

# Public Procurement

in Chapters 23 and 24

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Author:  
Center for Applied  
European Studies – CAES

Belgrade, October 2019



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# Table of Contents

List of Abbreviations .....	4
Importance of fight against corruption in public procurement .....	5
Public Procurement in Chapters 23 and 24 within EU Accession Negotiations .....	10
Chapter 23 .....	10
Chapter 24 .....	11
Anticorruption provisions of the Public Procurement Law: Valid provisions and solutions in the proposed new law .....	12
Provisions of the valid Public Procurement Law .....	12
Solutions in the Proposal of the new Law on Public Procurement .....	16
Misdemeanour proceedings relating to public procurement .....	20
Misdemeanours from the Public Procurement Law .....	20
Misdemeanours from the Budget System Law .....	23
Prosecution of the criminal offence of abuse in relation to public procurement .....	27
State of legislation .....	27
Overview of the main elements of definition of this criminal offence .....	28
Legal aspects of the definition of this criminal offence .....	28
Detecting a criminal offence and substantiation .....	31
Statistical indicators and features of legal practice .....	32
Recommendations for the improvement of suppression of irregularities and fight against corruption in the public procurement field .....	33
General recommendations .....	36
Improving the role of the Public Procurement Administration (Office) .....	36
Improving the coordination of bodies .....	38
Ensuring to the full extent the implementation of misdemeanour proceedings in relation to public procurement .....	41
More efficient prosecution of the criminal offence of abuse in relation to public procurement .....	41

# List of Abbreviations

SAI	State Audit Institution
EU	European Union
OECD	Organisation for Economic Co-operation and Development
OLAF	European Anti-Fraud Office
SIGMA	Support for Improvement in Governance and Management (joint initiative of the OECD and the European Union)
PPA	Public Procurement Administration
USAID	United States Agency for International Development
PPL	Public Procurement Law
EC	European Commission



# Importance of fight against corruption in public procurement

The public procurement system should be observed as specific and complex given that it implies procedures aimed at the achievement of a particular objective, with earlier defined deadlines, necessary resources and expected results to meet the needs of end-users – citizens of a country. All steps in the implementation of public procurement procedures must be planned in advance and adjusted to the justified purposes that they serve and the results to be achieved, in accordance with public procurement principles and regulations, and the basic “value for money” public procurement principle.

Due to substantial public funds spending, well-conducted public procurement can and must play one of important roles in strengthening the efficiency of the public sector and building citizen trust both in the public procurement system and competent institutions conducting supervision of the application of regulations and implementation of procedures in this field. Still, public procurement, as an important part of public spending, is the area particularly vulnerable to irregularities in all phases of implementation. The consequences of inadequately implemented public procurement procedures have a twofold negative influence on the work of all contracting parties: the costs of their functioning increase, while the quality of services they provide to citizens is weaker than needed.

The fight against irregularities is, therefore, one of the primary objectives of the overall public procurement system. Given that around EUR 3,300,000,000<sup>1</sup> are spent annually on public procurement in the Republic of Serbia, the conclusion can be reached that in this area there is a risk of activities and phenomena aimed illegal favouring of some bidders and discrimination against others, with a view to meeting particular financial, political and other interests of individuals or interest groups etc. Irregularities in public procurement can also be manifested through corruption. The public procurement system should ensure efficient prevention of corruption and other irregularities, and their more efficient sanctioning if they occur.

Due to numerous occurrences of irregularities and corruption in public procurement, it is not possible to give their universal definition, but it is certainly possible to detect critical points in each phase of implementation of public procurement procedures and, based on them, develop a strategy to fight these phenomena, which also implies reducing risks to the least possible extent. “Red flags” are used to indicate unusual behaviour and activities that should be further examined and monitored, along with mandatory recommendations aimed at preventing re-occurrence.

In general, a significant focus is placed in the European Union (EU) on the conflict of interest, irregularities and corruption in public procurement, which is particularly important given the status of the Republic of Serbia in negotiations on joining this intergovernmental and supranational community of twenty eight countries of Europe. The European Anti-Fraud Office (OLAF) plays an important role, with numerous researches it has conducted, and studies and publications it has published about the fight against corruption<sup>2</sup> and conflict of interest in public procurement<sup>3</sup>. Other international organisations and

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1 According to the Report on Public Procurement in the Republic of Serbia for the Period from 1 January 2018 to 31 December 2018 of the Public Procurement Administration, the total value of all public procurement contracts concluded in 2018 equalled RSD 403,963,400,000, or close to EUR 3,300,000,000. The Report was published on the website of the Public Procurement Administration (in Serbian): <http://www.ujn.gov.rs/izvestaji/izvestaji-uprave-za-javne-nabavke/>.

2 *Fraud in Public Procurement – A collection of Red Flags and Best Practices*, OLAF, 2017.

3 *Identifying conflicts of interests in public procurement procedures for structural actions – A practical guide for managers*, OLAF, 2013.

institutions also devote significant attention to this issue. For instance, the Organisation for Economic Co-operation and Development (OECD) defines the conflict of interest as a conflict between the public duty and the private interest of a public official, in which the official's private capacity could improperly influence the performance of their official duties and responsibilities.<sup>4</sup>

Serbia is on the path of joining the EU. In a part of Chapter 5, negotiations opened at the very end of 2016. At the time, the European Commission (EC) defined for the Republic of Serbia the closing benchmarks, which also include the adoption of mechanisms to curb irregularities and corruption in public procurement. Closing benchmarks for Chapter 5 are:

- “1. *Serbia fully aligns its national legal framework with the EU acquis with regard to all areas of public procurement, including its legislation on concessions and international agreements exempting certain works from public procurement rules.*
2. *Serbia puts in place adequate administrative and institutional capacity at all levels and takes appropriate measures to ensure the proper implementation and enforcement of national legislation in this area in good time before accession. This includes, in particular:*
  - » *the implementation of Serbia's public procurement development strategy 2014-2018 to improve its administrative capacity, in particular by reinforcing the public procurement Office's staff and by ensuring proper training at all levels for all stakeholders;*
  - » *the preparation of practical implementing and monitoring tools (including administrative rules, instruction manuals and standard contract documents);*
  - » *the strengthening of control mechanisms, including close monitoring and enhanced transparency of the execution phase of public contracts and systematic risk assessments with prioritisation of controls in vulnerable sectors and procedures;*
  - » *the effective functioning of the remedies system;*
  - » *measures related to the prevention of and fight against corruption and conflicts of interests in the area of public procurement at both central and local level.*
3. *Serbia demonstrates a track record of a fair and transparent public procurement system, which provides value for money, competition, and strong safeguards against corruption.*<sup>5</sup>

The annual EC Serbia 2019 Report<sup>6</sup> states about public procurement, among other things, the following:

*“Serbia remains moderately prepared on public procurement. No progress was made during the reporting period. Significant efforts are needed to further improve competition, efficiency and transparency in public tenders. The Commission recommendations from 2018 were not implemented and remain fully valid.*

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4 *OECD Recommendation of the Council on Public Procurement*, 2015, p. 7, Chapter III, para. i, available at: <https://www.oecd.org/gov/public-procurement/OECD-Recommendation-on-Public-Procurement.pdf>; also see: *Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service*, 2003, p. 5, Annex, section 1, available at: <https://legalinstruments.oecd.org/public/doc/130/130.en.pdf>.

5 Source: <https://www.consilium.europa.eu/en/press/press-releases/2016/12/13/accesion-conference-serbia/>.

6 European Commission, *Serbia 2019 Report*. Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-serbia-report.pdf>.





*In the coming year, Serbia should in particular:*

- » *ensure further alignment with the 2014 EU Directives on public procurement, including on utilities and on concessions, in particular by adopting the new public procurement law and amendments to the law on public-private partnership and concessions;*
- » *ensure that intergovernmental agreements concluded with third countries and their implementation do not unduly restrict competition, comply with the basic principles of public procurement, such as transparency, equal treatment and non-discrimination and are in line with the national legislation and the EU acquis;*
- » *continue to strengthen the capacity of the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procedures and the administrative courts.*

[...]

*The legal and institutional frameworks on public procurement are broadly aligned with the acquis. A new law on public procurement, aiming to further alignment with the 2014 EU Directives on public procurement, on utilities and on their remedies is under consultation and is yet to be adopted. The legislation on defense and security procurement still contains too many exemptions that are excessively applied without justification and remain to be aligned with the relevant EU Directive. Intergovernmental agreements concluded with third countries and their implementation do not seem to be systematically in line with the principles of equal treatment, non-discrimination, transparency and competition and neither fully consistent with the relevant EU acquis and national legislation. The law on public-private partnerships and concessions is not yet in line with the new Directive on concessions. The implementation of the public procurement strategy and its action plan for 2018 has been delayed as the adoption of new legislation is pending. A new strategic framework is being prepared but has yet to be adopted. This new strategy should be harmonized with the public financial management strategy.”<sup>7</sup>*

On the other hand, in assessing the situation in the public procurement field, the National Anti-Corruption Strategy in the Republic of Serbia for the Period 2013–2018 (the last so far adopted strategy in this field<sup>8</sup>) states the following:

*“So far, there has been no efficient sanctioning of malpractice in public procurements and adequate cooperation between the Directorate for Public Procurement, public prosecutor’s offices, the ministry competent for financing affairs, SAI and other competent institutions. The new Law on Public Procurements (“Official Gazette of RS” No. 124/12), came into force on 6 January 2013, and its implementation began on 1 April 2013. It has achieved a significant progress in the regulatory plan, in the field of transparency of procedures, reduction of discretionary powers of directors of the bodies conducting procurement, strengthening control over public procurement procedures, sanctions, professionalism, building capacities and integrities of the persons responsible for public procurements. Anti-corruption effects of the new Law and the need for possible amendments cannot be fully perceived. However, it is clear that it is necessary to harmonize other regulations with the new Law and adopt by-laws which shall govern the issues of determining appropriateness (justifiability) of public procurement, carrying out the monitoring and control of public procurement procedures, preventive mechanisms aimed at preventing conclusion of agreements on the basis of unjustified or irregular execution of the public procurement procedure, internal acts that would precisely govern the public procurement procedure, etc. Introduction of discipline in public procurements and combating irregularities should be supported by decisions of the National Commission for the Protection of Rights, however, they have not been enforced consistently.”<sup>9</sup>*

<sup>7</sup> Ibid, pp. 59-60.

<sup>8</sup> According to available information, the development of the new Strategy is underway.

<sup>9</sup> The National Anti-Corruption Strategy in the Republic of Serbia for the Period 2013–2018, p. 6, Art. 3.2.2, pos. a), para. 2. Available at: <https://www.mpravde.gov.rs/en/vest/3369/the-anti-corruption-strategy-and-the-action-plan.php>.

The Strategy specifies the following objectives to be achieved in the public procurement field:

*"[1] Enhance participation of the public in monitoring budget expenditures.*

*[2] Consistent application of the Law on Public Procurements and keeping records on the actions of competent authorities related to the irregularities found in their reports.*

*[3] Improve cooperation and coordination between relevant institutions at all levels of the government on anti-corruption activities."<sup>10</sup>*

Based on the above interim benchmarks for closing Chapter 5 and the above quoted segment of the National Anti-Corruption Strategy in the Republic of Serbia for the Period 2013–2018, it is possible to conclude that in the coming period as well, particular attention will be devoted to the assessment of the efficiency and applicability of provisions of the Public Procurement Law (PPL), particularly those about authorisations of competent bodies and measures relating to the prevention of and fight against corruption and conflict of interest. In this regard, a particular emphasis should be placed on proposing activities to improve this struggle, particularly in relation to the execution of public procurement contracts. In this regard, it is necessary to particularly ensure efficient sanctioning of abuse in public procurement and adequate cooperation between the Public Procurement Administration (PPA), Republic Commission for the Protection of Rights in Public Procurement Procedures, public prosecutor's offices, ministry in charge of finance, State Audit Institution (SAI) and other competent institutions.

Corruption in public procurement does not imply monetary losses only (losses in public funds), but also impacts the procurement of goods, services and works which, in terms of their characteristics, quality and delivery deadlines, do not meet the contracting authority's needs, and it often happens that only a part of the contracted amount is delivered or that the entire delivery fails to take place. Inadequate execution of public procurement contracts only further amplifies the negative effects of corruption, while the quality of services provided to citizens is weaker than potential. All this, ultimately, falls upon citizens as these are institutions that are financed largely by citizens' money, with citizens at the same time using those services.<sup>11</sup>

Therefore, the fight against irregularities and corruption in public procurement must be carried out through different measures that underlie all three phases of the public procurement process: planning, implementation of the public procurement procedure (awarding the public procurement contract) and contract execution.

The public procurement system should ensure efficient prevention of corruption and its easier sanctioning if it occurs. Therefore, the question of curbing irregularities and fight against corruption cannot be considered exclusively as the question of the implementation of special anticorruption measures, but as the aim achieved through different aspects of the reform of the public procurement system such as, for instance, increase in transparency<sup>12</sup> and, certainly, better informing the public (particularly civil society organisations) and a higher degree of education of all participants in public procurement procedures.

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<sup>10</sup> Ibid.

<sup>11</sup> Saša Varinac, Ivan Ninić, Association of Public Procurement Professionals of the Republic of Serbia – *Public Procurement Corruption Map in the Republic of Serbia*, OSCE Mission to Serbia, Belgrade 2014, 2.

<sup>12</sup> Strategy of the Development of Public Procurement in the Republic of Serbia for the 2014–2018 Period (RS Official Gazette, No 122/14).



One of the objectives of the improvement of the public procurement system, as stated in the Proposal of the new Strategy of the Development of Public Procurement in the Republic of Serbia for the 2019–2023 Period<sup>13</sup>, is the reduction of the risk of irregularities in the public procurement system. The following is stated:

*“All activities aimed at the development of a more modern and efficient public procurement system must be analysed also in the context of reducing the risk of irregularities. Public procurement is one of the key areas where the public and private sectors enter into financial interaction to a significant degree, thus being one of the most critical economic activities in terms of the occurrence of risk – of irregularities in general, and the risk of corruption.*

*The achievement of this objective will be based primarily on the strengthening of the regulatory framework, including the improvement of coordination and cooperation among competent institutions, as well as strengthening of their administrative capacities and the capacities of contracting authorities and bidders. In line with this, the confirmation of the achievement of this objective will be based on the increased number of coordination meetings, training sessions, issued instructions, guidelines etc., including the enhancement of the system of supervision of implementation of regulations in the public procurement field”.*<sup>14</sup>

It is highlighted in the Proposal of the new Strategy of the Development of Public Procurement that the results of the activities of new monitoring to be implemented by the PPA based on the new PPL (which will be further elaborated hereinafter) should be made publically available through appropriate means of information, information about the most frequent sources of wrong implementation of regulations, including possible structural problems or problems repeated in the implementation of rules, about prevention, detection and adequate reporting of cases of fraud, corruption, conflict of interest and other irregularities in relation to public procurement.

