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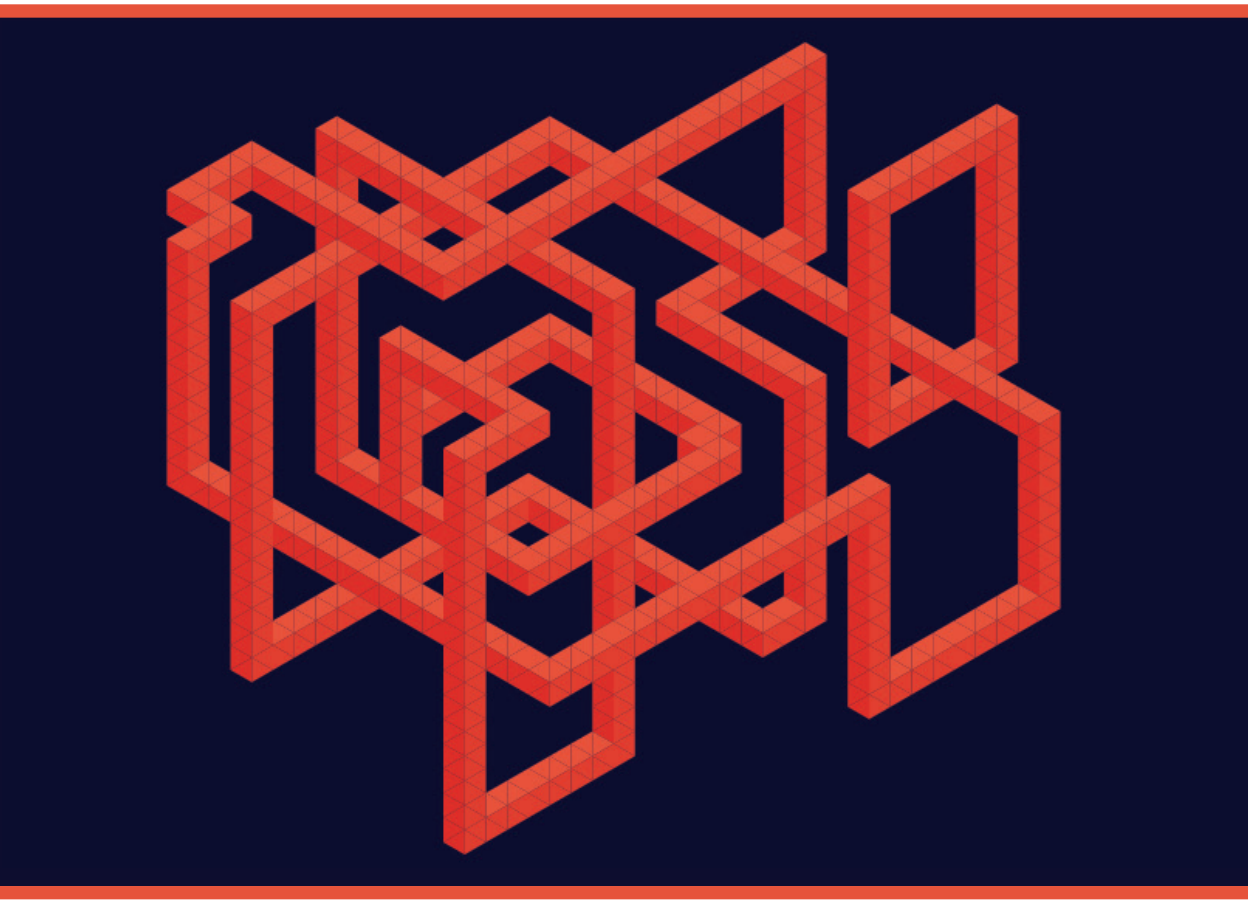
ALARM REPORT on the State of Play in Public Procurement in Serbia 2020



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ALARM REPORT

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November 2020

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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 2020
November 2020

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Content

Introduction

This double issue of the Alarm Report for Chapter 5: Public procurement, is published under the three-year project „Towards a Sound Public Procurement System in Serbia", which has been implemented by the Centre for Applied European Studies (CPES) and the Association of Public Procurement Professionals (UPJN) since 2018, with the support of the European Union Delegation in Serbia. Although planned as the fourth out of six reports, this Alarm report is a double issue. This is primarily due to the coronavirus pandemic that broke out in the first quarter of 2020, significantly affecting all segments of life and work, including regular implementation of public procurement procedures. Due to the COVID-19 pandemic, Serbia was under the state of emergency from 16 March to 6 May 2020. During this period, many procedures that had already been initiated were either postponed or suspended (to be resumed after the state of emergency was terminated). However, during this period, some contracts were awarded without any special procedures. According to the government representatives, these were contracts for the procurement of medication, medical supplies and equipment necessary for the treatment of coronavirus patients (ventilators, protective facemasks, protective clothing, etc.). For many of these, there is no information on how the procurement was conducted, how many tenders were submitted or what prices were offered, which we will discuss in more detail in this report.

In the first half of the year, the volume of public procurement procedures was conspicuously low, at least when it comes to the procedures implemented under the law on public procurement, whilst

the procedures that were conducted without the application of public procurement rules have not been documented (and the question is if and to what extent they will be in the future). As there was a significant lack of information on public procurement, there was no point in publishing the Alarm report.

The previous report, Alarm Report 2019, has announced that, using the publicly available information, the upcoming alarm reports will monitor whether and to what degree the competent authorities have been meeting their obligations set out in the public procurement action plans, and that they will look into relevant initiatives to improve the public procurement system. It has also announced that the alarm reports will rely on the new findings, including those made by CSOs and investigative journalists, in particular the findings concerning the cases of suspected misappropriation of public funds, corruption and/or the irrational spending of public resources, i.e. the taxpayers' money. This Alarm Report analyses the findings of the public procurement case studies concerning three areas of the highest public importance because they directly impact people's daily lives and receive substantial public funding. These areas are infrastructure, healthcare and environmental protection. The aim is to use the stakeholders' (CSOs, media, public administration, private sector, regulatory bodies, expert public) joint action and common approach to strategies, regulations and practices concerning the public procurement system and fighting corruption, to establish national and local networks and bring positive change to the public procurement, enable the exchange of information, knowledge and best practices, as well as highlight its weak spots, i.e. where the public procurement system is most vulnerable to malpractices and corruption.

This double issue of the Alarm Report is divided into two thematic chapters, both relating to the aim of the project: to reduce corruption by establishing an efficient public procurement system and accountability in the spending of public funds.

Chapter I focuses on extremely restricted competition, lack of appropriate control in the public procurement and serious challenges to the implementation of the new law on public procurement (which

started on 1 July 2020). Considering the first results of the law implementation became visible only in the last few months, this double issue of the Alarm Report analyses the first effects of the new law. Also included in Chapter I are the observations about the contracts awarded during the state of emergency without applying public procurement rules, and after it was lifted.

Chapter II focuses on the European Commission Serbia 2020 Report (6/10/2020), more specifically Chapter 5 covering public procurement, public-private partnership and concessions. We have analysed the key findings of the report which, perhaps for the first time, are quite negative, as it concludes that the Commission recommendations from 2019 were only partially implemented and remain valid for 2021.

In Chapter II, we also look at:

- *The law on special procedures for linear infrastructure projects,* as under this law the implementation of public procurement regulations in an entire infrastructure project or its stages can be suspended, and the Government is authorised to choose a strategic partner without complying with a legally prescribed procedure governing the award of public procurement contracts;
- *Bilateral (international) agreements* abrogating all national regulations and transparent procedures and excluding any form of even a minimum of competition. In other words, the practice of signing contracts without complying with the law on public procurement continues, especially contracts for big infrastructure projects;
- *Amendments to the law on public-private partnership and concessions,* about which there is no information, neither on the website of the competent ministry, i.e. the Ministry of Economy (under „Draft laws and regulations"[1]) nor in the report of the Working Group tasked with drafting the law amending the law on

1 Available (in Serbian only) at: https://privreda.gov.rs/cat_propisi/zakoni-u-pripremi/page/2/

public-private partnership and concessions. The European Commission has repeatedly pointed out that Serbia must draft this law. This is also Serbia's obligation under the Serbian Public Procurement Development Programme for 2019–2023.

Key findings

Unfortunately, according to the key findings of this Alarm Report, there was no progress in improving the public procurement system compared to the year before. On the contrary, both in 2019 and 2020, **competition in public procurement was restricted to the extent that we can safely say that it did not exist at all**. The application of the new law on public procurement, which is supposed to ensure increased transparency in this area, started on 1 July this year. It remains to be seen if it will bring any changes.

Another important finding that we will address in this Alarm Report is that **public procurement** in Serbia **lacks appropriate control**, and that there are serious challenges to the application of the new law on public procurement.

The year 2020 was marked by the procurements of medical consumables and equipment to fight the coronavirus pandemic. These **procurements were conducted during the state of emergency without applying public procurement rules, and after it was terminated**. Although it is in the public interest to know what public funds are spent on, how much and under what circumstances, the information on these procurements has mostly remained unavailable to the public.

Lastly, the discriminatory rules in the recently adopted **law on special procedures for linear infrastructure projects** undermine the added value and effective implementation of the new law on public procurement as they allow for the circumvention of national legislation and the European Union rules and standards. This was also noted in the European Commission Serbia 2020 Report.

Based on all of the above, it can be concluded that in 2020, Serbia made progress in regressing, both in the area of public procurement and in other areas vulnerable to corruption. Control is weakening and competition is practically non-existent, whilst new regulations directly devaluing the law on public procurement are persistently being adopted, especially those governing contracts of high value. Besides, as Serbia does not currently have an anti-corruption strategy (the previous one expired in 2018), its door to corruption is wide open, especially in public procurement. This is not only confirmed by the European Commission Serbia 2020 Report but also by the fact that Serbia has not opened a single new negotiation chapter in 2020.

I

CURRENT STATE OF PLAY IN PUBLIC PROCUREMENT IN SERBIA

1. Restriction of competition and (non-)implementation of public procurement procedures

Public procurement has become a hot topic in Serbia over the past few years as significant amounts of public funds are being spent through public procurement procedures. The public sees it is a breeding ground for corruption and for meeting the needs of stakeholders hiding behind the governmental and political apparatus to which they belong. Bearing this in mind, we will analyse the information from three different sources that unequivocally lead to the same conclusion: that competition is at an unacceptably low level and public procurement procedures are either conducted inadequately or not at all.

First, we will analyse **the case studies of public procurement in infrastructure, environmental protection and healthcare** undertaken by the Centre for Applied European Studies and the Association of Professionals in Public Procurement.[2]

Second, we will analyse the **results of a study** of **100 highest-valued works procured by public buyers in 2019**.[3] This extensive research was done by the Toplice Centre for Democracy and Human Rights.

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2 Available at: https://cpes.org.rs/towards-sound-public-procurement-system-in-serbia/?lang=en

3 A tabular list of contracts with the information on the contracting authority, contractor, contract value, scope of contract, the number of bids, contract date and the type of public spending is available (in Serbian only) at: http://nadzor.org.rs/pdf/tabela-2019.pdf

And third, we will analyse the **Audit Report on the Public Enterprise Roads of Serbia** compiled by the State Audit Institution, which has been presented to the public.[4]

The case studies analyse public procurement in healthcare, infrastructure and environmental protection. They were made (and published in 2020) under the project „Towards a Sound Public Procurement System in Serbia". The studies show that certain tenderers have been favoured by the same or different contracting authorities, usually reducing competition to one acceptable (flawless) offer. They also show various ways in which the application of procedures prescribed under the law on public procurement has been circumvented. **Restriction of competition has (undoubtedly) become a given in the public procurement in Serbia. It takes many forms – it seems that the contracting authorities are never short of ideas. However, in our opinion, the ideas do not come just from the contracting authorities and their responsible persons but also from those who put (hierarchical, political, party) pressure on the contracting authorities that they are not formally part of**. The studies confirm that favouritism towards certain contractors (or groups of contractors) is manifested in setting particular requirements for the tenderers, technical specifications for the contract itself and the criteria for the award of contracts. Furthermore, favouring a certain tenderer (and, consequently, full restriction of competition) transpires through the contract itself, e.g. a specific tenderer has an exclusive right to an element of the contract or the contract is not divided into lots (subdivisions for which tenderers can bid) although it consists of many items, most of which can be grouped. Below is a brief overview of the conclusions of several studies of some of the most obvious cases of restricted competition in public procurement in Serbia.

