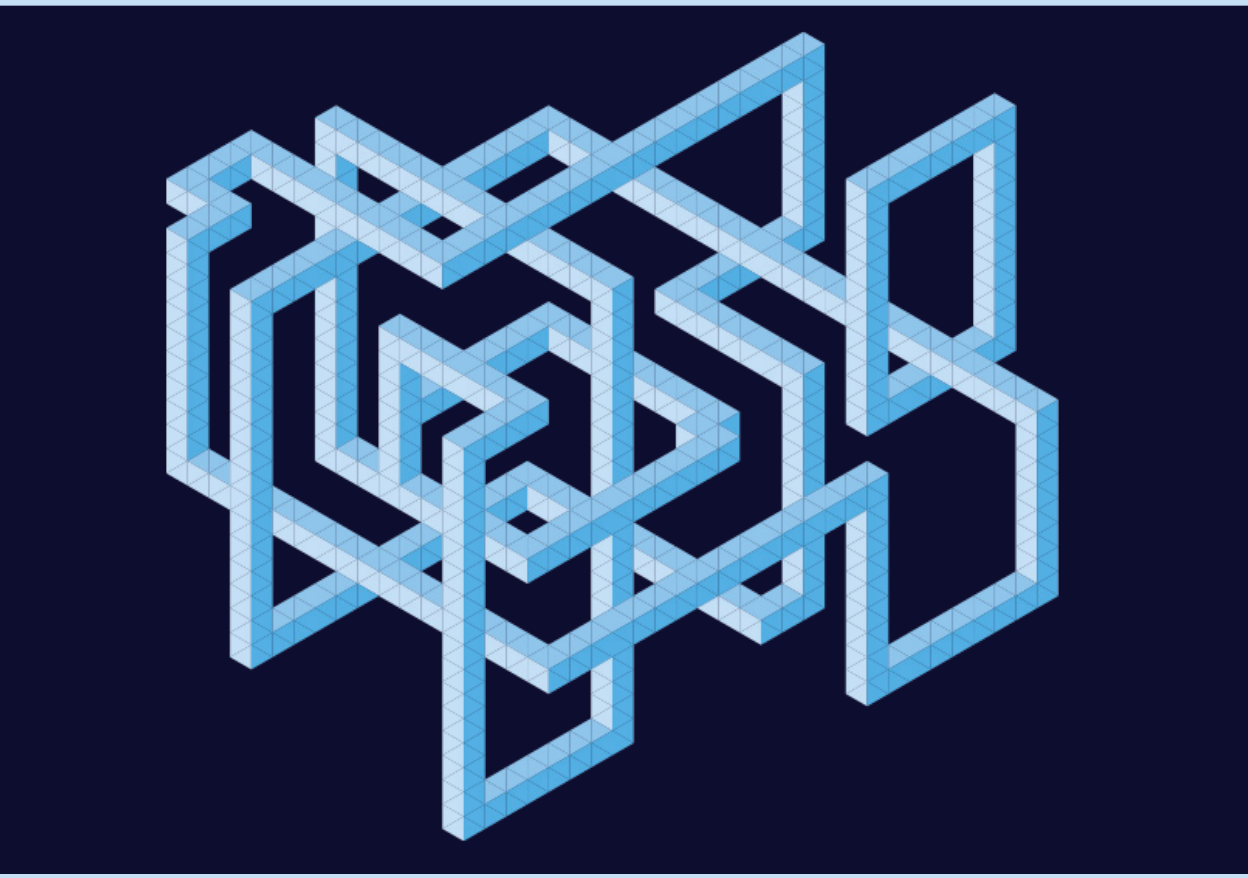
ALARM REPORT on the State of Play in Public Procurement in Serbia 2022



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ALARM REPORT

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December 2022

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Content

Introduction

A year after the release of the last Alarm report on the state of play in the field of public procurement in Serbia (November 2021),[1] the situation in this important area unfortunately has not changed. Over the course of three years (2018–2021), the Alarm reports mostly noted a regression in the field of public procurement or stagnation at best, with rare positive steps forward, such as the partial harmonization of legislation with EU directives or the start of the implementation of the new Public Procurement Portal.

Due to this situation in the field of public procurement, the annual reports of the European Commission on the progress of Serbia in the implementation of reforms and European integration for 2019 and 2022, note that Serbia has not made any progress in this area, while in the reports for 2020 and 2021, a somewhat euphemistic assessment was made that limited progress had been achieved (primarily due to the start of the implementation of the new Public Procurement Law and the new PP Portal). Similar assessments of the state of public procurement in Serbia are given in the reports of some other European organizations.

In this issue of Alarm report, we wanted to avoid using yet another catchphrase that describes the state of public procurement in Serbia ("progress in regressing", "one step forward, two steps back"). Therefore, we decided to present the key findings and offer a comprehensive overview of the current situation in this area through the

1 https://media.cpes.org.rs/2022/02/Alarm-4-ENG.pdf

analysis of some of the documents relevant to public procurement, and to propose certain measures that, in our opinion, are necessary in order to get things going from a standstill.

Of the documents that best reflect the current state of public procurement, in this issue of Alarm we have analyzed the annual report of the European Commission on the progress of Serbia, the Monitoring report on the implementation of the principles of public administration - SIGMA, as well as the reports of the State Audit Institution, and the Public Procurement Office.

Key findings

Considering the aforementioned reports, as well as everything that we wrote about in previous Alarm reports, several key problems stand out as neuralgic points in the public procurement system in Serbia.

- **A large number of exemptions from the Law on Public Procurement**

  The basic prerequisite for the construction of a functional and fair public procurement system in Serbia is the repeal of the Law on Linear Infrastructure Projects, and the abolition of the practice of awarding contracts for large infrastructure projects through interstate agreements.

- **Absence of competition and lack of transparency in public procurement procedures**

  The problem of the absence of competition can be solved by the contracting authorities consistently applying the Law on Public Procurement, but also by the key institutions in the public procurement system consistently and timely performing their functions and using legal powers; in the first place, we are referring to the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procurement Procedures and the Administrative Court, but also to the institutions such as the Commission for the Protection of Competition, the Agency for Prevention of Corruption, the State Audit Institution and competent courts and prosecutor's offices. The solution, therefore, lies in the famous phrase that "competent authorities should do their job".

- **Incomplete harmonisation of national legislation with EU acquis**

  Bearing in mind that the public procurement system in a broader sense also includes public-private partnerships and concessions, for the full harmonization of national legislation in this area, it is necessary to adopt amendments to the Law on Public-Private Partnerships and Concessions without any further delay, in order to harmonize it with Directive 2014/23/EU on the award of concession contracts.

- **Non-compliance with environmental principles in public procurement**

  In order to ensure respect for ecological principles in public procurement, we believe that it is necessary to amend the Law on Public Procurement: in addition to the existing obligation of bidders to act in accordance with the "green" regulations, it is also necessary to prescribe the obligation of the contracting authority to, when determining the technical specifications, selection criteria and the criteria for awarding the contract, take into account environmental and energy efficiency requirements.

- **Lack of contract performance supervision**

  In order to ensure detailed monitoring and increased transparency in the execution phase of public procurement contracts, we believe that it would be beneficial to enable contracting authorities to publish on the PP Portal data concerning the execution of contracts. In this way, the principle of transparency in the spending of taxpayers' funds would be fully realized, while the possibility of abuses in the contract implementation phase would be minimized. Also, in this way, it would be much easier to exercise the powers and obligations related to the supervision of the execution of public procurement contracts. In addition, in order to prevent unfounded changes to the contract during its implementation and corrupt agreements between the contracting parties and selected bidders, it is necessary that the Ministry of Finance,

in accordance with the law and without any further delay, starts supervising the execution of public procurement contracts.

- **Insufficient capacities of key institutions in the public procurement system (Public Procurement Office, Republic Commission and Administrative Court)**

  Public Procurement Office: In order to increase the range and quality of monitoring, we believe that it would be necessary to prescribe the deadlines for the PP Office's action, the minimum range of monitoring and the number of public procurements that will be controlled, as well as the time of conducting of regular controls, which is not the case now.

  Republic commission: Bearing in mind the importance of this body for the entire public procurement system, it is necessary that the Republican Commission without further delay start using all the powers given to it by the Law on Public Procurement, and above all start holding oral hearings and engage experts in situations when it is necessary to clarify the factual situation and make a proper judgment. Also, in order to ensure legal security, it is necessary for the Republican Commission to establish a uniform legal practice and improve the quality of its decisions so that they are understandable for both the contracting authorities and the bidders.

  Administrative Court: In order to make judicial protection in public procurement more efficient and effective, it is first of all necessary to adjust the deadlines for the Administrative Court's actions to the specific nature of public procurement by prescribing shorter deadlines for the Administrative Court to make a decision (ruling) in administrative litigations concerning public procurement procedures. Furthermore, it is very important to prescribe the obligation for the Administrative Court to decide in a "dispute of full jurisdiction" when it determines that there are reasons for the annulment of the Republic Commission decision: in that case, instead of returning the case to the Republic Commission for reconsideration, the Court should decide on the

request itself (especially because after reconsidering, the Republic Commission usually makes the same decision, rendering the already lengthy administrative litigation completely pointless). And in order for the power to act in a dispute of full jurisdiction to be effective, it is important that the Administrative Court judges are specialized in public procurement, and that they collaborate with the Public Procurement Office and the Republic Commission. Also, a right of action should also be granted to the contracting authorities as the representatives of the public interest, or to entities above contracting authorities in the hierarchy (for example, the founder of the public company or a ministry, where the contracting authority is a lower-ranking government body, etc.), given that protection of rights encompasses both bidders and purchasers.

