



BALKAN TENDER WATQH

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS IN BOSNIA AND HERZEGOVINA, NORTH MACEDONIA, MONTENEGRO, KOSOVO, AND SERBIA

June 2022



This Report was produced with the financial support of the European Union. Its contents are the sole responsibility of Balkan Tender Watch coalition (BTW) and do not necessarily reflect the views of the European Union.

Table of Contents

CORRUPTION IN THE PUBLIC PROCUREMENT REMAINS ONE OF THE BIGGEST PROBLEMS IN THE WESTERN BALKAN COUNTRIES.....	3
VALUE OF PUBLIC PROCUREMENT.....	6
ANNUAL PUBLIC PROCUREMENT VALUES.....	7
VALUE OF PUBLIC PROCUREMENT COMPARED TO GDP AND BUDGETARY EXPENDITURES	9
VALUE OF PUBLIC PROCUREMENTS IN TERMS OF THE TYPE OF PROCUREMENT	14
VALUE OF PUBLIC PROCUREMENT IN TERMS OF THE CHOICE OF THE PROCUREMENT PROCEDURE	17
INTENSITY OF COMPETITION	20
STATE OF AFFAIRS IN PUBLIC PROCUREMENT SYSTEMS OF THE WESTERN BALKAN COUNTRIES - EU PERSPECTIVE	23
1. BOSNIA AND HERZEGOVINA.....	23
2. NORTH MACEDONIA	25
3. MONTENEGRO.....	26
4. KOSOVO	28
5. SERBIA.....	29
STATE OF AFFAIRS IN PUBLIC PROCUREMENT SYSTEMS OF THE WESTERN BALKAN COUNTRIES – BALKAN TENDER WATCH PERSPECTIVE	30
1. BOSNIA AND HERZEGOVINA.....	30
2. NORTH MACEDONIA	34
3. MONTENEGRO.....	36
4. KOSOVO	40
5. SERBIA.....	43
WHAT COVID-19 PANDEMIC “REVEALED” IN THE PUBLIC PROCUREMENT SYSTEMS OF THE OBSERVED COUNTRIES?.....	45
1. BOSNIA AND HERZEGOVINA.....	45
2. NORTH MACEDONIA	47
3. MONTENEGRO.....	48
4. KOSOVO	50
5. SERBIA.....	51
IDENTIFIED CORRUPTION RISKS IN THE PUBLIC PROCUREMENT CYCLE IN THE OBSERVED COUNTRIES.....	53
1. BOSNIA AND HERZEGOVINA.....	53
2. NORTH MACEDONIA	55
3. MONTENEGRO.....	56
4. KOSOVO	59
5. SERBIA.....	60
REGIONAL RECOMMENDATIONS FOR IMPROVEMENT OF PUBLIC PROCUREMENT SYSTEMS.....	61

CORRUPTION IN THE PUBLIC PROCUREMENT REMAINS ONE OF THE BIGGEST PROBLEMS IN THE WESTERN BALKAN COUNTRIES...

Corruption and public procurement go hand-in-hand in the Western Balkan countries (hereinafter: WB countries) ever since the introduction of public procurement as a method of procurement of goods, works and services by the governments in the region. This symbiosis takes enormous toll on public finances as the resources spill over to private pockets rather than to serve public interest. Corruption is illegal and secretive activity; thus, all calculations of its value need to be taken with caution. It is especially so because of the widespread impunity for corruption in public procurement throughout the region. Just a quick look at the findings of supreme audit institutions in the region or monitoring reports of the Balkan Tender Watch coalition for the last few years clearly demonstrate how deeply rooted is corruption and in what various forms it appears. It is estimated that up to **25%** of funds allocated for public procurement on average is spent illegally as a result of corruption or mismanagement.

The general public, however, has very little or no knowledge about the level of corruption and mechanisms utilized to achieve private gains from public funds. In our earlier annual reports on corruption in public procurement (2012-2016) we identified dominant corruption enabling practices and indicators of corruption. Corrupt practices evolved in the WB countries over the years and today it is not as easy to spot corrupt procurement as it used to be. We moved from simple relying on secretive negotiating procedure in public procurement (e.g., making over **50%** of procurement in Bosnia and Herzegovina and over **30%** in Serbia in 2012) to more sophisticated methods such as technical specifications tailored for certain bidders and biased criteria for bid selection. Probably the champions among the corruption methods, identified through hundreds of analyzed cases of public procurement by organizations publishing this report, are the procurement of services related to public relations and other consulting services that are leaving no traceable track behind them as well as bilateral and multilateral agreements between the countries through which countries exclude application of public procurement rules and procedures and often other important mechanisms, such as free access to information, etc.