4 Available (in Serbian only) at: https://www.rts.rs/page/stories/sr/story/125/drustvo/4139855/purevi-srbije-dri.html

Case Study: Public Procurement of Animal Waste Disposal Services[5]

The study focused on the procurement of animal waste disposal services in 2020. The contracting authorities were the local governments of Bač, Bačka Palanka, Beočin, Titel and Novi Sad, in Vojvodina. All procurement documents for these procurement procedures were identical in terms of technical capacity, which was an additional requirement that the tenderers had to meet, but also in other elements. Each procurement procedure received only one bid, by the same bidder. As there was no competition, that offer was selected as the best one. In all these cases, the price quoted by the economic operator was either quite close or identical to the estimated value of the contract, and it was accepted as such. The tenders always quoted either monthly or annual lump-sum prices although the approximate number of potential animal carcases, or even the households keeping animals or cattle, was unknown (with the exception of Bač). Bidders were not asked to provide unit cost per kilogram so that they would get paid for the actual number of the carcases they dispose of although unit cost per kilogram can be determined in this type of services and would have made it easier to control the implementation of public procurement contracts. Finally, none of the contracting authorities provided technical specifications that would have served as parameters for monitoring contract implementation, helping determine whether the paid asking price was fair.

Case Study: Public Procurement of Water Conditioning Agents for Distance Heating Systems[6]

In this case, even before the deadline for submitting offers expired, a potential candidate had repeatedly pointed out to the contracting authority that the technical characteristics of the subject matter of

5 Available at: https://cpes.org.rs/removal-of-animal-waste-in-bac-beocin-backa-palanka-titel-and-novi-sad/?lang=en

6 Available at: https://cpes.org.rs/water-conditioning-agents-in-obrenovac-district-heating-system-2018/?lang=en and at: https://cpes.org.rs/water-treatment-agents-in-the-heating-system-of-the-clinical-center-of-serbia-2018/?lang=en

the contract favoured a specific bidder, arguing that said bidder had been awarded similar contracts by the same contracting authority a few times before.

The contracting authority denied all but one allegation: that it had been awarding similar contracts to the same economic operator for several years. Every time, the offer of the favoured bidder was the only acceptable one. Every time, the quoted price was quite close to (just a fraction under) the asking price. So, competition was restricted by the technical requirements that favoured a specific economic operator, making it impossible for others to submit offers because they could not meet those requirements. All procurement procedures where the same economic operator was awarded contracts were open procedures, which should have encouraged all interested economic operators to apply, ensuring the widest possible competition.

Case Study: Public Procurement of Wood Chip Boilers[7]

This case study focused on the procurement of the design, delivery, installation and construction of wood chip boilers in 2019 and 2020. The contracting authorities were the local governments of Osečina, Svilajnac, Kladovo, Majdanpek and Surdulica. The procurement documents were almost identical in all procurement procedures in terms of the required capacity and the majority of other elements. The same group of economic operators submitted tenders in all procedures (it was always a joint tender, variations were minimal), and it was always this group that was awarded contracts. Some procurement procedures received one more offer besides the one by this group of economic operators. However, judging by its content, we can safely assume that the other bidder was not interested in getting the contract (this bidder did not submit the required evidential paperwork, just a couple of forms). In all these cases, the prices quoted by the favoured group

7 Available at: https://cpes.org.rs/construction-of-boiler-rooms-with-burners-for-woodchips-in-osecina-svilajnac-kladovo-majdanpek-and-surdulica-2019-2020/?lang=en

of economic operators were just under the estimated contract value, and it was accepted as such.

In the section below, we will look at the case studies confirming that many public procurement procedures in Serbia (especially those of high value) are implemented without the application of the law on public procurement. The award of public procurement contract without a procurement procedure is deemed a misdemeanour under the new law on public procurement, which is particularly interesting. It is absurd that what is probably the gravest violation of this law is classified as a misdemeanour rather than a criminal offence of procurement fraud under Article 228 of the Criminal Code. The question is whether the intention of the Serbian legislator was to ensure lighter penalties for failure to implement public procurement procedures when a penalty could not be avoided.

Case Study: Construction of Pojate–Preljina Motorway[8]

In this case, the design and execution of works of enormous value were not procured under the law on public procurement despite fully qualifying for a procurement procedure under this law. In fact, the provisions of the law on public procurement were made ineffective under the law on establishing public interest and special procedures for the construction of the infrastructure corridor of motorway E-761, section Pojate-Preljina, specifically Article 17 paragraph 7 thereof. According to this provision, the legislation governing public procurement does not apply to the selection of a strategic partner and the award of the Morava Corridor design and construction contract. For some reason, the procedures and exemptions laid down in the law on public procurement were not to be applied despite being the norm even under international laws (first and foremost, they are regulated in the same way under the relevant EU directives and other international rules).

If the intent was to regulate expropriation differently, which is mostly the focus of this law, the legislator should have amended the

8 Available at: https://cpes.org.rs/construction-of-the-section-of-the-pojate-preljina-highway-moravski-koridor-2019/?lang=en

regulations governing this area instead of passing a special law and using it to abrogate the entire law on public procurement for this project. The regulation that was adopted on the basis of this special law does not mention any of the public procurement principles (nor does the law itself). Its general and specific criteria for the selection of strategic partner are so restrictive that only one offer was submitted for this contract. The cost of the design and works was not considered at all during the selection process because it is not regulated under the law on establishing public interest and special procedures for the construction of the infrastructure corridor of motorway E-761, or the regulation, or indeed any other published documents (Call for Proposals, Decision on the Selection of Strategic Partner). In this way, an important anti-corruption law, whose application is insisted upon in Serbia's EU accession negotiations, was completely bypassed.

Case Study: Construction of a Wastewater Treatment Unit in Belgrade[9]

In January 2020, the Serbian Ministry of Construction, Transport and Infrastructure signed two cooperation agreements with the China Machinery Engineering Corporation (CMEC) on the collection and treatment of wastewater in Belgrade's central sewage system. The contracts were awarded without a procurement procedure. According to the Ministry, the deal was based on the Agreement on Economic and Technical Cooperation in Infrastructure between the Chinese and Serbian governments, which rendered a public call and a public procurement procedure unnecessary. „This is a capital project that has to involve everyone as the Chinese company negotiates the financing conditions with the Ministry of Finance. The first construction phase will cost around EUR 271 million […] Now that we have signed the cooperation agreement, the investigative work – studies, analyses and design – can start, so that we do not waste time", said the Minister for Construction, Transport and Infrastructure, Zorana Mihajlović, who attended the signing of the agreements on 20 January 2020.

9 Available at: https://cpes.org.rs/construction-of-wastewater-collection-and-treatment-plant-belgrade-2020/?lang=en

It is certainly good news that agreements have been signed for the construction of the first major wastewater treatment plant in Belgrade. However, when it comes to Serbia's legal order, it is bad that this was not done through a public procurement procedure or a public-private partnership established under the Serbian laws but was based solely on the Agreement on Economic and Technical Cooperation in Infrastructure signed in 2009 by the Government of the Republic of Serbia and the Government of the People's Republic of China. Conditions for project implementation remain unknown to the public. Nor does the public know whether the Chinese company will have to comply with the Serbian and EU regulations and standards during project implementation. It should be pointed out that the European Commission has reiterated in its reports on Serbia's progress that some international procurement agreements signed with the non-EU countries are not in line with the EU acquis and Serbian regulations. For example, the European Commission Serbia 2019 Report reads, inter alia, that Serbia should „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".

So, when it comes to environmental protection, the practice of signing contracts, especially those for capital infrastructure projects, without applying the law on public procurement or the law on public-private partnerships, continues.

We must point out here that the law on public procurement stipulates that it does not apply to the procurements that contracting authorities must conduct in accordance with the procurement procedures established under an international agreement or another act from which an international obligation arises, concluded with one or more states and/or political-territorial units, concerning works, goods or services intended for joint application or utilisation by the signatories. However, to what extent is the collection and treatment of wastewater in Belgrade's central sewage system intended for the joint application or joint utilisation by the Serbian and Chinese governments remains

unclear. And again, this is the requirement that the project must meet to be exempt from the law on public procurement.

Our second source of data are the **findings of a study of 100 highest-valued works procured by public buyers in 2019**.[10] This comprehensive study titled **„2019 Public Spending Transparency Index"** was undertaken by the Toplice Centre for Democracy and Human Rights. The Toplice Centre analysed the procurements by public buyers (i.e. the contracting authority was from the public sector), focusing on three forms of public spending: public procurement, public-private partnerships and (international) bilateral investment agreements. Out of 100 highest-valued contracts, 84 contracts were awarded in public procurement procedures, 5 following the selection of private partners in public-private partnership and concessions procedures, and 11 bilateral investment agreements signed by the Serbian Government. The findings are devastating. The total value of these contracts was EUR 2,856,687,745 per middle exchange rate of the National Bank of Serbia as at the day of signing or ratification of the contracts. The average contract value was EUR 28,566,877. The average number of bidders applying for projects of such financial magnitude was 1.42 – much lower than the already appallingly law average! According to the official information of the Public Procurement Administration, the average number of bidders per public procurement procedure in the same year (2019) was 2.5. More specifically, in 72 out of 100 procedures there was only one bidder, in 19 out of 100 procedures there were two bidders, whilst in only 9 procedures there were three or more bidders.[11] So, it is fair to say that there is no real competition in public procurement in Serbia.

10 A tabular list of contracts with the information on the contracting authority, contractors, contracted value, subject matter of the contract, number of tenders, date of contract conclusion and the form of public spending is available (in Serbian only) at: http://nadzor.org.rs/pdf/tabela-2019.pdf

11 „Indeks transparentnosti javne potrošnje 2019" [2019 Public Spending Transparency Index], Toplički centar za demokratiju i ljudska prava, Prokuplje, 2020, pp. 12–15

The same study found that, according to the publicly available information, in 2019, one economic operator made a turnover of EUR 84 million through the deals made exclusively with the public sector. In 2017, the same economic operator had a turnover of EUR 51 million. So, in just two years his turnover went up by a whopping 65 %. According to the information on the Public Procurement Portal, in 2019, this economic operator signed 337 contracts with the public sector over 261 working days – an absolute record in the number of contracts concluded per day. In only 22 out of 337 public procurement procedures where the contracts were awarded to this economic operator, there were two or more bidders. In 315 procedures, there was no competition.[12]

Bearing all this in mind, we must point out that according to the Serbian Public Procurement Development Programme 2019–2023, the first indicator of public procurement performance is the average number of offers received per contract awarded. However, as if aware that Serbia cannot be proud of its performance indicator, the Public Procurement Administration degraded the public procurement performance indicator to the third place in its Report on Public Procurement in Serbia 1/1/2019–31/12/2019[13]. We must stress that the average number of bidders per procurement procedure is also identified as the first performance indicator in the Action Plan for the Implementation of the National Programme for Curbing Gray Economy 2019–2020[14], Measure 4.3.

Finally, we will look into the findings of the **Audit Report on Public Enterprise Roads of Serbia by the State Audit Institution**. According to this report, in 2018 and 2019, Public Enterprise Roads of Serbia acquired goods, services and works totalling RSD 51.38 billion without implementing procurement procedures although these

12 Ibid, p. 17.

13 Available (in Serbian only) at: http://www.ujn.gov.rs/izvestaji/izvestaji-uprave-za-javne-nabavke/

14 Available (in Serbian only) at: https://mfin.gov.rs/UserFiles/File/strategije/2019/Akcioni%20plan%20za%20sprovodjenje%20Nacionalnog%20programa.pdf

procurements did not qualify for the exemption from the law on public procurement procedures. Even when it did conduct procurement procedures, PE Roads of Serbia did not comply with the law on public procurement in 22 cases, whose estimated total value was RSD 4.63 billion, claims the report. The State Audit Institution audit report on PE Roads of Serbia also states the following:

- For 51 contracts whose estimated value is RSD 7.18 billion, the enterprise failed to document whether the value of contracts was estimated under the law on public procurement.
- The enterprise initiated 30 procurement procedures whose estimated value is RSD 6.01 billion without meeting the requirements for initiating the procedures;
- Twenty-two contracts whose estimated value is RSD 4.63 billion were not awarded in compliance with the law on public procurement;
- The procurement documents were not consistent with the law on public procurement in eight procurement procedures whose estimated value is RSD 3.42 billion;
- The procurement documents did not contain technical specifications stipulated under the law on public procurement in six procurement procedures whose estimated value RSD is 3.97 billion.

So, what is our conclusion? **It seems that in Serbia all major contracts are awarded exclusively to specific, favoured economic operators though public procurement procedures – if the procurement procedures are conducted at all. More often than not, public funds are spent without procurement procedures or with serious violations of the law on public procurement procedures.**

2. Inadequate control of public procurement

Republic Commission for the Protection of Rights in Public Procurement Procedures

In this section, we focus on the institutions that, being by definition expert, unbiased and independent, should act with full integrity when applying laws and with the capacity to prevent the abuse of legal procedures by government organisations and officials as participants in public procurement procedures. Acting outside and above any ideological, political or particular interest, they should ensure a timely protection of the values of democratic society and public interest.