- **Ineffective legal protection (under criminal and misdemeanor laws)**

  To improve the efficiency of public prosecutor's offices and courts of law and create conditions for legal provisions protecting the legality of public procurement procedures to become a real and serious threat to potential perpetrators of offences and achieve prevention in general, it is necessary to clarify and specify in more details the act of committing this criminal offence by narrowing down the act of perpetration and by defining the terminology used to stipulate the substance of the criminal offence. Furthermore, it is necessary to ensure better coordination between public prosecutor's offices and state bodies authorized to act in public procurement matters (Public Procurement Office, Republic Commission for Protection of Rights in Public Procurement Procedures, State Audit institution, Commission for Protection of Competition, Budget Inspection). This could be done through liaison officers and task forces provided for in the law, as well as through other forms of cooperation. Besides that, it is also necessary to increase and strengthen staff capacity by increasing the number of employees and by conducting continuous

trainings in the complex matter of public procurement, with the simultaneous strengthening of technical capacities (computers and other necessary equipment).

In addition, regarding the possible amendments to the criminal and misdemeanor provisions, the inadequately stipulated gravity of the violation of regulations should be eliminated: failure to apply the Public Procurement Law (failure to implement a public procurement procedure) should be deemed as a criminal offence, not a misdemeanor.

1. European Commission 2022 Progress Report on Serbia

2022 Progress Report on Serbia was published in October 2022.[2] The Report states that Serbia is moderately prepared in the area of public procurement, but that no progress was made in the reporting period.

Identical remarks were made in the 2019 Progress Report as well, where it was stated that Serbia: a) should ensure further alignment with the 2014 EU Directives on public procurement, including public-private partnership and concessions, b) should ensure that intergovernmental agreements concluded with third countries do not violate the basic public procurement principles, and c) should continue to strengthen the capacity of the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procedures and the administrative courts. Since then, only one recommendation was implemented (new Public Procurement Law was adopted), so the latest European Commission remarks don't really come as a surprise.

At the same time, when it comes to the harmonization of legislation in the field of public procurement, Serbia did adopt a new Public Procurement Law that entered into force on January 1, 2020, but not long after that it also adopted the now famous Law on special procedures for linear infrastructure projects of special importance for the Republic of Serbia (hereinafter: Law on linear infrastructure projects) that enabled the government to exempt linear infrastructure projects

2 https://www.mei.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/ec-report-2022.pdf

of 'special importance for the Republic of Serbia' from the application of public procurement rules. Simply put, this law that entered into force on February 12, 2020, enabled the government to suspend the Public Procurement Law for largest infrastructure projects.[3]

On the other hand, when it comes to public-private partnership and concessions, to this day Serbia has not yet adopted amendments to the existing law in order to bring it into line with EU directives.

Bearing in mind all of the above, after 2019 the already existing list of the EC recommendations was modified and expanded, so from 2020 (to date) Serbia is expected to:

- Repeal the law on special procedures for linear infrastructure projects;
- Ensure full alignment with the 2014 EU Directives on public procurement, in particular by adopting amendments to the Law on public-private partnerships 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, 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 Partnerships and Concessions, the Republic Commission for the Protection of Rights in Public Procedures, and the administrative court.

When we take a look at these recommendations that have been repeating in the last few years, if we exclude the one that refers to the adoption of the Law on Amendments to the Law on Public-Private Partnerships and Concessions, it is clear that the main objection of the European Commission is the existence of a large number of exemptions from the application of the Law on Public Procurements.

3 More details on Law on linear infrastructure projects can be found in 2020 Alarm report at https://media.cpes.org.rs/2021/03/Alarm-2020-engleski.pdf

This serious problem is pointed out not only in the section that refers to Chapter 5 (Public Procurement), but also in the section that refers to the management of public finances, as well as in the section that talks about the fight against corruption. It is particularly emphasized that a large number of exemptions from the application of the Public Procurement Law represent a serious risk of corruption in this area. It is also noted that the Law on Linear Infrastructure Projects lacks clarity of selection procedures and transparency, but that even intergovernmental agreements do not always comply with the principles of equal treatment, non-discrimination and transparency or competition rules.

The value of procurements exempted from the application of the Public Procurement Law skyrocketed by 88 % or by EUR 1.5 billion when compared to the previous year, to a total value of EUR 3.2 billion. Exemptions from the application of the Public Procurement Law accounted for 67 % of the cumulative value of all public procurement contracts concluded in 2021.

Furthermore, in its Annual 2021 Report, the **State Audit Institution** identified contracts worth EUR 150 million that were exempted from public procurement procedures with no valid justification, accounting for 33% of all identified irregularities in 2021. The most frequently used legal basis for exemption was intergovernmental agreements that accounted for 22.7% of the total value of exemptions in 2021.

In addition to the non-implementation of the public procurement procedure, State Audit Institution identified numerous other irregularities related to:

- public procurements in which an act on the closer regulation of the public procurement procedure has not been adopted, or funds for procurement have not been planned or allocated, or the said

acts have not been published, in the total amount of 68.58 million dinars;

- irregularities during the implementation of the public procurement procedure, in the total amount of 28.15 billion dinars;
- irregularities during the conclusion of contracts, in the total amount of 4.14 billion dinars;
- irregularities during the execution of contracts, in the total amount of 3.44 billion dinars.

The total amount of participation of all irregularities in relation to the amount included in the audit was 44.50%.

Due to such a large number of observed irregularities in public procurement contracts determined by the State Audit Institution, the European Commission in its report warned Serbia of the danger of regression in the field of public procurement.

On the positive side, the EC report states that the proportion of negotiated procedures without prior publication stood at 7.7% of the total value of contracts concluded in 2021, decreasing from 23.2% registered in the second half of 2020.

However, despite the significant drop in the share of negotiated procedures without prior publication, it should be said that the share of almost 8% is still very high, primarily bearing in mind that negotiated procedures are the least transparent procedures where competition is almost always limited. For example, the share of these procedures in the total value of concluded contracts was 3% in 2018, 4% in 2019, and 2.5% at the beginning of 2020.

On the other hand, this drop was expected, since during 2020 negotiated procedures were largely used in response to the COVID-19 pandemic, in order to speed up public procurement procedures. Mostly unjustified, bearing in mind the Public Procurement Law and the Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19

crisis, which we wrote about in more detail in the Alarm Report from May 2021.[4]

In this regard, let's remember that the principle of transparency in public procurement during the COVID-19 pandemic was not threatened only by the unreasonable implementation of negotiated procedures without prior publication. The principle of transparency was also completely suspended during the procurement of medical equipment carried out by the Republic Health Insurance Fund (RFZO) in the name and at the expense of healthcare institutions during and after the state of emergency. Namely, the Government of the Republic of Serbia declared the information on these procurements "strictly confidential", and to this day the legal grounds for this decision remain unknown as the Government Conclusion itself is also designated as "strictly confidential".

Because of the above, the European Commission, repeating the last year's report, recommended that it would be especially important "to maintain audit trails" with regard to procurements carried out during the pandemic, all in order to mitigate the risks of fraud and corruption. It was also pointed out that the disclosure of all information linked to procurement conducted in relation to COVID-19 on government portals would certainly contribute to enhanced transparency and trust.

Finally, it is important to mention that, as in every report since 2015, the 2022 Report also points out that the Administrative Court's capacity to deal with the complexity, diversity and overall quantity of cases and lengthy legal proceedings remains weak and needs to be additionally strengthened. It was also noted that the "cooperation between Public Procurement Office and the Republic Commission with the Administrative Court on exchange of knowledge and information remains to be strengthened".

Finally, the EC 2022 Report, same as every previous report, states that no progress has been made in integrity and conflict of interest.

4 https://media.cpes.org.rs/2021/07/Alarm-3-ENG.pdf

2. Monitoring Report on the Principles of Public Administration - SIGMA

SIGMA is a joint initiative of the OECD and the EU whose aim is to support the public administration reform of countries that are in the process of joining the European Union.

As we already wrote in the first issue of the Alarm Report from October 2019, SIGMA monitors the implementation of the principles of public administration assessing the state of play and progress in this area. Each principle consists of an indicator and several sub-indicators; the indicator value is based on the total number of points received for the sub-indicators. Based on the overall results regarding the fulfillment of the principles, it is possible to monitor progress in the field of public procurement over time. The principles of public administration define what good governance entails in practice and highlight the main requirements that EU candidate countries should meet. SIGMA monitoring reports are very important, and the European Commission takes them into account when preparing its Progress Reports.

SIGMA has carried out reviews against the Principles of Public Administration[5] in EU candidate countries and potential candidates since 2015. Since 2017, these reviews have been carried out based on

5 https://www.sigmaweb.org/publications/principles-public-administration.htm

the Methodological Framework for the Principles of Public Administration.[6]

According to this Methodological Framework, the area "Public Financial Management" includes principles related to public procurement (10-14). Each Principle is measured by a series of qualitative and quantitative indicators, with the total final value for the indicators that goes on a scale from 0 (the lowest) to 5 (the highest).

The Methodological Framework provides a comprehensive monitoring framework for assessing the state of a public administration against each Principle previously mentioned. The Framework features a complete set of indicators, focusing on the preconditions for a good public administration (good laws, policies, and procedures) and how the administration performs in practice, including the implementation of reforms and subsequent outcomes. Benchmarks and performance criteria have been defined to analyze both the state of play at a point in time and a subsequent progress a country makes towards the standards for good governance.

