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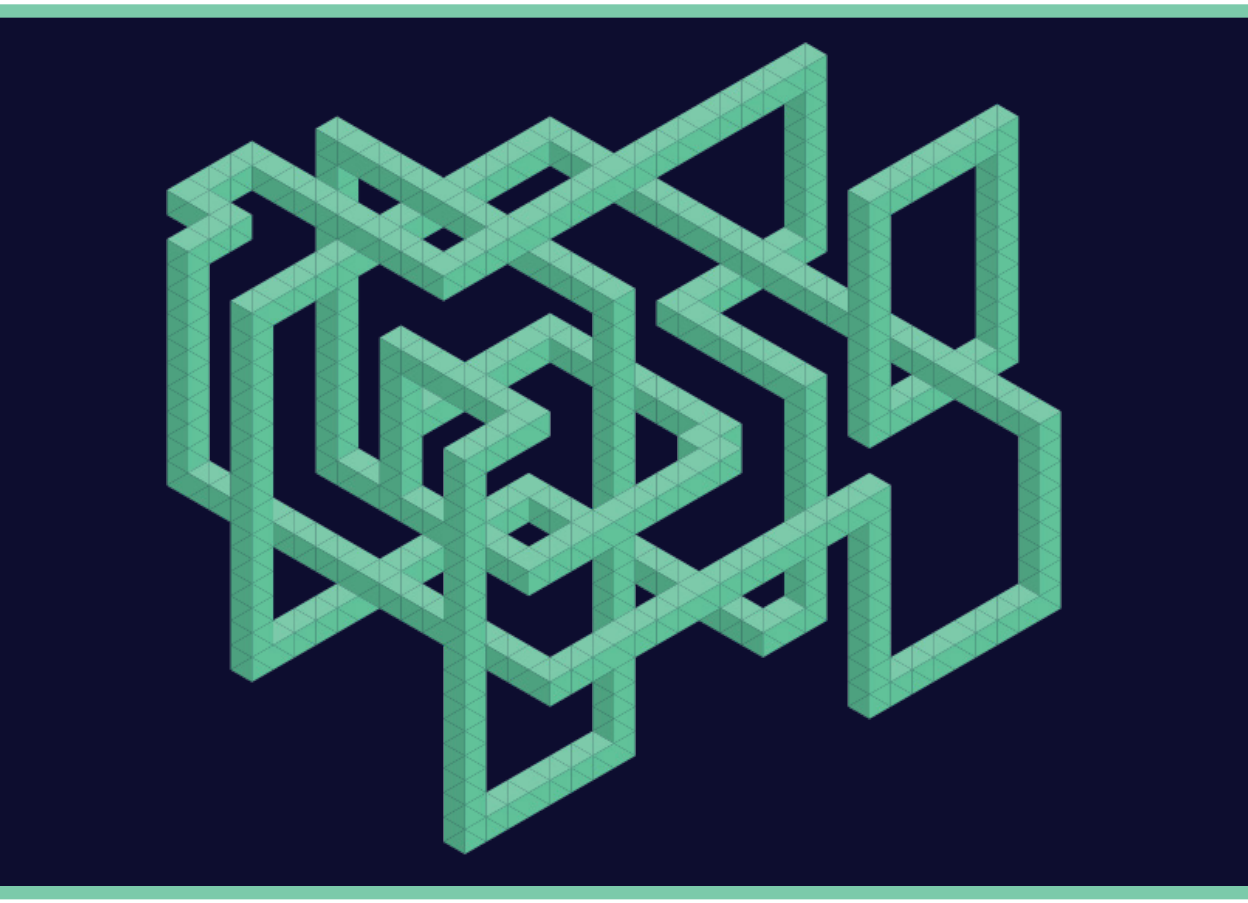
ALARM REPORT
on the state of play in public procurement in Serbia



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PROJECT: **Towards a Sound Public Procurement System in Serbia**

ALARM REPORT ON THE STATE OF PLAY IN PUBLIC PROCUREMENT IN SERBIA

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Content

INTRODUCTION

The Alarm Report for Chapter 5 – Public Procurement is the first of six reports to be compiled under the project Towards a More Efficient Public Procurement System in Serbia, which the Centre for Applied European Studies (CPES) and the Association of Public Procurement Professionals (UPJN) have been implementing since December 2018 with the support of the European Union Delegation in Serbia.

Since relevant strategic documents (the law on public procurement and the public procurement development strategy for 2019-2023) had not been adopted by 30 September and waiting for this to happen has become pointless, the two reports originally planned for 2019 have been combined in this single issue.

The aim of this October 2019 double issue of Alarm Report is to present the current state of play in public procurement in Serbia based on the relevant strategic documents and the analyses and reports of public authorities, international organisations and civil society organisations, and to share key findings and offer recommendations for the forthcoming period, especially in the context of Serbia's EU accession negotiations on Chapter 5 – Public Procurement.

Using publicly available information, the upcoming Alarm Reports will monitor whether and to what extent the competent authorities have been meeting their obligations set out in the public procurement action plans and carrying out initiatives related to public procurement. The reports will also rely on the new findings, including those made by CSOs and investigative journalists, and in particular the findings concerning the cases of suspected misappropriation of

public funds, corruption and/or irrational spending of Serbian public resources, i.e. taxpayers' money.

The upcoming Alarm Reports will especially focus on the findings concerning public procurement in three selected areas that are of the highest public importance as they directly impact the daily lives of citizens and receive significant amounts of public funds. These areas are infrastructure, healthcare and environmental protection. The aim is to establish networks of stakeholders (CSOs, media, public administration, private sector, regulatory bodies, expert public) at the national and local levels with a common approach to the strategy, regulations and practices in the public procurement system and the fight against corruption and joint action will make a positive change in public procurement, enable the exchange of information, knowledge and best practices, pointing out the vulnerabilities of the public procurement system – i.e. where it is most vulnerable to malpractices and corruption.