However, we cannot help but wonder how public procurement can be riddled with irregularities when Serbia has government bodies responsible for the supervision of the application of the law on public procurement and protection of bidders' rights and public interest. Quite often, these expert institutions hide behind their independence and act without being subjected to proper control, doing their best to keep the public as indifferent to their work as possible, i.e. make their (poor) results in detecting and penalising corruption and irregularities in public procurement as unobtrusive as possible. This is particularly true of the Republic Commission for the Protection of Rights in Public Procurement Procedures, the Public Procurement Office, and competent prosecutors' offices. For example, the Public Procurement Office hardly ever mentions corruption in its annual reports, let alone active efforts to uncover it or take measures to penalise it. Also, prosecutors' offices hardly ever bring charges for procurement fraud.

It seems that one government body in particular keeps staying under the radar: the Republic Commission for the Protection of Rights in Public Procurement Procedures (below: Republic Commission). Neither the Serbian public nor the government body supervising its work (the National Assembly's Committee for Finance, Republic Budget and the Control of Public Funds) seem to be particularly interested in it. And yet, the Republic Commission is extremely important because it makes final decisions in the cases where participants in public procurement, public-private partnership and concession procedures claim that their rights have been violated. The Republic Commission also makes decisions on the complaints concerning protection of public interest in public procurement procedures filed by the Public Procurement Office, State Audit Institution and prosecutors' offices.

Practically, the Republic Commission decides how a disputed public procurement will be resolved. Its decision can be challenged before the Administrative Court, but since there are no legal limitations to the duration of the dispute, the Administrative Court may take time to rule, and it often takes as long as two years after the award of contract and project completion. In fact, when the Republic Commission reaches a decision, the procurement may still go on and the contract may still be executed, even if it is unlawful – the administrative litigation does not prevent it.

To put it simply, the Republic Commission is the supreme judge of controversial and dubious public procurements. Nevertheless, the National Assembly's Committee for Finance, a body whose task is to supervise the work of the Republic Commission, has never discussed petitions against the Republic Commission although the law on public procurement so prescribes and there must have been such petitions (it is easy to check). Bearing in mind that the Committee's meetings are public and broadcast on the National Assembly website, discussions about these petitions would be an opportunity for the public to get acquainted with the work of the Republic Commission, its objectivity and consistency. However, as the Committee for Finance does not perform its supervisory role, the work of the Republic Commission

remains unsupervised. The public is aware of the Committee's methods when processing civic supervisors' reports on the contracts worth over RSD 1 billion. For example, when analysing the report on the procurement of the construction of a railway station in Prokop, in Belgrade, the civic supervisor who wrote it was ordered to leave the meeting.[15] However, with the adoption of the new law on public procurement (its application started on 1 July 2020), the legislator went even further and abolished the right to file petitions against the work of the Republic Commission. In other words, the very mechanism that made it possible for all of us whose tax money is spent through public procurement to request that those responsible for the supervision of this body do their job, no longer exists.

So, we are talking about a sort of public procurement hub, which is largely out of the public and competent authorities' reach in terms of control of the way it works and decides. This is inevitably reflected in the way the Republic Commission acts and makes decisions. Just a little closer inspection reveals numerous contradictions in its decisions (they are published on the Public Procurement Portal and the Republic Commission website). The same facts and indicators are treated differently depending on the contract awarded, the contracting authority and the economic operator getting the contract. There are also many instances where the decisions not only contradict the law but also elementary logic. Some analyses of the Republic Commission's decisions have been done, such as case studies of the procurement in healthcare, infrastructure and environmental protection, and are available on the Centre for Applied European Studies website.

Some of these studies found various instances of biased and unethical actions and decisions of the Republic Commission. For example, it blatantly ignored the arguments supporting the claim that an economic operator, the only participant in and winner of public procurement procedures for years, was being favoured (case study

15 Available (in Serbian only) at: http://rs.n1info.com/Vesti/a33931/Gradjanski-nadzornik-udaljen-sa-sednice-Odbora.html

„Water Treatment Agents in the Heating System of the Clinical Centre of Serbia" /2018/).[16] Also, the Republic Commission made different decisions when the same factual and legal issues were raised about different contracting authorities despite being legally required to treat them the same (case study „The Reconstruction and Extension of the General Hospital in Prokuplje" /2019/).[17] It failed to honour its own positions (case study „Medical Devices and Reagents for Immunohaematology Blood Tests – The Blood Transfusion Institute of Vojvodina" /2019/)[18], „firmly" stating in its decisions that it was not bound by its earlier rulings, rendering its own decisions subjective and biased.

An interesting case is the procurement of maintenance services for photocopier and multifunctional devices in the National Employment Service. It stands out because although the Commission for the Protection of Competition had found that there was a long-standing practice of rigging the procurement of these services, the Republic Commission a priori accepted the contradictory arguments of the contracting authority that the added requirement for the prospective bidders was justified, rejecting the claim (for the protection of rights of the economic operator) and making it possible for the illegal behaviour of market players to continue. This is an example of a complete lack of cooperation and coordination between two major independent control bodies. What is more, the Republic Commission blatantly ignored numerous facts and evidence presented in the decision of the Commission for the Protection of Competition.[19]

It is disconcerting that it is no longer possible to complain to the competent Finance Committee of the National Assembly on the

16 Find out more at: https://cpes.org.rs/water-treatment-agents-in-the-heating-system-of-the-clinical-center-of-serbia-2018/?lang=en

17 Find out more at: https://cpes.org.rs/reconstruction-and-extension-of-general-hospital-in-prokuplje-2019/?lang=en

18 Find out more at: https://cpes.org.rs/medical-devices-and-reagents-for-immunohematological-blood-testing-blood-transfusion-institute-of-vojvodina-2019/?lang=en

19 Find out more at: https://cpes.org.rs/maintenance-of-copiers-and-multifunctional-devices-2019/?lang=en

work of the Republic Commission and that the Committee has never publicly discussed or decided on the complaints filed before the ban. The complaint procedure (for the protection of rights) should be an integral part of the public procurement system, as the economic operators' and public trust in the system goes hand in hand with their right to complain. If economic operators (and the public) were confident that a complaint about an irregularity in a public procurement procedure would be treated objectively, impartially and efficiently, their trust in the entire public procurement system would grow, and more economic operators would want to participate in procurement procedures. However, as the National Assembly does not supervise the Republic Commission members during and after their terms of office, or the Republic Commission's handling of the complaints, and given the Republic Commission's inconsistent and biased decisions, prospective bidders and the public do not trust the public procurement system. And where there is no trust in the system, there is no competition and irregularities are more likely to happen. The finding of the Toplice Centre for Democracy and Human Rights, that as many as 72 out of 100 procurement procedures had only one bidder, proves this.

As was already mentioned, the legality of the decisions of the Republic Commission on the public procurement procedures has not been subjected to the control of the competent committee of the National Assembly or efficient judicial control. Under the new law on public procurement, the control of the Republic Commission will no longer even be possible, allowing it to make decisions that favour certain stakeholders, and a disputed procurement procedure to continue after the Republic Commission has made its decision (an administrative litigation does not mean automatic suspension of the activities of the contracting authority), even if the decision is unjust and unlawful. To sum up, the government body that is supposed to supervise public procurement, i.e. the Republic Commission, is not itself supervised at all, allowing it not to perform the supervision it is supposed to.

Going forward, the expert public and civil society organisations must keep a close eye on the Republic Commission. They should gather information on whether and how the Republic Commission exercises its authority, whether its decisions show different treatment of different parties in disputes about the protection of rights, whether its actions are inconsistent and biased, and whether there might be elements of corruption. This is critical, given the weight of the Republic Commission's decisions and the absence of any institutional control so far, especially since under the new law on public procurement it will no longer be possible to control the Republic Commission.

Public Procurement Office

As regards the Public Procurement Office (former Public Procurement Administration), the impression is that it should have done more in terms of fighting for more competition and combating irregularities and corruption in public procurement. There are no analyses of the reasons why competition in public procurement is on the decline, whilst the results of uncovering and combating the irregularities are modest. The report of the **Anti-Corruption Council**[20] for the Public Procurement Administration reads:

„Bearing in mind the aforementioned competences of the Public Procurement Office in the area of supervision and control of conduct of contracting authorities, the [Anti-Corruption] Council has requested the following information from the Public Procurement Administration:

20 Available at: http://www.antikorupcija-savet.gov.rs/sr-Cyrl-CS/izvestaji/cid1028-3296/izvestaj-o-svrsishodnosti-kontroli-i-realizaciji-javnih-nabavki-u-srbiji

- The volume of requests for misdemeanour proceedings and proceedings to determine the nullity of public procurement contracts that the Public Procurement Administration has filed;
- Whether the Public Procurement Administration has reported any irregularities it may have detected in public procurement procedures to the State Audit Institution and the Budgetary Inspection."

In its Response No. 07-00-13/19 of 11/09/2019, the Public Procurement Administration informed the Council that it had not filed complaints to competent courts to determine the nullity of contracts, and that it had filed only three requests for misdemeanour proceedings in 2018.

Based on its response to the Council, it can be concluded that the Public Procurement Administration has never contacted the State Audit Institution, and that it has contacted the Budget Inspectorate, i.e. its local offices in Bečej and Prijepolje, twice.

According to the Report on Public Procurement in Serbia 1/1/2019–31/12/2019, the Public Procurement Administration filed four requests for misdemeanour proceedings in 2019: two against the public enterprises, and two against an educational institution and a healthcare facility. In all four cases, the Public Procurement Administration acted on the complaints received.

So, in terms of irregularities it has discovered and reported to the competent authorities, the results of the Public Procurement Administration are quite modest. The new law on public procurement, which lays down new responsibilities for this institution, might change this. For the first time, the law gives the Public Procurement Office authority to monitor the application of public procurement regulations and sets out clear monitoring rules. Specifically, Article 179 paragraph 1 of the law clearly stipulates the following responsibilities of the Public Procurement Office: under point 1) the Public Procurement Office is responsible for monitoring the application of the public procurement regulations and compiling annual monitoring reports, and under point 3) the Public Procurement Office is tasked with filing requests for

proceedings for misdemeanours recognised by this law, submitting requests for the protection of rights and instituting other proceedings before competent authorities when it observes irregularities in the application of the public procurement regulations.

Article 108 of the law lays down the monitoring rules. Namely, the Public Procurement Office will monitor the application of the law with the aim of preventing, discovering and removing any irregularities. The monitoring is done as follows: as per the annual monitoring plan adopted by the Public Procurement Office at the end of the year for the next year; if a negotiation process is held without prior notice referred to in Article 61 paragraph 1 points 1) and 2) of this law; ex officio; as a follow-up on the information received from a legal or natural person, a state government body, a provincial government body, a local government unit or other government bodies.

All this gives the Public Procurement Office the opportunity (and imposes the obligation) to be much more efficient in discovering and reporting irregularities in public procurement. Hopefully, the Public Procurement Office has better results for the next Alarm Report.

State Audit Institution

The State Audit Institution had much better results than the Public Procurement Office. We can safely say that, when it comes to discovering and reporting irregularities in public procurement, this is the only trustworthy institution in the public procurement system. This is partly because the State Audit Institution is much better staffed than the Public Procurement Office, and partly because it is willing to do its utmost to perform its tasks. We must stress that the Public Procurement Administration could and should have filed more requests for misdemeanour proceedings in 2019 although the Republic Commission was not going to follow up on misdemeanour claims under the law on public procurement (due to conflicting regulations). The Public Procurement Administration was aware that the statute of limitation for these misdemeanours was three years and that by 2020 the responsibility for misdemeanour proceedings would have been

transferred to misdemeanour courts, which meant that the requests it had filed would have resulted in legal action, eventually.

According to the State Audit Institution 2019 Annual Report[21], the total value of contracts awarded by the audited entities was RSD 19.66 billion. The compliance audits focusing on the implementation of the law on public procurement by 52 audited entities found that the goods, services and works were not procured in compliance with the law in 515 cases, totalling RSD 2.35 billion. The State Audit Institution found public procurement-related irregularities in 11.94 % of audited entities.

The majority of irregularities concerned the following:

- Awarded contracts where calls for proposals and notifications on the award of contract were not published on the Public Procurement Portal within the legal deadline or at all, worth RSD 594.07 million (25 audited entities);
- Awarded contracts where the procurement documents set out specific (additional) requirements for participation in the public procurement procedure that had no logical connection to the subject matter of the contract, worth RSD 310.65 million (15 audited entities);
- Contracts awarded without the public procurement procedure although they did not qualify for the exemption from the law on public procurement, worth RSD 306.69 million (41 audited entities);
- Procurements where the value of the contract was not estimated as prescribed by law, worth RSD 181.21 million (18 audited entities);
- Contracts awarded in the public procurement procedures where the procurement documents did not provide a clear description of the subject matter (technical specifications, quality and quantity) of the procurement, worth RSD 157.60 million (12 audited entities);

21 See: https://www.dri.rs/dokumenti/godisnji-izvestaji-o-radu.93.html (available in Serbian only)

- Procurements that did not meet the procurement procedure requirements, worth RSD 126.31 million (10 audited entities);
- Awarded contracts that violated the public procurement principles, worth 113.34 million RSD (16 audited entities);
- Procurements where the contracting authority failed to inform about its decision on the award of contract or provide a rationale for the decision on the award of contract, worth 112.57 million RSD (4 audited entities);
- Awarded contracts where the contracting authority did not reject the offer of the awarded economic operator although it had serious flaws, worth 92.94 million RSD (4 audited entities);
- Other irregularities (failure to submit reports as prescribed by law, failure to plan and allocate funds for the procurement that has been conducted, etc.), worth RSD 352.05 million (36 audited entities).