In November 2021, Reports on monitoring the implementation of the principles of public administration were published, covering the full scope of the principles for Albania, Kosovo, Montenegro, Republic of North Macedonia, and Serbia.[7]

The following is a summary of the assessment of the implementation of public administration principles related to public procurement in Serbia.

Principle 10 – Public procurement regulations (including public private partnerships and concessions) are aligned with the EU acquis, include additional areas not covered by the acquis, are harmonized with corresponding regulations in other fields, and are duly enforced.

When it comes to the implementation of this principle, according to the SIGMA report, the overall indicator value (1-5) is 4, which

6 https://www.sigmaweb.org/publications/Methodological-Framework-for-the-Principles-of-Public-Administration-May-2019.pdf

7 https://www.sigmaweb.org/publications/Monitoring-Report-2021-Serbia.pdf

represents progress compared to the previous report when the value of the indicator was 3.

This indicator measures the quality of the legislative framework for public procurement and public private partnerships and concessions, above and below EU thresholds. Opportunities for participation of small and medium-sized enterprises in public procurement are assessed, as well as whether practical measures are taken to allow proper implementation of the legislation. The other indicators in the public procurement area analyze the actual implementation of laws and regulations and the results thereof.

According to the report, Serbia has made some progress in the implementation of this principle, primarily due to the adoption of the new Public Procurement Law. In this regard, it was pointed out that the public procurement regulations are largely aligned with the 2014 EU Directives. At the same time, the Report warned that the integrity of the entire public procurement system is seriously threatened by the possibility of awarding contracts for infrastructure projects without applying the Public Procurement Law, made possible by a special law (Law on linear infrastructure projects) and bilateral agreements with other countries. It was also noted that the new Directive 2014/23/EU on concessions has not yet been transposed into national legislation.

Principle 11 – There is central institutional and administrative capacity to develop, implement and monitor procurement policy effectively and efficiently.

When it comes to the implementation of this principle, according to the 2021 SIGMA report on Serbia, there has been no change. Overall 2021 indicator value is 4, the same as in the previous report.

This indicator measures to what extent public procurement policy is systematically developed, implemented, and monitored, how central public procurement functions are distributed and regulated, and to what extent the preparation and implementation of policies is open and transparent.

The report notes that the key institutions in the public procurement system (the Public Procurement Office and Republic Commission

for the Protection of Rights in Public Procurement Procedures) are well established and perform all the main functions. However, some contracts are awarded based on special law and bilateral agreements and remain outside monitoring and control. Shortcomings are also observed in the area of public-private partnerships and concessions where many functions are not performed at all, such as monitoring and control or professionalization and capacity-strengthening functions, or are performed less efficiently, as in the case of advisory and operation's support, or publication and information functions.

The co-ordination between the main institutions responsible for the public procurement system was assessed as sporadic, although the COVID-19 pandemic situation might have contributed to this. Finally, it was stated that thanks to the new PP Portal, the Public Procurement Office now has full access to a comprehensive range of procurement data, but contract management remains beyond the data collection system.

Principle 12 – The remedies system is aligned with the EU acquis standards of independence, probity and transparency and provides for rapid and competent handling of complaints and sanctions.

The overall value for this indicator remained unchanged (4), although some positive steps have been made.

This indicator measures the effectiveness of the system for protection of rights in public procurement. First, the quality of the legislative and regulatory framework is assessed, specifically in terms of compliance with EU Directives. Then, the strength of the institutional set-up for handling complaints and the actual performance of the review system are measured and analyzed. Finally, the performance of the remedies system for public-private partnerships and concessions is evaluated.

According to the Report, the remedies system is aligned with the EU acquis standards. The introduction of the opportunity to lodge the request for protection of rights through the PP Portal solved the problem of submission outside working hours of the Republic Commission for Protection of Rights. The Report also states that the Republic

Commission successfully adopted instruments for work co-ordination, and that the quality of its decisions is good. On the other hand, it is noted that the accessibility to decisions issued by the Republic Commission may be improved with faster publication times, and that the mechanism ensuring the availability of Administrative Court judgments need to be created.

Principle 13 – Public procurement operations comply with basic principles of equal treatment, non-discrimination, proportionality, and transparency, while ensuring the most efficient use of public funds and making best use of modern procurement techniques and methods.

Overall, the value for this indicator is 3, the same as in the previous Report. This indicator measures the extent to which public procurement operations comply with basic principles of equal treatment, non-discrimination, proportionality, and transparency, while ensuring most efficient use of public funds. It measures performance in the planning and preparation of public procurement, the transparency and competitiveness of the procedures used, the extent to which modern approaches and tools are applied, and how the contracts are managed once they have been concluded.

Therefore, according to the SIGMA report, the value of this very important PP indicator has remained at the relatively low level and no progress has been made.

Hopefully, the implementation of the new Public Procurement Law (July 2020) along with the wider use of e-procurement might positively influence the scoring in coming years. It is important to note here that the SIGMA Report was written in 2021, and that it refers to the previous year, 2020, in which the new Public Procurement Law, as well as the new e-Portal, were first implemented (July 1st). It was assessed that the e-submission of tenders enabled by the new PP Portal is a significant step toward the efficiency of public procurement operations. Framework contracts and centralized procurement play an important role in the system, but despite the positive changes, the public procurement market appears not very attractive to the business sector. The main issue in this area remains the fact that the extremely

high number of awarded contracts is based on price-only criterion and that the number of procedures in which only one tenderer submitted an offer affect the expected effects of the procurement procedures.

Finally, the contract management and execution phase were criticized. As stated in the Report, the methods of contract management are neither regulated in the PPL or its by-laws; and no special guidelines or instructions were adopted. There is no evidence that systematic ex post evaluation is conducted by contracting authorities. The weaknesses of contract execution are confirmed in the State Audit Institution's report: observed irregularities during execution of the contracts amount to approximately EUR 57.5 million and are related to the modification of contractual conditions during implementation without deciding on amending the contract, improper performance of contracted works, or non-compliance with contractual obligations.

Principle 14 – Contracting authorities have the appropriate capacities and practical guidelines and tools to ensure professional management of the full procurement cycle.

According to the SIGMA report, Serbia has regressed in the implementation of this principle. Overall value for this indicator is 3 (it was 4 in the previous report). The reduction is mainly due to the delays in preparing good-quality materials adjusted to the new law. However, the Report notes that the COVID-19 pandemic probably influenced the overall situation.

This indicator measures the availability and quality of support given to contracting authorities and economic operators to develop and improve the knowledge and professional skills of procurement officers and to advise them in preparing, conducting, and managing public procurement operations. This support is usually provided by a central procurement institution. This indicator does not directly measure the capacity of contracting authorities and entities. It assesses the scope of the support (whether all important stages of the procurement cycle are covered), its extent, and its quality and relevance for practitioners (whether it provides useful, practical guidance and examples).

As stated in the Report, key materials (instructions, guidelines, and models) are available to assist contracting authorities in complying with procedural regulations, but they do not cover all stages of the procurement process in-depth. More practical examples are needed. It was also noted that the introduction of the new PP Portal was accompanied by the preparation of good-quality instructions, which refer mainly to technical operations. Finally, the Report observes that the training activities that are available on the market for both contracting authorities and economic operators are not of high interest, and that the Public Procurement Office provides advice and support on the interpretation of legal provisions and on certain practical matters.

3. Neuralgic Points in the Serbian Public Procurement System

Considering the reports mentioned above and everything we have discussed in the previous Alarm Reports over the years, the following problems stand out as neuralgic points in the public procurement system in Serbia:

1) Too many exemptions from the law on public procurement;
2) Absence of competition and insufficient transparency in public procurement procedures;
3) Incomplete harmonisation of national legislation with the EU regulations;
4) Non-compliance with environmental principles in public procurement;
5) Absence of supervision of the performance of public procurement contracts;
6) Insufficient capacity of key institutions in the public procurement system (Public Procurement Office, Republic Commission for the Protection of Rights in Public Procurement, Administrative Court), and
7) Ineffective legal protection (under criminal and misdemeanour laws).

If it solved these problems, Serbia would certainly achieve significant progress in the field of public procurement and simultaneously meet the criteria for closing Chapter 5. And not only that. A sound

system of public procurement would be established, resulting in less corruption, the restoration of citizens' trust in institutions, bigger budget savings and a better quality of life for citizens.

Thus, the treatment of identified neuralgic points should by no means be viewed exclusively in the context of European integration or as an unfairly imposed obligation. On the contrary, public procurement should be seen as a carrier of social change. Simply put, this is because through public procurement the state spends taxpayers' money on the goods, services and works that ultimately serve all of us. Citizens should be aware that the quality of health care, the air we breathe and the public transport we use largely depends on well-planned and carried out public procurement. Also, citizens should be interested in what their money is being spent on, whether what is being procured is necessary, whether more money is being spent than necessary, the quality of what is being procured, etc.

How developed the public procurement system of a country can be observed through the so-called seven-stage model,[8] which we wrote about in the Alarm Report in May 2021. According to this model, public procurement in the initial stage should only enable the procurement and delivery of goods, services and works through the adoption of public procurement laws. In the later stages of development, through public procurement procedures, the state should ensure the rational use of public funds, the responsibility of the contracting parties

8 Telgen, J., Harland, C., & Knight, L., "Public procurement in perspective". In L. Knight, C. Harland, J. Telgen, K. V. Thai, G. Callender, & K. McKen (Eds.), *Public Procurement: International cases and commentary,* Oxford, 2007, Routledge, pp. 16–24

and the application of value-for-money criteria so that in the final stage public procurement drives the achievement of wider social goals, such as creating new jobs, encouraging innovation, greater participation of small and medium-sized enterprises, improving the environment and public health, etc. [9]

Unfortunately, judging by what we have seen so far, we must conclude that according to this model, public procurement in Serbia is still in the initial stage of development characterised by the mere existence of the public procurement law. Moreover, given that in numerous cases the law on public procurement is not adhered to, we cannot help but conclude that public procurement in Serbia is slowly but surely dying out.