Media freedom is the issue tightly connected to this problem. Mainstream media fail to inform public about the scale of the problem. Somewhat unpleasant formulations in the EU Country Reports for WB countries claiming that corruption remains a concern in public procurement and no or little progress has been made in tackling corruption remain overshadowed by political issues. Populist political elites successfully steer the EU agenda in the domain of burning political issues (territorial disputes, security threats, identity issues) leaving the substantial reforms out of the public focus. Tightening space for free media, especially mainstream media, further diminishes the opportunities of public deliberations on serious political and economic issues such as corruption in public procurement. Investigative journalists and their outlets are under continuous pressure by the political and economic circles, "administrative harassment" measures, or controlled media to deter journalists' interest in misuse of public funds. Threats and slander campaigns are used to stigmatize investigative journalists whenever they manage to break the silence and reach the wider audience.

Other stakeholders remain silent on high levels of corruption. Trade unions, professional associations in public enterprises and other public entities should be at the forefront of the anticorruption movement being the first

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

to suffer from the misuse of funds. The same stands for the users' associations, such as patients' associations, schoolchildren parents' associations, youth associations etc. It would be expected that these actors formulate demands for stronger participation in the decision-making process related to public procurement and require more accountability from decision makers. Trade unions fail to build their case around the good government in public enterprises where the corrupt public procurement practices are most often present. These entities also spend the largest portion of funds in WB countries. Simple increase of the share of employees in governing boards of public enterprises to 50% would strengthen the position of labor in public sector and significantly contribute to lowering the level of corruption in the sector as employees are proven to be more interested in sound management of the enterprises they work in, than the outsider members of boards.

Business sector in the WB countries is oddly silent about the high levels of corruption in public procurement. Even though corruption is among leading problems identified in the reports published by business associations in the region, especially those dominated by foreign investors, there are virtually no practical moves made by these actors to mitigate the problem. The sector does not even provide financial or technical assistance to civil society organizations which openly address corruption in public procurement thus promoting the interests of the business too. An extremely low level of competition in public procurement in the region clearly tells the story about prevalent corruption in public procurement. Bidders, who should be the main and most effective monitoring "mechanism" within public procurement cycle do not use their right to file the complaint even when they know that certain tender is rigged because they are afraid that it will affect their business in the future and that they will not win any tender because of that. "*It is more profitable to remain silent in these situations*" is the most common answer that you can get when you ask them regarding this issue. We can illustrate this claim with worrying data that almost 70% of public procurement have been conducted with only one bid in the period 2017-2020 in Serbia. Based on conducted monitoring we can claim that situation was not changed during the 2021.

Above mentioned clearly exemplifies the attitude towards the public procurement and nonexistent trust in mechanisms prescribed and established by WB countries legislations.

The reforms of the public procurement are focused on legislation and its alignment with the EU Directives. Governments are obsessed with the formal side of the reform, drawing attention far away from the implementation of the rules and its poor effects. Even though the legislation regulating public procurement in the WB is pretty much in line with the EU Directives it needs to be further aligned. It seems that the regional governments intentionally avoid full harmonization in order to leave further space for formalist intervention and more harmonization every time the issue of corrupt and ineffective public procurement systems is opened by the EU institutions or national stakeholders. Even though the legislation seems to be the least controversial part of the public procurement systems in the observed countries, the governments regularly tend to adhere to the minimum EU standards in the area of public procurement or fight against corruption which are on paper sometimes below the standards already prescribed in the region.