Acting within its powers and having reasonable grounds to suspect that the misdemeanours / economic transgressions / criminal offences had been committed, the State Audit Institution filed 301 reports against 384 responsible persons. Out of this number, the State Audit Institution filed 256 requests for misdemeanour proceedings against 272 individuals, 12 cases concerned the economic transgressions of 79 responsible persons, and there were 33 criminal complaints against 33 individuals. Furthermore, the State Audit Institution filed 47 reports to the competent prosecutors' offices to follow up on and investigate whether the illegal actions of responsible persons qualified as criminal offences. It is not known how many of these were in connection with public procurement but considering the number of identified irregularities (and the value of the contracts awarded), it is highly likely that most of them were.

Prosecutors' offices and courts of law

The criminal offence of public procurement fraud has existed in Serbia since 1 January 2013, when the application of the amendments to the Criminal Code adopted in 2012 started (Official Gazette of RS 121/12 of 24/12/2012). Under the amendments to the Criminal Code from 2016 (Official Gazette of RS 94/16 of 24/11/2016), whose application started on 1 March 2018, a different number was assigned to the article regulating this criminal offence, and former Article 234 of the Criminal Code became Article 228. Besides the changed article number, the description of the criminal offence, i.e. the persons in the economic operator perpetrating the criminal offence, also underwent minor changes.

The outcomes of the litigations that were conducted following procurement-related criminal complaints are probably best shown in the Report on the Purposefulness, Control and Implementation of Public Procurement in Serbia by the Anti-Corruption Council, an advisory body to the Government of the Republic of Serbia. As the report was compiled and published in 2020, some of its findings deserve a mention in this Alarm Report. With regard to the processing of the criminal offence of procurement fraud, the Anti-Corruption Council contacted the anti-corruption departments of the Higher Public Prosecutor's Office in Belgrade, Novi Sad, Niš and Kraljevo, and received the following information:

1. The Anti-Corruption Department in Belgrade informed the Anti-Corruption Council that since its establishment (01/03/2018) until 15/11/2019, it had processed 176 individuals for public procurement fraud. The outcomes were as follows:
   – pre-criminal proceedings against 95 individuals were in progress;
   – criminal complaints against 70 individuals were dismissed;
   – three investigations orders were filed;
   – criminal charges were brought against 14 individuals were filed;
   – one acquittal was issued and four suspended sentences were pronounced.

2. The Anti-Corruption Department in Novi Sad informed the Anti-Corruption Council that 31 complaints claiming the criminal offence of procurement fraud were filed between 01/03/2018 and 01/11/2019. The outcomes were as follows:
   – pre-criminal proceedings (collection of notices) were in progress for 15 cases;
   – criminal complaints were dismissed in five cases;
   – in three cases, evidentiary hearings were being held before the Higher Public Prosecutor's Office;
   – three cases were referred to other competent prosecutors' offices;
   – in two cases, investigations were ordered and are yet to be completed;
   – in three cases that were tried, there was one conviction, one acquittal and one case was still in progress.

3. From 01/03/2018 to 31/12/2018, the Higher Public Prosecutor's Office in Niš built eight cases relating to the criminal offence of procurement fraud, out of which:
   – in one case, evidentiary hearing was in progress, i.e. checks were being done to assess the allegations in the criminal charges;
   – five criminal complaints were dismissed;
   – one criminal complaint was referred to a competent prosecutor's office;
   – once case that was tried ended in conviction.

   From 01/01/2019 to 31/10/2019, 20 cases were built, out of which:
   – evidentiary hearings were underway in 14 cases;
   – the Prosecutor's Office dismissed three criminal complaints;
   – three cases were brought to court, two of which ended in convictions, whilst one was in progress.

4. The Anti-Corruption Department in Kraljevo informed the Anti-Corruption Council that since it was established until 19/11/2019, it filed 11 criminal complaints in the KTKo register for the criminal offence of procurement fraud under Article 228 paragraph 2 of the Criminal Code. Out of these 11 complaints, there was one conviction, one complaint was dismissed, and nine cases were still being processed, i.e. checks were being done and evidence was being collected.

All this leads to the conclusion that the volume of criminal complaints filed to prosecutors' offices is not high considering the hundreds of thousands of awarded public procurement contracts, and that the number of convictions is underwhelming. This might be due to the lack of information about public procurement procedures, the unavailability of the documents, the fact that corruption in public procurement is hard to prove and, presumably, strong political pressure on the prosecutors' offices. This also shows that Serbia is not fighting corruption in public procurement as it should be and that there has been no progress in this area. Thus, it is not surprising that economic operators choose not to participate in procurement procedures, that competition is on the decline, and that, as a result, the principle „best value for money" cannot be achieved.

3. Challenges in the application of the new law on public procurement

The new law on public procurement, whose application began on 1 July 2020, has been further aligned with the EU acquis, primarily the directives regulating public procurement. To sum up: the terminology of the new law has been aligned with the terminology of the directives; the exemptions from the law have been explained and aligned with the directives; all procurement procedures and techniques recognised by the directives have been introduced; proving that the the criteria for the qualitative selection has been met is simplified; the most economically advantageous offer is the sole award criterion (but it can be assessed on the price only); new, clearer grounds for amending and terminating the awarded contract have been introduced; a special type of monitoring by the Public Procurement Office (former Public Procurement Administration) has been introduced; as regards protection of rights, the right of action has been expanded allowing more parties to take part in the proceeding, etc. All these novelties indicate that the provisions of the law have been further aligned with the provisions of the relevant EU directives (Directive 2014/24/EU, Directive 2014/25/EU, Directive 2014/23/EU, Directive 2009/81/EZ, Directive 2007/66/EZ) and to some extent with the closing benchmarks for Chapter 5. In this regard, we must mention that the Public Procurement Portal now has numerous new features that should help the efficiency and transparency of public procurement. Article 183 paragraph 1 of the law stipulates that the Public Procurement Portal is an information system enabling:

1) the contracting authorities to compile, send for publication and publish calls for tenders on standard forms; to make available the procurement documents and publish and send decisions in procurement procedures, and to publish procurement plans;
2) the contracting authorities to send calls for tenders on standard forms to the Publications Office to publish in the Official Journal of the European Union;
3) all interested parties to get free, unlimited, direct access to, as well as search, browse and download published calls for tenders and procurement documents;
4) the economic operators to submit their offers, applications, plans and projects;
5) the opening of tenders, applications, plans and projects;
6) communication and information exchange between the contracting authorities and economic operators, in accordance with this law;
7) communication and information exchange between the Public Procurement Office and contracting authorities, under Article 62 para. 2 and 3 of this law;
8) filing claims for the protection of rights, other communication between the contracting authorities, bidders and the Republic Commission for the Protection of Rights in Public Procurement Procedures;
9) record-keeping of registered economic operators;
10) the management of the data published and exchanged on the Public Procurement Portal;
11) the Public Procurement Office, Republic Commission for the Protection of Rights in Public Procurement Procedures, State Audit Institution and the Republic Public Prosecutor's Office to access the database to perform their tasks and fulfil their responsibilities.

Perhaps the most important novelty is that the law allows for electronic procurement, via the portal, in nearly all stages of the public procurement procedure. Judging by the first experiences of public procurement professionals, the new portal is simple to use and navigate and is currently functioning without any major glitches. Also, the instructions for users, including video tutorials, are quite useful for beginners learning how to use the portal. It does seem that the portal is easy to use and that the contracting authorities and bidders (as well as competent authorities) will quickly get used to using it.

However, some provisions of the new law remain ambiguous and fragmentary and are likely to be challenging in practice. The relevant and real indicators of the competent authorities' ability to handle these challenges will be known to the public in 2021, after more procurement procedures have been conducted under the new law. At the time of writing this report, just over 4,000 calls for tenders have been published on the portal under the new law. The key challenges are discussed below.

High thresholds

Under the previous law on public procurement, the threshold below which a procurement was not necessary was RSD 500,000. Any contract whose annual value exceeded this amount was subject to the provisions of the law on public procurement. **Under the new law, the threshold for goods and service was raised to RSD 1,000,000, and for works to as much as RSD 3,000,000.** So, the thresholds are now two to six times higher than they used to be. The question is what comparative statistics and analytics the legislator had used to come up with these amounts.

As regards procurement for diplomatic missions, the threshold for goods and services is RSD 15,000,000. For works, the threshold was a whopping RSD 650,000,000!

It is quite interesting that for the procurement referred to in Article 75 of the new law – social and special services, including, among others, the services of hotels and restaurants, legal services that are not already exempt from the law, the services of trade unions, political organisations, youth associations and other organisations with memberships – the threshold is RSD 15,000,000, or RSD 20,000,000 if the procurement is conducted by a contracting entity. These are incredible annual amounts, and the service categories are quite wide.

Let us go back to the basic thresholds of RSD 1,000,000 for the procurement of goods and services and RSD 3,000,000 for the procurement of works. According to the Report on Public Procurement in Serbia 1/1/2019–31/12/2019, the average value of a public contract in 2019 was RSD 3,609,000 – so, a bit over the newly established thresholds for the procurement of works. If we take into account that the statistics include all procurements by public contracting authorities, including ministries, public enterprises, directorates, agencies and other public entities with big budgets, we can easily work out that the average value of a public contract at a local level is much lower than RSD 3,000,000. If this is so, then how many procurements will there be at the local level, by „smaller" contracting authorities, and if there are any, what will be their annual share in public procurement procedures? Probably not many, and not much. Let us have a look at the current data.

According to the Public Procurement Office, since the application of the new law started, only 4,800 procurement procedures were initiated on the new Public Procurement Portal.[22] In other words, there

22 See: https://www.danas.rs/ekonomija/na-portalu-javnih-nabavki-od-njegovog-aktiviranja-pokrenuto-oko-4-800-novih-postupaka/ (available in Serbian only)

were half as many procurement procedures during the five months of the application of the new law as there were over just one month the year before. According to the official data, 122,066 contracts were awarded in public procurement procedures in 2019, whilst slightly more than that, 125,619 contracts, were awarded in 2018. Many procedures were still being implemented under the provisions of the old law because the contracting authorities had opened the procurement procedures before the application of the new law began. However, such a low volume of only 4,800 procedures under the new law indicates that many contracts were below the thresholds set out in the new law. Of course, more detailed analyses are yet to be done, but the general impression is that the new thresholds are too high for Serbia.

We must stress that the contracts whose value falls below the new thresholds are still subject to rules. For example, under Article 49 paragraph 2 of the new law on public procurement, the contracting authority must prescribe, in a special by-law, how a procurement that is subject to the new law will be planned and conducted, including the procurements falling below the thresholds. Contracting authorities must not procure anything below the threshold value without complying with the law unless they have prescribed a procedure for such procurement in a bylaw, which they must publish on their website.

For the principles of the new law on public procurement to apply to the exempt contracts in a manner appropriate to the circumstances of a specific procurement (which is also an obligation of the contracting authority under Article 27 paragraph 3 of this law) it is important, in our opinion, that the by-law regulates the following:

- The procurement plan;
- How the procurement procedure will be initiated;
- A follow-up procedure on the approved application for procurement procedure;
- Who will be in charge for the public procurement procedure, and the procurement committee;
- Call for proposals;

- Tender submission and opening;
- Key flaws of a tender;
- How a decision on contract award is made;
- Contract signing and contract performance monitoring;
- If necessary, a special treatment for procurements of lower value;
- Powers and responsibilities in the procurement procedure.

The monitoring and supervision of the performance of procurement contracts

As part of the project „Towards a Sound Public Procurement System in Serbia", many consultations and expert meetings were held to discuss the expected effects of the new law on public procurement, bearing in mind the aim of the project: to reduce corruption by establishing an efficient public procurement system and accountability in the spending of public funds. The major flaws of the new law recognised in these meetings were the fact that the contracting authorities were no longer required to report on the performance of the awarded procurement contracts to the Public Procurement Administration (a.k.a. Public Procurement Office, according to the new law), and that, consequently, this information will no longer be available on the Public Procurement Portal.