1. Too many exemptions from the law on public procurement

We have written about how big infrastructure projects circumvent the application of the law on public procurement a few times, and the European Commission points to it in all its Serbia Reports.

The possibility of suspending the law on public procurement (one of the most important anti-corruption laws) through a special law (the law on special procedures for linear infrastructure projects) and increasingly using intergovernmental agreements to avoid complying with it, is unacceptable.

Therefore, repealing the law on special procedures for linear infrastructure projects and abolishing the practice of awarding contracts for big infrastructure projects under intergovernmental agreements is the basic prerequisite, condicio sine qua non*, of building a functional and fair system of public procurement in Serbia.*

The law on public procurement (Articles 11-19) regulates in detail situations in which exemptions are allowed, and where these exemptions do not apply, the law must be complied with.

9 https://media.cpes.org.rs/2021/07/Alarm-3-ENG.pdf

We must point out that the Government of Serbia adopted the Operational Plan for the Prevention of Corruption in the Areas of Special Risk in September 2021, which identifies public procurement as one of the sectors particularly sensitive to corruption.

The purpose of this Operational Plan is to bridge the period until the adoption of the new anti-corruption national strategy and the accompanying Action Plan, which has been delayed for full four years (the last strategy covered the period 2013-2018)!

The implementation of the Operational Plan is time-bound to the end of 2022, and a part of it is dedicated to the measures and activities that have to be implemented to prepare the future anti-corruption national strategy and the accompanying action plan properly.

Among other issues, the part of the Operational Plan concerning public procurement notes that the special law and intergovernmental agreements allow for a high number of exemptions from the law on public procurement (as mentioned in the report of the European Commission). In this regard, to should ensure removing the risk of corruption from the laws that allow for procurement without the full application of the law on public procurement, the plan foresees a corruption risk assessment of these regulations, with recommendations for their removal.

Although even the mere mention of this issue in the context of fighting corruption is, to an extent, progressive, it certainly is not enough, especially if the proposed measure does not lead to the repeal of the law on special procedures for linear infrastructure projects. Even if it did, the proposed measure does not address the problem of awarding contracts under intergovernmental agreements.

And finally, although it is a fact that a high number of exemptions from the law on public procurement undeniably presents a serious risk of corruption and that there is no doubt that it needs to be repealed, the question of whether such a measure is really necessary still remains. It seems that the Operational Plan is nothing more but yet another in a series of excuses for failing to adopt an anti-corruption strategy and repeal the law on special procedures for linear infrastructure projects.

A quick reminder: Serbia's National Anti-Corruption Strategy expired in 2018.

2. Absence of competition and insufficient transparency in public procurement procedures

Closely connected with the problem of exemptions from the law on public procurement is the problem of (non-)observance of the basic principles of public procurement, primarily the principle of competition and the principle of transparency.

As was mentioned above, the law on special procedures for linear infrastructure projects lacks clarity of selection procedures and transparency. These principles are often ignored even when awarding contracts under intergovernmental agreements. According to the latest report of the European Commission, the value of procurement exempted from the application of the law on public procurement in 2021 increased by as much as 88 % or by EUR 1.5 billion year-on-year and accounted for 67 % of the cumulative value of all public procurement contracts concluded in 2021. Intergovernmental agreements were most frequently used as a legal basis for exemption.

Also, according to the latest report of the Public Procurement Office, the average number of bids per public procurement procedure in 2021 was 2.5, similar to 2019 but notably lower than 3 in 2017.

However, just like one should be careful with the information on the average salary in Serbia because it does not show the real state of affairs,[10] the average number of bids per procurement procedure is not the best indicator of the (absence of) competition in public procurement. The information on the average number of bids might indicate a growing trend, stagnation or decline in competition, but the data on

10 Unlike, for instance, median earnings, which is far more realistic because it shows the income of 50 % of the population. For example, according to the report of the Republic Institute of Statistics, the average net salary in August 2022 was 75,282 dinars, while the median net salary was 57,911 dinars (meaning that 50 % of the employed population earned up to this amount).

the number of procedures where only one bid was submitted would give a much more realistic picture.

According to the report for the first half of 2019, in 2018 and the first half of 2019, as many as 55 % of procedures received only one bid. This may be the reason why the Public Procurement Office has not published this information in its annual reports since.

Also, according to the research conducted by the Toplice Centre for Democracy and Human Rights, in 2020, only one bidder participated in 79 out of the 100 financially most valuable procedures, 2 participated in 16, while only 5 procedures had 3 or more bidders. It was similar in 2019: only one bidder participated in 72 out of 100 procedures, 2 participated in 19, while 3 or more participated in the remaining 9.[11]

So, we can safely conclude that public procurement procedures are often not carried out at all, and when they are, there is practically no competition.

> There are various reasons for the absence of competition (in the cases where the law on public procurement *is* complied with). It may be due to the lack of bidders' interest because they do not trust the system or the contracting authorities do not research the market properly. However, in our opinion, the most common reason is that the contracting authorities favour certain bidders and/or that business operators rig the bids.

Lately, one of the most common forms of bid rigging in Serbia has been the division of the market. In this form of collusive tendering, there is an agreement (express or tacit) between the bidders to divide the market so that specific bidders agree not to participate in public

11 http://nadzor.org.rs/pdf/indeks-transparentnosti-javne-potrosnje-2020.pdf

procurement procedures with specific contracting authorities or in specific geographical areas. For instance, companies may divide specific buyers or categories of buyers among themselves and then not participate in the bidding (or they submit only a complementary bid) for buyers that are not "theirs", i.e. they do not compete for contracts with buyers who are "reserved" for other companies.

In addition to market segmentation, other forms of bid rigging include fictitious bids, bid rotation or bid suppression collusion. It has to be pointed out that different bid rigging techniques are not mutually exclusive and often occur together.

Contracting authorities can also restrict competition in various ways – from setting specific additional requirements and criteria for the award of contracts and adjusting technical specifications to fit specific bidders to how the procurement item will be acquired (i.e. whether the procurement item is comprised of lots or not).

We have analysed the examples (and ways of restricting competition) listed above in numerous case studies of public procurement in infrastructure, healthcare and environmental protection (Development, Expansion and Maintenance of Electronic Platforms Intended for the Healthcare System,[12] Equipment for the Clinical Centre of Serbia,[13] "Eagle Eye" – Procurement of Vehicles for Parking Control Management,[14] Construction of Wood Chip Boilers in Osečina, Svilajnac, Kladovo, Majdanpek and Surdulica,[15] etc.).

The absence of competition is an issue that can only be solved if the contracting authorities consistently complied with the law on public procurement, but also if the key institutions in the public procurement system – the Public Procurement Office, the Republic Commission for the Protection of Rights in Public Procurement Procedures and the Administrative Court, as well as institutions such as the Commission for the Protection

12 https://cpes.org.rs/development-expansion-and-maintenance-of-electronic-platforms-intended-for-the-healthcare-system-2021/?lang=en

13 https://cpes.org.rs/equipment-for-the-clinical-centre-serbia-2021/?lang=en

14 https://cpes.org.rs/hawk-eye-2019/?lang=en

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

of Competition, the Anti-Corruption Agency, the State Audit Institution and competent courts of law and prosecutor's offices – performed their functions and used their legal powers in a consistent and timely manner.

The solution, therefore, lies in the famous phrase that "competent authorities should do their job". The work of some of these institutions will be discussed later.

As regards the principle of transparency, it should be noted that some progress has been made with the launch of the new Public Procurement Portal (1/7/2020). This is where public procurement plans, announcements, documentation and decisions are published and businesses can communicate with the Public Procurement Office, under the law. In addition to this, bidders can submit bids electronically. The European Commission has praised the Portal in its reports.

However, it is important to stress that there is practically no transparency in one of the most important stages in the public procurement process – the stage of contract performance.

Under the previous law on public procurement, which was in force until 1 July 2021, the stage of contract performance was more or less transparent. The transparency was achieved through the obligation of the contracting authorities to announce their decisions on any amendments to the contracts and an obligation to submit quarterly reports to the then Public Procurement Administration (now Public Procurement Office) on the procedures carried out and the contracts awarded. Contracting authorities had to collect and record specific information concerning public procurement procedures and the contracts awarded (i.e. whether a contract was performed, how long it took, how much money was spent, why it was not performed, etc.), and compile this information into reports for the Public Procurement Administration, which was responsible for the efficient and up-to-date monitoring of public procurement procedures and contract performance.

However, when it comes to the supervision of contract performance, the new law on public procurement contains only two provisions stipulating that the performance of a contract is controlled by the contracting authority and supervised by the Ministry of Finance.