This combined issue of Alarm Report is divided into two thematic chapters, both relating to the main aim of the project: *reduce corruption by establishing an efficient public procurement system and introduce accountable spending of public funds*. Chapter I provides an overview of the anti-corruption legislation concerning public procurement and its effects in practice. It also provides an analysis of the anti-corruption potential of the new draft law on public procurement.

Chapter II brings an overview and analysis of all relevant strategic documents adopted by the end of September 2019: the reports of public authorities and international organisations along with the key findings and recommendations for the coming period, especially in the context of Serbia's EU accession negotiations on Chapter 5 – Public Procurement.

Since most of the relevant strategic documents cover the period ending with 2018, the English edition of this Alarm report contains only the latest European Commission report on Serbia for 2019. All other strategic documents and reports are still available online, as well as in the Serbian edition of this Alarm report.

Key findings

According to the biannual Report on Public Procurement in Serbia 1/1/2019 to 30/6/2019, **'The average number of tenders per procedure indicates competitive intensity and is an important public procurement performance indicator. For the first six months of 2019, it was 2.2.'** A rather modest value of what might be the most important indicator of the efficiency and effectiveness of public procurement in Serbia. **The same indicator was 3.2 in 2011, and 3.0 in 2017.**

According to the same report, published on the Public Procurement Office website, **in the first half of 2019, in 55 % of the cases (contracts awarded), only one bid was received.**

'An important indicator of competitive intensity is the share of contracts for which only one tender was received. More tenders mean more options for contracting authorities and easier achievement of one of the key objectives of public procurement: getting value for money,' states the Public Procurement Office in the report.

Quite evidently, the Serbian public procurement system has a serious problem: **value for money, one of the key objectives of public procurement, is not achieved.** To put it simply, a handful of bids per tender procedure can hardly be regarded as competition and, in such conditions, the government cannot get value for money.

It seems that the comment made by the European Commission in its Serbia Report 2019 builds on (or rather, directly underlies) the above data. It 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. The anti-corruption action plan focusing on higher education has yet not yielded concrete results.'

It is quite evident that Serbia does not implement an appropriate anti-corruption policy in the field of public procurement, and that no perceptible progress has been made in this regard, which is why it is not surprising that procurement procedures receive few tenders, restricting competition and the chance to comply with the principle 'value for money'.

In a system where anti-corruption mechanisms are dysfunctional, there is no fair competition among the tenderers. In a healthy environment, they would be offering competitive products and services at competitive prices. In a system which does not fight corruption, competition is reduced to other parameters that concern personal and political rather than public interests.

I
CURRENT STATE OF PLAY

1. (Mis-)trust in the public procurement system

When analysing the reasons why few companies participate (bid) in tender procedures, one can say that Serbia is an underdeveloped market and there are not that many companies that can respond to the numerous calls for competition published every year.[1] It is still strange, though, that the progress that had been made in terms of transparency and quality of the legislation and that the European Commission had noted in its annual reports up until 2019, has not encouraged more companies to participate in procurement procedures. In this regard, one cannot help but wonder how an increased number of calls for competition on the public procurement portal[2] and public procurement plans published by the contracting authorities have had the opposite effect: a drop in the number of bids per tender procedure? Was not the point of all the reforms of the public procurement system, carried out over the years, to stimulate competition, i.e. increase the number of bidders to achieve the ultimate goal of public procurement, get the best value for money (the best possible quality of goods, services or works at the best price)? What is even more confusing is why this has happened when there is a constant increase in the number of

1 According to the Report on Public Procurement in Serbia 1/1/2018 to 31/12/2018, the latest annual report published (the 2019 report has not been published yet), 125,619 contracts were awarded in 2018.

2 According to the Report on Public Procurement in Serbia 1/1/2018 to 31/12/2018, the number of calls for competition published on the public procurement portal increased in 2018 by 2,562 relative to the year before.

tenderers registered in the Register of Tenderers, kept by the Business Registers Agency.[3]

However, the underdeveloped public procurement market does not seem to be the main reason why so few companies participate in public procurement procedures. Besides, the level of development of the Serbian market should not have decreased over the years, particularly considering that many economic indicators have been showing upward tendencies, at least according to the official data. Economic operators from abroad, especially those from the EU Member States and the countries with developed public procurement systems, could also participate in the Serbian public procurement market. However, like their Serbian counterparts, not many of them want to do so. In terms of total value, only 3 % of the contracts were awarded to foreign tenderers in 2018. In comparison, 10 % of the contracts were awarded to foreign tenderers in 2006, 12 % in 2012, whilst between these years the numbers were lower.[4]

Judging from the experience of many tenderers that competed in public procurement procedures and the contracting authorities that implemented them, and based on the realistic indicators used in statistical reports, it can be concluded that the key reason why competitive intensity in public procurement procedures in Serbia is currently so low is that tenderers lack confidence in the public procurement system as a whole and in the way that the competent institutions approach it.

The companies do not seem to believe that competition in public procurement is fair or that the competent institutions are particularly interested in ensuring fair competition. In this regard, the critical points in a public procurement process are the following:

– establishing the needs of the contracting authority in the procurement plan;
– writing technical specifications;

3 According to the Report on Public Procurement in Serbia 1/1/2018 to 31/12/2018, the total number of tenderers registered in the Register of Tenderers went up from 7,651 in 2015 to 11,615 in 2018.

4 Report on Public Procurement in Serbia 1/1/2018 to 31/12/2018.

– laying down additional participation requirements for tenderers (their financial, staff, technical and business capacities);
– performing the public procurement contract.