However, Article 154 paragraph 5 of the new public procurement law prescribes that the ministry responsible for finance will control the execution of procurement contracts. **The new law does not clarify how the Ministry of Finance will be able to successfully control the execution of procurement contracts given the volume of contracts awarded in Serbia per year. It does not prescribe a control procedure or the authority to pass a by-law regulating this procedure. If the law proposer thought that the Finance Ministry's Budget Inspectorate would do it, we must point out that this will not be possible – at least not in those cases where the contracting authorities are not the beneficiaries of the government budget, such as public enterprises, the biggest contracting authorities in**

Serbia (see the list of major contracting authorities according to the annual reports of the Public Procurement Administration). Furhtermore, it remains unclear whether the Ministry of Finance will control all or just some procurement contracts, and how will it choose which contract to supervise. The absence of information on the performance of contracts on the Public Procurement Portal will additionally challenge this control.

> We wish to stress that an entire procurement procedure may be rendered pointless in the contract execution stage if the awarded bidder is allowed unjustifiable price increase, if the public funds are spent on the goods, services or works that have not been delivered, and if the contracting authority tolerates the contractor's failure to comply with the set deadlines and agreed quality of procured goods, services or works without honouring the required security instrument (promissory note, bank guarantee, etc.). So far, this procurement stage has not been transparent enough or properly controlled by the competent authorities. However, due to the ambiguous provisions of the new law on public procurement, there is a risk that this procurement stage will remain insufficiently transparent in the future. Furthermore, one of the benchmarks for closing Chapter 5 of Serbia's accession negotiations with the EU is that 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, including, in particular, „the strengthening of control mechanisms, including close monitoring and enhanced transparency of the execution stage of public contracts and systematic risk assessments with prioritisation of controls in vulnerable sectors and procedures".

Bearing all this in mind, we cannot help but raise the following questions:

1) Will the Public Procurement Portal be publishing the information on the performance of contracts awarded after 1 July 2020, and if yes, how? When designing a new version of the Public Procurement Portal, will it be possible to include collecting and publishing basic information on the performance of contracts, such as information on fulfilled obligations (e.g. the price paid, meeting the delivery and payment deadlines), information on any problems that may have been encountered during the performance of contracts and derogations, as well as information on any fines, complaints and honoured security instruments?

2) How will the Ministry of Finance control the execution of procurement contracts under the new law? Which organisational unit of the Ministry will be responsible for supervision and how many members of staff will it need to have? Is there a plan to adopt an act that would prescribe the procedure in detail?

After the new law on public procurement was adopted and before its application started, the CPES sent two requests for access to information of public importance. Specifically, we asked the Ministry of Finance how it was going to monitor the execution of contracts, and we asked the Public Procurement Administration whether the Public Procurement Portal would be publishing information on the performance of contracts, and if it was possible to include collecting and publishing key information on the performance in the new version of the Public Procurement Portal.[23] Both the Ministry of Finance and the Public Procurement Administration replied, but they both avoided giving direct answers to our questions. The Ministry replied that „before the application of the [new] law starts, the Ministry will, in a timely manner, pass all by-laws necessary for its application", whilst the Administration said that it „does not have a document containing

23 See: https://cpes.org.rs/initiatives/?lang=en

the information requested". As they were both evasive in their replies, the questions remain unanswered. The CPES and its project partner, the Association of Professionals in Public Procurement, will pursue the matter until they get concrete answers. We are also prepared to help the Ministry of Finance and the Public Procurement Office and propose concrete solutions. For example, these solutions may be:

1) Create simple e-forms and make them available on the Ministry of Finance website (or, even better, the Public Procurement Portal). Contracting authorities would fill them in periodically (monthly, quarterly or another appropriate frequency) with the basic information on the performance of contracts, such as the information on:
   – the procurement contract;
   – the contract value and contract execution stage (the value of delivered goods, services, works);
   – payment per contract (how much was paid for the delivered goods, services, works);
   – any other relevant payment information (e.g. any advance payments);
   – deadlines – whether they are being met or there are delays;
   – any penalties imposed on the contractor for failing to comply with the contractual obligations (charged fees, honoured security instruments, etc.).
2) Make the completed forms on the performance of contracts publicly available on the Ministry website or the Public Procurement Portal (except, of course, where contracts are subject to the positive regulations concerning confidentiality of information).

In our opinion, this would facilitate the Ministry's supervision of the performance of contracts because the Ministry would get the information from the contracting authorities themselves. Any discrepant or illogical information would lead to in-depth scrutiny and appropriate, concrete action. The very existence of such a platform would be a big step forward in performing the tasks and realising the

responsibilities concerning the supervision of performance of public procurement contracts.

By making the information and forms publicly available on the Ministry website and/or the Public Procurement Portal, Serbia would also meet the obligations (benchmarks) for closing Chapter 5 of the accession negotiations with the European Union regarding „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".

Misdemeanour proceedings

Under the 2012 law on public procurement, the Republic Commission for the Protection of Rights in Public Procurement Procedures was authorised to conduct misdemeanour proceedings in the first instance. This proved to be virtually impossible to implement as the provisions of the law governing misdemeanour proceedings prevented the Republic Commission from exercising its authority. As a result, not a single misdemeanour proceeding has come to a legally binding conclusion since 1 April 2013.

Under Article 236 of the new law on public procurement, the Republic Commission is authorised to request a misdemeanour proceeding if it establishes that there has been a violation of rights guaranteed under the law on public procurement that gives grounds for a misdemeanour proceeding. In other words, **as of 1 July 2020, when the application of the new law on public procurement started, the Republic Commission no longer has the authority to conduct misdemeanour proceedings in the first instance for violations of the public procurement law (it can only request them). As of that date, this is the responsibility of misdemeanour courts.** Therefore, misdemeanour courts should get support to specialise their staff taking on the challenge of resolving the cases taken over from the Republic Commission (instituted under the old law on public procurement) and managing the new ones (under the new law).

Speaking of the new authority of misdemeanour courts, we must raise a few issues concerning the processing of misdemeanours under

the new law on public procurement. These issues suggest that the proposals to amend certain provisions of the public procurement law as well as the interpretations of the relevant provisions of the law on public procurement and the law on misdemeanours need to be considered in the near future. Thematic meetings, where judges and public procurement experts would come up with useful conclusions and solutions, should be organised. The issues are:

1. Article 236 paragraph 1 of the new law on public procurement prescribes fines from RSD 100,000 to RSD 1,000,000 for misdemeanours committed by contracting authorities. Article 17 paragraph 2 of the law on misdemeanours stipulates that the Republic of Serbia, territorial autonomies, local governments and their bodies cannot be liable for misdemeanours but that a law may stipulate that a responsible person in a state body, a body of a territorial autonomy or a local government body is liable for a misdemeanour under Article 18 paragraph 1 of the law on misdemeanours. So, under the law on misdemeanours, if the contracting authority is the Republic of Serbia, a territorial autonomy or a local government unit, or their bodies, they cannot be liable for a misdemeanour. The question is: How will misdemeanour courts interpret said provisions of the law on public procurement and the law on misdemeanours, i.e. will these categories of contracting authorities be liable for breaching the law and will only the responsible person in the contracting authority be fined for a misdemeanour or will the contracting authority too be fined for a misdemeanour?

2. Under Article 236 paragraph 2 of the new law on public procurement, a responsible person in the contracting authority will also be fined from RSD 30,000 to RSD 80,000 for the misdemeanour referred to in paragraph 1. But how will a misdemeanour court decide who the responsible person in the contracting authority is, considering that Article 30 paragraph 1 of the law on misdemeanours prescribes that the responsible person (under that law) is a person whose tasks concern management, business operation

or work process and a person holding an office in a state body, a body of a territorial autonomy or a local government body? More specifically, the question is whether the responsible person is only the manager of the contracting authority or if the responsible persons are individuals who are authorised under the contracting authority by-law or by another manager to sign some of the acts adopted in a public procurement procedure or to take specific actions. Also, are the members of the contracting authority's procurement committee deemed responsible persons under the law on misdemeanours? These are all important questions because it does matter whether a misdemeanour proceeding will be instituted against one individual or a group of people.

3. Next, who is deemed to be the responsible person in centralised public procurement, where a centralised public procurement body conducts a procurement procedure and signs a framework contract, whilst contracting authorities (contract users) take over the framework contract and sign individual contracts? Given that a contracting authority may commit a misdemeanour at any stage of a public procurement procedure, who will be responsible for various stages of centralised procurement procedures where, as explained above, one contracting authority conducts the procurement procedure and another signs the contract and monitors its performance? By the same token, in a situation where a centralised public procurement body monitors the performance of the contract, are both the contracting authority that concludes the contract and the centralised public procurement body (and its responsible persons) liable for misdemeanours in that stage of procurement, e.g. misdemeanours under Article 236 paragraph 1 points 13) and 14) of the new law on public procurement? Under Article 236 point 13), if in the performance of the contract the contracting authority fails to comply with Article 154 paragraph 1 of the new law on public procurement, which prescribes that a public procurement contract is performed under the conditions established in the procurement documents and selected tender, such contracting authority has committed a misdemeanour.

However, under point 1), a contracting authority that amends the awarded procurement contract contrary to the provisions of the new public procurement law laying down justified reasons for amending the signed procurement contract, has committed a misdemeanour.

4. Another enigma is why Article 237 of the new law on public procurement prescribes that a subcontractor will be penalised for a misdemeanour that a bidder (contractor) has committed. Also, it is unclear which misdemeanours the subcontractor and its responsible person may be liable for, especially bearing in mind that Article 131 paragraph 7 of the new law on public procurement prescribes that the bidder is fully accountable to the contracting authority for the performance of contractual obligations whether a subcontractor is involved or not. The law also prescribes that the offer must be submitted by the contractor, not the subcontractor, and that any proof concerning the offer is provided by the contractor rather than the subcontractor.

5. Article 237 paragraph 4 of the new law on public procurement procedures prescribes that a bidder, candidate or subcontractor who has committed a misdemeanour under Article 1 points 2) and 4) will be banned from participating in public procurement procedures for a maximum of two years. This protective measure is pronounced by a misdemeanour court, under the law governing misdemeanours. The court must inform the Public Procurement Office about this measure no longer than three days after the ruling has become effective, and the Public Procurement Office must publish the information on its website. Judges in misdemeanour courts and lecturers both agree that this measure should have been included in the law on public procurement as the mandatory grounds for exclusion and recorded in the Register of Bidders.

6. Finally, can an injured party file a request for a misdemeanour proceeding, under the new law on public procurement? But first, who can be an injured party and which misdemeanours involve injured parties? Second, will the injured party first file a complaint

with the Public Procurement Office under Article 180 paragraph 3 of the law on misdemeanours, and if the Public Procurement Office does not request a misdemeanour proceeding, could the injured party still do it? Under Article 180 paragraphs 1 and 2 of the law on misdemeanours, an injured party may always request a misdemeanour proceeding except in the cases where the law prescribes that only a specific government body can do so (under the new law on public procurement, these bodies are the Public Procurement Office and the Republic Commission for the Protection of Rights in Public Procurement). In that case, if the authorised body does not request a misdemeanour proceeding, the injured party should still be able to, under the provisions of the law on misdemeanours.

Amendments to the contracts awarded under the previous law on public procurement

When the application of the new law started, the question arose as to which law will apply to the amendments to the contracts awarded under the previous law? According to the opinion of The Public Procurement Office published on its website, amendments to these contracts will be subject to the new law. The Public Procurement Office provided the following rationale:

- Under Article 245 of the new law on public procurement, the previous law on public procurement and related regulations and by-laws will cease to have effect as from the day of application of the new law on public procurement (1 July 2020);
- Under Article 239 of the new law, the public procurement procedures initiated before the application of this law will be completed under the regulations that applied when these procedures were initiated;
- Considering that the need to amend a contract may arise only during its execution, i.e. after the completion of the public procurement procedure, any issues regarding the amendments to

the awarded procurement contract cannot be subject to the provisions of the previous law even though the contract was entered into before 1 July 2020. This is because the execution of a procurement contract (including its amendments) cannot be deemed part of the public procurement procedure;

- The provision stipulating that the procedures initiated under the previous law will be completed under that law, does not apply to the contracts entered into under the previous law;
- All public procurement contracts entered into before 1 July 2020 that are still valid, after the said date will be amended under the new law, if necessary and if legal reasons for it have been met.

The rationale of the Public Procurement Office cannot be criticised because there is nothing about this matter in the new law, and it should have been clarified in its transitional or final provisions. Prescribing which provisions would apply to the amendments to the contracts awarded under the previous law would eliminate all conundrums regarding this matter. Besides, this has been clarified for public procurement procedures and procedures for the protection of rights initiated under the previous law: Articles 239 and 240 of the new law stipulate that these procedures will be completed in accordance with the previous law. The same could have been prescribed for the amendments to the contracts entered into under the previous law. However, we are left with an interpretation that may cause many problems in practice, including misuse.