In addition, the Proposal of the new Strategy of the Development of Public Procurement states that the aim of further professionalization of public procurement officers is, among other things, a reduction in irregularities and risk of corruption. It is also highlighted that the activity of conducting the assessment of the public procurement corruption risk will be completed, that an adequate brochure will be prepared and workshops concerning the risk assessment held.

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<sup>13</sup> At the moment of writing this analysis, the Proposal of the new Strategy was not adopted by the Government of the Republic of Serbia and the public discussion is underway. The Proposal was published on the website of the Public Procurement Administration (in Serbian): <http://www.ujn.gov.rs/vesti/izvestaj-o-sprovedenoj-javnoj-raspravi-za-strategiju-razvoja-javnih-nabavki-u-republici-srbiji-za-period-2019-2023-godine/>.

<sup>14</sup> Strategy of the Development of Public Procurement in the Republic of Serbia for the 2019–2023 Period, p. 12, section 3.3.

## 2. Public Procurement in Chapters 23 and 24 within EU Accession Negotiations

### 2.1 CHAPTER 23

The observations of the European Commission have a particular weight, especially taking into account the closing benchmarks for Chapter 5 which concerns public procurement (including public-private partnership and concessions), i.e. aims that Serbia should fulfil so that the policy and instruments such as those in EU countries be achieved in the public procurement field. In terms of this analysis, particularly important are the benchmarks for closing Chapter 5, which require the strengthening of control mechanisms, including direct monitoring and improvement of transparency of the phase of execution of public procurement contracts and systemic risk assessments with the prioritisation of control in the most vulnerable areas and procedures, including the measures concerning the prevention of and struggle against corruption and conflict of interest in the public procurement field, both at the central and local levels.

The measures to prevent corruption in public procurement are also the topic of Chapter 23 which relates to the judiciary, anti-corruption policy, fundamental rights and the rights of EU citizens. The revised Action Plan adopted by the Republic of Serbia for Chapter 23<sup>15</sup> states, among other things, that the following questions are crucial for the prevention of corruption: conflict of interest, financing of political activities, access to information, public procurement, protection of whistleblowers, and the integrity of the state administration. The Action Plan states a number of activities in the public procurement field that Serbia should undertake in order to fulfil its obligations under Chapter 23. The annual EC Serbia 2019 Report, in relation to Chapter 23, section 2.2.1, reads: "Public procurement, infrastructure projects, healthcare, education, construction and spatial planning, and public companies remain particularly vulnerable to corruption. No tangible improvements took place in relation to verifications and procedural transparency in these fields. Serbia's public procurement legislation is largely in line with the *acquis*. A draft law aimed at further alignment including on e-procurement was prepared. The public procurement office still lacks staff and technical capacity. It needs to step up efforts in supervising other institutions and monitoring, partly by setting up a centralised database."<sup>16</sup>

In addition to the fight against corruption, the importance of Chapter 23 is also reflected in the fact that the EU will insist on an independent, impartial, efficient, accountable and professional judiciary. The role of the judiciary is crucial for all segments of social life, including public procurement and the application of regulations governing public procurement. The judiciary, with the said characteristics that have been achieved in reality (to the highest extent possible) and confirmed in practice, provides sanctions for the violation of regulations and for established irregularities, which is why it is of paramount importance for the stability of the legal system of a country. In this regard, trial within reasonable time must be ensured, as one of the core principles of an efficient judicial system. This concerns courts acting upon criminal and misdemeanour cases in relation to public procurement, and the Administrative Court which decides on the submitted complaints initiating administrative disputes about the legality of decisions of the Republic Commission. It is an almost generally known fact that the Administrative Court makes decisions on such complaints within two, three or four years, when the public procurement that the

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15 Published on the website of the Ministry of Justice: <https://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf>.

16 European Commission, *Serbia 2019 Report*, op.cit, p. 21.



administrative dispute relates to has already been completed (the contract is executed) and when such decisions practically have no special effect, apart from the moral satisfaction for the person submitting the complaint, and the potential initiation of the procedure for the compensation of damages, or raising the question of the responsibility of members of the Republic Commission. However, all these effects do not impact the public procurement directly as it has been completed, which is why it is not possible to prevent the occurrence of irregularities and their damaging consequences. Efficiency is certainly important also in regard to the prosecution of criminal offences and misdemeanours in public procurement. Also important is the question whether there is an adequate penal policy in this respect, which shall be further elaborated in this text. The education of judges and prosecutors in terms of acting upon public procurement-related cases is also important.

The field of judiciary is in a particular focus of the EU given that a stable judicial system is necessary for the achievement of the rule of law. For a candidate country to be successful in reforms in this field, it must ensure not only full compliance of its legal acts, but also have measurable results in their implementation.

In terms of this analysis, the question of reporting about the sanctioning of irregularities and corruption in the public procurement field is also important. A concrete step towards the improvement of reporting on the criminal offences of corruption and abuse in relation to public procurement would be the implementation of activities from the revised Action Plan for Chapter 23, envisaged under section 2.3.4, which imply the establishment of a single system of reporting on corruption and organised crime cases dealt with by judicial bodies. This will be examined further in the following parts of this analysis, which relate to misdemeanour proceedings concerning public procurement and the prosecution of the criminal offence of abuse in relation to public procurement.

## 2.2 CHAPTER 24

The activities from Chapter 5 that Serbia will undertake in relation to the public procurement system are also important for Chapter 24 – Justice, freedom and security. The fight against organised crime and judicial and police cooperation (the topics that the Chapter relates to), particularly in the field of public procurement that is highly vulnerable to corruption, are of great importance for this Chapter. The cases concerning irregularities and corruption in public procurement must be treated somewhat differently by the police, prosecutor's offices and courts, in terms of ensuring a greater scope of education for employees in those institutions in the public procurement field, as well as public-private partnership and concessions, and the knowledge of regulations about the state administration and public enterprises, so as to ensure their gradual specialisation.

### 3. Anticorruption provisions of the Public Procurement Law: Valid provisions and solutions in the proposed new law

The valid Public Procurement Law<sup>17</sup> (PPL), Section II (Articles 21–30) contains provisions regulating the prevention of corruption and conflict of interest in public procurement. This part of the analysis will present solutions in the valid PPL and solutions proposed in the Proposal of the new PPL<sup>18</sup> (hereinafter: Proposal).

#### 3.1 Provisions of the valid Public Procurement Law

**Article 21** contains general anti-corruption provisions, stipulating that the contracting authority must take all necessary measures to prevent corruption in the course of public procurement planning, public procurement procedure or implementation of the public procurement contract, in order to timely reveal corruption, to remedy or mitigate adverse consequences of corruption, and to sanction participants in corruption in line with law. In addition, the contracting authority's manager and the responsible person must provide all instructions and guidelines to employees engaged in public procurement tasks, either in writing or via electronic mail. The employee engaged in public procurement tasks must refuse to act pursuant to an instruction of the responsible person where such guideline or instruction is contrary to regulations. Such person may not be transferred to other tasks or get his employment contract rescinded within the period of twelve months from the day of refusal of the instruction, provided that he performs the tasks in compliance with law. Article 21 also stipulates that the PPA will draft a model of the internal plan for preventing corruption in public procurement and that the contracting authority whose total estimated annual value of public procurement exceeds one billion dinars must adopt an internal plan for preventing corruption in public procurement.

**It is certainly positive that the legislator has prescribed for managers and responsible persons of the contracting authority the obligation to give instructions and guidelines to employees engaged in public procurement tasks in writing. However, in practice the majority of managers still give instructions orally,** and employees engaged in public procurement tasks, fearing for their jobs, do not insist on written instructions. The violation of provisions of Article 21 is stipulated as a misdemeanour in the PPL (Article 169, paragraph 1, item 3)<sup>19</sup>, but as it will be explained hereinafter, not a single misdemeanour procedure envisaged by the PPL has been completed with a final decision since the PPL came into force on 1 April 2013 to date, and the violations of these provisions have not been sanctioned.

In addition, it turned out as unnecessary that contracting authorities whose total estimated annual value of public procurement exceeds one billion dinars must adopt a separate plan for fight against corruption in public procurement (as also prescribed by Article 21) given that Article 59 of the Law on the Anti-Corruption Agency stipulates the obligation for contracting authorities to adopt the integrity

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17 Public Procurement Law (RS Official Gazette, Nos 124/12, 14/15 and 68/15).

18 Published on the website of the National Assembly of the Republic of Serbia:  
[http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi\\_zakona/2019/2478-19.pdf](http://www.parlament.gov.rs/upload/archive/files/cir/pdf/predlozi_zakona/2019/2478-19.pdf).

19 Article 169, paragraph 1, item 3) of the PPL.



plans in accordance with the guidelines for the development and implementation of the integrity plan of the Anti-Corruption Agency. The Agency supervises and sanctions the obligations that contracting authorities have in regard to integrity plans, both during their adoption and implementation. It is therefore not necessary that, in addition to the integrity plan, contracting authorities should adopt a separate plan for the fight against corruption in public procurement. This implies the duplication of administrative obligations for the contracting authority, and does not contribute to a more efficient fight against corruption in public procurement. It is therefore not efficient that the Public Procurement Office should prepare the model of the internal plan, but it should be envisaged that it proposes to the Anti-Corruption Agency parts of guidelines concerning fight against corruption in public procurement.

**Article 22** regulates the **internal bylaw and control of procurement**. According to Article 22, the contracting authority must adopt a bylaw to regulate the internal process of the public procurement procedure in detail, and in particular the manner of planning procurement, responsibility for planning, public procurement procedure targets, the manner of executing obligations in the procedure, the manner of ensuring competition, conducting and controlling public procurements, the mode for monitoring implementation of the public procurement contract. The PPA determines in detail the contents of the bylaw. In addition, if after the adoption of the internal bylaw the PPA identifies inconsistencies between that bylaw and the PPL, it shall notify thereof the contracting authority and submit the proposal on how to comply and the deadline. If the contracting authority fails to act in such manner and within such deadline, the PPA shall notify thereof the body in charge of supervising the operation of the contracting authority and the SAI, and initiate the proceedings before the Constitutional Court.

In relation to the above, it is important that the contracting authority has the internal bylaw to regulate procurement procedures and to designate employees responsible for individual actions in each phase of public procurement. However, it is unclear in **the valid solution what is implied under the control of public procurement mentioned as a part of contents of the internal bylaw adopted by the contracting authority, i.e. whether this implies the control of all phases of public procurement (including planning and implementation of the contract)**. It is important that the PPA, which more closely regulates the contents of the bylaw, must have clear guidelines concerning its contents, so as to be able to adequately concretize these contents through the bylaw for whose adoption it was authorized by the PPL. On the other hand, the solution based on which the PPA, if it determines the discrepancy between the internal bylaw and the PPL, must inform the contracting authority thereof, and submit the proposal on how to comply and the deadline, and if the contracting authority fails to act within such deadline, the PPA notifies thereof the body in charge of supervising the operation of the contracting authority and the SAI, and initiate the proceedings before the Constitutional Court – is not an efficient or logical solution. It is not clear what the body in charge of supervising the operation of the contracting authority and the SAI could undertake in relation to the information that they would obtain from the PPA. On the other hand, it is unclear what kind of proceedings the PPA would initiate before the Constitutional Court. We also believe it is not necessary that the PPA should previously inform the contracting authority, with the proposal on how to comply and the deadline, as it is sufficient that there is the bylaw (adopted by the PPA) explaining to contracting authorities what the contents of the internal bylaw should be. The PPA simply cannot control the internal bylaws of all contracting authorities in Serbia. In this regard, it is sufficient to sanction the non-adoption of the internal bylaw or its inadequate contents by envisaging a separate misdemeanour in the part of the Law stipulating misdemeanours, which is now not the case.

**Article 23** regulates the protection of the integrity of the procedure – the person who participated in planning of the public procurement, in preparing the tender documents or separate parts thereof, and the person related to him, may neither act as a bidder or as a bidder's subcontractor, nor cooperate with bidders or subcontractors in the course of bid preparation. In that case, the contracting authority shall reject the bid and notify the competent government bodies without delay. In addition, if a

bidder, i.e. an applicant, directly or indirectly gave, offered or promised a benefit or tried to find out confidential information or to influence in any way the contracting authority's actions in the course of the public procurement procedure, the contracting authority must urgently notify the competent government bodies.

In regard to the situation when the actions of the contracting authority during the public procurement procedure were influenced, it is unclear what are the competent bodies that the contracting authority must urgently notify. Also, it is not prescribed what happens with the bidder's bid and the entire public procurement procedure, i.e. whether the bid is rejected or the entire procedure is suspended if the influence was made both during the planning of public procurement and preparation of tender documents.

**Article 24** stipulates the duty of reporting on corruption for the person engaged in public procurement or any other person employed by the contracting authority, as well as any interested person who possesses information on existence of corruption in public procurement. These persons must immediately notify thereof the PPA, the government body authorized for combating corruption, and the competent prosecutor's office. In addition, neither of these persons can have his employment contract rescinded nor can he be transferred to another work position just because he, acting conscientiously and in good faith, has reported corruption in public procurement, whereas the contracting authority shall grant full protection to that person.

The Criminal Code and the Law on Protection of Whistleblowers generally regulate the reporting on corruption and the protection of persons revealing information on corruption and other violations of regulations. Therefore, separate regulation of these issues by the PPL can lead and leads to the situation that provisions in different regulations are not harmonised, creating dilemmas in their implementation, which jeopardises the efficiency of fight against corruption in public procurement. If corruption occurs in public procurement, it is necessary to inform primarily the competent prosecutor's office with the aim of initiation of criminal proceedings against perpetrators. Informing several different bodies about the same event can create the dilemma as to which of these bodies will truly react. **We have noticed that in practice, due to the overlapping of authorisations of several different bodies, eventually not a single body reacts. The relevant EU Directive (2014/24/EU) does not contain such provision either, as it is assumed that these issues are regulated by other regulations.**

**Article 25** regulates the prohibition of work engagement with the supplier in the period of two years (after the termination of office or employment with the contracting authority) for the representative of the contracting authority who has in any way participated in public procurement procedures or persons related to him, where the total value of contracts awarded to a specific supplier within the last year prior to termination of office or employment of the representative of the contracting authority exceeds 5% of total value of all contracts that this contracting authority has concluded over that period. If this prohibition is violated, the contracting authority must notify thereof the government body authorized to fight corruption and the competent prosecutor's office.