The first three critical points are important because they are a means of favouring specific tenderers and restricting or preventing the participation of others through the procurement plan, call for competition and procurement documents. This is why the participants in public procurement procedures often say, 'As soon as a call published, it's as good as closed'. This essentially means that many tenderers believe that there is no point in participating if you did not participate in the procurement planning and preparation of procurement documents because everything is already tailored to fit a specific economic operator, favoured by the contracting authority. The fourth critical point is important because it means that if favouring did not happen in the planning and implementation stages of public procurement, it is likely to happen in the contract performance stage, where the awarded bidder will be allowed to unjustifiably increase the price, to deliver what has not been agreed under the contract or what the contracting authority has not requested, to miss the deadlines set in the contract, to fail to provide contract guarantees (bank guarantees, bonds, etc.). In this way, a procurement procedure where none of the tenderers (or even the competent authorities) suspected or pointed out to discrimination or restriction of competition in the planning stage, i.e. when decisions were made about the subject-matter of the contract or the technical specifications and participation requirements, may turn into something completely different in the contract performance stage if the awarded bidder, with the approval of the contracting authority, does not comply with the agreed technical specifications, prices, timeframe or other contractual obligations. So, what looked like a fair competition becomes its very opposite in the final stage, where the awarded economic operator is allowed to perform the contract in a way that compromises the results of the competition. The principle of awarding the best tender becomes meaningless where the contracting authority allows the economic operator to ignore the

public procurement contract in the crucial stage of the procurement, contract performance.

Consequently, the economic operators' mistrust is manifested in a sense of strong political pressure not only when establishing said key elements of procurement documents on which the procurement will be based but also when deciding whether to participate in a tender or not. The political parties that for years (decades) have been managing the government institutions and enterprises, as the contracting authorities in public procurement, pressurise (or, to put it mildly, encourage) specific companies to participate, or not to participate, in public tenders. In this way, they have divided the public procurement market to achieve certainty in meeting specific financial interests of political parties and some of their members through nonmarket and non-competitive selection.

Economic operators also have misgivings about the fairness and objectivity of competent institutions. How competent institutions act – or do not act – in the public procurement system will be covered in more depth later. Here, we will just say that the tenderers (and to be fair, the general public):

- have reservations about the objectivity of the competent authorities, i.e. that their actions are free from any political influences;
- have misgivings about the institutions acting promptly and within the deadlines prescribed by law;
- do not trust that the institutions will penalise irregularities, even if they do find them.

2. Institutional performance in the public procurement system

The key institutions in the Serbian public procurement system are the Public Procurement Office, the Republic Commission for Protection of Rights in Public Procurement Procedures, and the State Audit Institution. In addition to these, there are other institutions (the Commission for Protection of Competition, the Anti-corruption Agency, the Ministry of Finance and public prosecutors' offices) but since the responsibilities of the first three are set out in the law on public procurement, this report will primarily focus on them.

In this chapter, we analyse what these institutions do to attract more tenderers (stimulate competition) and uncover and combat irregularities in public procurement procedures.

Despite all the positive results that it lists in its annual reports, the Public Procurement Office (PPO) should have done more to encourage competition and combat irregularities and corruption in public procurement. The PPO has also failed to investigate why competition in the field of public procurement is on a downward slope and why discovering and combating irregularities has given such modest results. According to the biannual Report on Public Procurement in Serbia 1/1/2019 to 30/6/2019 (as mentioned earlier, the report covering the entire year is yet to be published):

– In supervising the application of the law on public procurement, the PPO has investigated 39 cases of alleged irregularities reported by authorised entities;
– Out of said 39 cases, 14 were reported by prosecutors' offices;

- In this period, the PPO has collaborated with the law enforcement across Serbia, delivering reports on three cases at their request;
- The PPO has investigated two cases of alleged irregularities reported by the Anti-corruption Agency, and two cases reported by the Commission for Protection of Competition;
- Also, the PPO has investigated 18 cases of alleged irregularities reported by other stakeholders, such as contracting authorities, tenderers, etc.

In our opinion, these results (i.e. the number of reported irregularities that the PPO has investigated) are negligible in comparison to the total number of contracts awarded in the reporting period. According to the same PPO report, a total of 60,696 contracts were awarded in the first six months of 2019, and their combined value was RSD 217,276,719,000.00.

It is therefore clear that the PPO, and other key institutions in the public procurement system, lack sufficient human resources (they are understaffed) or technical capacity (their business premises are inadequate), as has been repeatedly pointed out in the annual reports of these institutions and the European Commission's reports on Serbia's progress in the accession negotiations. However, it seems that the Serbian institutions use the same arguments to justify their failure to take frequent and concrete actions to detect and penalise irregularities and boost competition in public procurement.

Furthermore, the PPO report for the first half of 2019 does not mention a single activity concerning concrete institutional cooperation of the three key institutions, whilst the 2018 report mentions only two meetings. This is highly unsatisfactory because, in such an important and complex field, where great amounts of public funds are being spent, it is very important that the participants in procurement procedures know how the rules that they must comply with are interpreted, and that the legal positions are as unified as possible. This creates legal certainty and makes it easier for oversight authorities to do their job, especially for those authorised to penalise irregularities, such as courts of law and prosecutors' offices, as well as those

that initiate legal proceedings. Efforts must be increased to establish continued and, if possible, formalised institutional cooperation (by signing the memorandums of cooperation, agreements, protocols and other formal documents), in particular between the Public Procurement Office, the Republic Commission, the State Audit Institution, the Anti-corruption Agency, the Ministry of Finance, the Ministry of Justice and prosecutors' offices.

Protection of rights is a vital part of the public procurement system as the tenderers' confidence in the system is inseparable from the functioning of the complaints procedure in that system. If the tenderers (and the general public) were certain that, if there is an irregularity in a public procurement procedure, the complaints procedure would be handled objectively, impartially and efficiently, their confidence in the entire public procurement system would increase. As a result, more companies would be willing to bid. As regards the Republic Commission for Protection of Rights in Public Procurement Procedures (below: the Republic Commission), judging from the annual reports and its decisions published on its website and the public procurement portal over the years, despite all the good results it has achieved, the Republic Commission:

– has failed to adopt or publish a single formal legal opinion since 2014, although the law on public procurement prescribes that it is the Republic Commission's responsibility to pass legal opinions concerning the application of legislation under its jurisdiction with a view to harmonising legal practices and clarify any issues (from 1 April 2013 to April 2014 the Republic Commission adopted 18 legal opinions);
– has never, since it was established, held public consultations on any of the cases it has handled although the law on public procurement so prescribes;
– has never engaged experts (e.g. forensic accountants) to find out the facts and establish evidence although the law on public procurement so prescribes. This is especially important considering

that the members of the Republic Commission are lawyers who do not specialise in any particular field;

– has never used some of its special authorities, such as press charges where the award of a public procurement contract proved to be invalid, especially in the cases where it has found that the public procurement contract was awarded contrary to its own decisions (as was the case with the procurement of equipment for the Niš Clinical Centre, where the entire procurement was annulled but the contracting authority still went on and performed the contract[5]);

– has never had petitions concerning its work investigated by the National Assembly Committee for Finance, Budget and Control of Spending, which is responsible for the supervision of the Republic Commission, although the law on public procurement so prescribes and there is no doubt that Committee has received such petitions.