The contracting authority no longer has to provide the Public Procurement Office with information on the performance of the awarded public procurement contract, and the information on the amendments to the contract must be published on the Public Procurement Portal only if they concern the addition of goods, services or works, i.e. unforeseen circumstances. In other cases, the contracting authority does not have this obligation. The new law also provides for significantly more possibilities (which are also much more substantial) when it comes to contract modification compared to the previous law.[16]

Considering all of the above as well as the fact that one of the benchmarks for closing Chapter 5 of Serbia's accession negotiations with the EU is that Serbia should take 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 performance stage of public contracts**, it would be advantageous if contracting authorities were *able to publish the information concerning contract performance on the Portal. In this way, the principle of transparency when it comes to spending the taxpayers' money would be fully adhered to, while the opportunities for abusing the contract performance stage would be minimised. In addition, it would be much easier to exercise the powers and obligations concerning the supervision of the performance of public procurement contracts.*

With this in mind, a year and a half ago, the CPES sent an initiative to the Ministry of Finance proposing to allow the contracting authorities to publish information on contract performance on the new Public Procurement Portal. There has been no response. To make it easier for the contracting authorities to monitor the performance of public procurement contracts (which is their legal obligation), and since the Public Procurement Office failed to do it within its powers,

16 We wrote in detail about contract modifications under the new law on public procurement in the Alarm Report published in May 2021.

the CPES offered the contracting authorities a model act on monitoring the performance of public procurement contracts.[17]

When it comes to the principles of competition and transparency, it should be pointed out that both principles are almost entirely restricted in negotiated procedures without prior publication. This is why the law prescribes strict conditions for the implementation of these procedures, which should be interpreted very restrictively.

However, as we have seen, during the COVID-19 pandemic in Serbia, there was an enormous increase in the number of negotiated procedures without prior publication, primarily for reasons of urgency, usually with the explanation that the Coronavirus situation required it, which of course was not true.[18] These non-transparent procedures were also abused for the procurement of medicines and medical equipment that is not used for the treatment of COVID-19 patients. An excellent example is the attempt of the Republic Health Insurance Fund to conduct a negotiated procedure of a large estimated value under the pretext of the Coronavirus pandemic and for reasons of extreme urgency to procure, among other things, linear and circular staplers (suture material used in abdominal and rectal surgery), surgical compresses, non-sterile covers for operating tables, endoscopic video-capsules (used for the imaging of the small intestine, colon and stomach), etc.[19]

In most of these procedures, the contracting authority favoured a specific bidder. The contracting authority would either use discretion when choosing which bidders to invite to negotiations or would put together such technical specifications that only a specific business operator could meet them.

The share of these non-transparent negotiated procedures without prior publication in the total value of contracts awarded in 2021 dropped to 7.7 % but still remained high.

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

18 In 2020, negotiated procedures without publication amounted to 23.2 % of the total value of contracts awarded in 2020!

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

Lastly, it should be reiterated that the principle of transparency was completely suspended under the Conclusion of the Government of Serbia declaring the information on the procurement of medical devices carried out by the Republic Health Insurance Fund (RFZO) on behalf of health institutions during (as well as after) the state of emergency "strictly confidential".

Public procurement procedures conducted during the COVID-19 pandemic need to be audited and all the information on these procedures disclosed to mitigate the risks of fraud and contribute to enhanced transparency and trust, as recommended by the European Commission.

Another example of abuse of the negotiation process during the pandemic, which also proves the importance of transparency and supervision in the stage of contract performance, is the procurement of equipment for COVID hospitals in Zemun and Kruševac.

Case study: Equipment for COVID hospitals in Zemun and Kruševac[20]

In the second half of 2020, the Ministry of Health carried out two procedures for the procurement of equipment for COVID hospitals in the military complexes Zemun Economy in Belgrade and Rasina in Kruševac. The procurement procedures were carried out one after the other, both as negotiated procedures without prior publication for reasons of extreme urgency. These non-transparent procedures with restricted competition were common at the time because of the epidemiological situation caused by the Coronavirus, with the addition of a short deadline for the completion of the hospitals for which the equipment was procured.

The contracting authority first procured the equipment for these hospitals and then, two months later, decided to procure the "remaining" equipment. In the meantime, an annexe to the first contract was signed, under which "additional" equipment worth about 40 % of the original contract was procured. All in all, nearly RSD 3 billion were

20 https://cpes.org.rs/equipping-covid-hospitals-in-belgrade-and-krusevac-2020/?lang=en

spent on the entire equipment for both hospitals. In both procedures, the contract was awarded to the same supplier, Magna Pharmacia d.o.o. Belgrade.[21]

The public procurement procedures in question are only two of countless examples of non-transparent procurement of equipment for medical institutions during the Coronavirus pandemic and abuse of the negotiated procedure. It is obvious that there was no urgency for the implementation of the negotiated procedure without prior publication in either of these cases and that with better planning the contracting authority could have procured all the necessary equipment and supplies on time in open procedures with shorter (or even perhaps regular) deadlines for submitting bids.

The alleged urgency and complete absence of transparency cause legitimate concern that the contracting authority favoured the aforementioned supplier who was awarded both contracts. This concern is reinforced by the fact that the State Audit Institution found in its report that the contracting authority did not specify any characteristics, units of measure or provided technical specifications in the tender documents, i.e. there was no column for the price per unit (within a set of goods) for the goods whose total value amounted to as much as RSD 533.8 million. This not only raises the question of how the contracting authority had estimated the value of the contract but also how it established that the individual goods offered by the awarded bidder were appropriate.

The concern that one bidder was favoured is also justified by the fact that the contracting authority never published a notice of the amendments to the contract on the Public Procurement Portal, even though it had a legal obligation to do so. And those amendments, as we have seen, were not insignificant at all.

In any case, by conducting negotiated procedures and restricting competition, as well as by not dividing the procurement subject matter into several lots according to the type of goods, the contracting

21 In the first procedure, this bidder was the leader of a consortium that was awarded the contract, while in the second procedure it acted independently.

authority had spent much more of taxpayers' money than was really necessary.[22]

3. Incomplete harmonisation of national legislation with the EU regulations

The new law on public procurement entered into force on 1 January 2020, while its application started on 1 July 2020. With the adoption of this law, two directives on public procurement were successfully incorporated (transposed) into the national legislation: Directive 2014/24/EU (the so-called classic directive) and Directive 2014/25/EU (the so-called sectoral directive).

Considering that the public procurement system, in a broader sense, also includes public-private partnerships and concessions, for national legislation governing this area to be fully harmonised it is necessary to adopt, without any further delay, the amendments to the law on public-private partnerships and concessions to align it with Directive 2014/23/EU on the award of concession contracts.

The European Commission has stressed this year after year in its reports. The full alignment of Serbia's national legislation with the EU *acquis* in the field of public procurement, **including legislation governing public-private partnerships and concessions**, is listed as one of the interim benchmarks for the temporary closure of Chapter 5.

However, Serbia is yet to adopt amendments to the existing law on public-private partnerships and concessions.

The only thing that has been done in this regard is the establishment of a Working Group tasked with drafting this law, but it remains unknown to this day whether the drafting of the law has begun. What is known for certain is that all action plans for the implementation of the Public Procurement Development Programme in the Republic of Serbia since 2019 have been postponing the deadline for its adoption

22 These procurement procedures were divided into two lots, but in such a way that they covered the entire (medical and non-medical) equipment for the specific hospital.

and that according to the latest Action Plan for 2022, the law should have been adopted in the last quarter of 2022. However, at the time of compiling this Alarm Report, the Commission for Public-Private Partnerships and Concessions has not published any information about the activities concerning the drafting of the law on its website, the National Assembly and the Ministry of Economy have not published the draft law in the "Laws in Procedure" and "Regulations in Preparation" sections on their respective websites, there is little (or rather, no) chance that this deadline will be met, i.e. that the law will be adopted by the end of 2022.

4. Non-compliance with environmental principles in public procurement

The new law on public procurement implements, among other things, the guidelines of the EU Directives on public procurement concerning environmental protection (the so-called green procurement).

The long-term policy goals of the Republic of Serbia in the field of public procurement are defined in the Serbian Public Procurement Development Programme 2019-2023, while the issues such as the dynamics of activities and the responsibilities for the implementation of specific activities are defined in the accompanying Public Procurement Development Programme Action Plan. The starting point of the modernisation of the public procurement system, as stated in the Programme, will be based on the public procurement priorities established by the European Union in its Public Procurement Strategy. These include, among others, ensuring wider acceptance of innovative, green and social procurement.

The application of green procurement and energy efficiency under the existing legislative framework can have numerous benefits. First and foremost, they are:

- Environmental benefits: enabling the state to achieve environmental protection goals, raising awareness of environmental issues in everyday life, achieving greater energy efficiency of products and production processes, etc.

- Social benefits: improving the quality of life, establishing specific standards for products and services, procurement of less hazardous chemicals, and lowering health risks.
- Economic benefits: incentives for the economy, promotion of green products and technology, savings based on the life cycle of the product i.e. the assessment of all costs incurred during and after the use of the procured items, etc.
- Political benefits: an effective way to show the state's responsibility towards the environment. [23]

The current law on public procurement prescribes the obligation to comply with the environmental protection regulations only for bidders, but not for buyers, and in our opinion, therein lies the problem. Under the law, the contracting authority may, but does not have to, incorporate environmental and energy efficiency requirements in technical specifications, selection criteria and contract award criteria, while business operators must comply with environmental protection obligations i.e. the provisions of international law governing environmental protection when performing a public procurement contract.

Conversely, the previous law on public procurement incorporated environmental protection and energy efficiency in the basic principles. Under this law, it was the obligation of contracting authorities to procure goods, services and works that are environmentally friendly, have a minimum impact on the environment and are energy efficient and, when justified, incorporate energy efficiency and the life-cycle cost of the public procurement item in the criteria for the most advantageous offer. The fact that in practice the contracting authorities did not always honour this principle in no way diminishes the quality of these provisions. On the contrary, it only means that the bidders did not raise this issue in their requests for the protection of rights. Because if they had done, the Republic Commission, if it found that the buyer had failed to honour this principle, would have to uphold such requests.