Institutional framework related to public procurement and fight against corruption in numerous cases remains ineffective. Structures mandated to deal with these issues have grown progressively over the years in the region but with limited effects on the levels of corruption in public procurement. It is the result of a formalistic

approach, but also of misunderstanding of the term institution building by the regional governments. It seems that political elites in the WB countries understood institution building literally as producing new institutions with new competences, rather than strengthening established institutions and respecting their unique role and independence. Competent institutions often lack capacities – personnel, financial and technical, to act and produce results. Even the efficient institutions remain ineffective in their strivings as they remain in silos with limited or no interoperability among institutions in charge. Flourishing institutions therefore result in the effects opposite to proclaimed intents, leaving fight against corruption in limbo. They remain as a kind of monuments to ineffective anti-corruption work in the region.

It is not the diagnosis part that bothers anti-corruption community in the region. For almost two decades the problems have been identified and the corrupt practices and their promoters are well known. It is the way to go from there that bothers scarce anti-corruption activists in the region. The region is overwhelmed with strategies to curb corruption including the corruption in public procurement, but the roadmap is not clear at all. Such high levels of corruption cannot be cured in a piece meal fashion – they require a comprehensive approach covering financing of political parties, budgetary policies, taxes, subsidies, public-private partnerships. In all these areas the nexus of politics and economy takes its toll. The stakes are enormous and overcome the investment in fight against corruption by several thousand times. Such battle is lost even before it began.

In such circumstances the Balkan Tender Watch coalition of civil society organizations gathered around the idea of narrowing the space for corruption in public procurement through:

- **identifying spots in the public procurement cycle which are vulnerable to corruption;**
- **exposing corrupt practices in the observed public procurement cases;**
- **proposing and advocating for policy solutions which would contribute to decrease of corruption in public procurement in the Western Balkans.**

Civil society joined their forces in order to overcome some of the deficiencies of the civil society engagement in fight against corruption such as lack of capacities and difficulties to reach their audiences. Alongside investigative journalists these organizations remain the only source of information for the public.

As the results of our Coalition's work in the past ten years we analyzed an enormous number of concrete public procurement cases, found concrete results of illegal or corrupt behaviors. We tried to fight on "several different fronts" - by submitting criminal and misdemeanor charges, by formulating concrete evidence-based policy and advocacy documents in order to pursue governments in our countries to conduct necessary changes. In addition, we tried to unite the region in this never-ending fight – we created regional network that encompass grassroots organizations from the entire region, shared our knowledge and experience with them in order to empower them to join this "battle", to stay in it and to actively engage in fight against corruption at the local level...

This Report represent the compilation of evidence-based finding and views of our Coalition. Besides analyzing public procurement systems through main basic quantitative indicators of the functioning of the system and the impact of public procurement on the economic and social system, in this Report we tried to incorporate EU perspective, through analysis of EC Country Reports, statements and views dedicated to the area of public procurement. As we mentioned earlier, Covid-19 virus pandemic strongly affected all areas of life but also situation

is public procurement systems of our countries. One chapter of this Report is precisely because of that dedicated to the findings and views of the Balkan Tender Watch Coalition regarding state of public procurement systems during pandemic. In the very end, we have identified and pointed out **main corruption risks in the public procurement cycle** in each of our countries. Based on our work results and experience from the past ten years and of course based on knowledge and capacities that our Coalition posses we formulated concrete regional recommendations for improvement of public procurement systems in observed WB countries.

VALUE OF PUBLIC PROCUREMENT

The analysis of public procurement system, besides analysis of the legal and institutional framework and legislation in this field which Balkan Tender Watch coalition conducted in the past, also requires an analysis of the basic quantitative indicators of the functioning of the system and the impact of public procurement on the economic and social system. The GDP and the taxpayer's money are redistributed through public expenditures including public procurement. This means that a quantitative analysis of the functioning of a public procurement system is important and necessary because public procurement procedure and money disbursed for public purchases i.e., their regularity and legality determine the quality of public goods and services. They therefore determine the level of social welfare and the living standard.

In order to better understand public procurement systems in the WB region, we have compared basic statistical information pertaining to public procurement in Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Kosovo and Serbia. The data pertain to the period of entire project implementation - from 2017 to 2022.

