

Financial Law Review

No. 17 (1)/2020

UNIVERSITY OF GDAŃSK • MASARYK UNIVERSITY • PAVEL JOZEF ŠAFÁRIK UNIVERSITY • UNIVERSITY OF VORONEZH
<http://www.ejournals.eu/FLR>

ROMANA BUZKOVÁ*

LEGAL REMEDIES AGAINST GRANT DECISIONS

Abstract

This contribution deals with grant procedures in the Czech Republic, in particular with grants from the European Structural and Investment Funds. The main aim of the article is to examine possible legal remedies that can be used by grant applicants in case of adverse decisions. There is no separate legal act dealing solely with grant procedures in the Czech Republic. Therefore, this contribution analyses the relation between Act No. 218/2000 Coll., Budgetary Rules and Act No. 500/2004 Coll., Code of Administrative Procedure, with an emphasis on the amendment to Budgetary Rules which came into effect on 1st January 2018 and brought significant changes to rules governing the grant procedures. This article does not deal with the control of projects implementation nor remedies against sanctions for the breach of budgetary discipline. The methods of description, analysis, comparison and synthesis are used for writing this contribution.

Keywords: Appeal, Decision, ESI funds, Grant application, Grant selection, Judicial review, Legal remedies.

JEL Classification: H81, K49

* Ph.D. student at the Department of Financial Law and Economics, Faculty of Law, Masaryk University in Brno, Czech Republic. Author specializes in EU funding and regional policy. Contact email: romana.buzkova@law.muni.cz.

1. Introduction

This contribution focuses on grant procedures in the Czech Republic and presents details regarding grants from the European Structural and Investment Funds. The article aims to examine possible legal remedies that can be used by grant applicants against decisions issued by grant providers. This aim should be met by analysing relevant legal acts and case law. The contribution further analyses the relation between Act No. 218/2000 Coll., Budgetary Rules and Act No. 500/2004 Coll., Code of Administrative Procedure, with an emphasis on the amendment to Budgetary Rules which came into effect on 1st January 2018. The article does not deal with the control of projects implementation nor remedies against sanctions for the breach of budgetary discipline but sticks to the evaluation and selection phase of grant applications. The contribution is divided into the following chapters: Czech legal framework, Grant procedure, Remedies, and Conclusion. The methods of description, analysis, comparison and synthesis are used for writing this contribution.

2. Czech legal framework

The basic legal act governing Czech grant procedures is Act No. 218/2000 Coll., Budgetary Rules. However, until the amendment No. 367/2017 Coll. came into force on 1st January 2018, it contained very few provisions regarding grant procedures. Administrative proceedings, in general, are governed by Act No. 500/2004 Coll., Code of Administrative Procedure. There have been ongoing discussions whether the Code of Administrative Procedure could be of subsidiary use for grant procedures or not.

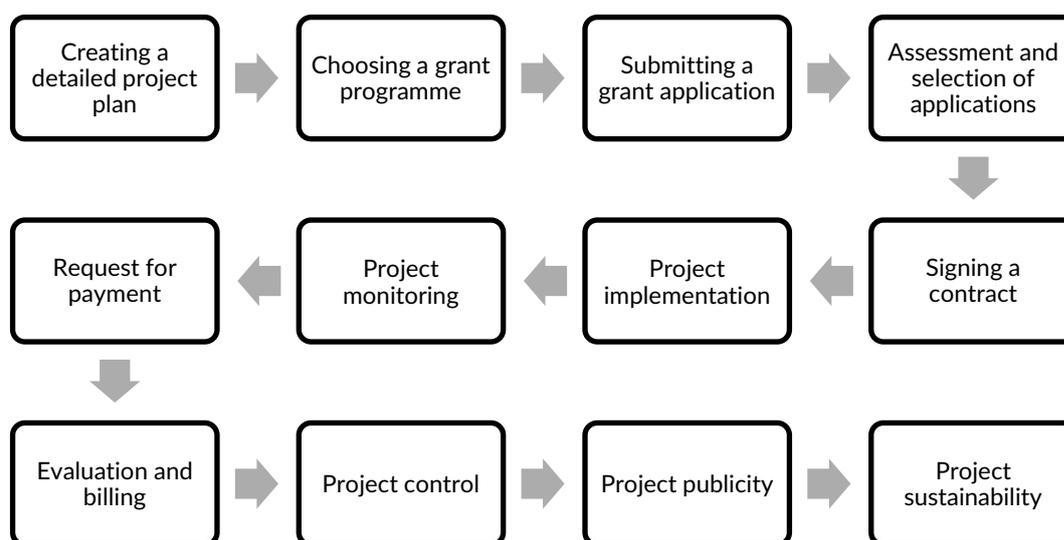
The term “grant” or “subsidy” does not have a universal definition in the Czech legal system. In the Budgetary Rules context, a grant shall mean *funds from the state budget, state financial assets or the National Fund¹ provided to legal or natural persons for a specified purpose*. However, there is no legal entitlement to obtaining a grant [Budgetary Rules Section 2 and 3]. A grant provider, meaning entity administering the grant procedure, can be a central state administrative body, the Labour Office of the Czech Republic, the Academy of Sciences, the Grant Agency, the Technology Agency or a state organisation created under a specific law [Budgetary Rules Section 14 (2)].