For example, bidders who participated in public procurement procedures where contracts were awarded under the previous law, could not consider the options for amending those contracts granted under the new law (e.g. the significantly increased volume of delivery allowed under the new law), which may have motivated them to offer better conditions in their bids. Some of them could have had a more advantageous

bid and got the contract. Then, some bidders may have decided not to participate in a procurement procedure because they were not allowed to hire subcontractors (and they needed them), whereas under the new law it is possible to amend the contract and hire subcontractors even though they were not included in the offer and the contract. What is more, at the time when the old law was still effective, criminal proceedings were instituted against several contracting authorities for allowing the hire of subcontractors who were not included in the tender and the procurement contract. Finally, combining the new grounds for amendments with the provisions of the old contracts will also be a challenge. We expect that all this will cause confusion for those who may need to modify contracts, which is especially important bearing in mind what has already been observed in this report: that the new law does not clarify who will monitor the execution of public procurement contracts, and that the new law is not transparent when it comes to the contract execution stage and the amendments to the contracts.

4. Public procurement during the pandemic

Since the World Health Organisation declared the novel coronavirus outbreak a pandemic in March 2020 and the daily number of positive cases started increasing globally, healthcare systems in over 170 countries worldwide have been under such an immense pressure that even the best prepared ones struggled to persevere. The pandemic forced tens of millions of people into lockdown, whilst economic activity almost completely died down.

These new circumstances have raised a number of questions concerning the functioning of societies and states, including the question of implementation of public procurement procedures. To help the EU Member States cope with the crisis and eliminate its effects, on 1 April 2020, the European Commission published Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis (2020/C 108 I/01).

As stated in the guidance, it focuses in particular on procurements in the cases of extreme urgency, which enable public buyers to buy within a matter of days, even hours, if necessary, noting that precisely for a situation such as the current COVID-19 crisis, which presents an extreme and unforeseeable urgency, the EU directives do not contain procedural constraints. The guidance gives public buyers several options to consider in order to address the crisis.

The guidance states that under Article 32 paragraph 2 point (c) of Directive 2014/24/EU, public contracts may be awarded by a negotiated procedure without publication „in so far as is strictly necessary where, for reasons of extreme urgency brought about by events

unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority".

The guidance then goes on to analyse each requirement for a negotiated procedure in the current crisis and concludes that negotiated procedures without publication may offer the possibility to meet immediate needs, covering the gap until more stable solutions can be found, such as framework contracts for supplies and services, awarded through regular procedures.

Meanwhile, on 24 March 2020, the Serbian Public Procurement Administration published on its website a notice informing public buyers that they must fully comply with the previous law on public procurement (Official Gazette of RS 124/12, 14/15 and 68/15) during the state of emergency, including meeting the deadlines for the submission of tenders, opening of tenders, provision of public procedure documents for interested candidates, etc. However, if due to the new circumstances a public buyer is not able to continue a procurement procedure that was initiated under the previous law, the Public Procurement Administration points out that the procedure may be suspended under Article 109 paragraph 2 of the previous law, explaining that the state of emergency within the meaning of this provision may be deemed an objective and verifiable reason for the suspension of the public procurement procedure, which could not have been predicted at the time it was initiated, hindering the completion of the procedure. Suspended procedures may resume after the necessary conditions for their implementation have been met. The Public Procurement Administration goes on to recommend that public buyers do not initiate procurement procedures during the state of emergency until the conditions for the full implementation of the provisions of the previous law have been met, and if they think that they can open and complete a procedure, they should take into consideration the execution of the contract too. Finally, as regards urgent procurement with the aim of providing basic living conditions in the event of natural disaster, the

Public Procurement Administration advises contracting authorities to refer to Article 131e concerning Article 7 paragraph 1 point 3) of the previous law, which regulates the procurement of goods, services and works that are not subject to the provisions of the law.

Keeping in mind the notice, the quoted provisions of the law and the absence of guidance for the procurement of medical equipment and material during the pandemic, as well as the lack of information about the procurement of medical equipment and consumables, one cannot help but wonder how medical equipment and consumables – primarily, the ventilators – were procured between 15 March, when the state of emergency was declared in Serbia, and 1 July, when the application of the new law on public procurement started.

Were ventilators procured under Article 131e of the old law (*Ensuring Basic Living Conditions, Providing Healthcare to the Sick and Ailing*), or by negotiated procedure without publication referred to in its Article 36 paragraph 1 point 3). Under the latter, contracting authorities may award public contracts by a negotiated procedure without publication „for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority," but there is no proof that this was the case.

In the absence of official information, we can only assume that the ventilators were procured either by a negotiated procedure under Article 36 paragraph 1 point 3) of the old law, or through a direct deal. If the goods are procured by a negotiated procedure, the Public Procurement Administration must give an opinion on meeting the conditions for the implementation of the negotiated procedure. The opinion is not legally binding, but it is necessary for the procedure to go ahead. The last time the Public Procurement Administration issued its opinion was on 11 March 2020, regarding the Ministry of Health's procurement of ventilators. According to the information circulating in the media, over 1,000 ventilators were bought since then.

We must stress that we do not mean to criticise the procurement of ventilators, nor do we claim that the law was violated. On the contrary. In a situation such as the state of emergency due to the COVID-19 pandemic, human lives and health are an absolute priority. Even the guidance of the European Commission points out that in extraordinary circumstances, when human lives and health are at stake, there should be, and is preferable to have, options and flexibility for urgent procurements, such as the purchase of ventilators. It is important, however, that these procurements are done in compliance with law and public procurement principles.

The problem with the procurement of ventilators in Serbia was that it lacked transparency, i.e. official information about the procurement, which may have caused perhaps unnecessary doubts as to the ability of the government to get organised and work for the benefit of all citizens in the most challenging of times whilst fully respecting the Constitution and legislation.

Considering all of the above, it would have been useful if the Ministry of Finance or the Public Procurement Office published exact information on the public procurement of medical equipment as of the date when the state of emergency was declared. This would clarify how the equipment was purchased and on what legal basis. Also, the public would not need to guess or suspect wrongdoing, which would help build its trust in the government and its institutions. And last but not least, the government would show that it did not suspend the public procurement law even in the most challenging of times.[24]

Many non-government organisations have requested to access the information of public importance held by competent institutions to find out what medical supplies have been procured, but to no avail. In its press release regarding the response received from the Republic Healthcare Fund, the NGO Transparency Serbia states that the old law on public procurement allowed for immediate procurement

24 The analysis in this section has mostly been borrowed from the blog of Rastko Naumov, a solicitor with years of experience in public procurement: https://rastkonaumov.wordpress.com

procedures where, for reasons of urgency, it was not possible to wait even for a week, which was how long it took the Ministry of Health to procure 15 ventilators in March. „However, even in such situations, there was a legal obligation to publish what was procured and at what price – which the Serbian government has failed to do," reads the press release.[25]

In this regard, the period after the adoption of the new law on public procurement is particularly interesting. The new law allows a negotiated procedure without publication in extraordinary situations (Article 61 paragraph 1 point 2)). However, under Article 62 paragraph 9 point 1), there is no obligation to comply with a legally prescribed procedure (specifically, request the opinion from the Public Procurement Office) if the aim of the procurement is to provide basic living conditions due to a natural or technical/technological disaster that is jeopardising people's safety, health and lives under the regulations governing the state of emergency. So, a procedure prescribed under the new law must be implemented even when procuring medications, medical supplies, services and works that are urgently needed for the treatment of COVID-19 patients or to prevent the disease from spreading. Given the imminent procurement of COVID-19 vaccines and quite interesting procurements such as the construction of the so-called Covid hospital in Batajnica, the public should be informed whether the law on public procurement was applied, who the bidders were, which offer was selected and at what price. Again, we do not deny that the hospital had to be built or that its construction was urgent given the current circumstances, but we still need answers to these questions: what were the conditions of the contract and which selection procedure did the contracting authority use? Having said that, we do commend the speed at which the hospital was built (it took just four months, according to the media).

25 Find out more at: https://www.danas.rs/drustvo/zasto-je-nabavka-medicinske-opreme-i-dalje-strogo-poverljiva/, and at: https://www.danas.rs/drustvo/toplicki-centar-za-demokratiju-vlast-da-polozi-racune-o-nabavkama-medicinske-opreme-zbog-epidemije/ (both available in Serbian only)

II

THE OVERVIEW AND ANALYSIS OF THE KEY PUBLIC PROCUREMENT ISSUES AND PUBLIC PROCUREMENT REGULATIONS ADOPTED BY THE END OF OCTOBER 2020

1. The European Commission Serbia 2020 Report

With regard to Chapter 5: Public procurement, public-private partnership and concessions, the European Commission Serbia 2020 Report[26] reads:

Serbia is moderately prepared on public procurement. Limited progress was made during the reporting period. The new law on public procurement is an important positive step towards alignment. However, the recently adopted law on special procedures for linear infrastructure projects will likely seriously undermine the effective implementation of the law on public procurement as it allows for the exemption of projects „of special importance for the Republic of Serbia" from public procurement procedures. The Commission recommendations from 2019 were only partially implemented and remain valid. In the coming year, Serbia should in particular:

- *ensure further, full alignment with the 2014 EU directives on public procurement, in particular by adopting amendments to the law on public-private partnership and concessions and by ensuring that projects financed from public funds are subject to public procurement procedures;*
- *ensure that intergovernmental agreements concluded with third countries do not unduly restrict competition and comply with the basic principles of public procurement, such as transparency, equal treatment*

26 Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/serbia_report_2020.pdf

and non-discrimination, in line with the national legislation and the EU acquis;

- *continue to strengthen the capacity of the Public Procurement Office, the Commission for Public-Private Partnership and Concessions, the Republic Commission for the Protection of Rights in Public Procedures, and the Administrative Court.*

In addition, the report states the following:

Serbia's legal and institutional frameworks on public procurement are broadly aligned with the EU acquis. A new law on public procurement aiming to further align with the 2014 EU directives on public procurement, on utilities, and on remedies was adopted in December 2019 and has entered into force in July 2020 […] However, in February 2020, Serbia adopted a new law on special procedures for linear infrastructure projects, that allows the government to exempt linear infrastructure projects of 'special importance for the Republic of Serbia' from the application of public procurement rules. National public procurement legislation can be suspended for entire or particular phases of a project and the government is empowered to select a strategic partner in circumstances deemed as urgent. This new law undermines the added value and effective implementation of the new law on public procurement. Through allowing for the circumvention of national legislation as well as EU rules and standards in this way, Serbia maintains serious discriminatory rules in the field of public procurement.

1.1 The law on special procedures for linear infrastructure projects

In this section of the Alarm Report, we will be focusing on the law on special procedures for linear infrastructure projects, which was singled out in the European Commission Serbia 2020 Report. Essentially, this might be the very law that shows the real state of play in the Serbian public procurement system.

The law on special procedures for linear infrastructure projects of special importance for the Republic of Serbia entered into force on 12 February 2020 (Official Gazette of RS 9/2020).

According to the rationale for the law proposal, Article 97 point 12 of the Serbian Constitution provides constitutional grounds for the law. Under this article, the Republic of Serbia is responsible for spatial organisation and utilisation, among other things.

As we are about to demonstrate, the law on special procedures for linear infrastructure projects governs organisation and utilisation of space, procedures and discretionary powers of the Government of Serbia when evaluating and selecting strategic partners, i.e. contractors in major infrastructure projects in Serbia. The rationale of the law proposal states that experience has shown that during the implementation of these projects a lot of time is wasted on property relations before any necessary permits are issued, which often delays the works. It also points out that in its Activity Plan and Budget for 2020 (with the plans for 2021 and 2022), the Ministry of Construction, Transport and Infrastructure envisages the implementation of projects from the new investment cycle, whose value is estimated at around EUR 5 billion. The projects will be funded from the Budget of the Republic of Serbia, whilst credit guarantees are being negotiated with the banks to ensure the most favourable lending conditions.

The rationale continues that the law has to be adopted to speed up the construction and reconstruction of these infrastructure facilities, to enable faster and simpler project implementation (from acquiring the land to obtaining necessary permits), and to accelerate the public procurement processes necessary for the implementation of these projects of special importance for the Republic of Serbia. Particularly interesting is the argument that „...for these projects to be fully efficient, it is necessary to speed up all other procedures and, so to speak, get them all together under a special law so that all government bodies and organisations participating in (any stage of) the implementation can act in a unified manner following clearly defined procedures, deadlines, etc.".

The law proposer's reference document is the Development Strategy for Railway, Road, Water, Air and Intermodal Transport in the Republic of Serbia (2008–2015), a public policy document that covers a period that ended four years ago. There is no new strategy that would provide even a minimum of basis for the adoption of the new law. The law proposer also states that the law does not lean on the EU acquis.