Following values are expressed in foreign currency i.e. euro and in percentages and include statistical information which pertains to:

- **total annual public procurement value**, in absolute terms as well as in proportion to the gross domestic product (GDP) and budgetary expenditures;
- **percentage of public procurement value according to the type of procurement**;
- public procurement **value in terms of the choice of the procedure** and public procurement value structure in terms of the applied procedure, taking into account type of procedure with the greatest absolute and relative prominence among conducted procedures in selected countries;
- data which reflect **intensity of competition in the field of public procurement, namely an average number of bids per awarded contract**;

ANNUAL PUBLIC PROCUREMENT VALUES

The tables and charts¹ (1-3) are the total annual value of public procurement in six WB countries, namely, Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Kosovo and Serbia. The data on the total annual public procurement value in North Macedonia are shown as values which include value-added tax (VAT). Public Procurement Bureau collecting and keeping the data on public procurement conducted in North Macedonia since 2009 ceased to calculate public procurement values excluding the value-added tax, with an explanation that only the data including the VAT are relevant because they show the real expenditure paid by institutions.

In five consecutive years (2017-2021) of our monitoring, we have observed the total annual value of public procurement in all countries. There is a substantial difference among annual public procurement values in Albania, Bosnia and Herzegovina and Serbia on the one hand, and public procurement values in North Macedonia, Montenegro, and Kosovo, which is certainly the consequence of size of states and the volume of their respective public sectors.

Average value, for the period of five years, that observed countries spent through public procurement were as follows:

1. Albania: 1.215.989.770 EUR;
2. Bosnia and Herzegovina: 1.401.720.126 EUR;
3. North Macedonia: 895.035.336 EUR;
4. Montenegro: 469.013.124 EUR;
5. Kosovo: 560.424.113 EUR;
6. Serbia: 3.587.933.170 EUR.

As we can see, on the average Serbia is spending through the public procurement around 80% of amount that all other countries are spending combined.

¹ Hereinafter in all charts we will use abbreviation N. Macedonia when we refer to the Republic of North Macedonia.

Chart 1 - Total annual public procurement value per country (in EUR)