23 https://media.cpes.org.rs/2022/02/Alarm-4-ENG.pdf

To ensure that the environmental principles in public procurement are honoured, it is necessary to amend the law on public procurement and, in addition to the obligation to comply with the regulations governing environmental protection for bidders, the contracting authorities should also have the obligation to incorporate environmental requirements and requirements regarding energy efficiency in technical specifications, selection criteria and contract award criteria.

According to the 2021 Report of the Public Procurement Office, contracting authorities incorporated environmental aspects only in 650 public procurement procedures. In the majority of these procedures, environmental aspects were incorporated in technical specifications, and the most common procurement items for which environmental criteria were used were vehicles, office supplies, computers, laboratory materials, lighting, cleaning services, etc.[24]

Perhaps the best examples of the implementation of green public procurement in Serbia, but also of our awareness of the need for a healthier environment, are the construction of a wastewater treatment plant and sewerage in Divčibare and the procurement of forest growing and protection services in the Fruška Gora National Park, which we wrote about in case studies on environmental protection.

Case study: Divčibare wastewater treatment plant and sewerage[25]

Divčibare is a well-known resort on the mountain Maljen, near Valjevo. Because of its ideal location at about 950 metres above sea level and climate features, this area was once declared an air spa and a climatic health resort. Under the Government of the Republic of Serbia Regulation of 27 August 2021, Maljen became a protected region of exceptional natural features. Unfortunately, decades of government negligence have put all the benefits of Divčibare at risk. More specifically, as more buildings (hotels and apartment blocks) are being built while the issue of sewage and wastewater treatment remains

24 https://jnportal.ujn.gov.rs/annual-reports-ppo-public

25 https://cpes.org.rs/wastewater-treatment-plant-with-sewerage-system-in-divcibare-2021/?lang=en

unresolved, Divčibare is at risk of an environmental disaster. Many buildings are not connected to the main sewage system, and since there is no wastewater treatment plant, wastewater from the existing sewage system is discharged directly into rivers and streams.

The existing sewage system in Divčibare was built nearly 60 years ago. As it has been poorly maintained, numerous segments of this network are out of order today. In 2018 and 2019, a section of the new primary sewage system was built in the centre of Divčibare, but it does not reach Kaona, where many tourist facilities are located. Because of this, but also because no secondary sewage system has been built, many buildings are still not connected to the mainline.

The first wastewater treatment plant was built in Divčibare some 45 years ago. However, as its equipment was designed for coastal rather than mountainous areas, the plant only worked for one year – it did not survive its first winter! If it was not funny, it would be sad. But there is more.

Some 15 years ago, the Institute of Transportation CIP prepared the technical documentation for the construction of sewerage and a new wastewater treatment plant in Divčibare, for which the then Ministry of Trade, Tourism and Services paid around RSD 11.3 million. The Ministry presented the documentation to the local authorities in Valjevo, intending to complete the construction of sewerage and related facilities by 2010. The project, however, was never realised. Instead, in July 2020, the City of Valjevo conducted a public procurement procedure for the design of and technical documentation for the construction of a wastewater treatment plant in Divčibare that it had already had! However, the Faculty of Civil Engineering in Belgrade raised some serious objections to the Feasibility Study and its Addendum (which were the basis for the preparation of tender documents), and the procedure was suspended. Among other things, the Faculty of Civil Engineering found that the Feasibility Study paid little attention to the quality of purified water and that adverse effects of the mountain climate and low temperatures on the operation of the plant were not addressed at all.

One year after this fiasco, in April 2021, the local government of the City of Valjevo re-announced public procurement for the preparation of technical documentation for the construction of a wastewater treatment plant and its sewage system in Divčibare, taking into account the remarks and suggestions of the Faculty of Civil Engineering in Belgrade. The contract worth around RSD 15 million (before VAT) was awarded to a group of bidders headed by the Institute of Transportation CIP – the same Institute that had originally prepared the technical documentation 15 years ago!

The current Mayor of Valjevo commented that he "took out the old technical documentation from a drawer" when he became mayor and that a substantial portion of that documentation was used in the preparation of the new project, but that it needed "correcting and innovating" because various changes had happened over the course of 15 years on the location where, according to the 2007 project, the collector and the sewage system were to be built. The Mayor, however, did not explain who was responsible for leaving the documentation in the drawer for 15 years and having to pay for its preparation and "innovation" again.

Anyway, the Institute of Transportation CIP has been paid twice for the same or slightly improved technical documentation. Whether this updated version has been finished, is not known. According to the tender documents, the deadline for the preparation of technical documentation for the construction of the sewage system was 90 days, and for the plant, 70 days from the date of signing the contract, and both deadlines have expired.

However, it is quite certain that the work on the construction of the wastewater treatment plant had not started by March 2022, and nobody knows when it will. In the meantime, faeces and wastewater from sewers and permeable septic tanks continue to be discharged directly into streams and rivers.

Case study: Forest growing and protection services for NP Fruška Gora[26]

This public procurement is one of the four procurements conducted by the public enterprise JP Fruška Gora National Park, where a specific firm from Beočin, Bonik-Team d.o.o., was favoured. This public procurement stands out from the numerous similar examples of the absence of competition because the contracting authority concluded a framework agreement with this bidder although it did not meet the additional condition concerning the professional capacity of the staff. The tender documents required bidders to have two employees trained to work with a grass trimmer and a saw for each of the five lots. To prove that the condition was met, Bonik-Team submitted employment contracts for 11 individuals. However, nine of the contracts were invalid when the bid was submitted.

That this was not just an accidental oversight on the part of the contracting authority during the expert assessment of the bids is proven by the fact that in the procurement conducted only two and a half months later (land preparation services for nursery gardens), JP Fruška Gora National Park awarded the contract to the same bidder despite it failing to meet an additional requirement again, this time concerning technical capacity. In this procedure, to prove that it had a suitable bulldozer, the bidder submitted a lease agreement concluded seven months before the lessor actually owned the bulldozer it was leasing.

In the above examples, Bonik-Team's bid should have been rejected as unacceptable under the public procurement law. However, the contracting authority awarded this bidder a contract/framework agreement in both cases. What is more, the forest growing and protection services framework agreement was awarded for all five lots at the price identical to the estimated value of the public procurement: RSD 19,384,305.00 before VAT.

26 https://cpes.org.rs/forest-growing-and-protection-in-fruska-gora-national-park-2020/?lang=en

The entire situation weighs even more heavily if we take into account that Fruška Gora has been subjected to intensive deforestation in recent years and that the forest ecosystem is critically endangered. So, rather than focusing on cultivation and forest protection, the framework agreement for the provision of these services was awarded to the bidder that did not meet additional requirements of the procurement procedure. Additional requirements are prescribed for the sole purpose of ensuring the participation of the bidders who can perform the public procurement agreement by providing the procurement item of the best quality. In these two cases, however, the framework agreement was signed with the bidder that had failed to prove that it was able to do so.

The findings of the State Audit Institution (SAI) concerning how the contracting authority had worded the additional requirement for the professional capacity of the staff in the procedures where Bonik-Team participated and in those where it did not are also quite interesting. According to the SAI report, the audit found that in the four public procurement proceedings conducted in 2020, the contracting authority required only temporary service agreements as proof of the staff's professional capacity. In all of them, the contract was awarded to Bonik-Team. Conversely, in other procurement procedures that required evidence of professional capacity, in which this company did not participate, M-forms were required in addition to the temporary service contracts.

Out of four procedures in 2020 where contracts were awarded to Bonik-Team, this company was the only bidder in two proceedings, while in the other two, two fictitious bids were submitted to create the illusion of competition.

All this shows that the market in Serbia is divided and that, more often than not, the company that will be awarded the contract is known in advance. As a consequence, competition is non-existent and there is a significant outflow of the budget funds. In such circumstances, it is virtually impossible to honour the principle of "best value for money".

5. Absence of supervision of the performance of public procurement contracts

The purpose of the procurement procedure is achieved through the performance of the public procurement contract. If the contract is not performed as per the requirements of the tender documents and the decision on the contract award, i.e. if any changes to any of the key factors that the decision on the contract award was based on (price, deadline, quality) were allowed, the public procurement procedure would be pointless. This does not mean that making amendments to some elements of the contract is *a priori* not allowed but that this is possible only in the cases and under the terms and conditions prescribed by law.

It is therefore extremely important that the contract performance is fully transparent (as discussed earlier in the section on the principle of transparency) and that there is this stage of public procurement proceedings is properly supervised. Otherwise, there is ample opportunity for corruption and illicit agreements between the contracting authorities and bidders.

This is why the benchmarks for the temporary closure of Chapter 5 – Public Procurement repeatedly insist on the strengthening of the control mechanisms in the stage of public procurement contract performance.

And yet, the provisions of the new law on public procurement on the supervision of contract performance are laconic and vague. In fact, there are only two of them: one stipulating that the contracting authority monitors the procurement contract performance and another stipulating that the Ministry of Finance supervises the performance of public procurement contracts.[27]

What causes much more concern is that the competent Ministry has not supervised contract performance since 1 July 2020, and it is certain that it will not start before 1 January 2023!