In regard to the said prohibition, it should be emphasised that there is no clear sanction for the situations when non-permitted work engagement occurred. If one of the stipulated criminal offences took place, it is justified to notify the competent prosecutor's office. As regards the Anti-Corruption Agency, it can undertake sanctions only against officials as representatives of the contracting authority when the Agency, in accordance with the Law on the Anti-Corruption Agency, submits the request for the initiation of misdemeanour proceedings because non-permitted work engagement according to the provisions of that Law represents a misdemeanour. Moreover, for the sake of efficient detection and sanctioning of the prohibition, it would be important to define what the phrase "who has in any way participated in public procurement procedures" means. This is currently not clear.





**Article 26** prescribes the obligation of the contracting authority to submit along with the bid the declaration of independent bid in each individual public procurement procedure. In the declaration of independent bid, the bidder confirms under full financial and criminal responsibility that the bid was submitted independently, without any agreement with other bidders or interested parties. In case of non-permitted agreements of bidders with the aim of participation in a concrete public procurement procedure, it is necessary to inform the Commission for Protection of Competition, which the following article of the PPL addresses, and the competent prosecutor's office if there are elements of a criminal offence. The bidder's declaration about it is superfluous.

**Article 27** stipulates the duty of reporting on the violation of competition – in case of existence of reasonable doubt in the veracity of the declaration of independent bid, the contracting authority shall immediately notify the organization competent for protection of competition. On the other hand, each interested person must notify the organization competent for protection of competition, if possessing any information on violation of competition in the public procurement procedure. Such person cannot be fired or transferred to another work position because he has reported violation of competition in the procedure of public procurement. In such case, the contracting authority may continue the public procurement procedure, whereas the contract, if concluded with the bidder for whom there is a suspicion of violation of competition, will be terminated by force of law if the organization competent for protection of competition determines the existence of violation of competition.

According to Article 28, where the contracting authority conducts the public procurement procedure whose estimated value exceeds RSD 1 billion, the procedure is monitored by the **civil supervisor**. The PPA regulates in detail the requirements and criteria for the appointment and mode of operation of the civil supervisor. The civil supervisor was introduced into the public procurement system in Serbia with the aim of ensuring additional control of the most valuable public procurement procedures by independent experts. However, based on the analysis of reports of the PPA and practice, it seems that the institute of the civil supervisor has not yielded the expected results. **According to data from annual PPA reports, of 130 procedures where the civil supervisor was engaged as of 1 April 2013, supervisors submitted reports in 42 procedures, and only several reports were considered before the competent committee of the National Assembly (without any special conclusions of the committee).** If the legislator decides to keep this institute, it is necessary to consider changes in the manner of defining the future role and authorisations of the civil supervisor. The proposals in regard to this will be presented in the continuation of this analysis.

**According to the valid provisions of the PPL, the civil supervisor is authorised to supervise only the public procurement procedure and not the implementation of the public procurement contract. It would be logical that the civil supervisor who supervises the implementation of high-value public procurement procedures continues to supervise the contracts concluded based on those procedures, until these contracts are in force. This would help introduce complete civil supervision in high-value public procurements, which are often highly complex and greatly important for citizens.**

We also believe that the civil supervisor should be granted the authorisation to – in addition to submitting the requests for the protection of rights – submit other initial acts for the initiation of procedures for the sanctioning of irregularities determined in the public procurement procedure and in the phase of implementation of a concrete contract, these being, primarily, the submission of the complaint for determining the nullity of the contract and the submission of the request for initiation of misdemeanour proceedings. This would enable more efficient sanctioning of irregularities because without these authorisations the civil supervisor would first have to inform competent bodies (the PPA, Republic Commission for the Protection of Rights in Public Procurement Procedures, SAI etc.), and only then should these bodies submit initial acts to courts for the purpose of initiating relevant procedures.

We also believe it would be necessary to introduce clearer and stricter rules in regard to examining reports of the civil supervisor before the competent committee of the National Assembly. It has often happened that several months pass before the report of the civil supervisor is introduced in the agenda of the meeting of the competent committee, and that a more concrete analysis of the report does not take place at the meeting, nor are conclusions by the committee members adopted. This makes rather senseless the effect of supervision carried out by the civil supervisor because, in addition to the short presentation of the report at the meeting of the competent committee and asking of merely a few questions by the committee members, there is no more concrete verification of facts determined by civil supervisors.

**The conflict of interest** is regulated by **Article 29** – it exists when the relation between the representative of the contracting authority and the bidder may impact impartiality of the contracting authority in making the decision in the public procurement procedure. Three situations are specified in which, according to the PPL, there is the conflict of interest. **In the valid provision it is not clear what the phrase “may impact impartiality of the contracting authority” means.**

**Article 30** stipulates the prohibition of concluding the public procurement contract if there is the conflict of interest, if the existence of the conflict of interest has influenced or could have influenced the decision-making in the public procurement procedure. On the other hand, the same article envisages the possibility that, in particular situations, the Republic Commission for the Protection of Rights in Public Procurement Procedures, on request of the contracting authority, approves the conclusion of such contracts. In regard to such authorisation of the Republic Commission, **it is unclear what the phrase “has influenced or could have influenced the decision-making in the public procurement procedure” means.** It is also important to examine the question whether the Republic Commission can have the authorisation to allow the conclusion of contracts when there is the conflict of interest as similar bodies in EU member states do not have such authorisation. Such contract is considered null and void, and the nullity of the contract implies serious deficiencies which cannot be eliminated in any way so that the contract, with such deficiencies, remains in force. According to provisions of the Law on Contracts and Torts, this cannot be done by competent government bodies either.

## 3.2 Solutions in the Proposal of the new Law on Public Procurement

Article 49 envisages **General measures for prevention of corruption.** As in the valid PPL, it is prescribed that the contracting authority must undertake all necessary measures to prevent corruption in the planning of public procurement, in the public procurement procedure or during the implementation of the public procurement contract, so as to timely detect corruption, to remove or mitigate damaging consequences of corruption, and to punish participants in corruption, in accordance with law.

The internal bylaw of the contracting authority is more precisely regulated in the Proposal – it is determined that it will contain the manner of planning, implementation of the public procurement procedure and monitoring the implementation of the public procurement contract (manner of communication, rules, obligations and responsibility of persons and organisational units), manner of planning and implementation of procurement that the Law does not apply to, and the procurement of social and other special services. A focus is placed on the determination of obligations and responsibilities of persons and organisational units of the contracting authority, the monitoring of contract implementation, and the manner of implementation of procurement that the Law does not apply to or applies only above defined values (social and other special services). The contents of the internal bylaw are no longer regulated by the Public Procurement Office (PPO) (new name of the Public Procurement Administration), which is perhaps not a good solution, because, as it is the case now, the contents could be made further precise and elaborate. The contracting authority is still obliged to publish its internal bylaw on its website.



The deficiency of the Proposal is that there is no longer the obligation for the manager and the responsible person of the contracting authority to issue all instructions and guidelines to employees engaged in public procurement tasks in writing. In the valid PPL this is specified within general measures for the prevention of corruption, in Article 21. Articles 44, 45 and 46 of the Proposal regulate only the communication between contracting authorities and economic entities, and the communication between contracting authorities and the Public Procurement Office, and not communication within the contracting authority. Therefore, it remains that the communication between managers and responsible persons with employees engaged in public procurement tasks be regulated only by the internal bylaw, which is not a good solution as it will depend on the conscientiousness and will of the manager of the contracting authority.

Conflict of interest is regulated more precisely in Article 50 of the Proposal than in the valid PPL. It is envisaged that the conflict of interest between the contracting authority and the economic entity includes situations when representatives of the contracting authority who are involved in the implementation of the procedure or who can influence the outcome of the procedure (i.e. managers of the contracting authority, representatives of the founder, consultants etc.) have direct or indirect financial, economic or other private interest, which can be considered to bring into question their impartiality and independence in the procedure. Some situations are, further on, specified as examples, and not, as so far, as the only possible forms of conflict of interest (if the representative of the contracting authority participates in managing the economic entity or the representative of the contracting authority has more than 1% of stake, i.e. shares of the economic entity). It is also defined who is considered the representative of the contracting authority (and related persons) and who is considered the economic entity in the context of conflict of interest.

A positive novelty is certainly the fact that the same Article 50 of the Proposal clearly defines that the representative of the contracting authority (not only members of the public procurement commission) must be exempted from the public procurement procedure if conflict of interest is ascertained in any phase of the procedure. It is also determined that after the opening of bids or applications, the representative of the contracting authority (member of the public procurement commission, and/or the person implementing the public procurement procedure) signs the statement about the existence or non-existence of conflict of interest. Members of the commission of the contracting authority, based on provision of Article 54, paragraph 10 of the valid PPL, are obliged, after adoption of the decision on setting up the commission, to sign the statement confirming that in the given public procurement they are not in conflict of interest. This is not a logical solution because at that moment it is not known who will be bidders in a concrete procedure. As already said, according to the new provision of Article 50 of the Proposal, representatives of the contracting authority (in this case, members of the commission, and/or the person implementing the public procurement procedure) sign such statements only after the opening of bids or applications they see who are economic entities in relation to whom they can be in conflict of interest.

According to Article 111 of the Proposal, which regulates the grounds for excluding the economic entity from the public procurement procedure, the contracting authority must exclude the economic entity if, within the meaning of the Law, there is conflict of interest which cannot be eliminated with other measures (paragraph 1, item 4) of that Article). This solution is better than in the valid PPL, which in Article 30 (as already stated) envisages the prohibition of concluding the contract, and not the obligation of refusal (exclusion) of the bid, which is why it was possible to have the situation when there is conflict of interest in relation to a bid and that the contracting authority must accept such bid, and only after the contract is concluded can it give up on concluding the contract or require from the Republic Commission to allow the conclusion if conditions from Article 30, paragraph 3 of the valid PPL are fulfilled.

Article 90 of the Proposal envisages the protection of integrity of the public procurement procedure. It should be noted that the valid solution is not good, as it is automatically (in every situation) forbidden that the bidder who prepared the project should participate as the contractor in that project because he often does not have any special advantage compared to other bidders, particularly if he was chosen to prepare the project in the public procurement procedure (in competition with other bidders) and if the project does not imply any special technical-technological requirements that would give advantage to the bidder during the selection of the contractor. The new solution in Article 90 of the Proposal requires from the contracting authority to undertake appropriate measures to ensure that the participation of the bidder or candidate does not jeopardise competition, but does not require from the contracting authority to automatically reject such bid. These measures include the submission to other economic entities of relevant information that was exchanged or has arisen in the context of participation of the bidder in preparing the procurement procedure (preparation of the project that is integral to the tender documents for the execution of works) and determination of adequate deadlines for bid submission. A bidder can be excluded from the public procurement procedure if there is no other way to ensure acting, in accordance with the obligation of respecting the principle of ensuring competition and equality of economic entities, but before potential exclusion, the contracting authority must enable him to prove that his participation in preparing the procurement procedure (preparation of the project for the execution of works) cannot jeopardise competition (during the procurement of execution of works in respect of that project).

As evident in the above stated, the Proposal no longer contains the provisions which in the valid PPL regulate:

- » duty of reporting on corruption (Article 24 of the valid PPL);
- » prohibition of work engagement with the supplier (Article 25 of the valid PPL);
- » declaration of independent bid (Article 26 of the valid PPL);
- » duty of reporting on the violation of competition – in case of existence of reasonable doubt in veracity of the declaration of independent bid (Article 27 of the valid PPL).

In regard to the duty of reporting on corruption and violation of competition, the reasons justifying the deletion of the provisions of the valid PPL which defined them have already been stated. Citizens and all participants in public procurement procedures report on corruption both in respect of provisions of the Criminal Code and the Law on Protection of Whistleblowers, and these regulations also govern their protection if they do so. On the other hand, as already stated, the declaration of independent bid is not needed and is therefore not necessary to also prescribe the duty of reporting on the violation of competition in the case of reasonable doubt in veracity of the declaration.

A positive new solution is that Article 144 of the Proposal, within the requirements for contract award, envisages that the contracting authority will refuse the bid as unacceptable if, among other things, there is valid evidence of the violation of competition or corruption. This is the new basis for the refusal of bids which does not exist in the valid PPL, and is given in the Proposal. The question is asked what the “valid evidence of the violation of competition or corruption” means, but in this regard it will be important that competent bodies (above all, the PPO and the Republic Commission) should take a stand and interpret this provision. It is certainly a good solution that the contracting authority is obliged to reject the bid if the contracting authority violated competition or performed an act of corruption, but on the other hand, it would not be good that such provision, not defined by the Law and insufficiently clearly interpreted by competent bodies, leads to its abuse, in terms of unjustified rejection of bids. In this regard, it is important to be guided also by relevant provisions of the Law on Protection of Competition and the Criminal Code when determining the fact whether there is valid evidence of the violation of competition or corruption.



In regard to the prohibition of work engagement with the supplier, we believe it is a good solution that such prohibition is no longer envisaged by the Proposal of the PPL. There is no need for such limitation of the right to work and free choice of work<sup>20</sup> (work position) if there is no evidence that the representative of the contracting authority participated in irregularities and corruption and that everything was done in favour of his future employer. There is particularly no reason for such automatic limitations towards persons who are engaged in public procurement tasks and who do not make crucial decisions in such tasks (i.e. should not be making such decisions), while the special prohibition for managers as officials who make such decisions still exists in the Law on the Anti-Corruption Agency.<sup>21</sup>

What should be particularly emphasised in the Proposal, in regard to the suppression of irregularities and corruption in public procurement, is the differently defined role (competences and authorisations) of the Public Procurement Administration. Namely, the Public Procurement Office (the new name of the PPA envisaged by the Proposal) will carry out monitoring of the implementation of public procurement regulations with the aim of prevention, detection and removal of irregularities which may occur or have occurred during the implementation of the Law. The procedure of monitoring will be conducted based on the annual monitoring plan adopted by the Public Procurement Office until the end of the current year for the next year, and *ex officio* in case of implementation of the negotiated procedure without invitation to submit bids under Article 61, paragraph 1, items 1) and 2) of the Proposal (negotiated procedure with a single, specific bidder and in the case of urgency). Also, monitoring will be conducted based on the notification of the legal or natural person, a body of the state administration, body of the autonomous province or local government unit and other government bodies.

Monitoring to be carried out during the public procurement procedure does not suspend the public procurement procedure. We therefore conclude that this relates to the monitoring of concrete public procurement procedures and, generally, the application of regulations in this area. Therefore, the Public Procurement Office should be the central institution conducting systemic monitoring of the public procurement system and, based on information obtained from competent institutions, propose necessary changes in the system, conduct training, prepare guidelines etc. In addition, the Office would conduct monitoring of individual public procurements in accordance with clearly defined rules, with the aim of eliminating irregularities in the implementation of the Law. In this regard, it would be important what would be specified in the annual monitoring plan adopted by the Office until the end of the current year for the next year.