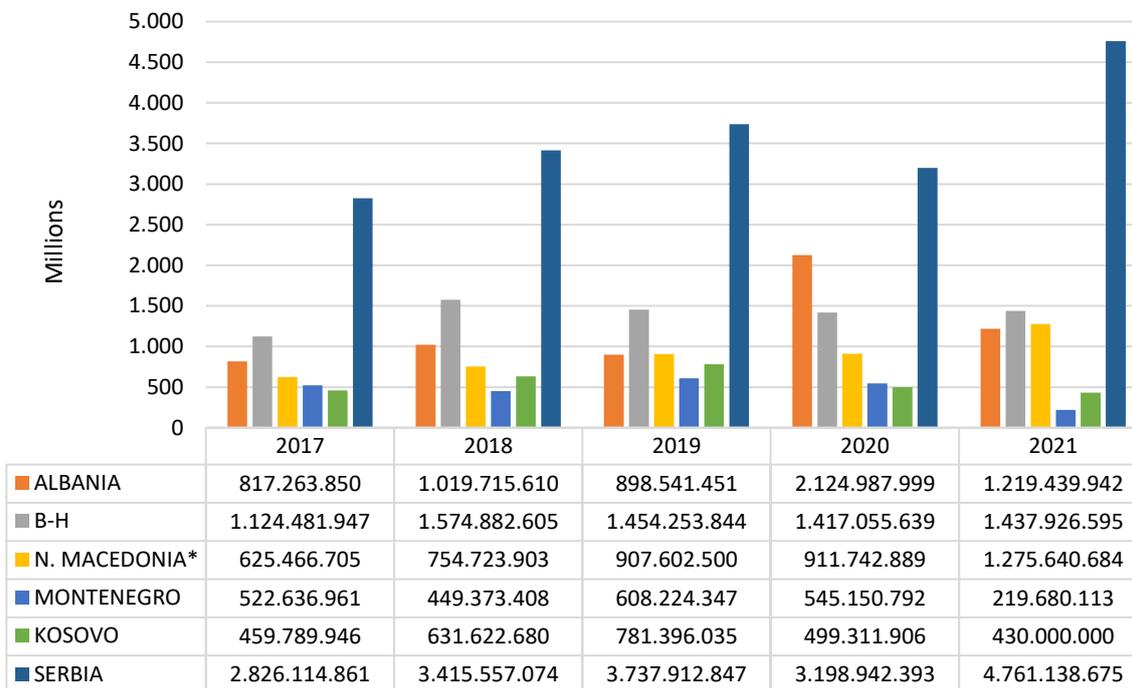
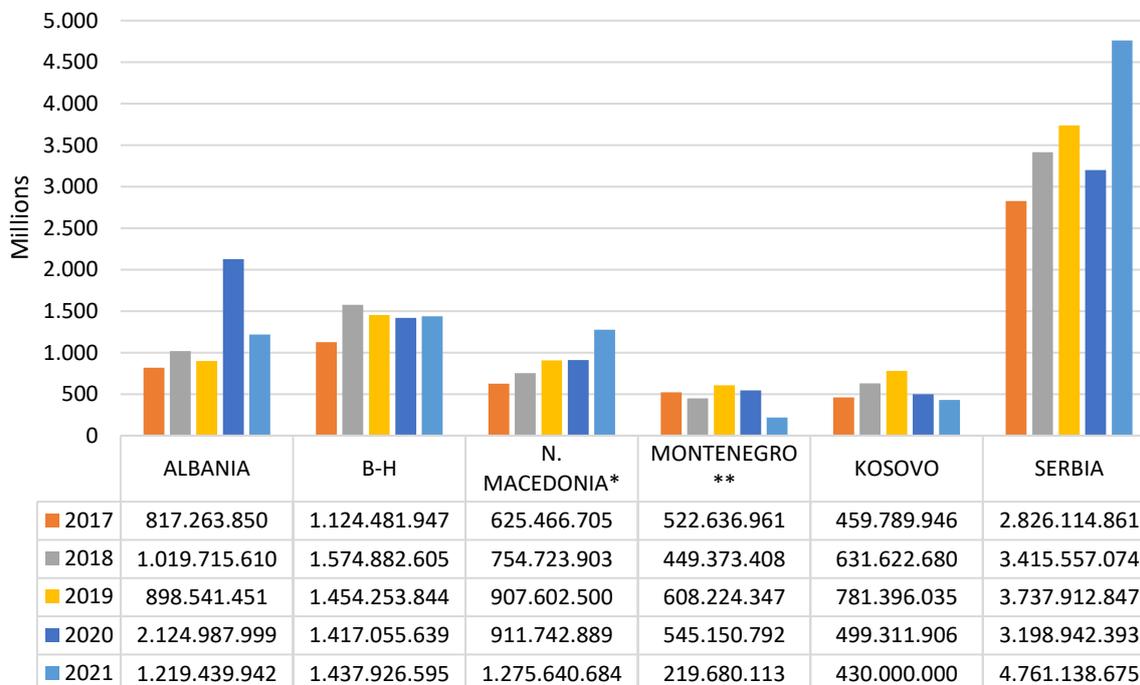
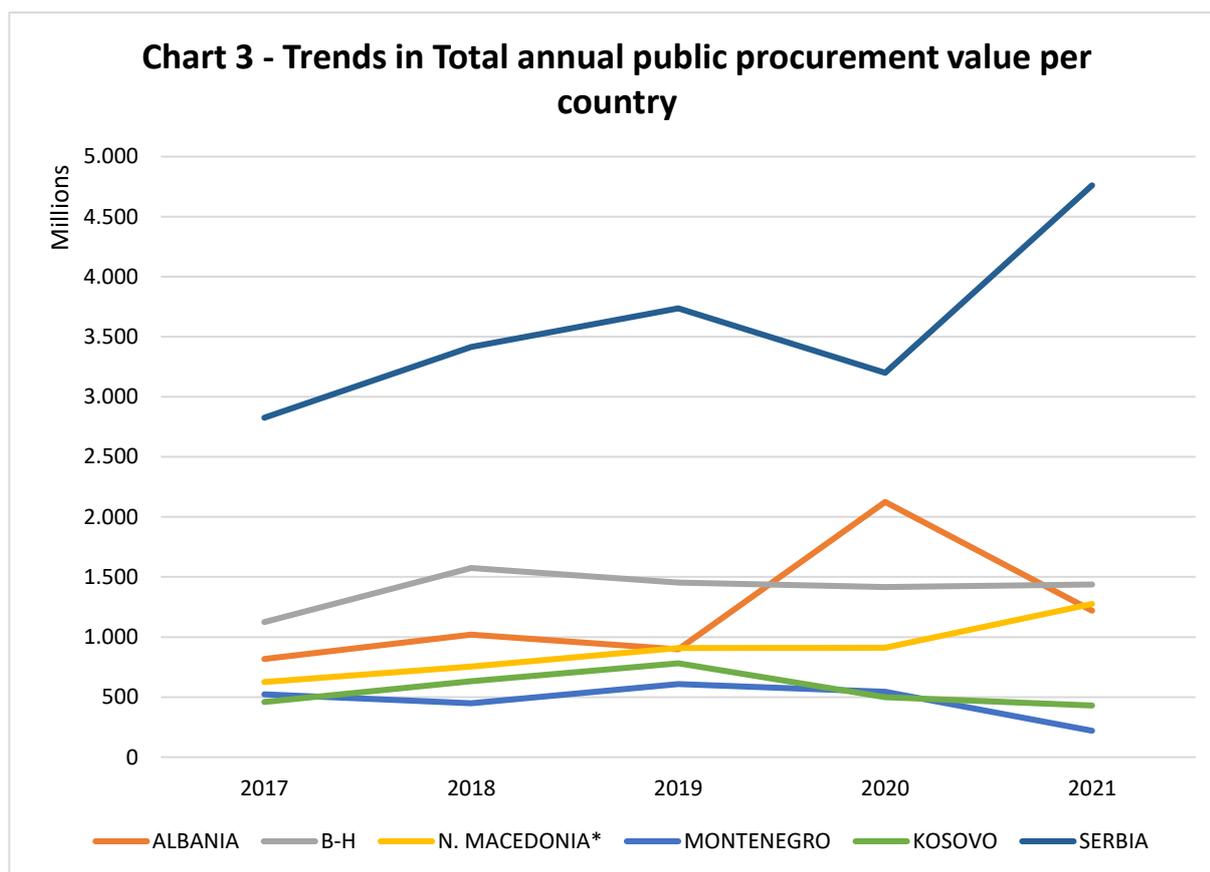