Keeping in mind all of the above, it can be concluded that many aspects of the Republic Commission's decision-making are unclear, and yet this institution's responsibility is to correct the irregularities in the public procurement system. For instance, it remains unclear how relevant facts can be determined and fully examined considering that the Republic Commission does not pass formal legal opinions, the decision-making is done in closed meetings (which, incidentally, are not recorded, whilst the meetings of other government authorities deciding on important issues are recorded, including the meetings of court councils), and it does not seek assistance from experts in the fields relevant for specific procurements (this is particularly important where the technical requirements set by the contracting authority are contested). All of this challenges the objectivity and impartiality of the Republic Commission's decisions. And yet, it must

5 Republic Commission Decision No. 4-00-50/2017 of 18/4/2017 is available at: http://kjn.rs/wp-content/pdf/50-2017odlukark.pdf
The documents concerning this public procurement are available at: http://portal.ujn.gov.rs/Dokumenti/JavnaNabavka.aspx?idd=1325927

be pointed out that a decision of the Republic Commission is final and that the administrative procedure against its decision would not delay the implementation or repetition of an annulled public procurement procedure.

The State Audit Institution, which supervises the application of the law on public procurement, has produced concrete results: criminal charges have been brought, motions for initiating infringement proceedings have been filed. However, cooperation with the other two key institutions, the PPO and the Republic Commission, is still lacking.

3. The new law on public procurement

The current law on public procurement[6] was adopted in late 2012, and its application started on 1 April 2013. Over the following two years, it was amended twice, in February and July 2015. These amendments were aimed at further alignment of the Serbian public procurement legislation with the EU *acquis*.

The public procurement development strategy for 2014–2018 and its action plan 2017 envisage the adoption of the new law on public procurement by the end of 2017 to ensure the full alignment of the national public procurement legislation with the EU *acquis*.

The adoption of the new law has been delayed and is expected to happen by the end of 2019. It has been announced that the new law will become effective as of 1 January 2020, but its application is postponed for 1 July 2020.[7]

With the adoption of the new law on public procurement, Serbia has met a benchmark of the EU common position. In fact, the negotiations on Chapter 5 – Public Procurement were opened in late 2016, when the European Commission set the benchmarks that Serbia needed to meet before negotiations in this policy field could be closed.

6 The law on public procurement was published in the Official Gazette of RS 124/2012, 14/2015 and 68/2015

7 Apart from some provisions that will become applicable when Serbia joins the EU, the application of the provision prescribing that the organisation responsible for the registration of economic operators must grant the registration of all economic operators in the Register of Tenderers under this law, should start on 1 March 2020.

The first benchmark was to fully align the legal framework with the EU *acquis*.

Before passing the new law on public procurement, the Serbian Government announced the adoption of the 2019–2023 public procurement development programme, highlighting the key novelties, including:

- New thresholds for the application of the new law, including the abolishment of small value public procurements;
- New ways of establishing that the economic operator meets the criteria for the qualitative selection – in all procurement procedures, all economic operators will be requested to submit a statement, on a standard form, declaring that they meet the criteria for qualitative selection and that there are no grounds for excluding them from the public procurement procedure, whilst only the best tenderer will be requested to provide proof;
- Communication: electronic communication and data exchange in public procurement procedures will be done on the public procurement portal;
- Partnership in innovations: a new type of public procurement procedure aimed at developing and procuring innovative solutions, works and services;
- Special regime for the procurement of social and other special services;
- New grounds for amending public procurement contracts and reasons for their termination;
- Identifying the responsibilities of the Ministry of Finance concerning its control of the performance of public procurement contracts;
- New monitoring by the Public Procurement Office of the application of public procurement legislation;
- New ways of organising and carrying out activities concerning centralised public procurements, auxiliary public procurement activities and other work;

Identifying the responsibilities of magistrate courts in the cases laid down in the law on public procurement.

Even though a new public procurement law, harmonised with the EU Directives governing public procurement (i.e. the EU *acquis*), was indeed necessary, the overwhelming impression is that many provisions have been copied from the Directives, without being adjusted to the national legislation and without explaining certain situations and institutes that the law recognises. As we know, the Directives only provide a legal framework for the EU Member States and candidate countries (such as Serbia), and each country is supposed to apply those provisions and recommendations in accordance with its national legislation, environment and conditions, i.e. to adjust them to local conditions. As regards the implementation of public procurement procedures, many provisions of the new law on public procurement are ambiguous, rudimentary, leaving the contracting authorities and the institutions responsible for the oversight of procurement procedures too much room for discretion, and directly affecting the legal certainty of those who participate in procurement procedures.

The new law has significantly fewer provisions on anti-corruption than the current one – just two. However, we must point out that some current measures have been incorporated in the new law, namely in the grounds for exclusion (conflict of interests, violation of the integrity of the procedure, inappropriate influence on the contracting authority). This is a good solution, but exclusion grounds should have been defined better to avoid any conundrums in practice.

The new law on public procurement abolishes civic supervision, with the explanation that this mechanism was not properly implemented in practice and did not give desired effects. However, we believe that the lawmakers did not consider all the options. Civic supervisor could have been kept in the law provided some significant corrections were made, including:

– prescribing more clearly who can be civic supervisor and how to ensure that their election is more efficient and more certain (there has been a lack of interest in this role in the past);

– prescribing a civic supervisor fee to create interest in this role (the current law on public procurement explicitly prescribes that a civic supervisor is not entitled to a fee);
– expanding the authorities of civic supervisor to include the supervision of the performance of public procurement contract.