In relation to monitoring to be conducted by the Public Procurement Office, it should be emphasised that Article 179 of the Proposal envisages that the Office will submit requests for the initiation of misdemeanour proceedings for misdemeanours prescribed by the Law, as well as requests for the protection of rights, and will initiate the implementation of other relevant procedures before competent bodies when, based on monitoring, it detects irregularities in the implementation of regulations on public procurement. It should be expected that the Office will have sufficient capacities to implement its authorizations to a higher extent, particularly in regard to requests for the initiation of misdemeanour proceedings because, due to the new solution in the Proposal, the misdemeanour proceedings for misdemeanours from the PPL will be finally “unblocked”, which shall be further elaborated hereinafter. Also, a greater role of the Public Procurement Office is expected also in terms of the initiation of criminal proceedings, given the new organisation and the manner of acting of competent bodies in the prosecution of criminal offences with elements of corruption, which shall be examined in more detail

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20 Article 60 of the Constitution of the Republic of Serbia.

21 Article 38 of the Law on the Anti-Corruption Agency (RS Official Gazette, Nos 97/08, 53/10, 66/11-US, 67/13-US and 8/15-US) which regulates the prohibition of entering into employment or business cooperation after the termination of public office.

in the part of this analysis which relates to the prosecution of the criminal offence of abuse in relation to public procurement. Certainly, a higher volume of activity in this regard is also expected from other competent bodies, such as the SAI, budgetary inspection, the police, prosecutor's offices.

Finally, in relation to the new role of the Public Procurement Office, it should be noted that according to provisions of Article 182, paragraph 1, items 3) and 4) of the Proposal, in its special annual report on public procurement, the Office will specify particularly the following:

- » information on measures undertaken in the prevention, detection and reporting on corruption, conflict of interest and other irregularities in the implementation of the PPL;
- » proposal of measures for the suppression of irregularities and corruption in public procurement, strengthening the efficiency of the public procurement system and enhancing competition in public procurement procedures.



## 4. Misdemeanour proceedings relating to public procurement

### 4.1 Misdemeanours from the Public Procurement Law

According to the definition from the Law on Misdemeanours,<sup>22</sup> a misdemeanour is an unlawful act stipulated by law or other regulation of the competent body as a misdemeanour, and subject to a misdemeanour sanction. According to the same Law, the purpose of prescribing, imposing and enforcement of misdemeanour sanctions is that citizens respect the legal system and that misdemeanours be not committed in the future.

Based on the said, it is possible to conclude that misdemeanours are the violations of provisions of regulations and other acts which constitute the legal system of a country and which, unlike criminal offences, do not represent delicts which imply major jeopardising of property and people. Therefore, misdemeanour sanctions are much more lenient than criminal sanctions – those are mostly fines, and rarely a relatively short imprisonment sentence (up to 60 days), unlike the imprisonment sentence which can be pronounced for a criminal offence (up to 40 years). Thus, the aim of sanctioning misdemeanours is primarily to ensure the implementation of provisions – the disposition of norms of a particular law and other regulations, so that the very stipulation of those provisions would have an effect. Misdemeanours are not envisaged for all laws or all provisions (articles and paragraphs) which constitute a single regulation, but only for those being more important for the government and society, as this ensures the achievement of the purpose – the objective of a regulation as a whole.

The PPL, as the law regulating procedures for large-scale spending of public funds (at the start of this analysis, it is stated that over 3 billion euros are spent in Serbia each year), envisages a large number of misdemeanours in the public procurement field. These misdemeanours encompass the most important provisions of the Law which, in fact, ensure the achievement of the main objectives of public procurement – principles prescribed by the Law. Both contracting authorities and bidders can commit misdemeanours in public procurement. The PPL thus envisages 11 misdemeanours which can be committed by contracting authorities and five which can be committed by bidders.

According to the PPL, the Republic Commission conducts misdemeanour proceedings in the first instance for misdemeanours provided for by this Law. Misdemeanour proceedings before the Republic Commission are initiated at the request of the PPA, SAI, another authorized body, or *ex officio*, immediately after learning of the misdemeanour.<sup>23</sup> On the other hand, according to the Law on Misdemeanours, first-instance misdemeanour proceedings are conducted by misdemeanour courts and, exceptionally from this rule, first-instance misdemeanour proceedings for misdemeanours in the public procurement field are conducted by the Republic Commission.<sup>24</sup>

Misdemeanours prescribed by the PPL are, in fact, the way of ensuring the implementation of the most important provisions of the Law, because sanctions envisaged for them warn both contracting authorities and bidders to comply with those provisions because, in case they do not comply with them, penalties would be imposed. In this regard, of exceptional importance for the achievement of positive effects of

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22 Law on Misdemeanours (RS Official Gazette, Nos. 65/13a and 13/2016 – Constitutional Court decision).

23 Article 165 of the PPL.

24 Article 100 of the Law on Misdemeanours.

the PPL is ensuring efficiency in the prosecution of misdemeanours, including certainty in regard to punishing. **It is important that competent bodies authorised for the submission of requests for the initiation of misdemeanour proceedings, and those conducting the proceedings, should act quickly and cover the highest possible number of cases representing such violations, with the aim of ensuring the highest possible degree of certainty that those who committed violations would be convicted and punished, and that information thereon would be publicly available.** Thus, misdemeanours, along with the criminal offence of abuse in relation to public procurement under Article 288 of the Criminal Code<sup>25</sup>, are aimed at preventing corruption in public procurement because even knowledge that the misdemeanour proceedings have been initiated against someone or that such proceedings are conducted can indicate the existence of such criminal offence whereby, in any case, corruption in public procurement is sanctioned. The relation between this criminal offence from the Criminal Code and misdemeanours from the PPL will be elaborated hereinafter. We only wish to highlight that it is necessary to clearly distinguish activities representing the description (substance) of the criminal offence from actions representing the description of misdemeanours in the public procurement field, which is currently not the case. This must be done so that it does not happen that someone is prosecuted only on misdemeanour and not on criminal grounds for serious violation of provisions of the PPL and serious damage caused to public funds, only because it is unclear whether the violation is considered a misdemeanour or a criminal offence (it can be considered both).

Therefore, we can conclude that without the efficient implementation of misdemeanour sanctions it is not possible to talk either about an efficient or economical (and effective<sup>26</sup>) public procurement system.

Due to all the above, **it is unfortunate that no misdemeanour proceedings for misdemeanours under the valid PPL ended in a final decision, i.e. that no sanction envisaged by the PPL has been pronounced by the Republic Commission back since 1 April 2013 (the date of the start of application of the Law). The reason is the collision between the provisions of the PPL and the Law on Misdemeanours**, which has not been removed for more than six years already, although the competent body – the Republic Commission (in the annual reports it submits to the National Assembly) has been pointing out this collision, as well civil society organisations and numerous experts. This clearly suggests that misdemeanour sanctions envisaged by the PPL are not implemented at all since the start of application of the Law. It is true that this does not fully exclude the possibility of such sanctioning in public procurement as it is possible to initiate misdemeanour proceedings also according to the provisions of the Budget System Law, but for the misdemeanour that in the other Law is defined in an entirely general manner without clear indications of what actions can be considered a misdemeanour, which shall be discussed in detail hereinafter. However, it is important to note that (to a large extent) clearly defined misdemeanours in the PPL are not being sanctioned over the entire period of implementation of the Law, i.e. that the mechanism which should ensure its (correct) application has not been used so far at all. The bodies authorised for the submission of requests for the initiation of misdemeanour procedures under the PPL (SAI and PPA) have submitted such requests to the Republic Commission, but this body has not initiated any misdemeanour proceedings for the said reasons. Budgetary inspections have been submitting some requests under the Budget System Law (which will be analysed), but the Republic Commission has justifiably declared itself non-competent in relation to these requests, because it is authorised to conduct first-instance misdemeanour proceedings exclusively for misdemeanours from the PPL.

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25 Criminal Code (RS Official Gazette, Nos 85/2005, 88/2005 – corr, 107/2005 – corr, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016).

26 Effectiveness means the assessment of the extent to which the results achieved, in terms of procured goods and services, correspond to the pre-defined objectives. The principles of economy and efficiency are recognised by the majority of regulations governing the public procurement field, and acting in line with these principles is a legal obligation for contracting authorities. The principle of effectiveness links the results of the contracting authority (efficient and economical public procurement) with the purpose of existence of the contracting authority, i.e. public interests that the contracting authority serves – *Priručnik za praćenje i kontrolu svrsishodnosti javnih nabavki (Manual for Monitoring and Control of the Purpose of Public Procurement)*, Open Society Foundation, Belgrade 2016.





**The collision between the provisions of the PPL and the Law on Misdemeanours** can be presented as follows. As already stated, the PPL, adopted in 2012, before the Law on Misdemeanours, envisages that the Republic Commission should conduct first-instance misdemeanour proceedings. On the other hand, the Law on Misdemeanours<sup>27</sup>, adopted later, in 2013, fully updated the earlier system of misdemeanour responsibility, integrating the competence for decision-making in misdemeanour proceedings by introducing the competence of misdemeanour courts (no longer administration bodies as well), envisaging entirely new mechanisms to avoid the conduct of formalised procedures, and ensuring an efficient sanctioning policy. The only exception is envisaged in regard to the Republic Commission as it is stipulated that it should also be a first-instance misdemeanour body, but this exception is stated only in three provisions of the Law on Misdemeanours, without any specially defined procedure implemented by the Republic Commission and without eliminating (non-solvable in practice) differences in the way in which the acting of misdemeanour courts and the Commission is organised. Namely, the procedural rules defined by the provisions of the Law on Misdemeanours, based on which misdemeanour proceedings are conducted, are by their legal nature such that they make the Republic Commission entirely unfit to be the body in charge of decision-making in this matter, because they cannot be applied to that body and by that body. For instance:

- » based on Article 146, paragraph 1 of the PPL, the Republic Commission works and makes decisions exclusively in three-member panels, while based on Article 102, paragraph 1 of the Law on Misdemeanours, the individual judge conducts and makes decisions in first-instance misdemeanour proceedings;
- » based on Article 157 of the PPL, the Republic Commission makes decisions by adopting only two types of decisions – conclusions (procedural decisions) and decisions (meritorious decisions), while based on Article 246 of the Law on Misdemeanours, misdemeanour proceedings end with the adoption of a judgement of conviction or acquittal, and based on valid legal regulations, the judgment can be adopted exclusively by a judicial body, i.e. such authorisation does not belong to bodies that are not courts, nor does it belong to the Republic Commission;
- » ensuring the presence of the convicted person by bringing him, if his presence is needed for the sake of determining the factual situation, when he does not respond to court subpoena, is envisaged by Article 188 of the Law on Misdemeanours – such action can be ordered exclusively by the court, and not by the Republic Commission;
- » the enforcement of fines pronounced in misdemeanour proceedings is in exclusive responsibility of the misdemeanour court, according to the provision of Article 314 of the Law on Misdemeanours, so the Republic Commission could not enforce the sanctions it imposes (through regular collection, enforced collection or substituting a fine with imprisonment or work in the public interest);
- » according to the provision of Article 233 of the Law on Misdemeanours, it is possible to conclude a plea agreement, while Article 235 of the same Law envisages that the decision on the plea agreement is made by the court, which can reject, adopt or refuse the agreement, which means that such authorisation does not belong to bodies that are not courts, or to the Republic Commission etc.

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<sup>27</sup> Law on Misdemeanours (RS Official Gazette, Nos 65/2013, 13/2016 and 98/2016 – Constitutional Court decision).

**We therefore believe that a more adequate solution would be to have misdemeanour courts deciding on misdemeanours from the PPL and that the Republic Commission (as other authorised bodies – the SAI, PPA, budgetary inspection) submits requests for the initiation of misdemeanour proceedings before these courts,** based on facts and evidence it reaches while deciding on cases of the protection of rights.

The Republic Commission reached the same conclusions in its reports. The Report on Work of the Republic Commission for the Protection of Rights in Public Procurement Procedures in the Period from 1 January 2016 to 31 December 2016 reads the following:

“Given all the said, the Law on Misdemeanours must be amended in the coming period by deleting the provisions of Article 87, paragraph 2, item 1) and Article 100, paragraph 2, which at the same time means repealing the provisions of Article 139, paragraph 1, item 10), Article 157, paragraph 5, item 9) and Article 165 of the PPL. It is also necessary, during the oncoming preparation of the new PPL, to explicitly define that the initiation and conduct of misdemeanour proceedings in the public procurement field be carried out exclusively based on the provisions of the Law on Misdemeanours. The Republic Commission believes this is the only way to achieve full efficiency and cost-effectiveness in the area of misdemeanour responsibility and to use in the right way the existing capacities of both the bodies authorised for the submission of requests for the initiation of misdemeanour proceedings and misdemeanour courts for the conduct of misdemeanour proceedings and execution of prescribed fines. Also, given the evident positive effects achieved with the hitherto application of the Law on Misdemeanours, the Republic Commission believes that in this way and through the adoption of these proposals, additional revenues would be made for the budget of the Republic of Serbia, with timely and successful sanctioning of misdemeanours in the public procurement field. Finally, in relation to this question, the Republic Commission concludes that within the Analysis of the Internal Composition and Work of the Republic Commission for the Protection of Rights in Public Procurement Procedures, which was during the reporting period prepared by SIGMA experts, it was explicitly stated, as one of recommendations aimed at improving the work of the Republic Commission, that during the oncoming amendment to the PPL, misdemeanour proceedings should be exempted from the existing competence of this body and fully placed under the competence of misdemeanour courts.”<sup>28</sup>

## 4.2 Misdemeanours from the Budget System Law

According to Article 57 of the Budget System Law<sup>29</sup>, contracts on procurement contracted by budget beneficiaries and beneficiaries of funds of organizations for mandatory social insurance must be concluded in line with the legislation regulating public procurements. On the other hand, Article 103, paragraph 1, item 4) of the same Law envisages that a fine from RSD 10,000 up to RSD 2,000,000 shall be ordered as a punishment to the accountable person of a budget beneficiary, accountable person of beneficiaries of funds of organizations for mandatory social insurance, or second-accountable person should he fail to comply, among others, with the provisions of Articles 49–61 of this Law (i.e. this misdemeanour also includes the quoted Article 57). Based on this, it is clear that violations of regulations governing public procurement can be sanctioned as misdemeanours according to the Budget System Law as well. Unable to conduct misdemeanour proceedings for misdemeanours from the PPL itself,

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28 Report on Work of the Republic Commission for the Protection of Rights in Public Procurement Procedures in the Period from 1 January 2016 to 31 December 2016, p. 476–477, available at (in Serbian): <http://kjin.rs/wp-content/uploads/lzve%C5%A1taj-o-radu-Republike-komisije-od-1-1-2016-do-31-12-2016-godine.pdf>.

29 Budget System Law (RS Official Gazette, Nos 54/2009, 73/2010, 101/2010, 101/2011, 93/2012, 62/2013, 63/2013 – corr., 108/2013, 142/2014, 68/2015 – other law, 103/2015, 99/2016, 113/2017, 95/2018 and 31/2019).



the authorised supervision bodies must submit requests for the initiation of procedures based on the Budget System Law, in relation to detected public procurement misdemeanours.