¹ According to Section 37 of the Budgetary Rules, the National Fund is defined as the sum of funds entrusted to the Czech Republic by the European Union for the implementation of programmes or projects co-financed from the European Union’s budget.

The next chapter focuses on applications for grants funded from the European Structural and Investment Funds (ESIF)² and serves as an example of a grant procedure falling within the scope of Budgetary Rules. For comparison, there is a separate legal act dealing with ESIF grants (Act No. 292/2014 Coll.) in neighbouring Slovakia.

3. Grant procedure

In the case of European Structural and Investment Funds, grant providers are the managing authorities³ of respective operational programmes, which in the Czech Republic are ministries or intermediate bodies. The following diagram shows the steps leading towards successful drawing of a grant from EU funds [Pařízková et al. 2018: 125]. This contribution further deals with legal remedies applicable in the first phase of a grant procedure, meaning until signing a contract between an applicant and a grant provider.



Source: Author's own elaboration.

3.1. Call for proposals

Grant providers publish calls for project proposals and evaluate received applications. There are two different types of calls:

² ESI Funds are redistributed under shared management, with the EU Member States taking responsibility for preparation, implementation and control of operational programmes. In other words, they provide financial support to final beneficiaries.

³ Managing authority is a body responsible for the efficient management and implementation of an operational programme. It is expected to conduct its work in line with the principles of sound financial management (Regulation (EU) No. 1303/2013, Common Provisions Regulation).

- a) ongoing calls, where applications can be submitted over a more extended period and are gradually assessed; or
- b) time-limited calls, which are open for several weeks or months, where all the submitted applications are reviewed at the same time.

Each call must specify the conditions for grant applications, for instance, the subject matter of given call, the pool of eligible applicants, the deadline for submission, or other requirements such as maximum financial support, regional focus et cetera [Ministry of Regional Development 2018].

The question arises as to whether the call for proposals is an act of public administration which can be challenged by legal action. The Supreme Administrative Court of the Czech Republic⁴ concluded that *calls could not be challenged by actions before administrative courts*. Deciding on which areas of public interest will be supported, under what conditions, and for which entities public funds could be made available, is a political activity of the state where administrative courts shall not interfere [Supreme Administrative Court: 6 Afs 7/2018 – 39]. Judicial review is only possible when deciding on the rights and obligations of individual applicants (see chapter 4).

3.2. Submitting an application

Section 14 (3) of the Budgetary Rules stipulates that the grant application must contain

- For natural persons: name, surname, date of birth, personal identification number, permanent address or, where applicable, identification number of an entrepreneur;
- For legal entities: name, seat address, identification number;
- Name and address of the grant provider;
- Requested amount;
- Purpose;
- Time limit;
- Further information regarding legal entity;
- Any other supporting documents necessary for the grant provider's decision;
- Identification of the call.

⁴ The Supreme Administrative Court is the highest judicial authority in matters falling within the competence of administrative courts.

Operational programmes' guidelines for applicants and beneficiaries that are issued by managing authorities also contain detailed information. For every applicant, it is necessary to familiarise himself with them. The application cannot be submitted orally to a protocol. The method of applying is usually specified directly in the call text. Should this not be the case, Section 37 (4) of the Code of Administrative Procedure shall apply, except for the aforementioned oral submission. For ESIF grants, the application and all the supporting documents and annexes are to be submitted by the set deadline via the electronic portal IS KP14+ which is part of MS2014+ system⁵ and is provided by the Ministry of Regional Development.