Chart 2 - Total annual public procurement value per country (in EUR)



*Values of public procurement in North Macedonia is presented with the value-added tax (VAT)

**Difference between total value of public procurement in Montenegro in 2021 and in previous years is due to difference in methodology applied by Directorate for Public Procurement Policy. In 2021 value of procurement is presented without values spent for procurement of coal and electricity due to fact that they are excluded from the application of the Law on Public Procurement.



VALUE OF PUBLIC PROCUREMENT COMPARED TO GDP AND BUDGETARY EXPENDITURES

The absolute value of annually procured goods, works and services may not be a sufficiently good indicator for an analysis that attempts to determine the prominence of this type of public outlay in terms of its value. The proportion of the value of procurements to the total value of budgetary expenditures or the gross domestic product might be more telling about the extent of state involvement in economic transactions. Moreover, comparing these data with similar ones in other countries, primarily those in one’s geo-economic neighborhood and on a similar level of development, provides a better insight into whether public procurement expenditures are excessive and whether there is room for savings.

The following six charts show the share of total annual values of public procurement in the gross domestic product, public expenditures, and trends of these values in countries covered by the research. When it comes to the share of public procurement in GDP in 2020, we had decrease in three countries (Bosnia and Herzegovina, Kosovo and Serbia) and increase in the rest of the observed countries (Albania, North Macedonia and Montenegro). In 2021 decrease continued so we had significant change in figures in four observed countries (i.e., in Albania for almost 6 percentage points, in Montenegro more than 8 percentage points). In 2021 only North Macedonia and Serbia recorded an increase of this share. The greatest share of GDP in 2021 is still redistributed through public procurement in North Macedonia – **10.08%**, followed by Serbia with **8.93%**. Lowest recorded share was in

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

Montenegro – **4.47%** while average of the entire region in 2021 was **7.71%**, much lower than in 2020 when it was **9.7%**.

As it was already mentioned significant decrease was recorded in Albania and Montenegro, while in North Macedonia and Serbia we had quite big increase. Based on available data, Montenegro is “in the last place” with “only” **4.47%**.