Too much room for discretion in the new law on public procurement, combined with ambiguous provisions, is reflected particularly in the following:

– Contracting authorities may (but do not have to) request that economic operators whose tenders are incomplete provide the missing information/documents. Contracting authorities may take advantage of the lack of obligation: if it suits them, they will request that incomplete applications be supplemented, if it does not, they will not;
– In the procurement documents, contracting authorities may (but do not have to) indicate that the participation of economic operators in the preparation of procurement procedure will be deemed competition violation and, as such, grounds for exclusion. This means that a tenderer cannot be excluded from the procurement procedure for violating the integrity of the procedure if this is not identified as grounds for exclusion in the procurement documents;
– Contracting authorities may suspend a procurement procedure if they learn about the circumstances that, had they been known before, would have significantly altered the content of procurement documents. There are two issues here: first, it is not clear what precisely is meant by 'significantly altered', and second, this provision may encourage contracting authorities to suspend procurement procedures whenever the opening of tenders proves that a favoured tenderer has been selected;
– Contracting authorities may set a 15-day time limit for the submission of tenders in the open procedure (normally, the time limit is 30-35 days, depending on the procurement value) in the cases of duly substantiated urgency. However, such cases are not

clearly defined. Considering the lacking details, this option may become normal practice and is likely to be taken advantage of;

– Contracting authorities may choose not to exclude an economic operator from the procurement procedure even if the compulsory exclusion grounds have been met (for example, a criminal offence has been committed) if the economic entity proves that it has adopted compliance measures which prove its reliability. When evaluating these measures, contracting authorities should take into consideration the gravity and specific circumstances of the criminal offence or unprofessional conduct, but the law does not provide clear indicators that they should follow, which suggests that contracting authorities will have free rein when applying this option too.

As regards modifications to the public procurement contracts, the new law on public procurement lays down a new list of the cases in which modifying procurement contracts would be justified but quite a few of them are vague and open to the contracting authorities' interpretation. For example, the clauses of a public procurement contract may be modified if the modifications (irrespective of their value) have been provided for in the procurement documents and the procurement contract clearly, precisely and unequivocally. However, it is not clear what would justify these modifications. Furthermore, under the new law on public procurement, there is no obligation for contracting authorities to publish a notice on the public procurement portal on the conditions under which procurement contracts may be modified. They only have to publish a notice on the modifications concerning additional goods, services or works and the modifications due to unforeseen circumstances. In other words, the information on the modifications to the contractual clauses, or on increasing the scope of procurement, replacement of the contracting party or subcontractor will not be available on the portal.

The new law on public procurement prescribes that the performance of public procurement contracts will be supervised by the Ministry of Finance, but it does not prescribe how the contracting

authorities themselves will supervise the performance of contracts or how they will document it. The new law does not clarify whether the Ministry of Finance will supervise the performance of all awarded public procurement contracts *ex officio*, or only those about which it receives specific information. Furthermore, the new law does not specify who will be authorised to provide the Ministry of Finance with the information that will give it grounds for supervision, what supervisory procedure the Ministry will use and what follow-up activities it will implement if it finds that the contractual obligations have been violated during the performance of the contract.

All this indicates that many provisions of the new law on public procurement are vague, giving the contracting authorities a lot of power, which may lead to the misapplication of the law. This cannot be justified by the fact that the EU Directives regulating public procurement contain the same provisions, because the EU Directives only provide a legal framework. Member States are allowed (and expected) to expand on them and regulate the subject matter in more detail always considering the local context, particularly the tendency to misinterpret and misuse legal provisions. It seems that Serbian regulators have failed to make that additional effort to clarify and adjust the provisions of the EU Directives and minimise the chances of misapplication. Furthermore, some provisions of the new law are contrary to those of the Directives. The European Commission seems to have overlooked them, at least at this stage of accession negotiations, but it does not mean that this will not be discussed at the later stages of the negotiations.

In addition to all that has been said about the public procurement procedure itself, we would like to make a few points about the second-instance public procurement appeal commission. Under the new law on public procurement, it is no longer possible to address petitions concerning the work of the Republic Commission with the National Assembly Committee for Finance, Budget and Control of Spending, which supervises the work of the Republic Commission. So, an important mechanism for supervising the work of the Republic Commission, which the current law provides for, has been abolished by the new law.

True, it has never been used, but the question is why it has not been strengthened instead of abolished. In our opinion, the Committee for Finance, Budget and Control of Spending should have been legally obliged to regularly consider the petitions in meetings that are open to the public and streamed on the National Assembly's website. We reiterate that the Republic Commission makes final decisions on disputed public tenders. It is therefore a critical authority in the public procurement system, which makes it particularly vulnerable to malpractices and corruption. In this regard, under the new law on public procurement, the members of the Republic Commission can no longer be dismissed if they are found to have performed their duties unprofessionally, which the current law provides for. The administrative procedure against the Republic Commission, as regulated under the current law, has proved to be completely ineffective when it comes to the protection of rights of the plaintiffs because the Administrative Court often takes years to reach a decision, rendering it inapplicable in the public procurement that has long been realised. In this regard, nothing has changed under the new law, except that the time limit for bringing charges against the Republic Commission has now been reduced from 30 to 15 days. During the legislative procedure, it has been repeatedly proposed that the time limit for the Administrative Court to reach decisions be reduced to three months, making the judicial control of the Republic Commission more effective, as was done in the law on competition protection, which regulates the administrative procedure against the Commission for Protection of Competition. The legislator rejected the proposal arguing that administrative procedure cannot be regulated under a special law such as the law on public procurement, despite being made aware that this had already been done in the law on competition protection.