3.3. Appraisal of applications and selection for funding

First, the managing authority or the intermediate body assesses the grant applications subject to the evaluation criteria as specified in the call. Second, it selects successful candidates for funding. If the grant provider complies with the grant request, it shall issue a written decision as specified in the Budgetary Rules. If the grant is provided in whole or in part, the operative part of the decision contains the requirements of Section 14 (4), i.e. the specific amount provided, the purpose for which the amount is intended, the period within which the purpose of the project is to be achieved, etc. The Budgetary Rules in Section 14m (2) also contain other elements that may be included in the operative part of the decision on an optional basis. These are specified in Section 14 (5) to (7); the provider may, for example, provide for the accounting of lump-sum expenses. Here comes the critical issue of remedies that the applicant can use in case of refusal, which is further analysed below.

3.4. Request for review

Request for review is usually granted by the ESIF guidelines for applicants and beneficiaries, not Budgetary Rules or any other legal act. Managing authorities send a notification with supporting documents for a decision via MS2014+ system. Grant applicants, who (based on these supporting documents) are expected to be unsuccessful, are entitled to comment on them through a request for review. Each applicant may submit a request for review via MS2014+ no later than 15 calendar days from the delivery date of

⁵ For details see <https://mseu.mssf.cz/>. The electronic portal is intended for applicants/beneficiaries for filling in and submitting of the electronic application and for project administration during its whole life cycle.

notification with supporting documents for a decision. The managing authority of the concrete operational programme sets up a Review Commission that reviews the comments and decides on them accordingly to its rules of procedure. If the application is not returned to the project approval process, the managing authority shall issue a decision⁶ to terminate the administration of such application [Ministry of Regional Development 2017].

4. Remedies

4.1. Situation before 1st January 2018

Section 14 (5) of the Budgetary Rules until 31st December 2017 stipulated that *the decision under paragraph 4 is not subject to general regulations on administrative proceedings and its judicial review is excluded*. However, paragraph 4 referred only to positive decisions of grant providers. The grant providers interpreted this provision in their favour in such a way that any grant decision in general (positive or negative) is not subject to judicial review and cannot be regarded as a decision within the meaning of the Code of Administrative Procedure. The case law of administrative courts was at first contradictory when some decisions of the Supreme Administrative Court precluded the application of the Code of Administrative Procedure, while others admitted its use for negative decisions [Polášek 2018].

The first group of court decisions, often without further legal analysis, adopted the wording of Section 14 (5) of the Budgetary Rules by excluding the application of the Code of Administrative Procedure to all grant decisions under Budgetary Rules (e.g. 4 Ads 66/2013 – 23 or 6 A 6/2002 – 65). The second group of court decisions excluded the application of the Code of Administrative Procedure, but only for positive decisions [e.g. 5 Ans 7/2011 – 90 or 1 As 22/2011 – 64]. This inconsistency regarding judicial review was also noticed by the Supreme Administrative Court itself and brought this matter to its Extended Chamber [Pecková Hodečková 2016: 67]. In 2015, the Extended Chamber concluded that a negative decision (not to grant a subsidy) issued by a grant provider is subject to the Code of Administrative Procedure. Therefore, those decisions are not excluded from judicial review; Section 14 (5) applies *a contrario* [Supreme Administrative Court: 9 Ads 83/2014 – 46].

⁶ Resolution to terminate proceedings pursuant to Section 14j (4) of the Budgetary Rules or decision to reject an application pursuant to Section 14m (1) of the Budgetary Rules. According to the Supreme Administrative Court, terminating the administration of grant application is a decision, not just a notification [1 Afs 61/2013 – 43].

Based on the Supreme Administrative Court's decision, the Ministry of Finance acknowledged the need to address the subsidiary application of the Code of Administrative Procedure in grant decisions. In June 2016, the Ministry responded to this verdict by submitting its first draft amendment to Budgetary Rules dealing with procedural issues when deciding on grant applications [Pecková Hodečková et al. 2017].

4.2. Amendment to Budgetary Rules

Until 31 December 2017, the Budgetary Rules did not expressly regulate the application of general regulations on administrative proceedings in grant procedures. Budgetary Rules contained only a very austere modification of grant procedure themselves. Given the long-term unsustainability of this situation and the evolution of case law, the legislators proceeded to amend the Budgetary Rules, which in principle allowed the subsidiary application of the general administrative proceedings' rules contained in the Code of Administrative Procedure [Zuska et al. 2018].