The difference between the stated misdemeanour from the Budget System Law and the misdemeanours from the PPL is the fact that the former is defined in an entirely general manner and it is not known what constitutes the nature of such misdemeanour, while the latter are explained more concretely in the PPL although it is possible to state that some of the descriptions should be further explained with the aim of efficient sanctioning. Namely, the action of the misdemeanour from the Budget System Law consists of situations when public procurement contracts are not concluded in accordance with regulations governing public procurement. First, the question is asked as to what are the situations when the contract is not concluded in accordance with the stated regulations. It may be interpreted that the violation of any provision of the PPL represents the action of the misdemeanour, which is an untenable attitude in terms of law and logic. As stated at the start of this analysis, misdemeanours cannot encompass all provisions (articles and paragraphs) which make up a single regulation, but only those that are more important for the state and society, because in this way the purpose – aim of the regulation as a whole is achieved. In the PPL, each misdemeanour is clearly connected with the concrete provision of the regulation (article and, when needed, paragraph of the Law), while this is not the case for the misdemeanour from the Budget System Law. Second, the misdemeanour from the Budget System Law concerns the violation of not only any provision, but also of any regulation governing public procurement, this being not only the PPL but any bylaw adopted based on the PPL, as well as other regulations, such as the Budget System Law. For instance, according to Article 54, paragraph 1 of the Budget System Law, commitments created by budget beneficiaries and beneficiaries of funds of organizations for mandatory social insurance must conform to the appropriation approved for such purpose in the budget year. This provision certainly also relates to public procurement contracts and, therefore, commitments made based on them in the budget year must conform to the appropriation approved to these beneficiaries (contracting authorities) for such purpose in that year. Also, according to paragraph 3 of the same Article of the Budget System Law, when creating commitments under capital project contracts, beneficiaries (contracting authorities) must obtain the consent of the competent body – the Government, competent executive body of the local government, or the board of directors of a mandatory social insurance organization before the initiation of the public procurement procedure in which the bidder to implement them will be selected.

All the above said aggravates the acting of bodies which should within their control and inspection competences reveal actions that represent a misdemeanour from the Budget System Law, and initiate misdemeanour proceedings, as well as courts that implement the misdemeanour proceedings (the Republic Commission is in charge only of misdemeanours from the PPL). Thus, not even those that should reveal a misdemeanour (primarily the SAI and the budgetary inspection), including misdemeanour courts, can determine with certainty what constitutes the action of misdemeanour from the Budget System Law in relation to mentioned Article 57 of that Law – thus, even this, the only manner of misdemeanour sanctioning of violations of provisions of PPL that is currently applied is, in essence, non-efficient. It also jeopardises legal certainty because the situation where everything can and nothing need not be a misdemeanour creates uncertainty for all participants in public procurement procedures, while at the same time creating room for potential abuse (ungrounded initiation of proceedings or ungrounded release). In such situation, it seems that the only legally justified and logical interpretation of violations from the Budget System Law should be such that under that Law, misdemeanours in relation to public procurements should be initiated for the same actions (violations) that are envisaged as misdemeanours in the PPL. Although it is entirely unnecessary to sanction the same violations pursuant to two different regulations in the situation when, due to all the said, misdemeanours from the PPL are practically not sanctioned at all, it is justified to sanction the same violations pursuant to the Budget System Law, but only until necessary amendments are made.

Amendments to regulations are necessary to enable the sanctioning of violations from the PPL (it has already been stated how) so as to envisage in the Budget System Law the misdemeanour to relate to provisions exclusively of that regulation, and not generally all regulations governing public procurement, as it is currently the case. The examples of such provisions are already stated in the text (Article 54, paragraphs 1 and 3 of the Budget System Law). We believe that such changes would certainly ensure higher efficiency of prosecution of violations in the public procurement field, and greater legal certainty in the application of such type of sanctions.

The Proposal of the new PPL for violations in the public procurement field envisages the following:

- » under Article 234, the Republic Commission submits the request for the initiation of misdemeanour proceedings when in the process of the protection of rights it is determined that the violation of the Law occurred in such way that it can be the basis for misdemeanour responsibility;
- » there is no longer the provision envisaging that the Republic Commission should conduct misdemeanour proceedings in the first instance for misdemeanours prescribed by this Law;
- » descriptions of misdemeanours have been somewhat redefined;
- » there is no longer a division into two groups of misdemeanours of the contracting authority: into less serious ones for which the valid Law envisages a lower penalty from RSD 100,000 to 1,000,000, and more serious, for which a higher penalty is envisaged – from RSD 200,000 to 1,500,000; now, all these violations belong to one group, with a single range of penalty from RSD 100,000 to 1,000,000 (based on which it is possible to conclude that penalties have been lowered although all value limits<sup>30</sup> have been raised in the Proposal);
- » Article 237 envisages that the protective measure of exclusion from public procurement procedures will be imposed upon contracting authorities for particular misdemeanours, prohibiting the contracting authority to participate in public procurement procedures in the period that cannot be longer than two years;
- » provisions of the Article of the Law on Misdemeanours concerning the Republic Commission as the first-instance misdemeanour body cease to be valid on the day of start of application of the new Law;
- » the Republic Commission will submit to competent misdemeanour courts the cases relating to misdemeanours from the PPL within no later than 30 days from the day of start of application of the new Law.

The above indicates that the new PPL (if adopted with the mentioned provisions of the Proposal) will envisage a solution based on which the first-instance misdemeanour proceedings for misdemeanours from that Law will be conducted by misdemeanour courts, and not the Republic Commission. The Republic Commission will submit requests for the initiation of misdemeanour proceedings when, during its work, it learns about a misdemeanour (other competent bodies will also act in such way). As already stated in this analysis, we believe this is a good solution. However, it has already been highlighted that it is also necessary to amend the provision of the Budget System Law which envisages a sanction for the misdemeanour in the public procurement field, to clarify when misdemeanour proceedings for such misdemeanours are initiated on the grounds from the PPL, and when based on grounds of the Budget System Law, which has been analysed.

In the expectation of the adoption of the new PPL and the specified solutions, we shall hereinafter analyse the manner in which misdemeanour proceedings have so far been conducted for the misdemeanour from the Budget System Law, according to data available to us.

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30 For instance, for the application of provisions of the PPL or implementation of a particular type of procedure.



In the publication “Pravosuđe pod lupom – Otvoreno o sudskim presudama u oblasti javnih finansija” (“Justice under the Magnifying Glass – Openly about Court Judgments in the Area of Public Finance”), issued by the Bečej Youth Association – BUM, in relation to misdemeanour proceedings conducted based on requests of the SAI, the following is stated, among other things:

“Given the amount of irregularities and non-purpose spending determined by the SAI at the annual level, with 217 billion dinars ascertained only for 2017, the fines equalling up to 10,000 dinars in 34.6 per cent of cases and up to 20,000 dinars in 19.6 per cent of cases, are exceptionally stimulating for further violations of law and potential corruption activities in society”.<sup>31</sup>

This publication states the results of research about the implementation of the Law on Access to Information of Public Importance. However, given that within the research, data were collected – decisions of misdemeanour courts in procedures initiated upon requests of the SAI, the non-governmental organisations that carried out the research analysed in the publication the contents of those decisions. The research concerned the period from 2011 to February 2019. The following is stated:

- » fines up to 10,000 dinars were pronounced in 34.6% of cases;
- » fines from 10,000 to 20,000 dinars were pronounced in 19.6% of cases;
- » fines from 20,000 to 30,000 dinars were pronounced in 11% of cases;
- » fines from 30,000 to 50,000 dinars were pronounced in 9.1% of cases;
- » fines from 50,000 to 100,000 dinars were pronounced in 8.3% of cases;
- » fines from 100,000 to 200,000 dinars were pronounced in 4.4% of cases;
- » fines over 200,000 dinars were pronounced in 1.5 % of cases;
- » in the remaining cases, non-conviction decisions were adopted (the accused person was released or the request was rejected etc.).<sup>32</sup>

We wish to emphasise that those were most often misdemeanour proceedings initiated due to misdemeanours from the already mentioned Article 103, paragraph 1, item 4) of the Budget System Law (misdemeanour in the public procurement field), for which the fine range equals from 10,000 to 2,000,000 dinars. **Therefore, in the majority of cases, the persons accused of misdemeanours were imposed the minimum prescribed fine of 10,000 dinars, which cannot be even considered a symbolic amount given the value and importance of public procurement.** Although the text already states that the level of the fine is not crucial in assessing the efficiency of prosecution of misdemeanours in the field of public procurement, as this is, primarily, the certainty of punishment, it is not possible to say that sanctioning with 10,000 dinars has an effect, particularly given that the prescribed maximum equals 2,000,000 dinars, and that in only 1.5% of cases, the fine pronounced is over 200,000 dinars. We believe that such a small percentage of fines above the stated amount (which is only the tenth part of the prescribed maximum) cannot play the role of serious sanctioning and future prevention of misdemeanours. **We can conclude that the sanctioning of misdemeanours in the field of public procurement does not function currently in the way that can be at least somewhat satisfactory.** On the one hand, misdemeanour proceedings for misdemeanours from the PPL are not conducted at all and, on the other hand, exceptionally mild penalties are pronounced for the misdemeanour from the Budget System Law after procedures implemented before misdemeanour courts.

31 “Pravosuđe pod lupom”, Bečej Youth Association, 2019, p. 37, available at (in Serbian): <https://bum-becej.org/publikacija-pravosudje-pod-lupom/>.

32 Ibid, p. 37.

## 5. Prosecution of the criminal offence of abuse in relation to public procurement

### 5.1 State of legislation

The provision of criminal-legal protection to the principle of legality in public procurement procedures is grounded in the importance of objectives achieved with the implementation of these proceedings, these being primarily the provision of rational and efficient use of public funds and prevention of corruption.

Although in scientific and professional circles, the rationale of the introduction of a separate criminal offence concerning public procurement was disputed at the start, by emphasising the arguments that it is superfluous, that criminal-legal protection can be achieved within other existing criminal offences (taking and giving bribery, trading in influence, abuse of the position of the responsible person), and that it represents another criminal offence which leads to the hypertrophy of criminal law in the Republic of Serbia, today, after several years of application and based on the experience of other countries, it is not disputable that due to the specificity and complexity of the public procurement matter, and due to the versatility of forms of criminality in public procurement, the existence of a separate criminal offence is necessary.

Criminal-legal intervention is always justified when some behaviour in society becomes rampant and essentially undermines the legal order. Numerous researches indicate that public procurement is the government's activity most prone to corruption<sup>33</sup> because in public procurement procedures there is the highest interaction between the public and private sector, which is why they offer numerous opportunities to participants in both sectors to re-channel public funds in favour of individuals.<sup>34</sup>

The criminal offence of abuse in relation to public procurement was introduced in the legal system of the Republic of Serbia with amendments to the Criminal Code (RS Official Gazette, No 121/12 of 24 December 2012), which began to apply on 1 January 2013. These amendments to the Criminal Law, within the group of criminal offences against the economy (twenty second chapter) introduced an entirely new article of the Code – 234a, which, according to the legislator's design, was to provide the criminal-legal protection to the principle of legality in the public procurement procedure, i.e. the behaviour of perpetrators that represent the most serious violations of the public procurement procedure should be considered a criminal offence, in order to prevent the illegal influence on decisions of the contracting authority in the public procurement procedure and damage to public funds.

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33 *Preventing Corruption in Public Procurement*, OECD, 2016.

34 Martina Matić Bošković, "Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni" ("Criminal Offence of Abuse in Public Procurement – Challenges in Application"), collection of papers *Privredna krivična dela*, 2017, I. Institute of Criminological and Sociological Research, Institute of Comparative Law, Belgrade, p. 215–227. Available at (in Serbian): [http://www.iksi.ac.rs/izdanja/privredna\\_krivicna\\_dela\\_2017.pdf](http://www.iksi.ac.rs/izdanja/privredna_krivicna_dela_2017.pdf).



## 5.2 Overview of the main elements of definition of this criminal offence

There are two basic and one graver form of the criminal offence and the legal description of each of them is exceptionally broad.

The first form of abuse in relation to public procurement concerns contracting authorities and it can be committed by the person who, in relation to public procurement, submits a bid based on false data, or contrary to law agrees with other bidders, or undertakes other illegal actions in order to influence decision-making of the contracting authority. The perpetrator of this form of the criminal offence can be any person participating in the public procurement procedure.

Another basic form of abuse in public procurement is “reserved” for responsible persons and official persons in the contracting authority, who by using their position or authorisations, exceeding the limit of their authorisations or by not performing their duty, violate law and other regulations on public procurement, and thus cause damage to public funds.

The graver form of the criminal offence means that two basic forms were committed in relation to the public procurement whose value exceeds 150 million dinars.

The imprisonment sentence of six months to five years is envisaged for two basic forms of the criminal offence, while a much stricter and wider range of sanction – from one to ten years is envisaged for the more serious form.

The provision of Article 228, paragraph 4 of the Criminal Code envisages the possibility that the perpetrator be acquitted (the facultative basis for acquittal) if he voluntarily reveals that the bid is based on false data or a forbidden agreement with other bidders, or that he undertook other illegal actions in order to influence decision-making of the contracting authority before it makes the decision on awarding the contract. Such provision by itself is not disputable, it exists for many other criminal offences in the Criminal Code, but the implementation of this institute is very rare in practice.

## 5.3 Legal aspects of the definition of this criminal offence

With an obvious intention to define various forms of acting of contracting authorities and bidders as a criminal offence, the legislator gave a too broad legislative description of the criminal offence, insufficiently concretising the action of perpetration, whereby he opened a number of legal issues and dilemmas in the work of public prosecutor’s offices and courts.

First, such way of formulating the action of perpetration is contrary to one of the basic principles of criminal law that norms prescribing criminal offences must be determined and precise to the highest extent possible (*nulla poena sine lege certa*) and is particularly unacceptable when the criminal offence concerns legal areas that are regulated in detail, that are complex and specific, such as public procurement.

**In fact, it is often unclear in practice what can be considered the action of perpetration of the criminal offence, what facts should be determined during the procedure, which is why the room is opened in the Republic of Serbia for uneven legal practice, self-will and arbitrariness in the acting of government bodies.**

Simply put, the consequence of a too broad and undetermined legal description of the criminal offence is that a large number of irregularities in the public procurement procedure of a different degree and importance can be considered the action of perpetration of this criminal offence, while at the same time it is easy to defend an entirely opposite legal attitude with reasoned explanation – there is no criminal offence in the actions of perpetrators, which creates legal uncertainty for contracting authorities and for responsible and official persons of contracting authorities.