27 Article 154 of the Public Procurement Act (Official Gazette of Rs 91/2019).

When in late October last year we sent the Ministry of Finance a request to access information of public importance and asked whether the Ministry had started to supervise the performance of public procurement contracts and which of its departments would be responsible for it, the response we received led us to the conclusion that the supervision had not started but (when it started) it would be carried out by the Ministry of Finance's Budget Inspection Department.[28]

For this to be feasible, it was necessary to amend the budget system law (also regulating budget inspection), i.e. centralise budget inspection, without which the contracts awarded by the contracting authorities founded by the autonomous province, i.e. a local government unit (which does not fall under the jurisdiction of the Republic Budget Inspection), would have remained without supervision.[29]

The problem was solved by adopting a special law on budget inspection (Official Gazette of RS 118/2021), which became effective on 17 December 2021, and whose application will start on 1 January 2023.

So, even if the Ministry of Finance's Budget Inspection does begin to perform supervision when the application of the special budget inspection law starts, it means that the performance of public procurement contracts will have been unsupervised for two and a half years!

However, considering that the Ministry has not yet published the internal documents on the supervision of contract performance or any related information, there is cause for concern that supervision will not even start next year. Just to reiterate, in its response to our last year's request to access information of public importance, the Ministry said that it was in the process of drafting "by-laws, and technical and methodological instructions" that the supervision will be based on.

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28 https://twitter.com/cpes_org/status/1458470943819448321

29 Under the law on the budget system, the tasks of the budget inspection on the territory of the autonomous province are performed by the budget inspection service of the autonomous province, established by the competent authority of the autonomous province, with the aim of performing, inter alia, inspection control over direct and indirect users of the budget funds of the autonomous province. Likewise, the budget inspection service of the local government unit, which is established by the competent executive body of that unit, is responsible for conducting inspection control over direct and indirect users of the budget funds of the local government unit.

What makes the existing situation even more serious and dangerous is the fact that the new law on public procurement leaves much more room for contract modifications during its performance compared to the previous law (in some cases, the new law allows an increase in the value of the contract of up to 50 % of the original contract value). Therefore, due to the lack of supervision of contract performance, as well as the lack of transparency at this stage, conditions have been created for corruption on an unimaginable scale.

To prevent unfounded modifications to contracts during their performance and corrupt agreements between the contracting authorities and awarded bidders, the Ministry of Finance should, in line with the law and without any further delay, begin to supervise the performance of public procurement contracts. Introducing the obligation for the contracting authorities to publish the information on contract performance and enabling them to do so would not only make this stage of public procurement transparent but would also significantly facilitate supervision.

Under the aforementioned initiative sent to the Ministry of Finance a year and a half ago, and to help facilitate the monitoring of contract performance, the CPES proposed introducing electronic forms, which would be available on the Ministry's website or on the Public Procurement Portal, to be filled in periodically (monthly or quarterly) by the contracting authorities, providing basic information on contract performance (performance stage, payments made, etc.). Unfortunately, we never received a response from the Ministry.[30]

6. Insufficient capacity of key institutions in the public procurement system

The key institutions in the public procurement system are the Public Procurement Office and the Republic Commission for the Protection of Rights in Public Procurement Procedures. In addition, when it

30 https://media.cpes.org.rs/2021/12/Pracenje_izvrsenja_ugovora_o_javnoj_nabavci.pdf

comes to protecting the rights of participants in public procurement, the Administrative Court plays an important role.

Because of the importance of these institutions in the public procurement system, the European Commission's recommendation in every report is to continue strengthening their capacity. The European Commission reiterates that, due to limited specialisation and training, the capacity of the Administrative Court is too weak to cope with the complexity, diversity and overall quantity of cases and lengthy legal proceedings and recommends strengthening the cooperation between the Public Procurement Office and the Republic Commission with the Administrative Court through the exchange of knowledge and information.

Public Procurement Office

The new law on public procurement gives the Public Procurement Office (PPO) a very important authority: to monitor the application of public procurement regulations. The intention was to increase the efficiency of the PPO in detecting and reporting irregularities in public procurement, which was one of the most criticised aspects of its work before the adoption of the new law.

The monitoring is based on the annual plan and the notifications that the PPO receives from legal and natural persons, the government, provincial and local bodies, or *ex officio* – when it comes to negotiated procedures without prior publication under Article 61 paragraph 1 items 1) and 2) of the public procurement law. The monitoring report is submitted for adoption by the PPO to the Government and the Assembly.

The PPO adopted a rulebook on the procedure for monitoring the application of regulations on public procurement (Official Gazette of RS 93/2020), which entered into force on 1 July 2020, regulating the monitoring method in more detail.

As stated in Monitoring Report 2021, the PPO's monitoring of the implementation of regulations on public procurement intensified, resulting in an increase in the number of procedures covered by this type of control compared to 2020. The annual monitoring plan for 2021 identified 10 entities subject to monitoring. According to the

report, a total of 131 procedures of these 10 entities were monitored. In addition, the PPO followed up on 31 requests from competent authorities (higher public prosecutor's offices, the Ministry of the Interior and the Anti-Corruption Agency) as well as 29 complaints from natural and legal persons.[31]

However, contrary to the Monitoring Report, according to the Draft Action Plan for the Public Procurement Development Programme, 258 procedures were monitored in 2021, which is fewer than in 2020 (274).[32]

Regardless of whether there was an increase in the number of monitored procedures or not, it is evident that the number is small considering that up to 60,000 public procurement procedures are announced annually in Serbia and that irregularities in the implemented procedures are not rare.

To increase the scope and quality of monitoring, the rulebook on the monitoring procedure should set the deadlines, lay down the minimum scope of monitoring, the number of public procurement procedures to be monitored and a schedule for regular control, which is not the case now.

Republic Commission for the Protection of Rights in Public Procurement Procedures

The Republic Commission is the second instance appellate body in public procurement procedures. It is very important because it makes final decisions on public procurement procedures, public-private partnerships and concessions when participants in these procedures believe that they have been wronged.

However, despite its undoubted importance for the Serbian public procurement system, the Republic Commission does not use all its powers under the law on public procurement, which affects the quality of its decisions. In other words, instead of correcting the

31 http://www.parlament.gov.rs/upload/archive/files/cir/pdf/izvestaji/2022/02-550_22.pdf

32 https://www.ujn.gov.rs/en/news/launching-the-work-on-the-2022-action-plan/

irregularities in the public procurement system, the Republic Commission contributes to its legal uncertainty.

Given the variety and sometimes narrow specificity of areas in which public procurement procedures are carried out, there is no doubt that the members of the Republic Commission (who are all lawyers by training) lack the knowledge needed to establish the facts in each individual case.

However, the Republic Commission has never held an oral hearing on any of the cases on which it made decisions, nor did it hire experts to clarify the factual situation, despite having been able to do it under all previous laws on public procurement.

In addition, since April 2014, the Republic Commission has not adopted a single principled legal position regarding the application of regulations in the field of public procurement, which also falls under its jurisdiction. The purpose of the principled positions is to provide clarifications and resolve dilemmas for the participants in public procurement in connection with the application of the law.

On top of all that, the Republic Commission does not even have a uniform legal practice and the quality of its decisions is getting worse, which may partly be the result of its lack of understanding of the areas in which it makes decisions.

Given the importance of this body for the entire system of public procurement, the Republic Commission must start using all the powers granted to it under the law on public procurement without further delay. First and foremost, it needs to start holding oral hearings and engaging experts to clarify the factual situation and help make correct decisions. Also, to ensure legal security, the Republic Commission must establish a uniform legal practice and improve the quality of its decisions so that they are understandable for both the contracting authorities and the bidders.

Administrative Court

An administrative action can be initiated against the decision of the Republic Commission within 15 days from the date of delivery of the decision to the claimant. The initiation of an administrative action does not delay the execution of the decision of the Republic Commission.

Because an administrative action does not have a suspensive effect and usually takes years to resolve, the expediency of this form of legal protection is debatable. In other words, the question is whether an administrative dispute can be deemed an adequate response to possible illegalities in the procedure for the protection of rights. In addition, the general provisions of the law on administrative actions do not fully apply to the supervision of the decisions of the Republic Commission, i.e. to the public procurement procedure, which further complicates the effective judicial supervision of public procurement.

To make judicial protection in public procurement more efficient and effective, the Administrative Court's deadlines must be adapted to the specific nature of public procurement, i.e. the Administrative Court must have shorter deadlines to make decisions/issue rulings in the administrative actions concerning public procurement procedures.

Furthermore, the Administrative Court *must have a legal obligation to act in a "dispute with full jurisdiction" when it finds that there are reasons for annulling the decision of the Republic Commission. Simply put, instead of returning the case to the Republic Commission for reconsideration, the Administrative Court should make final decisions on the breach of rights claims.* This is particularly important given that after reconsidering, the Republic Commission usually makes the same decision, rendering the already lengthy administrative litigation utterly pointless.

For an effective action in a dispute of full jurisdiction to be fully effective, *the specialisation of the Administrative Court judges in public procurement is imperative and so is their cooperation with the Public Procurement Office and the Republic Commission.*

The need to strengthen the capacity of the Administrative Court in the area of public procurement was stressed in the European Commission's report as far back as 2015.