Analyzed in total, for all observed years, entire region is spending around **8.5%** of GDP through public procurement. Analyzed annually, the highest share of public procurement in GDP is found in Montenegro for first three observed years –in 2017 **12.33%**, in 2018 **9.8%**, in 2019 **12.39%** while in 2020 Albania had the highest “score” with **14.7%** which was the highest share through the entire period and, as already mentioned in 2021 Serbia had the highest share with **8.93%**

Trends related to annual share of public procurement value in the GDP is presented in Chart 6.

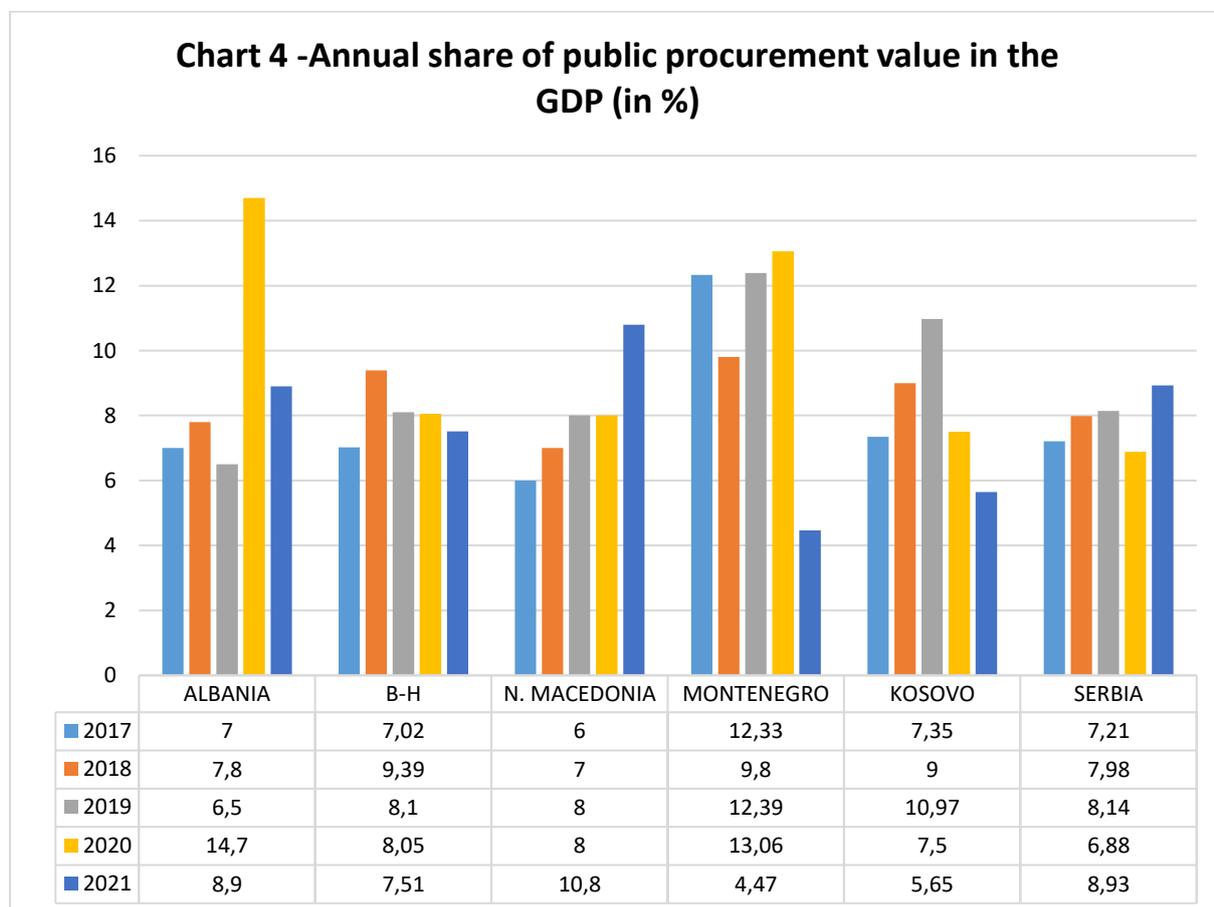
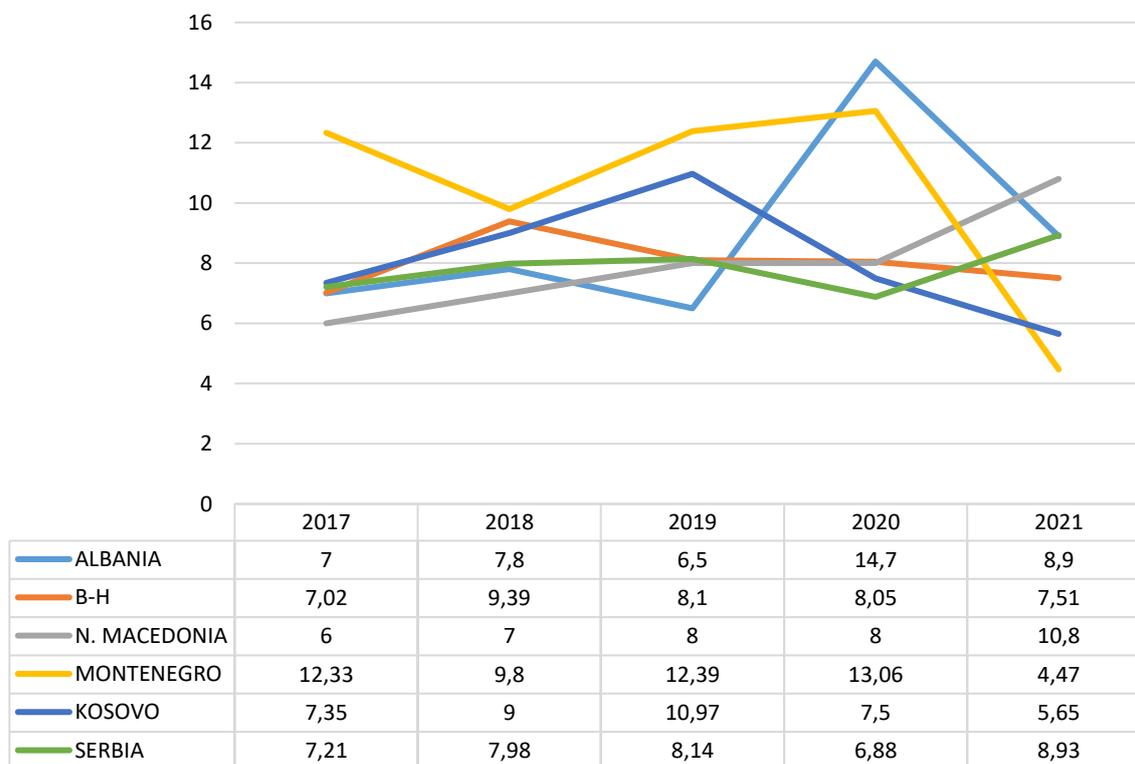