Thus, in relation to the first basic form of this criminal offence, it remains unclear what can be considered false data on which the bid is based, whether it is any inaccuracy in the composition of the bid or those are data with a particular “weight”, which is why public prosecutor’s offices and courts must assess the intensity and legal importance of inaccuracies which justify a criminal-legal intervention. Holders of judicial functions who do not act every day in the matter of public procurement do not find it easy to do. The Criminal Code and the PPL do not define the meaning of the notion “false data” (*lažni podatak*), and the matter is further aggravated by the fact that the PPL (Article 82) uses a terminologically different concept – “untrue data” (*neistinit podatak*).

In addition, also disputable is the phrasing that the criminal offence is committed by the person who “contrary to law agrees with other bidders” given that the PPL does not recognise a permitted method of agreeing. Moreover, as Article 26 of the PPL envisages the obligation of contracting authorities to submit the declaration of independent bid as an integral part of tender documents, whereby the bidder under full financial and criminal responsibility confirms that the bid was submitted independently, without any agreement with other bidders or interested parties, it is clear that every agreement of bidders in respect of the contents and all other aspects of the bid is not permitted. However, the Criminal Code does not define concrete or characteristic forms and ways of agreeing of bidders in relation to the submission of bids, which is why public prosecutor’s offices often direct evidence hearing into different directions. In this regard, judges of the Supreme Court of Cassation, in several professional publications<sup>35</sup>, observed that the problem is even more pronounced if the action of agreeing would be placed on the burden of the accused person in the negotiated procedure, which is possible to be implemented under the PPL, within which the contracting authority directly negotiates with one or several bidders, and a particular form of agreement certainly takes place.

In the absence of a precise legal provision, in interpreting what action represents an illegal agreement, a useful guideline (and not the source of law) in the work of public prosecutor’s offices and courts could be the Instruction of the Commission for Protection of Competition for the detection of rigged bids in the public procurement procedure from 2011, which contains the explanation of characteristic notions and forms of rigged bids which result from the agreement of bidders, such as: simulated or fictitious bid, refraining from the submission of bids, rotating bid and market division.

The action of perpetration of the first basic form of abuse in relation to public procurement is also “undertaking of other illegal actions with the aim to influence decision-making of the public procurement contracting authority”, which in our view is more than uncertain. The use of the notion of illegality in defining this criminal offence is, from the aspect of the technique of writing regulations, incorrect and confusing in conceptual terms, given that illegality must exist for the very criminal offence, i.e. pursuant to the Criminal Code it is the obligatory element for the criminal offence to exist at all. In addition, the question is posed what can be considered illegal actions, and it is not clear in relation to what regulation must the actions of the perpetrator be contrary. Based on the legal description of the criminal offence, we can conclude that any deviation from rules defining public procurement, including bylaws, can represent the action of perpetration of a criminal offence, which certainly would

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35 For instance: Bulletin of the Supreme Court of Cassation, No 2/2015.





not be a good measure of criminal-legal intervention. It seems that this problem would be solved if the legislator, within the definition of the offence, would at least (*exempli causa*) specify the specific actions enumerated within Article 23 of the PPL or refer to the stated provision, which relates to the protection of integrity of the public procurement procedure, and specify direct or indirect giving or promising a benefit, obtaining confidential information in the phase of preparation of tender documents, acting in the status of bidders of persons participating in the planning of public procurement or preparing tender documents, or persons related to them.

This form of the criminal offence can be perpetrated only with direct premeditation. The obtainment of advantage is not needed – the offence was committed with the submission of the bid, i.e. making the agreement which need not have a result (be achieved), while the intention is needed as well (as a special subjective feature of the offence) to influence decision making of the contracting authority. This is perhaps the only element of definition of this criminal offence which represents an orientation to participants in criminal proceedings and based on which it could potentially be possible to make a difference between the situation of a non-purpose error of the bidder during bid compilation and the situation of perpetration of the criminal offence.

In the practice of public prosecutor's offices and courts, an even greater problem is caused by another form of the criminal offence of abuse in relation to public procurement, given that its description states that the criminal offence is committed by the responsible or official person who: "by using his position or authorisation, exceeding the limit of his authorisation or by not exercising his duty, violates law or other regulations on public procurement", while it is not known what concrete violations of laws and regulations are implied. This practically means that the responsible and official person can be the perpetrators of the criminal offence whenever there is irregularity in the procedure, which represents unjustified broadening of the criminal zone.

The definition of this form of the offence is formulated similarly to the criminal offence of the abuse of position of the responsible person under Article 227 of the Criminal Code, which is disputable *per se* and is for a number of years criticized by the entire scientific and professional public, both in the country and abroad. However, it has remained in the legal system of the Republic of Serbia as an offence whose substance is of general, but also of auxiliary (subsidiary) character, with actions of perpetrators qualified as the abuse of position of the responsible person when it is not possible to find in them the features of another separate criminal offence. It is therefore illogical and entirely unnecessary that the same action (consisting of the "use of the official position or authorisation, exceeding the limit of the authorisation or not exercising duty") is prescribed at the same time for the specific and separate offence such as abuse in relation to public procurement. The question is asked what is the purpose of stipulating a separate criminal offence, if the action of the perpetrator is defined in the same way as in the case of abuse of position of the responsible person which is a subsidiary criminal offence.

The definition of the graver form of the criminal offence contains a logical inconsistency: it is required that the value of the public procurement in relation to which the offence was committed exceeds a threshold (150 million dinars), while the definition of another form of the criminal offence requires the occurrence of damage to public funds. It would be logical to place the amount of damage to public funds as the circumstance qualifying the offence as grave, and not the very value of public procurement, which in fact in criminal proceedings can be entirely irrelevant. The gravity of the consequence should be the one determining the gravity of the criminal offence, and not the estimated value of procurement.

The referral character of the norm stipulating the criminal offence is seen in the structure of the substance of the criminal offence in both prescribed forms, and the Criminal Code only partly prescribes the features of the offence, while other elements that define in detail the substance of the criminal offence should be sought in the other regulation – the PPL and other regulations from this legal field

whose provisions are violated by actions of perpetrators. This referral character within the first form of the criminal offence is reflected in the phrasing: “contrary to law... agrees”, and within the second form in the phrasing: “violates law and other regulations on public procurement”, and it is obvious that the Criminal Code does not refer to concrete provisions of the PPL being violated. At the same time, the PPL also does not define the concepts that can be the subject of criminal proceedings.

It remains unclear why the legislator within the substance of the criminal offence did not explicitly envisage at least some of the most frequent and blatant violations of the PPL that would doubtless have the character of a criminal offence, such as, for instance, adjusting tender documents to a particular bidder by the contracting authority. In practice, those would be the situations when the contracting authority, for instance, describing the technical characteristics of the requested goods in tender documents or by prescribing unjustified additional conditions for participation in the public procurement procedure, practically “draws” one bidder, hindering his competitors to submit acceptable bids and participate on equal terms in the public procurement procedure.

Besides, it is illogical and unjustified from the criminal-political aspect that different actions of contracting authorities and bidders in the public procurement procedure represent a criminal offence, while the non-implementation of the public procurement procedure in the situation when it is required by law represents only the violation from Article 169, paragraph 2, item 1) of the PPL. **The non-implementation of the public procurement procedure, i.e. the conclusion of the public procurement contract without the previously implemented procedure should represent the gravest form of the criminal offence of abuse in relation to public procurement**, as it is at the same time the gravest form of violating legality in that field.

## 5.4 Detecting a criminal offence and substantiation

Given that the contracting authority and the bidder have the interest to keep silent about the undertaken actions of abuse, the “dark figure” (number of perpetrated and non-detected criminal offences) is high for this criminal offence. Also, not even employees engaged in public procurement tasks in the contracting authority and the bidder, whose employment depends on the hierarchically superior responsible persons, are not motivated to report on the criminal offence, while often they themselves are in the role of the inciter or the abettor, because given the nature of their everyday work they are able to influence decision-making in the public procurement procedure, and are under constant corruptive pressure.

The police and public prosecutor’s offices most often obtain information about the potential perpetration of a criminal offence from dissatisfied participants in public procurement procedures, which results in a large number of criminal charges whose allegations are false (stated as an expression of dissatisfaction with the outcome of the procedure) or belated, i.e. presented in the phase when it is no longer possible to undertake evidence collecting procedures. Mutual reporting on competitors in the public procurement procedure must be subject to critical, fast and multifaceted examination by the body in criminal proceedings, given that the initiation of criminal proceedings against the company and its responsible person represents, pursuant to the PPL, the circumstance which disqualifies him in future public procurement procedures. In this regard, there have been attempts of a certain number of bidders to disable the competitor to participate in the oncoming public procurement procedures through ungrounded and arbitrary initiation of criminal proceedings, in which case there is the danger that the criminal procedure be abused and become the instrument of eliminating competition, i.e. the method of unfair competition. The “cure” for such endeavours is the efficient examination of allegations from criminal charges and consistent prosecution of perpetrators due to the execution of the criminal offence of false reporting from Article 334 of the Criminal Code.



It is important to note that the Law on Organisation and Competence of Government Authorities in the Suppression of Organised Crime, Terrorism and Corruption (RS Official Gazette, Nos 94/16 and 87/18), applied as of 1 March 2018, envisages by its Article 21 the possibility of establishing task forces, consisting of representatives of public prosecutor's offices and different government bodies (including the PPA and SAI), with the aim of detection and prosecution of criminal offences of corruption, including, among other things, the criminal offence of abuse in relation to public procurement. The Law also envisages the possibility of designating liaison officers of these bodies who will communicate with the public prosecutor's offices. These are procedural institutes aimed at strengthening the acting public prosecutor's office both in terms of staff and professionalism, given the complexity and specificity of this type of economic crime. It remains to be seen whether after some time these mechanisms will be effective in practice, given that since the Law came into force they have not been applied in a larger number of cases.

Reports of the SAI, particularly decisions of the Republic Commission adopted in the procedure of the protection of rights, can have importance also in terms of the detection and substantiation of this criminal offence, given that irregularities in public procurement procedures are often determined in advance within the decisions of these bodies. For instance, bodies in the pre-investigation and investigation procedures can find indications for the existence of this criminal offence in decisions of the Republic Commission which annul public procurement procedures due to the tender documents compiled in a discriminatory way, disputable documents used in the public procurement procedure which prove the technical characteristics of the requested goods, public procurement procedures implemented contrary to the principle of transparency etc. Although these decisions are published and are publicly available on the website of the given government body, for the time being there is no good practice of the police and public prosecutor's offices to follow and analyse them.

Given that criminal offences of corruption, including the criminal offence of abuse in relation to public procurement are characterised by pronounced concealment, dynamics, adjustability to new conditions, specialisation and professionalism of perpetrators, widespread nature, a self-interested motive, ineptitude and versatility of manifestations,<sup>36</sup> it is certainly justified that the Criminal Procedure Code should allow the application of special evidence collecting procedures,<sup>37</sup> of which the most important is the covert interception of communications (colloquially: tapping). This efficient evidence collecting tool allows that evidence in criminal proceedings can be the contents of communication achieved through letters, telephone, electronic mail, fax and other means, with the condition that evidence for criminal prosecution cannot be collected differently or its collection would be significantly aggravated.<sup>38</sup> Also, in terms of the application of the special evidence collecting procedure it is necessary to implement the procedure of approving its application by the preliminary proceedings judge, so that this measure be realised in a lawful way and with the least possible negative influences on human rights and freedoms. According to preliminary proceedings judges and public prosecutors, more intensive application of this evidence collecting tool and a higher number of prosecuted persons are expected in the coming period.

The Law on Organisation and Competence of Government Authorities in the Suppression of Organised Crime, Terrorism and Corruption introduced numerous novelties also in terms of the competence and specialisation of the public prosecutor's office and courts, by stipulating that the Prosecutor's Office for Organised Crime (if there are elements of organised crime) or special departments for suppression

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36 Stanimir Đukić: "Analiza krivičnih dela privrednog kriminaliteta u Srbiji i delikti korupcije u privredi" ("Analysis of Criminal Offences of Economic Crime in Serbia and Corruption Delicts in Economy"), *Vojno delo*, No 5/2016, p. 174-176.

37 Special evidence collecting procedures are envisaged by Articles 161-187 of the Criminal Procedure Code, and can be the following: covert interceptions of communications, covert interception and recording, simulated (business) deals, computer search of data, controlled delivery and undercover investigator.

38 Provision of Article 161, paragraph 1 of the Criminal Procedure Code.

of corruption formed within higher public prosecutor's officers and higher courts in Belgrade, Novi Sad, Kraljevo and Niš be competent for criminal offences of corruption, including abuse in relation to public procurement. Representatives of the Ministry of Justice proclaimed that judges and public prosecutors allocated to these departments have a particular moral integrity, that they underwent professional training relating to criminal offences of corruption, and are able to implement efficient and just criminal proceedings.

## 5.5 Comparative legal experiences

With the aim of comprehensive analysis of the matter concerned, it is necessary to as objectively as possible examine legislative solutions and experiences of countries facing the same challenges as the Republic of Serbia and having a similar legal tradition:

The Criminal Code of the **Republic of Croatia**<sup>39</sup> envisages two criminal offences relating to public procurement: Article 254 envisages the criminal offence of abuse in the public procurement procedure, while Article 293 envisages the criminal offence of illegal favouritism. The former criminal offence is in the chapter of criminal offences against economy, and the latter in the chapter of criminal offences against official duty, which is a logical choice.

The action of abuse in the public procurement procedure is exercised by the person submitting the bid based on the prohibited agreement between economic entities with the aim that it be accepted by the contracting authority. Although at first sight incrimination resembles that from the Criminal Code of the Republic of Serbia, a more detailed analysis shows that the action of perpetration of the offence is defined in a simple and clear manner, with a narrower and adequate criminal zone, without going into dilemmas caused by the use of the notion "false data" on which the bid is founded and the use of the vague concept of "other illegal actions in the public procurement procedure". Also, in the Republic of Serbia, agreements between entities are by themselves the action of perpetration of the offence, completed as soon as participants start to make agreements, even in the situation when the bid is not submitted at all, i.e. in the situation when the agreement has no implications in the public procurement procedure, while in the Republic of Croatia it is required for a committed offence that the bid is submitted as a result of agreement. This additionally confirms the fact that in the Criminal Code of the Republic of Serbia the substance of the criminal offence is defined too broadly, without rational endeavours to achieve the purpose of prescribing a criminal offence against economy.

The criminal offence of illegal favouritism is committed by the official or responsible person who, based on the agreement, favours one of economic entities by adjusting the terms of public procurement or concludes the agreement with the bidder whose bid is contrary to conditions from tender documents. In addition to the action of execution being precisely defined, it at the same time essentially reflects some of the gravest violations of regulations on public procurement, which doubtless deserve to be proclaimed a criminal offence.