To sum up, failure to adjust the provisions of the EU Directives to our circumstances and legal system and present them in more detail, on the one hand, combined with the legislator's stubborn refusal to accept good solutions proposed by experienced experts in the field, on the other hand, further hinders the efforts to detect, combat and penalise irregularities and corruption in public procurement. In these

circumstances, the role of competent institutions will be more important than ever, as they will need to fill in the legal blanks and offer their interpretations and opinions to help establish good practices with regards to the application of ambiguous provisions of the new law on public procurement. This will be the only way to efficiently apply and supervise the application of the law. With that in mind, we cannot help but feel that it will not be long before the new law on public procurement needs to be amended too.

4. Special laws repealing the law on public procurement

So far, we have analysed the flaws of the new law on public procurement that may be conducive to more irregularities and corruption in the field of public procurement than the current one has. However, there is another, more worrying tendency: passing special laws (*lex specialis*) repealing the provisions of the law on public procurement.

For instance, to realise a capital infrastructure project, the Pojate–Preljina motorway (The Morava Corridor), a special law on public interests and special procedures in the realisation of the infrastructure corridor of E–761 motorway, section Pojate–Preljina, was adopted (Official Gazette of RS 49/2019), repealing all provisions of the law on public procurement and the public procurement principles. Instead, this law prescribes a special procedure for selecting a strategic partner, which is essentially a new public procurement procedure. The Serbian Government was authorised to regulate the procedure on its own, establishing general and special criteria for participation and restricting competition so much that only one tender was received. By doing this, the legislator has shown that any law can be repealed by a special law and that a matter can be regulated completely differently to what current regulations prescribe, ignoring all the principles of domestic and international laws (especially in the EU *acquis*). Passing a special law that will regulate some mechanisms of the general law in a different (and more detailed) way is not an issue. But passing a special law that contradicts the basic principles of a general law – in this case, the law on public procurement – is a serious issue. If this is how the Government (which proposed the special law) and the

National Assembly (which adopted it) handle public procurement, the question is how other actors in the public procurement system (the contracting authorities' management, public procurement officials, competent authorities) will apply the law on public procurement, i.e. whether they and the general public in this country will lose faith in the public procurement system and the importance of correct and consistent application of regulations and general principles on which they are based.

5. The processing of public procurement-related infringements and criminal offences

It is a devastating fact that not a single infringement procedure under the law on public procurement has been finalised since 1 April 2013 (when the application of the law started), i.e. that the Republic Commission has not penalised a single infringement since then. This is due to the conflicting provisions of the law on public procurement and those of the infringement law. The inconsistencies have not been removed for over six years although they were repeatedly pointed out by the competent authority (the Republic Commission, in its annual reports to the National Assembly), civil society organisations and the expert community. This clearly indicates that the provisions regulating infringement penalties in the law on public procurement have not been applied since the law became effective. To be fair, this does not mean that it is impossible to be penalised for a public procurement-related infringement as a public procurement-related infringement procedure can also be initiated under the law on the budget system, but only if the infringement concerns a public procurement regulated under this law (which does not apply to public enterprises). However, the provisions of the law on the budget system are quite general and do not specify what exactly the infringement procedure entails. To sum up, although clearly identified in the law on public procurement, the mechanism ensuring the (correct) application of the law has never been used and public procurement infringements have not been penalised since the law entered force. The authorities responsible for

reporting the infringements under the law on public procurement (the State Audit Institution and the Public Procurement Office) did report them to the Republic Commission, but for the reasons described above the Republic Commission never initiated a single infringement procedure. Budget inspections also submitted reports under the law on the budget system (which will be discussed later), but the Republic Commission justifiably excused itself from those cases as it is authorised to conduct first-instance proceedings exclusively under the law on public procurement.

The new law on public procurement will change that because magistrate courts will be in charge of infringement procedures whilst the Republic Commission (and other competent authorities: PPO, State Audit Institution, budget inspection) will report infringements, ensuring full implementation of infringement procedures under the new public procurement law. In this context, establishing a good penal policy is vital. Under the law on the budget system (which is general and does not apply to public enterprises), the penalties for infringements relating to public procurement pronounced by magistrate courts were almost symbolic, averaging around several tens of thousands of dinars for infringements worth several millions of dinars.

As regards criminal penalties for corruption in public procurement, the offence of misappropriation in public procurement is defined in general terms in the Criminal Code (Article 228). Trying to fit various actions of contracting authorities and tenderers into a criminal offence bracket, the legislator has ended up with a definition of criminal offence that is too broad by failing to specify the act of perpetrating, thus opening a Pandora's box of legal issues and dilemmas about the work of public prosecutors' offices and courts. As a result, many irregularities in a public procurement procedure, of various degrees and importance, may be deemed a criminal offence, whilst a valid line of reasoning can easily prove quite the opposite – that a disputed action does not constitute a criminal offence – creating legal uncertainty both among tenderers and among contracting authorities' responsible persons and officers. However, although the Serbian penal legislation has numerous flaws, this does not mean that

special anti-corruption departments of public prosecutors' offices and courts cannot perform their duties. This is especially true if we bear in mind that Serbian penal laws do contain solutions, concepts and mechanisms that are not used because of the inert system and limited staff and technical capacity. Therefore, the first thing to do is to amend Article 228 of the Criminal Code by defining criminal offence in clearer and more specific terms, narrowing down the act of perpetrating and providing good definitions of the terms used to lay down the legal characteristics of a criminal offence, so that it covers the gravest violations of the law regulating public procurement and remove as many existing dilemmas and illogical reasonings as possible. Next, better coordination needs to be established between public prosecutors' offices and government authorities responsible for public procurement (Public Procurement Office, Republic Commission for Protection of Rights in Public Procurement Procedures, State Audit Institution, Commission for Competition Protection, budget inspection) both at the level of liaison officers and task forces envisaged under the law on the organisation and jurisdiction of government authorities in suppressing organised crime, and through other forms of cooperation. Furthermore, staff capacity needs to be built by increasing the number of public prosecutors' deputies and prosecution assistants, necessary IT and other technical equipment needs to be provided, and continuous training of public prosecutors, judges and solicitors on complex public procurement matters that need specialist knowledge should be implemented.