Act No. 367/2017 Coll., which amends the Budgetary Rules, came into effect on 1st January 2018 and supplements special rules for grant procedures aimed at simplifying the entire process. At the same time, it excludes the application of specific provisions of the Code of Administrative Procedure. Altogether, the amendment brought eleven new provisions to Budgetary Rules [Sections 14g – 14q].

Section 14m (1) now clearly states that by decision, the grant provider:

- a) fully grants the subsidy;
- b) fully rejects the grant application; or
- c) partially grants the subsidy and at the same time rejects the rest of the application.

The grant provider may also change its decision upon request of the beneficiary. Besides, it can issue a new decision to comply with a previously rejected application if the applicant agrees (so-called reconsideration option).

A resolution, on the other hand, may terminate the grant proceedings in cases listed in Section 14j (4):

- a) the application has not been submitted within the time limit laid down in the call for applications;
- b) the applicant does not correspond to the group of eligible grant applicants stated in the call for applications;

- c) the application suffers from errors, and the call for applications does not allow the possibility of their removal.

In two cases, the law does not specify how the proceedings will end, but given the procedural nature of such a decision, it would be a resolution again. The first case is the discontinuation of proceedings due to the applicant's failure to fix application errors within the time limit, although the grant provider challenged him to do so [Budgetary Rules, Section 14k]. The second case is a situation when the applicant dies or ceases to exist before the decision has been made, and the call does not specify otherwise [Budgetary Rules, Section 14l].

4.3. Relation to the Code of Administrative Procedure

As mentioned above, it was possible to use legal remedies against adverse decisions before amendment No. 367/2007 Coll. came into force. Therefore, the most significant change is brought by Section 14q (2) of the Budgetary Rules: *No appeal or remonstrance is permissible against the provider's decision. Renewal of proceedings is not admissible. Examination proceedings shall not be admitted, except for the procedure under Section 153 (1) a) of the Code of Administrative Procedure.* In practice, this means that applicants will no longer be able to appeal, and the only way to achieve a review will be filing an action before administrative courts (according to Act No. 150/2002 Coll., Code of Administrative Justice, as amended). This measure should reduce the administrative burden on the side of grant providers and minimise associated time lags. However, Budgetary Rules do not explicitly state whether the provider's decision refers only to a substantive decision within the meaning of Section 14m or to all decisions (including resolutions).

Sections 14q (1) of the Budgetary Rules now clearly states which provisions of the Code of Administrative Procedure cannot be used in grant procedures.

4.4. Transitional provisions

Transitional provisions set the temporal scope of legal acts. Grant applications submitted before 1st January 2018, i.e. before the amendment No. 367/2017 Coll. came into force, shall be assessed according to the old version of Budgetary Rules. Grant applications submitted on 1st January 2018 onwards, i.e. after the amendment No. 367/2017 Coll. came into force, shall be assessed according to the amended version of Budgetary Rules. This provision also applies to calls which were published before the entry date of the

amendment. Therefore, the decisive moment is the date of submission of a grant application, not the date of call publication. Theoretically, there could have been a situation where applications within one call were assessed according to different wording.

5. Conclusion

The aim of this contribution was met by the analysis of relevant legal acts and case law of the Supreme Administrative Court. The Czech legal framework regulating grant procedures, which was not completely transparent, has undergone many positive changes leading to a higher degree of legal certainty. Although there is no separate “Act on Grants” at the moment, the Budgetary Rules now contain several special provisions which make the grant procedures more transparent and formal. The relation to the Code of Administrative Procedure is also explicitly regulated. The grant procedure is designed as a one-stage procedure; the grant decision, therefore, becomes final. Although the Budgetary Rules do not allow examination proceedings, they do not exclude the possibility of judicial review (filing an administrative action under Section 153 (1) a) of the Code of Administrative Procedure); the exception is presented in Section 14q (2) of the Budgetary Rules. This brings a change from the previous wording, where, according to the case law of the Supreme Administrative Court, it was possible to appeal against a negative decision under the Code of Administrative Procedure. The question is whether such rules do not restrict the applicants’ rights too much and thus do not increase the number of lawsuits before administrative courts. However, given that there is no legal entitlement to obtaining a grant, it was in the interest of grant providers to limit the number of legal remedies.

The temporal scope of Budgetary Rules also plays an important role. Provisions of the version in force before the amendment No. 367/2017 Coll. shall apply to grant applications submitted before 1st January 2018. Applications submitted after 1st January 2018 are already subject to the current amended wording.

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