scope of information published in the contract does not exceed what the Freedom of Information Act has made available. Further, the bill on the Registry of Contracts excludes from obligatory publication those contracts concluded between a state/municipality-owned company and a natural entity who is not an entrepreneur, within the ordinary course of business in the scope of the company's line of business. It means that hundreds or thousands of contracts dealing with the supply of water, electricity, etc., with ordinary consumers will not be published.

The limitation of 100%-ownership would allow the obligatory publication of contracts to be easily circumvented by partial privatisation of the company, e.g. in the amount of one percent.

# Frequently asked questions

***Will all public transport tickets and similar contracts have to be published?***

No, they will not. As specified in § 2 of the bill, "the obligatory publication applies to contracts concluded in writing". Thus, contracts concluded verbally, or even implied contracts, need not be published. An agreement regarding the use of public transport is an implied one, concluded by the act of the passenger getting on the vehicle. A ticket is only a document showing that the transportation cost has been paid, it is not a contract; therefore, it need not be published.

***What happens if a clerk forgets to publish a contract?***

The sanction of invalidity comes only after three months. The other contracting party will most likely find out within those three months, and will publish the contract. The obligation to publish the contract applies to both parties and neither party may commence the contract execution before the contract becomes effective. Thus, the private party would check the situation in its own interest. If such a party pays no attention to this aspect for the duration of three months, its intention to execute the contract may be considered dubious.

In theory, anything can happen, but if a clerk starts to execute a contract without checking its validity and effectiveness first, this clerk is severely breaching his/her duties. A similar situation may happen at present if a clerk forgets to print a contract and have it signed by the mayor, but starts settling invoices.

***What if a clerk and the contractor make a deal to not publish the contract deliberately, and then the contractor seeks compensation from the public party?***

A contract may be published in the Registry by both parties. If both parties fail to do so and damage is caused, both parties will be guilty. Thus, neither party can seek compensation.

***What if the contract is found not to have been published when the three-month period is over, but the parties have already commenced the execution ("concrete has been laid and money paid")?***

It is the same situation as if a contract is not properly concluded: gratuitous enrichment must be returned; both parties have to give back what they have provided to each other. If concrete cannot be returned, expenditures spent will probably be deducted from the sum to be returned to the buyer. The buyer's representative should be legally liable for breaching the law and, depending on the scope of damage, also for breaching his/her duty while managing the other person's property.

***But what if the contractual parties state expressly in the contract that the contract is to be published by the contracting authority, in order to allow the contractor to seek compensation?***

If the contractual parties arrange that the publishing will be provided only by one of them and that the other party has no right to do so in place of the first party (with reference to § 549, par. 1 of the new Civil Code), we believe such a provision should not be taken into account, in compliance with § 2898 of the Civil Code, because it deprives one of the parties of possible compensation for damages caused by the other contractual party's breach of the contract.

However, it is evident that if the State or a municipality agrees to such an agreement, the problem is not the bill on the Registry of Contracts. If a clerk wants to enrich the other contractual party in this way, he/she can do it now, much more easily when concluding any contract, e.g. through a high penalty for delay.

***What about a contract for a rental apartment concluded with a natural person? The obligatorily published metadata would contain information such as the name and address of the real estate, breaching the right to the protection of personal data.***

It is stated in the bill that information contained in a contract, which is not stipulated by the Freedom of Information Act, shall not be published. The Freedom of Information Act protects personal data in compliance with the Act on the Protection of Personal Data. Although the bill requires personal data of the contractual party to be given, the provision on the protection of personal data is not affected and the data that breaches the act will not be published, even in metadata.

***What if a clerk does not publish the contract and the other party is a natural person – will this physical entity have to get a data box to be able to publish the contract?***

A Government Decree specifies a way in which natural persons may publish contracts in the Registry.

***What if a hacking attempt occurs and the Registry of Contracts will not be functional – will all contracts become invalid?***

No, they will not. The publication of a contract is done by sending the contract text through a data box, when the sender immediately receives an automatic confirmation that the contract has been delivered, i.e. published in the Registry.

***What if a dike is about to burst but the integrated system services do not agree on the fact whether citizens' lives, health, or property are at risk? What if an exception from the obligation to publish a contract in the Registry is used and a dispute arises as to whether or not a situation of a vaguely determined threat has occurred?***

No complete exception from the obligation to publish exists. Contracts related to emergency situations when human lives, health or property, or the environment are at risk, become valid immediately even without being published. However, these contracts have to be published within three months, too, otherwise the ex tunc sanction of invalidity applies to them. Thus, it is not probable that anybody would keep arguing for three months whether a contract is valid – the party would wait for the contract to be published, or to become invalid after the three-month period. Otherwise the contractual parties would have to prove – regardless of the opinions of the police or fire brigade – that the threat to the lives, health or property, or the environment, existed and that the contract had been concluded for the purpose of averting or at least reducing the imminent harm.

***But what if the contract cannot be published in the Registry due to a technical fault?***

Previous failures of the Public Administration Portal, which the Registry of Contracts is part of, have lasted several hours, but never for several days or more. The same applies to both scheduled and unscheduled failures of the data box information system. Thus, a later effect may be arranged, since no failure is expected to last more than three months after which a contract would become cancelled from the outset (ex tunc).

***What if a contractual party omits to publish all the essentials, or publishes a completely blacked-out (censored) contract? Does this make such a contract invalid?***

The bill assumes a contract invalid if its published version completely lacks (and only) the elementary contractual essentials, the so-called metadata, e.g. information on the total price or names of the contractual parties. A blacked-out contract will be valid if all its metadata is published.

***Who will pay the administrative costs incurred by scanning the contracts?***

Nothing will have to be scanned; an electronic version of the contract will be uploaded. According to mayors, who have been using the Registry of Contracts, this takes about three and half minutes. This is much less demanding than dealing with dozens of individual requests for information. Besides, municipalities may stipulate in contracts that the contractor will provide the publication, and that the other contractual party may fulfil this duty only if the contractor fails to do so by a specified deadline. Such a solution will minimise administrative costs.