It is a fact that Serbia does not have a tradition of independent supervisory bodies and independent prosecutors' offices and courts fighting corruption, and public procurement may not be the top priority for Serbian citizens (a great majority of Serbia's population has to deal with existential problems on daily basis), but fighting corruption and irregularities in public procurement must be the country's goal because only then will public funds be spent appropriately, so that the government can perform its activities appropriately, for the citizens' benefit. In this sense, all aspects of fighting corruption and irregularities must be considered, corrected where necessary, and then fully applied.

II
THE OVERVIEW AND ANALYSIS OF STRATEGIC DOCUMENTS ADOPTED BY SEPTEMBER 2019, RELEVANT FOR CHAPTER 5 – PUBLIC PROCUREMENT

1. Public procurement in the European Commission Serbia Report 2019

The european commission published its serbia report 2019 in late may, where it states that serbia remains moderately prepared on public procurement and that no progress was made during the reporting period.[8]

If these narrative descriptors were translated into numbers, on a five-tier assessment scale adopted by the european commission as part of its new reporting methodology, the state of play in public procurement in serbia ('moderately prepared') would score 3, whilst the progress made in the past 12 months ('no progress') would score 2.

Table 1

State of play in public procurement		Progress in the past 12 months	
	Score		Score
Early stage	1	Backsliding	1
Some level of preparation	2	No progress	2
Moderately prepared	3	Some progress	3
Good level of preparation	4	Good progress	4
Well advanced	5	Very good progress	5

8 Chapter 6.5 of Serbia Report 2019.

Serbia Report 2019 points out that significant efforts are needed to further improve **competition, efficiency and transparency** in public tenders. The message is clear: in the forthcoming period, special attention should be paid to these three areas and measures and actions should be taken to get positive effects with measurable indicators.

As the Commission recommendations from 2018 were not implemented, they remain fully valid, and in the coming year (reporting period) Serbia is expected to:

- **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.**

1.1 Further alignment with the EU Directives on public procurement

According to Serbia Report 2019, the **legal and institutional frameworks on public procurement are broadly aligned with the *acquis*, but further alignment is needed.**

A new **law on public procurement** and a **new law on public-private partnerships** and concessions were supposed to be adopted **in the last quarter of 2017**, as was envisaged under the Negotiation Position for Chapter 5 and the 2017 action plan for the implementation

of public procurement, **but they had not been adopted by 30 September 2019!**

A draft law on public procurement was prepared, a public consultation was held in October 2018, and the Public Procurement Office published the draft law on public procurement on its website in late January 2019. This was followed by consultations with the European Commission. However, the adoption of the new law is still pending.

Although full alignment with the EU *acquis* on public procurement is needed, it will not happen this time as the transitionary and final provisions of the draft law indicate that some provisions will become effective on the day of Serbia's accession to the European Union.

The legislation on defence and security procurement still contains too many exemptions that are excessively applied without justification and remain to be aligned with the relevant EU Directive.

Furthermore, the law on public-private partnerships and concessions is not yet in line with the new Directive on concessions.

Given that one of the benchmarks for closing Chapter 5 is the alignment of the Serbian legal framework with the EU *acquis* in all areas of public procurement, including the legislation governing concessions and international agreements regulating exemptions of certain works from public procurement rules, some progress will be made when the aforementioned laws are adopted. The European Commission points this out in its report, emphasising that recommendations from 2018 were not addressed and that they remain fully valid.

Serbia Report 2019 also emphasises that the transposition of key legislation under other chapters (e.g. EU law on environmental impact assessment, anti-discrimination legislation, public procurement, and state aid control) in the national legislation is a prerequisite for using European structural and investment funds.

Considering all of the above, it is clear what should be done by June 2020.

Summary

- *The legal and institutional frameworks on public procurement are broadly aligned with the acquis, but further alignment is needed;*
- *The adoption of the law on public procurement is still pending.*
- *The law on public-private partnership and concessions remains unaligned with the new Directive on the award of concession contracts;*
- *The deadlines for meeting the obligations are being extended;*
- *The European Commission recommendations from 2018 have not been implemented and remain valid;*
- *Some progress in Chapter 5 will be made when the aforementioned laws have been aligned with the EU acquis and adopted, which is one of the closing benchmarks for this chapter;*
- *The transposition of key legislation on public procurement is a prerequisite for using European structural and investment funds.*

1.2. Implementation of intergovernmental agreements

Serbia Report 2019 points out that the EU rules ensure that public procurement of goods, services and works in any Member State is transparent and open to all EU companies on the basis of non-discrimination and equal treatment.

On the other hand, the Report also states that Serbian public procurement rules are not always aligned (nor are they always compatible) with the EU standards, particularly in big infrastructure projects financed or implemented by non-EU companies. Furthermore, intergovernmental agreements concluded with third countries, and how they are implemented, do not seem to be systematically aligned with the principles of equal treatment, non-discrimination, transparency and competition nor are they fully compatible with the relevant EU acquis and national legislation. This prevents EU companies to participate in big infrastructure projects in Serbia.

One of the benchmarks that need to be met for closing Chapter 5 concerns international agreements exempting certain works from public procurement rules (e.g. direct intergovernmental credit agreements that simultaneously regulate who the contractor will be).

Although the draft law prescribes that international agreements (and other legally binding acts) must be concluded under the Treaty on European Union and that Serbia must inform the European Union about them, but only after Serbia has joined the European Union, significant progress concerning the European Commission's recommendations from the previous reports, i.e. meeting the aforementioned requirement for closing Chapter 5, can hardly be expected.

What could be considered in the coming period is prescribing a procedure ensuring that even without a public tender (if international agreements are exempt from the law on public procurement) is transparent and accessible to all interested companies, including those from the EU. This would be progress compared to the existing full exemption and unequal treatment.

We can draw an analogy between this step forward and the projects funded by the European Investment Bank (EIB) where, after frequent complaints from tenderers to the EIB, the Republic Commission got the jurisdiction over the protection of their rights although the law on public procurement did not (fully) apply to the disputed public tenders.