Lastly, we must point out that under the current legal provisions and the practice of administrative courts, contracting authorities do not have the right to challenge the legality of the Republic Commission's decisions and initiate administrative action, only bidders do. The reasoning is that the contracting authority, given that it decides

on the request for the protection of rights before it is referred to the Republic Commission, has the procedural position of an administrative body of the first instance and therefore has no legal interest in filing a lawsuit against the contested decision. *In our opinion, this is wrong. Contracting authorities or entities with higher-level jurisdiction than the contracting authorities (e.g. the founder of a public enterprise, a ministry responsible for lower-level state administration bodies, etc.) should also be able to legitimately dispute the decisions of the Republic Commission as representatives of the public interest since the rights of both bidders and buyers are protected in the rights protection procedure.*

7. Ineffective legal protection

As we have remarked in the November issue of the last year's Alarm Report, Serbia has a plurality of legal protection mechanisms in the field of public procurement.[33]

In addition to "legal protection" before the Republic Commission and in the PPO's monitoring procedure, legal protection is granted in the criminal proceedings before the competent public prosecutor's offices and courts (procurement fraud under Article 223 of the Criminal Code), misdemeanour proceedings before misdemeanour courts, competition protection procedures before the Commission for Competition Protection, and audit procedures before the State Audit Institution.

However, despite numerous mechanisms of legal protection in the field of public procurement, the legal implementation of public procurement and curbing corruption are yet to yield concrete results. This leads to the conclusion that both the citizens and economic operators' trust in state bodies is extremely low, but also that state bodies do not exercise their powers granted under the law on public procurement.

33 https://media.cpes.org.rs/2022/02/Alarm-4-ENG.pdf

Protection under criminal law

Public procurement fraud was introduced as a criminal offence in Serbia's legal system in 2012. There are two basic forms of the criminal offence of procurement fraud and one that is more serious. The law gives quite broad definitions of all three.

One of the two forms of basic procurement fraud is when a bidder submits a bid containing false information relevant to the public procurement or makes illegal arrangements with other bidders or undertakes other illegal actions to influence the decision of the contracting authority. This offence may be committed by any person who participates in a public procurement procedure.

Another basic form of procurement fraud is when a responsible person or official of the contracting authority, by using their position of power or overstepping their authority or failing to perform their duties, violates public procurement law or other regulations and misappropriates public funds.

A more serious offence is when the two basic forms of a criminal offence are committed in a public procurement procedure valued over RSD 150 million.

By giving too broad a legal description of the criminal offence and not being specific enough about the act of perpetration, the legislator opened up a myriad of legal issues and dilemmas about the work of public prosecutor's offices and courts. As a consequence, it is often unclear in practice what constitutes the act of committing this criminal offence and what facts need to be established during the proceedings, leaving room for disparate legal practice and arbitrary actions of the state authorities.

It is unclear what "false information on which the bid is based" actually is, i.e. whether it is any inaccuracy in the bid or only the one that has some "weight". Then, the provision stipulating that making "illegal arrangements with other bidders" constitutes a criminal offence is also problematic because the law on public procurement does not say what constitutes a permissive legal arrangement. Finally, the wording "undertaking other illegal actions to influence the decision of the contracting authority" is also vague as it does not specify the actions referred to. So, judging by the legal description of the criminal offence we can conclude that any deviation from the rules governing public procurement (including by-laws) may constitute the act of committing a criminal offence, which would certainly not represent a good measure of intervention under criminal law.

To improve the efficiency of public prosecutor's offices and courts and create the conditions for a criminal law norm that protects legality in a public procurement procedure so that it becomes a real and serious threat to potential perpetrators of criminal offences and achieves general prevention, *it is necessary to lay down the act of committing this crime more clearly and precisely, narrowing down the act of perpetration and defining the terms and phrases that were used when prescribing the essence of the criminal offence.*

This type of crime is rarely prosecuted in practice. According to the available information for 2020, 111 reports of criminal offences were filed, 26 persons were charged but only 17 verdicts were passed, of which as many as 13 were based on plea bargains (in 2019, there were 102 reports of criminal offences, 25 persons were charged, 16 verdicts were passed, 6 of which were based on plea bargains).[34]

According to the corruption statistics published on the website of the Ministry of Justice, in 2021, a total of 56 new reports on criminal acts of abuse in public procurement were filed to the special anti-corruption departments of the Higher Public Prosecutor's Office and the

34 "Main Problems of Public Procurement in Serbia in The Context of New Legal Solutions and European Integration", Transparency Serbia and CPES, Belgrade, May 2022. (https://preugovor.org/Policy-Papers/1756/Main-Problems-of-Public-Procurement-in-Serbia-in.shtml)

Prosecutor's Office for Organised Crime, but after investigations, only 3 persons were charged. Also, according to the same source, there were 4 convictions, 3 of which were based on plea bargains.[35]

According to information obtained by Transparency Serbia upon requesting access to information of public importance from special departments of higher courts and the Prosecutor's Office for Organised Crime, only 2 verdicts concerning criminal offences in public procurement were passed by the Higher Court in Belgrade in 2021, while the Higher Court in Niš and the Prosecutor's Office for Organised Crime had no cases related to criminal offences in public procurement that year.[36]

> Although the criminal legislation on abuses in public procurement has significant shortcomings, they cannot in any way justify the inadequate action of the competent prosecutor's offices and courts. This is especially true considering that there are solutions and institutes in criminal legislation that are not used because of the inertness of the system and limited staff and technical capacity.

For instance, the law governing the organisation and competence of state bodies in combating organised crime, terrorism and corruption (Official Gazette of RS 94/16 and 87/18), whose application started on 1 March 2018, has introduced an important innovation regarding the competence and specialisation of public prosecutor's offices and courts by stipulating that corruption (including procurement fraud)

35 https://www.mpravde.gov.rs/sr/tekst/33769/statistika-koruptivnih-krivicnih-dela-.php

36 "Main Problems of Public Procurement in Serbia in The Context of New Legal Solutions and European Integration", Transparency Serbia and CPES, Belgrade, May 2022.

is the jurisdiction of the Prosecutor's Office for Organised Crime (if there are elements of organised crime), or special anti-corruption departments of the higher public prosecutor's offices and higher courts in Belgrade, Novi Sad, Kraljevo and Niš. According to the Ministry of Justice, judges and public prosecutors assigned to these departments have demonstrated exceptional moral integrity, have taken special courses and are capable of conducting efficient and fair criminal proceedings.

Furthermore, as a key tool in detecting and prosecuting criminal acts of corruption, the same law allows for the establishment of task forces composed of the representatives of public prosecutor's offices and various state bodies (including the Public Procurement Office and the State Audit Institution). The law also stipulates that these state bodies may appoint officers to liaise with the public prosecutor's offices. These are procedural institutes whose objective is to build the capacity of public prosecutor's offices, both in terms of manpower and know-how, given the complexity and specificity of this type of economic crime.

To improve the efficiency in detecting the criminal act of abuse in connection with public procurement, *better coordination must be ensured between public prosecutor's offices and competent state authorities in the field of public procurement (Public Procurement Office, Republic Commission for the Protection Rights in Public Procurement Procedures, State Audit Institution, Commission for the Protection of Competition, Budget Inspection) both through liaison officers and task forces, as well as other forms of cooperation.*

Also, courts and prosecutor's offices should build and strengthen staff capacity by increasing the number of employees and conducting continuous training on public procurement. Their technical capacity should be improved through the provision of computers and other necessary equipment.

Protection under misdemeanour law

From 2013 to 2020, misdemeanours in public procurement were not sanctioned at all due to the inconsistent provisions of the previous law on public procurement and the law on misdemeanours.

Under the old law on public procurement, the Republic Commission for the Protection of Rights in Public Procurement Procedures made first-instance decisions on misdemeanours in public procurement. This was not legally viable because the Republic Commission both initiated and decided in the proceedings, causing the processing stages in individual cases to catch up with one another. Also, as an administrative body, the Republic Commission could not implement measures under the law on misdemeanours which due to their legal nature were reserved exclusively for the court (e.g. substituting a monetary sanction with a prison sentence, ordering attendance, deciding on plea bargains, etc.).

With the adoption of the new law on public procurement, those issues were eliminated, and misdemeanour courts were assigned jurisdiction over misdemeanours in the first instance.

The new law on public procurement identifies numerous offences of contracting authorities and bidders (18 offences for contracting authorities and 4 for bidders).

However, what "catches the eye" is the fact that the gravest violation of the law on public procurement – failure to comply with the law – is deemed a misdemeanour!

More precisely, under Article 234 paragraph 1 item 2) of the public procurement law, a contracting authority that awards a public procurement contract without conducting a public procurement procedure will have committed a misdemeanour.

It is even more absurd that the substance of the criminal offence of abuse of public procurement incriminates the actions only after the fact!

Awarding a public procurement contract without conducting a public procurement procedure is, in terms of its legal significance, definitely the gravest violation of law in this area and should therefore be deemed an act of perpetrating a criminal offence rather than a misdemeanour.[37]

37 Ristanović, O., Varinac, S., Vladisavljević, F. 2021. Priručnik – Prekršaji u oblasti javnih nabavki, Belgrade 2021.

Therefore, when it comes to the possible amendments to the provisions of criminal and misdemeanour laws, the erroneous gradation of the severity of the violation of regulations should be eliminated and failure to comply with the law on public procurement (i.e. failure to carry out the public procurement procedure) should be deemed an act of perpetrating a criminal offence rather than a misdemeanour.

There are still no official statistics on misdemeanour proceedings concerning public procurement. However, judging by the annual reports of the Public Procurement Office, we can conclude that the number of misdemeanour proceedings brought before the courts has increased. In 2021, the Public Procurement Office filed 143 requests to initiate misdemeanour proceedings, as opposed to 2020, when it submitted only 8. There is no such information in the reports of the Republic Commission, which is also authorised to initiate misdemeanour proceedings.