On the other hand, the **Republic of Slovenia**<sup>40</sup> has an entirely different model of criminal-legal protection in case of public procurement. A separate criminal offence of abuse in relation to public procurement does not exist but the criminal-legal protection is provided in terms of the rational use of public funds in the public procurement procedure within the criminal offence of causing damage to public funds.

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39 Criminal Law of the Republic of Croatia, <https://pravosudje.gov.hr/pristup-informacijama-6341/zakoni-i-ostali-propisi/zakoni-i-propisi-6354/kazneno-pravo/6441>.

40 Criminal Code of the Republic of Slovenia, <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO905>.



The perpetrator of this offence is a public officer or other authorised person of the beneficiary of public funds who, during the procurement, acquisition, managing or using such funds, consciously violates regulations, does not implement adequate control, and thus causes illegal or non-purpose use of public funds, and was aware or could have been aware that such acting could create greater material damage, which then takes place. We assume that this solution was adopted with the expectation that legality in the public procurement procedure will be protected primarily within other branches of law, i.e. in the work of an autonomous and independent body for the control of public procurement, while criminal-legal intervention will be exceptional.

## 5.6 Statistical indicators and features of legal practice

Before the analysis of numerical data and statistical tendencies, it should be noted that public prosecutor's officers and courts have different and non-compatible case management systems (SAP and AVP), which is why data obtained from these bodies which relate to the same cases can be mutually different. Unfortunately, this is a problem which dates from the introduction of information systems, aggravating statistical reporting in the Republic of Serbia, comparison of data, and the monitoring of results of work of government bodies.

A concrete step towards improving reporting on criminal offences of corruption and the criminal offence of abuse in relation to public procurement would be the fulfilment of activities from the revised Action Plan for Chapter 23 (in the context of EU accession negotiations) envisaged under section 2.3.4, which imply the establishment of a single system of reporting on corruption and organised crime cases. The Ministry of Justice of the Republic of Serbia implements this activity in cooperation with the USAID and in the coming period the establishment of the so-called electronic register of corruption cases is expected, whereafter it is necessary to re-examine statistical data about the criminal offence of abuse in relation to public procurement.

Given the above said, for the needs of this analysis we have collected data about the prosecution of abuse in relation to public procurement, by submitting requests for access to information of public importance before higher public prosecutor's offices and higher courts in Belgrade, Novi Sad, Kraljevo and Niš.<sup>41</sup> It is indisputable that due to the territorial jurisdiction of courts and head offices of contracting authorities, data from Belgrade are the most important because the majority of public procurement procedures have been implemented and potentially the highest number of criminal offences have been committed there.

All government bodies answered to the submitted requests for access to information of public importance apart from the Higher Public Prosecutor's Office in Kraljevo, which adopted the decision on rejecting the request for access to information of public importance, with a non-convincing explanation that the requested information "is not contained in a single document, and can be collected by inspecting a larger number of cases and records of the Higher Public Prosecutor's Office in Kraljevo, and its collection, sorting and anonymisation (removal of personal data) would aggravate the functioning and unimpeded work of the public prosecutor's office".

An interesting indicator is the answer of the Prosecutor's Office for Organised Crime which informed us that in the period observed it received not a single criminal complaint for the criminal offence of abuse in relation to public procurement.

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<sup>41</sup> The competence of four departments of these bodies covers the entire territory of the Republic of Serbia.

It can be noted that in the period observed, from 1 March 2018, when special departments for suppression of corruption were established in the above public prosecutor's offices and courts, until 2 September 2019, no significant results were achieved in criminal prosecution and trials for the criminal offence of abuse in relation to public procurement.

Dominant among those reporting on this criminal offence are citizens, instead of the police and government bodies whose competence covers public procurement. For the sake of illustration, in the period observed, in Belgrade 27 criminal complaints were submitted by police officers, 37 by citizens, 18 by companies. In Novi Sad the police filed eight criminal complaints, citizens filed 20, budgetary inspection – one, companies – one, and trade unions – one. Similar figures were recorded in Niš.

In the coming period, it is expected that criminal complaints will be to a greater extent filed by government bodies whose competence concerns the field of public procurement: the SAI, PPA, Republic Commission for the Protection of Rights in Public Procurement Procedures and Commission for Protection of Competition, because while acting upon their cases these bodies can learn about indications or grounds of suspicion that abuse occurred in relation to public procurement, and that they are obliged to report thereon to the territorially competent public prosecutor's office.

Furthermore, we can conclude that in regard to the criminal offence of abuse in relation to public procurement (including both legal articles incriminating the offence) there are a small number of legal judgments, as well as criminal charges raised. Also, as it is the case with other criminal offences in the Republic of Serbia, there is a pronounced tendency of concluding plea agreements, which means that the public prosecutor's office, the accused and his counsel agreed on the penalty and other important elements of the judgment, gave up on the right to complaint, and the court adopted the agreement.

In Belgrade, five final judgments were made (one acquittal and four convictions), and plea agreements were concluded with five persons. Criminal charges were filed against nine persons, and criminal complaints were rejected for 80 persons.

In Novi Sad, one legal judgment of conviction was adopted based on the concluded plea agreement.

In Niš, seven final judgments were made – all of them were convictions, and four plea agreements were concluded.

In Kraljevo, two legal judgments of conviction were adopted, and in both the institute of the plea agreement was applied.

In public prosecutor's offices, there are a large number of cases in the phase of pre-investigation and investigation procedures which last long due to the work burden of public prosecutors and their deputies, the lack of staff capacities and other operational resources (in some cases for over one year and a half). For instance, the Higher Public Prosecutor's Office in Novi Sad currently acts upon 27 cases, of which 25 are in the phase of the pre-investigation procedure, one in the investigation phase and one in the conviction phase, and the average duration of the pre-investigation procedure is nine months. It is indicative that other public prosecutor's offices did not answer to questions concerning the duration of the procedure, including characteristics of pre-investigation and investigation procedures.

A particular work burden for the currently competent and acting government bodies are the cases transferred for competence from other courts and public prosecutor's offices after coming into force of the Law on Organisation and Competence of Government Authorities in the Suppression of Organised Crime, Terrorism and Corruption. In these cases, the earlier competent basic public prosecutor's



offices did not undertake a significant number of evidence collecting procedures – in the Higher Public Prosecutor’s Office in Belgrade there are 66 and in the Higher Public Prosecutor’s Office in Novi Sad 22 such cases. Within these cases, a particular problem are cases initiated with another legal qualification – the abuse of position of the responsible person, and during the procedure the pre-qualification was made into abuse in relation to public procurement, which is why it is necessary to conduct differently evidence collecting procedures than so far.

Also, there are clear indicators that the penal policy for this criminal offence which is of corruptive nature is exceptionally mild, because from 1 March 2018 until today only one effective, one-year sentence of imprisonment has been pronounced in the territory of the entire Republic of Serbia (before the Higher Court in Kraljevo), which is at the same time the gravest pronounced sentence in the Republic of Serbia. Within the adopted final judgments, dominant are suspended sentences and imprisonment served on the premises where the convicted person lives (house arrest). The gravest sentence of house arrest was pronounced before the Higher Court in Niš, in the duration of ten months. It is indicative that in Belgrade and Novi Sad only suspended sentences were pronounced. The mildest suspended sentence was pronounced before the Higher Court in Belgrade – a six-month imprisonment sentence was pronounced against the convicted person and it is stipulated that the sentence will not be carried out if within the two-year verification period the convicted person does not repeat the criminal offence. The gravest suspended sentence was pronounced before the Higher Court in Novi Sad as the imprisonment sentence of one year and six months was pronounced against the convicted person, and it was envisaged that it would not be carried out if in the four-year verification period the convicted person does not repeat the criminal offence.

Also, except for one case before the Higher Court in Belgrade, there are no data of pronounced measures of security or measures of seizure of material gain obtained through the criminal offence of abuse in relation to public procurement.

Visible in the work of competent public prosecutor’s offices conducting pre-investigation and investigation procedures is swift and typical acting, a focus only on particular types of irregularities in the public procurement procedure, a focus mainly on acts of non-exercising authorisations and duties in regard to responsible and official persons (the so-called acts of omission), and actions of basing a bid on false data in respect of bidders. Therefore, for the time being there are not many criminal proceedings initiated and completed in regard to more complex forms of rigging the outcome of the public procurement procedure which would require a more intensive and complex evidentiary initiative. All the said results from deputy public prosecutors being burdened with a large number of cases (particularly in the Higher Public Prosecutor’s Office in Belgrade), and the lack of training in the field of public procurement.

## 6. Recommendations for the improvement of suppression of irregularities and fight against corruption in the public procurement field

### 6.1 General recommendations

For the suppression of irregularities and fight against corruption in the public procurement field, the following is necessary:

- 1) **Promote improved market research to determine the justifiability of needs for procurement** – introduce the obligation for contracting authorities to, when implementing procedures above the defined value limit, place at disposal to economic entities for prior counselling the basic parts of tender documents, whereafter they will prepare and publish the report thereon.
- 2) **Prevent the “fragmentation” of public procurement into several low-value procurements to avoid the application of some provisions of the PPL (primarily advertising on the Portal)** – prepare guidelines on the implementation of prohibition of unjustified division of public procurements.
- 3) **Reduce the implementation of exemptions in public procurement** – harmonise the implementation of exemptions with EU regulations,<sup>42</sup> as a measure to prevent irregularities and ensure a higher degree of transparency in relation to the use of exemptions from the application of regulations on public procurement. In this regard, it is necessary to introduce a new advertisement in the public procurement system – notification for voluntary *ex ante* transparency, whereby the contracting authority, before concluding the contract by applying an exemption, would inform all interested parties to do so (and interested parties would be able to submit the request for the protection of rights and dispute the basis for the application of exemptions).<sup>43</sup>
- 4) **Make more transparent communication between participants in the public procurement procedure** – introduce mandatory electronic communication in public procurement, in all phases.<sup>44</sup>
- 5) **Reduce the application of the negotiated procedure without invitation to submit bids** – harmonise conditions for the application of this type of procedure with EU regulations, primarily in regard to the so-called urgent procurements.<sup>45</sup>
- 6) **Reduce the possibility of discrimination when determining technical specifications, conditions for participation in the public procurement procedure and contract award criteria** – give recommendations in relation to the determination of the so-called exit specifications, i.e. the need that contracting authorities do not define detailed characteristics of the necessary subject

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42 Largely realised in the Proposal of the new PPL.

43 Envisaged by the Proposal of the new PPL.

44 Envisaged by the Proposal of the new PPL.

45 Envisaged by the Proposal of the new PPL.



of the public procurement, but place the focus on the description of their needs, while leaving to the market the finding of necessary solutions for their needs. Also important is the introduction of mandatory proving of conditions for participation in the procedure through the previously prescribed declaration.<sup>46</sup> It would be desirable to draft guidelines for individual subjects of public procurement, in the part of developing technical specifications, conditions for participation in the procedure and contract award criteria.

- 7) **Enable easier and faster detection of conflict of interest** – for instance, by establishing the existence of potential conflict of interest in advance – on the website of the contracting authority and/or in tender documents. Also, it would be possible to introduce the obligation for the selected bidder to submit, upon the invitation of the contracting authority, information about its founders, holders of stakes and other persons, and economic entities related to it.<sup>47</sup>
- 8) **Make even more transparent the opening and expert assessment of bids** – introduce electronic bid submission in order to eliminate the risk of incorrect handling of bids.<sup>48</sup>
- 9) **Establish stronger control of public procurement in the fields of defence and security** – harmonise provisions relating to these procurements with EU regulations, particularly in the part of exemptions from application and grounds for the application of the negotiated procedure without invitation to submit bids.<sup>49</sup>
- 10) **Strengthen supervision of the execution of public procurement contracts** – introduce the obligation of publishing data in relation to contract execution – the total amount paid to the other contracting party and explanation if the amount paid is higher than contracted, i.e. the explanation of reasons why the contract was terminated before its expiry.<sup>50</sup> Introduce the obligation of electronic payment, in accordance with EU regulations. The Proposal currently envisages in general that the contracting authority is obliged to control the execution of public procurement contracts in accordance with conditions determined in procurement documentation and selected bid, and the ministry in charge of finance should oversee the execution of public procurement contracts.
- 11) **Consistently apply anti-corruptive provisions of the PPL** – fully use all possibilities and authorisations envisaged by the Law.
- 12) **Increase general capacities of participants in public procurement** – adopt a comprehensive plan and programme of training for participants in the public procurement system, with the aim of reducing irregularity and corruption.

In addition to the stated recommendations that largely concern amendments to regulations and activities of the PPA, the future Public Procurement Office (which do not fall under the competence of that body only, but also concern other relevant actors in the public procurement system), we shall hereinafter present our view of the monitoring that the Office should implement in the coming period, after the new PPL comes into force (and its application begins) – its adoption is expected in 2019.

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46 Envisaged by the Proposal of the new PPL.

47 Not envisaged by the Proposal of the new PPL.

48 Envisaged by the Proposal of the new PPL.

49 Largely realised in the Proposal of the new PPL.

50 Not envisaged by the Proposal of the new PPL.

## 6.2 Improving the role of the Public Procurement Administration (Office)

The PPO should be the central institution which conducts systemic monitoring of the public procurement system and, based on information obtained from competent institutions, proposes necessary changes in the system, conducts training, prepares instructions etc. In addition, the PPO would conduct monitoring of individual public procurements in accordance with clearly defined rules in the Law, with the aim of eliminating irregularities in the implementation of the Law.

It is also worth noting that cooperation and coordination of all competent institutions in the public procurement field (which will be elaborated in more detail in the final part of this analysis), particularly in regard to monitoring and other control mechanisms, and cooperation with competent prosecutor's offices and the police, are exceptionally important for the efficient elimination of irregular acting in the public procurement system. In this regard, an important role could be played by the Public Procurement Administration (Office), primarily bearing in mind that this is a central institution in the public procurement system which possesses the greatest quantity of information about the situation in the system.

Such clear definition of monitoring by all institutions would significantly contribute to the realisation of requests from benchmark 2 for closing Chapter 5, as already stated in the first chapter of this analysis.

**The PPO would implement the procedure of monitoring individual public procurements based on the annual monitoring plan. In this regard, among other things, it should be envisaged that monitoring be conducted particularly in the following cases:**

- » if the PPO is informed about the absence of publication of public procurement plans, advertisements and tender documents (and answers to questions of potential bidders) by contracting authorities on the Public Procurement Portal;
- » when the PPO is informed about a larger number of procedures for the same subject of public procurement where only one acceptable bid is obtained, particularly if it is the bid of the same bidder (the same refers to procurements of the same contracting authority in several previous years);
- » if information is submitted that the public procurement procedure implemented in the current year has been annulled already several times by the Republic Commission;
- » if information is submitted that for the public procurement procedure implemented in the current year, the SAI determined in the previous years significant irregularities in the same contracting authority (due to which misdemeanour or criminal proceedings were initiated);
- » when the contracting authority requires the monitoring of its public procurement which is particularly valuable or the project is important for the entire country, while it is necessary to examine also a form of preventive monitoring in such case, which would include only the phase of preparing tender documents and would concern individual parts of tender documents.