Essentially, the subject matter of this law has already been covered by other laws and regulations but **under this special law, the established procedures, deadlines and mandates have changed only for those projects deemed to be of special importance for Serbia as per the discretionary decision of the Government of the Republic of Serbia. This very fact leads to the conclusion that, should it be necessary, strategic partners and projects of special importance will both be determined in line with the current policy of the Serbian Government and its interest to carry out certain works with specific partners, classifying them as the public interest and strategically important projects for Serbia.**

The law lays down the definitions and/or descriptions of these projects. They are: construction and reconstruction of linear transport infrastructure (public road, railway, water and air transport infrastructure); construction and reconstruction of linear public utility infrastructure and related facilities funded or co-funded from the Budget of the Republic of Serbia and foreign credits; public-private partnerships in construction and reconstruction of linear infrastructure facilities if the estimated value of the project exceeds EUR 50 million and is of special importance for Serbia. This is by no means an exhaustive list, but, interestingly enough, some local projects can also be classified under one of these categories. Again, the Government decides whether a project is recognised and implemented as a project of special importance for the Republic of Serbia.

The law on special procedures for linear infrastructure projects stipulates that the open procedure set out in the law on public procurement will apply to the procurement of works and services such as the production and control of planning and technical documents or project management or partial project management, as well as expert

supervision of works and technical inspection of construction and reconstruction projects, unless agreed otherwise under an international agreement. However, the law on special procedures for linear infrastructure projects prescribes that the provisions of the law on public procedure that regulate the procurement plan, prior notice, proof that mandatory and additional requirements for the participation in the procurement procedure have been met, deadlines to submit tenders and deadlines for the Republic Commission for the Protection of Rights to decide on the protection of rights, will not apply to this type of procurement procedure. So, important provisions of the law on public procurement either do not apply to the projects regulated under this special law (procurement plan, prior notice) or they have been changed (how a candidate proves eligibility to participate, deadlines to submit tenders, protection of bidders' rights in these procedures). For example, a bidder must submit a declaration (under full substantive and criminal liability) on meeting the requirements to participate, but the contracting authority is under no obligation to check it (i.e. to request proof) before awarding the contract. Next, the minimum deadline for the submission of offers is just 10 days, which is far from being long enough for this type of projects. The law also prescribes that a complaint about the protection of rights does not stop the contracting authority from continuing the procurement procedure, which means that the contracting authority may award a contract even before the deadline for complaints has expired. The law on alleviating the effects of floods in Serbia had the same provisions but it had a fixed term and it applied only to the provision of basic living conditions for the citizens of Serbia affected by the floods in May 2014. The question is whether the projects to which this special law applies may be compared and equated with the consequences of flooding to the extent that some important provisions of the public procurement law can be repealed. And this is not all. The law contains provisions that completely undermine the public procurement system when it comes to the contracts of enormous value (i.e. EUR 5 billion, minimum).

As pointed out earlier, under the special law, the law on public procurement may apply differently, or not at all, to the infrastructure

projects of special importance for Serbia. The Government is empowered to decide whether the law on public procurement will apply to the entire project or some of its phases, or if a special procedure for the selection of strategic partner regulated under the special law will apply instead. Under Article 37 paragraph 1, the Government may do so particularly in the case of urgency or jeopardised implementation of the project for which a preliminary feasibility study and a general project have been done. Under the special law, a strategic partner is nothing but a bidder in a public procurement procedure, except when it is a financier. The Government forms a working group which implements the procedure for the selection of strategic partner and passes a by-law (a separate one for each linear infrastructure project) laying down general and specific criteria for the selection of strategic partner, at the proposal of the competent authority. The general and specific criteria for the selection of strategic partner are based on the subject matter and content of each project, but it is not clear what could be required under these criteria (apart from calling, in principle, for competition and transparency). When the Government has decided on the strategic partner, the working group and the selected strategic partner negotiate the contract, based on the Government's negotiation platform. It is not clear what exactly they negotiate.

In 2019, in a procedure described above, a strategic partner was selected and a contract was signed for the design and construction of the Pojate–Preljina motorway, worth about EUR 800 million[27]. The contract provoked great controversies: the agreement with the partner

27 The rationale for the proposed law on establishing public interest and special procedures for the construction of the infrastructure corridor of motorway E-761, section Pojate–Preljina, which is available (in Serbian only) at http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/2019/1811-19%20-LAT.pdf, reads: „With regard to the implementation of this project, and bearing in mind the investment value of the motorway construction, river regulation and construction of the telecommunication corridor along the motorway, it is necessary to simultaneously negotiate credit conditions with several banks (concerning the funds needed to complete the project and technical documents and carry out the works). In this regard, the 2019 Budget of the Republic of Serbia envisages a credit with 'foreign investment corporations and funds' of EUR 800 million".

was made before the procurement procedure, there was only one tender, etc. Also, a special law was adopted just for this project. Now, one law regulates all similar projects, which the law proposer considers a more rational solution.

There is no doubt that many projects will be deemed urgent and their implementation jeopardised under this law, and the Government of Serbia is authorised to decide whether the provisions of the public procurement law will apply. The criteria for the selection of strategic partners will be set out in special by-laws assigned to each project.

In May 2020, the Government decided that the construction of Class I state road Vožd Karađorđe was a project of special importance and as such subject to the special law that entered into force in February. The government office Koridori Srbije[28], in charge of project implementation, announced that the construction of the road, which was 220 km long, was a project of special importance and impact on the development and improvement of infrastructural, economic and other interests of Serbia. The statement read: „The importance of the road is seen through its impact on the road network in Serbia, and beyond, as it will connect East Serbia with Central and West Serbia and the E-7 motorway, which is part of the international route E-75, i.e. Corridors 10 and E-763." The statement continued: „The route will connect East, West and Central Serbia with Belgrade and Vojvodina in the north, and on with Central and West Europe, and South Serbia with Macedonia, Bulgaria, the Middle East and Asia." The Šumadija Corridor, as it was dubbed, will pass through the municipalities of Sopot, Mladenovac, Lazarevac, Aranđelovac, Topola, Rača, Lapovo, Velika Plana, Svilajnac, Despotovac and Bor.[29] The estimated value

28 Koridori Srbije d.o.o. was founded in 2009 by the Government of the Republic of Serbia. It is responsible for the transport infrastructure (motorways) in Serbia, particularly investment in the construction of motorways, organising and performing expert work concerning the construction of motorways, including expropriation, planning and design, performing the works and expert supervision of the construction of motorways.

29 See: https://www.ekapija.com/en/news/2879852/put-vozd-karadjordje-gradice-se-po-leks-specijalisu-trasa-od-bora-do

of the project is between 1.7 billion and 2 billion EUR, or 2.3 billion EUR, depending on its final profile and access to other motorways.[30]

1.2 Bilateral (intergovernmental) agreements

As regards other European Commission recommendations that should have been implemented (at least to some extent) in 2020, only the new law on public procurement was adopted, whilst the new law on public-private partnership and concessions is still pending. In its Serbia 2020 Report, the European Commission states that its recommendations from 2019 were only partially implemented and remain valid. One problem in particular stands out: bilateral (intergovernmental) agreements concluded with third countries seriously undermine all national laws and regulations, preventing any – even minimal – competition. We have addressed this issue in this report, pointing to the practice of concluding contracts, especially for big infrastructure projects, without applying the law on public procurement. In this regard, let us go back to the findings of the study 2019 Public Spending Transparency Index:

The total value of 100 analysed contracts was 2,856,687,745, of which bilateral investment agreements totalled EUR 2,044,062,807 (71.55 %), public procurement EUR 610,461,438 (21.37 %), and the agreed public-private partnerships EUR 202,163,500 (7.08 %).

For the 12 highest-valued works, which were dominated by the deals made under bilateral investment agreements (as many as 11 out of 12), there was no competition whatsoever. By the will of the government, these deals are becoming more frequent. Competent authorities have failed to give any valid – or rather, any – explanation as to why these particular deals, which circumvented competition and national legislation, were more advantageous for Serbia. Competent authorities are yet to inform the citizens of Serbia how and when competition became an enemy to

30 See: http://2017.aurea.ekapija.ha.rs/en/news/2605551/vozd-karadjordje-high-speed-motorway-to-connect-corridors-x-and-xi-route#

quality and better prices [...] The contracts of the highest value are those concluded under bilateral investment agreements (EUR 2,044,062,807) [...] As regards bilateral investment agreements (11), four were signed with the European Investment Bank (EUR 262,000,000), three with the International Bank for Reconstruction and Development (EUR 124,100,000), two with The Export-Import Bank of China (EUR 1,285,462,807), one with the Council of Europe Development Bank (EUR 200,000,000) and one with the Government of the Russian Federation (EUR 172,500,000).

The findings of the Toplice Centre for Democracy and Human Rights lead to the following conclusions:

- Out of 12 highest-valued contracts concluded by the Serbian public sector in 2019, 11 were concluded under bilateral (intergovernmental) agreements;
- The share of contracts concluded under bilateral agreements in the 100 highest-valued contracts is 71.55 %;
- The contracts concluded under bilateral agreements were awarded without a transparent procedure or any competition.

This begs the following question: What is the real loss, or the extra cost, of restricting competition? Judging by the information in the media,[31] the cost of, say, the construction of a motorway where the contract was awarded in a non-competitive procedure (under a bilateral agreement) can vary as much as several million euros per kilometre of the motorway for the same or even simpler configuration of the terrain where the motorway is being built.

31 See: https://nova.rs/vesti/biznis/koliko-kosta-kilometar-autoputa-u-srbiji-a-koliko-van-nje/

1.3 Amendments to the law on public-private partnership and concessions

As noted earlier in this report, the recommendations of the European Commission from 2019 were only partially implemented and are still valid. One of the recommendations was that Serbia should ensure further alignment with the 2014 EU Directives on public procurement by adopting the amendments to the law on public-private partnership and concessions.

As regards the amendments, the Serbian Public Procurement Development Programme 2019–2023 states:

The European Union adopted special Directive 2014/23/EU on the award of concession contracts in 2014.

To fully align the Serbian law on public-private partnership and concessions (LPPPC) with Directive 2014/23/EU, the drafting of the amendments to the law started in 2018. The main aim was to make a clear distinction between a concession and a public-private partnership without concession elements.

The Public Procurement Development Programme also states the following:

As regards negotiation Chapter 5: Public procurement, comprehensive amendments to the law on public-private partnership and concessions must be made to enable full alignment of this important legislation with the EU acquis, primarily Directive 2014/23/EU on the award of concession contracts. A Working Group tasked with drafting the amendments to the law on public-private partnership and concessions (below: new LPPPC) has been established. The main aim of these amendments is to establish a clear distinction between a concession and a public-private partnership without the elements of concession, to meet the requirements of Directive 2014/23/EU.

There is no mention of any of this in the 2019 Report of the Commission for Public-Private Partnership and Concessions[32] or any other report by any of the competent institution, or on the Ministry of Economy website (in the section Legislative Work in Progress)[33] although this area falls under its competences. We do not know what the Working Group has done so far, although Serbia's obligation to draft a law amending the law on public-private partnership and concessions was repeatedly highlighted in the reports of the European Commission and the Serbian Public Procurement Development Programme 2019–2023. According to the Action Plan for the implementation of the Serbian Public Procurement Development 2019–2020, Measure 1 – Improve legal framework, the law amending the law on public-private partnership and concession will be adopted in Q4 2020. The end of the year is around the corner and the bill is not even in the parliamentary procedure.

1.4 The role of the Administrative Court in public procurement

The European Commission Serbia 2020 Report contains interesting observations on the role of the Administrative Court in public procurement, and the relationship of this court with the public procurement institutions. The report reads: „Due to limited specialisation and training, the Administrative Court's (AC) capacity to deal with complexity, diversity, and overall quantity of cases and lengthy legal proceedings remains weak. Improved cooperation between the PPO and AC on exchange of knowledge and information should be established. Limited collaboration between the Republic Commission and AC is hampering better enforcement of rights in the public

32 Available (in Serbian only) at: http://jpp.gov.rs/content/Datoteke/izvestaji/Извештај_о_раду_ Комисије_за_јавно-приватно_партнерство_Владе_ Републике_Србије_ за_2019._годину.pdf

33 Available (in Serbian only) at: https://privreda.gov.rs/cat_propisi/zakoni-u-pripremi/page/2/

procurement procedures. There are no feedback mechanisms informing the procurement officers of the Republic Commission's and/or AC's decisions."

This only confirms that administrative litigation, as regulated under the law on public procurement (both the old one and the new one) and the law on administrative litigation, is not an efficient way for dissatisfied participants in public procurement procedures to protect their rights. First, the proceedings take too long. In some cases, over a year would pass before the first hearing was scheduled, and it took even longer to deliver a verdict. By then, the disputed procurement had already been completed. Unless the case management improves, administrative litigation will remain inadequate. When the law on public procurement was being drafted, it was repeatedly suggested that its provisions on administrative litigation should be more detailed, more specific, to ensure efficient judicial control of the legality of the Republic Commission's decisions. This would not have been an isolated case as administrative litigation has already been regulated in more detail in another, similar area. Namely, under Article 72 paragraph 5 of the law on the protection of competition (another *lex specialis*), the Administrative Court must come to a decision within three months of the receipt of an answer to the charges, i.e. the expiration of the deadline for appeal to the charges. The same law prescribes deadlines for pressing charges and responding to the charges, as well as making decisions on remedies. Despite all these arguments, the proposers of the law on public procurement rejected the recommendation saying that the administrative litigation could not be regulated under a special law such as the law on public procurement.