Basically, when the goods, services and works are funded from the EIB credits, public tenders are implemented under the EIB rules (in line with ratified financial agreements), contained in the Procurement Guide. The Procurement Guide does not prescribe in detail how the procurement should be implemented, only the basic principles that must be respected, such as transparency, openness, international nature of the procurement, accessibility under the same conditions for protection of all tenderers' rights, etc.

During the implementation of some projects, there were some issues: some projects were practically blocked due to the increasing number of complaints to the EIB, and the mechanism for the protection

of tenderers' rights in the public tenders implemented according to the EIB's rules was practically non-existent.

To provide a legal basis[9] for the Republic Commission to take over the supervision of public tenders (to decide in the second instance on the complaints of interested parties) for the projects funded by the EIB, amendments to financial agreements 23.761, 24.745, 25.002, 25.198, 25.497, 25.610, 25.872, 81.657 and 82.640 between Serbia and EIB were adopted in late 2017.[10]

This example shows that where there is a mutual interest of all parties, there is a solution.

According to Serbia Report 2019, Serbia must ensure that its transport network projects (including railway projects on the Belgrade-Budapest and Belgrade-Bar routes) are implemented in line with the TEN-T regulatory framework.[11] The report also points out that future investments in infrastructure need to fully comply with the EU standards on public procurement, state aid and environmental impact assessments.

Next, the practice of adopting special laws with a sole purpose to implement specific projects should also be addressed as it can harm the public procurement system and negotiations concerning this area because it derogates from the law on public procurement, among other laws. This was the case with the construction of The Morava Corridor (the E–761 motorway connecting Kruševac and Čačak), where the draft law[12] regulated the matters already regulated under the Serbian

9 Reasoned proposal: http://www.parlament.gov.rs/upload/archive/files/cir/ pdf/predlozi_zakona/3596-17.pdf

10 The law ratifying amendments to Financial Agreements 23.761, 24.745, 25.002, 25.198, 25.497, 25.610, 25.872, 81.657 and 82.640 between the Republic of Serbia and European Investment Bank was published in the Official Gazette of RS – International Agreements 11/17.

11 Trans-European Transport Network (TEN-T) policy addresses the implementation and development of a Europe-wide network of railway lines, roads, inland waterways, maritime shipping routes, ports, airports and railroad terminals.

12 The draft law on public interests and special procedures in the realisation of the infrastructure corridor of E–761 motorway, section Pojate–Preljina, was on the agenda of the 12th regular session of the National Assembly's on 25 June.

laws on expropriation, public procurement, planning and construction, taxes and customs. The special law on public interests and special procedures in the realisation of the infrastructure corridor of E–761 motorway, section Pojate–Preljina, adopted on 8 July 2019 (Official Gazette of RS 49/19), sets out that 'the selection of a strategic partner, the conclusion of planning and construction contracts, and the selection of expert supervisors over the construction works shall be exempt from the legislation governing public procurement'.[13] Instead, the criteria and method of selection of strategic partner and expert supervisors were to be regulated under a regulation that the Government was going to adopt within 30 days.

From the perspective of the EU accession negotiations, the provision of this *lex specialis* prescribing that, during the construction works, 'the share of domestic materials and equipment used, and the domestic contractors hired, will be determined under the planning and construction contract' is also problematic.[14] According to the Stabilisation and Association Agreement, the preferential treatment of domestic over the EU tenderers was abolished on 1 September 2018.[15]

13 Article 17 of the adopted law.

14 Article 2 of the adopted law.

15 This information was published on the Public Procurement Office website: http://www.ujn.gov.rs/vesti/ukinuta-preferencijalna-prednost-u-odnosu-na-drzave-clanice-eu/

Summary

- *Public procurement rules in Serbia are not always fully compatible with the EU standards, particularly in big infrastructure projects financed or implemented by non-EU companies. They are not consistent with the basic principles of public procurement, such as transparency, equal treatment and non-discrimination, and they prevent EU companies from participating in projects in Serbia;*
- *One of the benchmarks for closing Chapter 5 concerns international agreements exempting certain works from public procurement rules (e.g. direct intergovernmental credit agreements that simultaneously regulate who the contractor will be);*
- *The application of some provisions of the draft law on public procurement will start (only) when Serbia joins the European Union. These provisions concern international agreements and other legally binding acts;*
- *Serbia is urged to ensure that transport network projects including railway projects on the Belgrade-Budapest and Belgrade-Bar routes are implemented in line with the TEN-T regulatory framework;*
- *Future investments in infrastructure need to fully comply with the EU standards on public procurement, state aid and environmental impact assessments;*
- *Passing special laws* (lex specialis) *for the sole purpose of implementing specific projects (such as the construction of The Morava Corridor), derogating from the rules of the law on public procurement, cannot have a positive effect on Chapter 5;*
- *Mandatory use of a specific share of domestic materials and equipment and hiring domestic contractors during the construction works, as prescribed under the* lex specialis, *is contrary to the Stabilisation and Association Agreement, under which the preferential treatment of domestic tenderers was abolished as of 1 September 2018.*

1.3. Institutional capacity building

In all its reports, the European Commission reiterates that the capacity of the PPO and the Republic Commission needs to be strengthened.

According to the European Commission, the PPO lacks staff and technical capacity, has many vacancies and considering the wide range of its responsibilities, it lacks the administrative capacity to carry out many of its tasks. As regards the Republic Commission, its capacity is stable but still needs further strengthening.

The European Commission also reiterates that Commission for Public-Private Partnerships and Concessions also remains understaffed.

It is repeatedly pointed out that the capacity of administrative courts to deal with complex and numerous cases remains weak and proceedings are very lengthy.

Last but not least, the European Commission should be regularly informed about the interinstitutional cooperation and experience exchange concerning public procurement.

Recommendations:

- Adopt a new law on public procurement by the end of 2019.
- Amend the law on public and private partnerships and concessions by 2019;
- Establish and apply a transparent procedure for intergovernmental agreements and ensure the participation of the EU companies.
- Strengthen the capacity of the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procedures and administrative courts.
- Strengthen interinstitutional cooperation and coordination in the field of public procurement.