### 6.3 Improving the coordination of bodies

While expecting the new anti-corruption strategy (whose preparation is underway), it remains to take a look at the previous strategy, whose period of application expired, but it can be concluded that observations concerning abuse in public procurements are still topical and that the envisaged objectives have still not been achieved to a sufficient extent. It is therefore also necessary to devote particular attention in the new strategy to abuse in public procurement.

**In this regard, it is necessary to strengthen efforts to establish continuous and, if possible, formalised cooperation between institutions (by signing memoranda, agreements, protocols or in another formal way), particularly between the PPA, Republic Commission, SAI, Anti-Corruption Agency, Ministry of Finance, Ministry of Justice and prosecutor's offices.** However, cooperation must be coordinated and mandatory for all institutions so that, for instance, the Government and the National Assembly of the Republic of Serbia be regularly informed about the results of such cooperation, as well as the public. Thus, it is important to define the methods of cooperation in the field of fight against corruption and suppressing irregularities in public procurement, including the application of anti-corruption provisions of the PPL. At the same time, coordination between institutions should be continuous and mandatory for all these institutions, and should take place through the exchange of information, experiences and know-how.

Institutions could nominate representatives (contact persons) in charge of mutual communication which, in addition to customary ways of communication, takes place by holding regular, periodical (e.g. quarterly) meetings, and, when needed, extraordinary meetings as well. At these meetings, the most important questions in the field of mutual cooperation and coordination would be examined, particularly the following:

- » analysis of application of valid regulations in the field of fight against corruption in public procurement;
- » potential (particularly new) risks of corruption arising in all phases of public procurement;
- » topical issues in relation to the interpretation of provisions of regulations whose violations have become frequent, particularly in the context of initiation of misdemeanour and criminal proceedings;
- » acting upon reports of corruption in public procurement;
- » improving measures of control of legal and purposeful spending of public funds in public procurement;
- » other issues important for fight against corruption in public procurement.

At meetings, institutions would adopt the recommendations of measures and activities, for the period until the next quarterly meeting, when reports on their implementation would be considered and adopted. Representatives of institutions would be fully authorised to propose models and methods for preventive coordinated acting with the aim of overcoming all potential risks of corruption, such as training, lectures, reconciliation of attitudes, exchange of information etc.

One of the reasons for holding extraordinary meetings would be, for instance, the case when the contracting authority requests from the PPA preventive monitoring in particularly important public procurements (as already proposed by the author, with a similar example existing in Italy). Monitoring would be carried out in regard to individual parts of tender documents which can be potentially disputable and jeopardise competition and discriminate against bidders, and the PPA could at these extraordinary meetings request assistance of other institutions. It is implied that topics of such meetings need not be concrete solutions proposed in tender documents with the specification of a concrete public procurement procedure and the contracting authority, but as general as possible issues relating to such concrete solutions can be examined. Representatives of institutions who would present their opinions would do so conditionally, so as not to oblige the institution when adopting the final decision

if the disputable issue arises in the resolution of cases under the competence of the institution. In the specified case, the role of the meeting would be, first of all, that representatives of institutions state whether they have already had a similar example in their practice and how they solved it, while familiarising others with such practice (decisions, opinions, reports, complaints etc.).

It is also important to designate the coordinator of activities of mutual cooperation. Coordinators from different institutions could alternate in the execution of such duty in particular time intervals (for instance, each six months). Through their representatives, institutions would timely submit all proposals to the coordinator (among other things, proposals for holding extraordinary meetings), questions, complaints, notifications and information concerning the subject of mutual cooperation.

It would be also important to establish a centralised database on submitted complaints indicating the existence of irregularities and corruption in public procurement, on measures undertaken, and the outcome of possibly implemented procedures under those complaints. By special protocols, institutions would determine the structure and type of data entered into the electronic database, and the manner of accessing data and authorisations. Institutions could also enable to each other access to internal databases so as to have more information during the detection of cases of irregularities and corruption in public procurement. Such approach can also be limited – only in terms of particular relevant data.

The continuity and mandatory character of the stated forms of cooperation and coordination could also be ensured by mutual obliging of institutions (or by specifying such obligation in law) to prepare joint annual reports to present all activities undertaken and results achieved. Institutions would (through the coordinator) submit such joint reports to the Government or the National Assembly of the Republic of Serbia for consideration, and the abbreviated version of such report, with the earlier defined data, would be published on the Public Procurement Portal.

However, it is particularly important to emphasise that so far there have been attempts to agree, through agreements and memoranda, cooperation and coordination between institutions in charge of fight against corruption and suppression of irregularities in public procurement, but such cooperation has not been realised in operational terms or attempts at cooperation have not yielded concrete results in terms of the number of detected and prosecuted cases. So, institutions have attempted to formalise their cooperation in the ways stated, but this most often remained a dead letter. Namely, given that some of such earlier signed documents on cooperation received even significant media coverage and were presented by competent institutions, it seems that their adoption, i.e. signing, had more of a marketing effect and that it was attempted that the mentioned objectives from the earlier valid National Anti-Corruption Strategy be achieved formally and not factually. Therefore, in the coming period more effort should be invested to re-establish and fully implement such forms of cooperation and coordination. In addition, the possibility of establishing a standing body for cooperation and coordination between these institutions (in the specified ways) should be examined. For instance, such body could be a type of a council or collegium, consisting of representatives of all the stated institutions. If the legislator believes it would not be adequate to establish such body by law (and regulate the method of its work), it could be established by a special decision of the Government or the National Assembly of the Republic of Serbia.

A separate topic for cooperation and coordination between competent institutions should also be the initiation and conduct of misdemeanour proceedings for misdemeanours from the PPL, in the period after the start of application of the new PPL. During the application of the valid PPL, no such misdemeanour proceedings ended in a final decision about the existence of misdemeanour. In the Law on Misdemeanours and the valid PPL there are significant collisions in terms of some relevant provisions which, as already emphasised, hinder the implementation of first-instance misdemeanour proceedings in the public procurement field. To reiterate, these collisions are the consequence of adoption of the Law on Misdemeanours after the PPL, which has been blocking these misdemeanour proceedings for



more than six years (since the start of application of the valid PPL). Pursuant to Article 246, paragraph 1 of the Law on Misdemeanours, the existence of a misdemeanour and pronouncement of penalty is decided upon by the adoption of the sentence of conviction or acquittal, which can be adopted only by courts, and not by other government bodies, such as the Republic Commission. Furthermore, fines pronounced in first-instance misdemeanour proceedings (including costs of misdemeanour proceedings and other pecuniary amounts adjudicated based on damage compensation, property claim or seizure of material gain), pursuant to the provision of Article 314, paragraph 1 of the Law on Misdemeanours can be coercively enforced only by the misdemeanour court pronouncing them, i.e. the court in whose jurisdiction the misdemeanour order was issued, which means that the fine that would be pronounced by the Republic Commission in misdemeanour proceedings could not be coercively enforced.

In addition, cases in relation to corruption and irregularities in public procurement must also be treated somewhat differently by the police, prosecutor's offices and courts, in terms of ensuring a higher scope of education for employees in these institutions, in the fields of public procurement, as well as public-private partnership and concessions, including knowledge about regulations on the state administration and public enterprises, so as to ensure their gradual specialisation. On the other hand, the mentioned forms of cooperation between institutions should enable prosecutor's offices to more easily recognise the elements of substance of particular criminal offences (primarily abuse in relation to public procurement) in relation to illegal and incorrect acting of participants in public procurement procedures, and to obtain adequate evidence thereon. There is often the problem that there is no clear material evidence that the public procurement was implemented with the intention to favour a particular bidder, while others are discriminated against.

## 6.4 Ensuring to the full extent the implementation of misdemeanour proceedings in relation to public procurement

As already stated, the Proposal of the new PPL envisages the solution based on which **first-instance misdemeanour proceedings for misdemeanours under that Law will be conducted by misdemeanour courts and not by the Republic Commission**. The Republic Commission will submit requests for the initiation of misdemeanour proceedings when in the course of its work it learns about a misdemeanour (other authorised bodies will also act in such way). This ensures the fulfilment of the most important recommendation that can be given in relation to these misdemeanour proceedings, in regard to the current situation. However, it has already been emphasised that it is **necessary to amend the provision of the Budget System Law which envisages a sanction for a misdemeanour in the field of public procurement**, so as to make it clear when misdemeanour proceedings for such misdemeanours are initiated according to the legal grounds from the PPL and when based on legal grounds from the Budget System Law, as it has already been discussed. An important question is certainly **adequate penal policy**, not only within misdemeanour proceedings, but also within criminal proceedings in relation to irregularities in the field of public procurement. This has already been discussed in the preceding parts of this analysis.

## 6.5 More efficient prosecution of the criminal offence of abuse in relation to public procurement

Although criminal-legal regulations feature significant deficiencies, dealt with in the previous part of the analysis, this does not mean that special departments for the fight against corruption in public prosecutor's offices and courts are not able to act and exercise their authorisations. This is particularly true given that criminal-legal regulations contain solutions and institutes which are not applied due to the system inertia and limited staff and technical capacities.

However, in order to enhance the efficiency of public prosecutor's offices and courts and to create conditions so that the criminal-legal norm which protects legality in the public procurement procedure and confidence in the economic system becomes a real and serious threat to potential perpetrators of criminal offences and ensures general prevention, and in order to ensure that the definition of the criminal offence of abuse in relation to public procurement be prescribed in accordance with criminal-legal principles, the following is necessary:

- 1) Amend the provision of Article 228 of the Criminal Code so that the action of perpetration of the criminal offence be defined in a more clear and concrete manner, with a narrowed action of perpetration, while defining the used terms and expressions in prescribing the substance of the criminal offence, with actual determination of the criminal zone which would cover the gravest forms of violation of concrete regulations on public procurement, with the aim of eliminating the existing dilemmas and illogicalities.** At the same time, amendments would ensure that the criminal offence of abuse in relation to public procurement be aligned with the rights proclaimed by the Constitution of the Republic of Serbia, primarily in regard to the right to fair trial from Article 32 of the Constitution and the right to legal certainty in penal law from Article 34 of the Constitution, and with international standards in the field of criminal law. Amendments should be made in respect of all remarks stated in the analysis. For the criminal-legal intervention to preserve its strength and importance, it must not be prescribed for any omission which is hard to determine in the public procurement procedure, but for a clearly defined action which represents grave and serious violation of regulations.
- 2) Ensure greater coordination between public prosecutor's offices and government bodies with competence in the public procurement field (PPA, Republic Commission for the Protection of Rights in Public Procurement Procedures, SAI, Commission for Protection of Competition, Budgetary Inspection) through the institute of liaison officers and the institute of task forces envisaged by the Law on Organisation and Competence of Government Authorities in the Suppression of Organised Crime, Terrorism and Corruption, and through other forms of cooperation.** This is necessary so as to improve efficiency in detection of the criminal offence and prevent that suspicions that the criminal offence has been committed appear in some cases of the above government bodies and that the government body, despite the explicit legal obligations, fails to report it to the police or competent public prosecutor's office.
- 3) Ensure continuous functioning of the financial forensics service<sup>51</sup> in higher public prosecutor's offices – special departments for suppression of corruption and the Prosecutor's Office for Organised Crime and hire staff for this service,** and ensure that financial forensic scientists be trained also in the public procurement field and that those already knowledgeable about this field be engaged. As criminal-legal cases relating to public procurement can be exceptionally complex,

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51 Forensics implies the observation and interpretation of physical evidence, with the aim of resolving criminal offences.

public prosecutors often need assistance in the analysis of money flows and financial transactions, particularly in relation to issues that may arise in criminal proceedings such as, for instance: hidden costs of maintaining goods procured in the public procurement procedure, financial aspects of executing public procurement contracts, payments for goods, services and works procured within unreasonable public procurement, disputable questions concerning the quality of delivered goods, and numerous other issues that are currently not being examined and prosecuted.

- 4) **Ensure the mechanism for the engagement of professional consultants and the list of experts (particularly for the public procurement field), in accordance with the provision of Article 125 of the Criminal Procedure Code.** This useful institute that would facilitate the acting of all participants in criminal proceedings is **insufficiently and rarely used in practice, and is exceptionally applicable when the matter of public procurement is the subject of criminal proceedings.** Although it was examined in theory and practice whether the public prosecutor's office can engage a professional consultant, we believe there are no legal impediments, as this is indicated by the mentioned provision of the Criminal Procedure Code which states that this can be done by the **party in the proceedings** – these being the public prosecutor's office and the accused person. The professional consultant is the person with expert knowledge in the field where an expert examination is need and, under law, has the right to attend the expert examination, to inspect during the examination documents and the subject of expert examination, to make remarks about the findings and opinion of the expert witness, to examine the expert witness at the trial and to be examined on the subject-matter of the expert examination. When it comes to complex cases of economic crime such as abuse in the public procurement procedure, the role of the consultant can be of exceptional importance.
- 5) **Enhance and strengthen staff capacities, by increasing the number of deputy public prosecutors, assistant prosecutors, and ensure technical capacities in terms of computer and other necessary equipment.** By ensuring more time for deputy public prosecutors to engage in individual complex cases, significant effects would be achieved in curbing economic crime. Besides, technical capacities of individual bodies whose competence includes struggle against criminal offences of corruption are not sufficient – for instance, the Higher Public Prosecutor's Office in Kraljevo (special department for suppression of corruption) practically does not have computers and is not even able to keep electronic records of cases.

This proposed measure entails financial means which are not high compared to the degree of damage caused every year to public funds due to the perpetration of the criminal offence of abuse in relation to public procurement.<sup>52</sup>

- 6) **Conduct continuous training of public prosecutor's offices, judges and lawyers in the complex matter of public procurement which requires specialisation,** by presenting examples of good practice and comparative legal experiences. This can be implemented within special programmes of the Judicial Academy and the Bar Association, and within projects of international and non-governmental organisations, in order to ensure adequate expertise of all participants in criminal proceedings.

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52 Although there are no reliable data and researches for the Republic of Serbia, for the sake of illustration, it is important to have in mind the study prepared on the EU request titled: "Identifying and Reducing Corruption in Public Procurement in the EU", PwC and Ecorys, European Economic Interest Grouping/2017", according to which it is estimated that the total costs of corruption in public procurement in five areas (Road/Rail construction; Water/Waste; Urban/Utility construction; Training; and R&D/High tech products) equal between 1.4 and 1.2 billion euros in eight EU states. Available at: [https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/identifying\\_reducing\\_corruption\\_in\\_public\\_procurement\\_en.pdf](https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/identifying_reducing_corruption_in_public_procurement_en.pdf).









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