Thus, the new law on public procurement did not bring any improvements or changes to administrative litigation in public procurement. Moreover, the general provisions of the law on administrative litigation are not fully applicable to the supervision of the Republic Commission's decisions, which hinders efficient judicial control of public procurement even further.

It is therefore necessary to strengthen the role of the Administrative Court, which decides in administrative litigations against the Republic Commission. This could be achieved by setting shorter deadlines for the court to act and authorising it to overturn the Republic Commission's decisions if there are sufficient grounds to do so. The current practice where the court returns the case to the Republic Commission to reconsider renders the already lengthy proceedings pointless as the Commission often makes the same decision again. So far, in the disputes of the so-called full jurisdiction, the Administrative Court has either rejected the charges or returned the cases to the Republic Commission to reconsider. For the power to act in a dispute of full jurisdiction to be effective, it is important that the judges of the Administrative Court specialise in public procurement, and that they collaborate with the Republic Commission. This is also important now, when the dispute of full jurisdiction is not properly regulated, as was also pointed out by the European Commission.

1.5 Integrity and conflict of interest

In its Serbia 2020 Report, the European Commission states that there were no developments in the area of integrity and conflicts of interest, implying that more attention should be paid to any improper influence on those who prepare and conduct public procurement procedures. Going forward, we expect that contracting authorities will make more effort to discover such cases and, as a result, there should be an increase in the volume of rejected tenders on the grounds of conflict of interest or violation of the integrity of the procedure.[34] We also expect appropriate action from the control bodies such as the Republic Commission,

34 Under Article 111 paragraph 1 point 4) of the new law on public procurement, conflict of interest is a mandatory ground for excluding a bidder. However, under Article 112 paragraph 1 point 4) of the same law, the violation of the integrity of the procedure (a situation where the bidder or associated person has participated in the preparation of the procurement procedure thus breaching competition rules) is not a mandatory ground for exclusion.

Public Procurement Office, State Audit Agency, misdemeanour courts[35], and competent prosecutors' offices and courts of law.[36]

A conflict of interest is a situation where a person holding public office or performing a professional activity makes decisions or acts in a way that serves the interests of that person, someone close to them or a social group or an organisation rather than the public interest. It is a conflict between a private and a public interest, where there is too high a risk of the private interest prevailing over the public interest, i.e. a risk of corruption.

Conflict of interest has many forms and may occur before, during or after making a decision in a procedure. It happens when a person who participates in the decision-making, or other activities of a government body or a public institution, does so with bias, in their own or another person's interest instead of the public interest. A private interest prevails where a person who represents the public interest is somehow connected to a person who represents a private interest, usually through family, financial or political connection.

The previous law on public procurement prescribed penalties for failing to comply with the rules on conflict of interest. Under Article 168, public procurement contracts were null and void if concluded contrary to the provisions of that law governing prevention of corruption and conflict of interest. Under Article 169, a contracting authority would be fined from RSD 200,000 to RSD 1,500,000 (a fine for a responsible person in the contracting authority ranged from RSD

35 Under Article 236, paragraph 1 of the new law on public procurement, a contracting authority that fails to comply with the provision of Article 90 thereof, which regulates protection of the integrity of the procedure, will be fined from RSD 100,000 to 1,000,000. Under paragraph 3 of the same Article, a representative of the contracting authority participating in a public procurement procedure contrary to the provisions of that law concerning conflict of interest (Article 50) will be fined from RSD 30,000 to 80,000.

36 Conflict of interest and violation of the integrity of the procedure, being conscious intentions of the participants in the procurement procedure which the contracting authority has not prevented, may be deemed a criminal offence relating to public procurement under Article 228 of the Criminal Code.

80,000 to RSD 150,000) for concluding a public procurement contract despite the existing conflict of interest.

According to the records of the competent authorities, not a single public procurement contract was deemed null and void on the grounds of conflict of interest and no public buyers (including their responsible persons) were fined for a misdemeanour pertaining to conflict of interest in a misdemeanour proceeding before the Republic Commission. Under Article 236 paragraph 3 of the new law on public procurement, a contracting authority with a conflict of interest in a public procurement procedure is deemed to have committed a misdemeanour, but the law no longer envisages the nullity of contracts concluded in such procedures. We expect that misdemeanour courts, which on 1 July 2020 took over the jurisdiction over the first-instance misdemeanour proceedings pertaining to the breaches of law on public procurement, will start issuing fines for these misdemeanours, as opposed to the period before that date when misdemeanor proceedings were not even held for conflicts of interest.

Evidently, conflicts of interest in public procurement were not penalised in misdemeanour proceedings and no proceedings establishing the nullity of contracts were instituted before competent courts. Criminal proceedings were never instituted either although, in our opinion, conflict of interest in public procurement should be a matter of criminal law. The Republic Commission has made only a few decisions on the conflict of interest, annulling the disputed public procedures. The Republic Commission has annulled public procurement procedures (in their entirety) for the following reasons:

- The members of the procurement committee of the contracting authority did not sign a conflicts of interest declaration, or they did not sign the declaration before initiating a procurement procedure (e.g. before the preparation of procurement documents started);
- The deputy members of the contracting authority's procurement committee did not sign a conflicts of interest declaration;

- The nominated members of the contracting authority's procurement committee were the bidder's employees;
- The nominated members of the contracting authority's procurement committee were in some form of business relationship with the bidder (e.g. they were the employees of the agency hired by the selected bidder to provide a quality report submitted with the offer).[37]

Conflict of interest in public procurement is mentioned in the anti-corruption law, but only in the context of public officials.[38] Under Article 53 paragraph 1 of the law, a legal entity whose more than 20 % shares is owned by a public official or his/her family member during public office and two years after its completion, which has participated in a public procurement procedure or privatisation or another procedure resulting in a contract with a public authority, another government budget beneficiary or a legal person whose more than 20 % of capital is owned by the Republic of Serbia, an autonomous province or a town/city municipality, within 15 days from the day of completion of the procedure must send a notice to the Agency containing the following:

1) Information on the notice sender (name of legal person, registration number, head office address, full name of the responsible person);
2) Name and surname of the public official and/or a public official's family member;
3) Name of the contracting authority;
4) Type and subject matter of the procedure;
5) Start and end dates of the procedure;

37 See the Republic Commission Decisions Nos. 4-00-683/2015, 4-00-945/2015, 4-00-2113/2014 and 4-00-3119/2014 (available in Serbian only).

38 Anti-corruption law (Official Gazette of RS 35/2019 and 88/2019).

6) Decision on the procurement, privatisation or another procedure, the procurement number and the value of the procurement, privatisation or another contract;

7) Responsible person's signature.

The old law on the Anti-Corruption Agency[39], which expired when the application of the anti-corruption law started (1 September 2020), had a similar provision but with a key difference. Article 36 of that law applied to public officials but not their family members. So, the new law has been improved as it envisages that not only public officials but also their family members may have conflicted interests in public procurement procedures. We will see if it helps boost the efficacy of the competent agency. Experience has taught us that there is little reason for optimism, as was pointed out in the European Commission Serbia 2020 Report.

The Anti-Corruption Agency has received many reports of conflicts of interest in public procurement under the anti-corruption law. The information is available on its website (the Public procurement, Privatisation and Other Procedures search box).[40] According to its 2019 annual report[41], that year, nine public buyers in which public officials were holding over 20 % shares sent the Agency a total of 111 notices of participation in public procurement procedures and 101 notices of completion. All notices were verified and published on the Agency website. The report also states that proceedings were instituted against seven responsible persons in legal entities for not informing the Agency about participating in public procurement procedures.

However, the question is what the Agency has done to investigate these claims, or at least those that clearly pointed that conflict

39 Law on the Anti-Corruption Agency (Official Gazette of RS 97/08, 53/10, 66/11 – US, 67/13 – US, 108/13 – other law, 112/13 – authentic interpretation and 8/15 – US).

40 Available (in Serbian only) at: http://www.acas.rs/pretraga_registra/#/acas/postupakJavneNabavke

41 Available (at the time of this report, in Serbian only) at: http://www.acas.rs/wp-content/uploads/2020/03/ACASizvestaj2019WEB.pdf

of interest had lead to favouring certain tenderers, and to follow up them up with requesting proceedings before competent authorities. The impression is that even when the Agency investigates, there are no proceedings before competent authorities or penalties. There were many reports in the media, especially in 2020, about the bidders who were public officials' family members (they were related to the Prime Minister, Minister for Justice, Deputy Head of the Institute for Public Health, Provincial Health Secretary), and who were favoured by the public buyers and awarded valuable contracts.[42] One such case was covered by the article „Minister's Husband's Company Gets a Public Procurement Contract – Is There a Conflict of Interest and What is the Main Issue", published on the Transparency Serbia website.[43]

The Centre for Applied European Studies has addressed this issue in its case study *Procurement of Medical and Sanitary Supplies and Equipment*[44]. In July 2020, the Republic Healthcare Insurance Fund conducted a negotiated procedure without prior publication for the procurement of sanitary and medical consumables whose estimated value was over RSD 1.5 billion, although it did not meet legal requirements. The urgency of the procurement was justified by the epidemiological situation in the country, i.e. the increased consumption of medical and sanitary material due to the increase in the number of

42 For example (available in Serbian only): „Nevidljivi premijerkin brat" [Prime Minister's Invisible Brother], *Vreme*, (https://www.vreme.com/cms/view.php?id=1872092); „Srbija među najkorumpiranijima u Evropi, muž Nele Kuburović samo u aprilu zaradio 3 miliona evra" [Serbia One of the Most Corrupted Countries in Europe – Nela Kuburović's Husband Makes EUR 3 Million in April Alone], *Slobodna televizija*, (https://slobodna.rs/drustvo/srbija-medju-najkorumpiranijima-u-evropi-muz-nele-kuburovic-samo-u-aprilu-zaradio-3-miliona-evra/); „Ko nije za sebe nije ni za krizni štab" [If you are not motivated by personal gain, you are not fit for the crisis staff], *Vreme*, (https://www.vreme.com/cms/view.php?id=1781029); „Korupcionaški skandal: Rođaka dr Gojkovića snabdevala RFZO" [Corruption Scandal: Dr Gojković's Cousin Supplies the RHIF], *TV Nova S* (https://nova.rs/vesti/drustvo/korupcionaski-skandal-sestra-dr-gojkovica-snabdevala-rfzo/).

43 Available (in Serbian only) at: https://www.transparentnost.org.rs/index.php/sr/aktivnosti-2/pod-lupom/11429-javne-nabavke-od-firme-ministarkinog-supruga-ima-li-sukoba-interesa-i-sta-je-glavno-pitanje

44 See: https://cpes.org.rs/sanitetski-i-medicinski-potrosni-materijal/?lang=en

people infected with the SARS-CoV-2 virus. However, some lots had nothing to do with the treatment of coronavirus patients and were not mentioned in the treatment protocol. Furthermore, considering that the framework contract (mostly for the consumables that were not going to be used for the treatment of Covid patients) was of high value and that it was awarded to the company owned by a relative of the provincial Deputy Prime Minister and Health Secretary, Zoran Gojković, it was inevitable that the issue of conflict of interest would arise.

Like many times before, the Anti-Corruption Agency (the competent authority) responded only after persistent media coverage of the case, stating that a procedure had been initiated against Zoran Gojković to assess whether the criteria were met for instituting a proceeding on the grounds of violation of the anti-corruption law. Had the Agency reacted promptly and declared its position on the alleged conflict of interest voluntarily, attention would have shifted much faster to what should have been the real issues: whether the public procurement had met the criteria for a negotiated procedure without publication, whether the government budget was unduly affected, whether competition was restricted, etc., especially considering that under the law on public procurement and the anti-corruption law, it is unlikely that there was a conflict of interest in the first place. With its belated response, and a proceeding whose outcome remains unknown to this day, the Agency only fuelled speculation in the media, drawing attention away from what was supposed to be the main issue in this specific case.

Incidentally, only a month after the procurement procedure was completed, the Republic Healthcare Insurance Fund terminated the framework agreements. According to its press release, this was done because the healthcare institutions that have requested urgent procurement of medical supplies have, in the meantime, received them from other sources and the epidemiological situation has become more stable.

This epilogue only confirms that, in this particular case, there were no grounds for a negotiated procedure without publication, and that the procurement procedure was illegal. The entire case shows

that, despite all the odds, the independent media and the public are an important corrective to the government's unlawful actions, especially when the competent authorities tasked with keeping an eye on such behaviour are not doing their job.