Chart 5 -Annual share of public procurement value in the GDP (in %)



Chart 6 -Trends in annual share of public procurement value in the GDP(in %)



COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

When the share of public procurement values in total budgetary expenditures is concerned, the average recorded in 2021 was **21.97%** and it was much lower than in 2020 - **27.59%**. For the purpose of comparison, it was **26,68%** in 2019 and slightly lower in 2018 and 2017 – around **25%**. Below-average values in 2021 were recorded in Bosnia and Herzegovina, Montenegro, and Kosovo, while Albania, North Macedonia and Serbia were above average. The greatest share of public procurement in the overall budget expenditures in 2021 was found in Serbia, namely as much as **32%**, closely followed by North Macedonia with 30.5%. In 2020 this share was highest in Albania, **49.3%** - the highest recorded value in the entire observed period and almost 19% more than the second placed Montenegro with **30.4%**. The difference between the lowest recorded share in 2021 in Bosnia and Herzegovina and the highest share in Serbia was **14** percentage points. In 2020 this difference was more than 30 percentage points between Albania and Bosnia and Herzegovina. The data demonstrate that in 2021 we had a decrease of the share of public procurement in total budgetary expenditures in three countries – Albania, Montenegro and Kosovo and increase in Bosnia and Herzegovina, North Macedonia, and Serbia. Both Serbia and North Macedonia have experienced growth in both observed values, share in budgetary expenditures and share in GDP. When it comes to the average of share of public procurement values in total budgetary expenditures for five years for all observed WB countries, it is **25.45%**

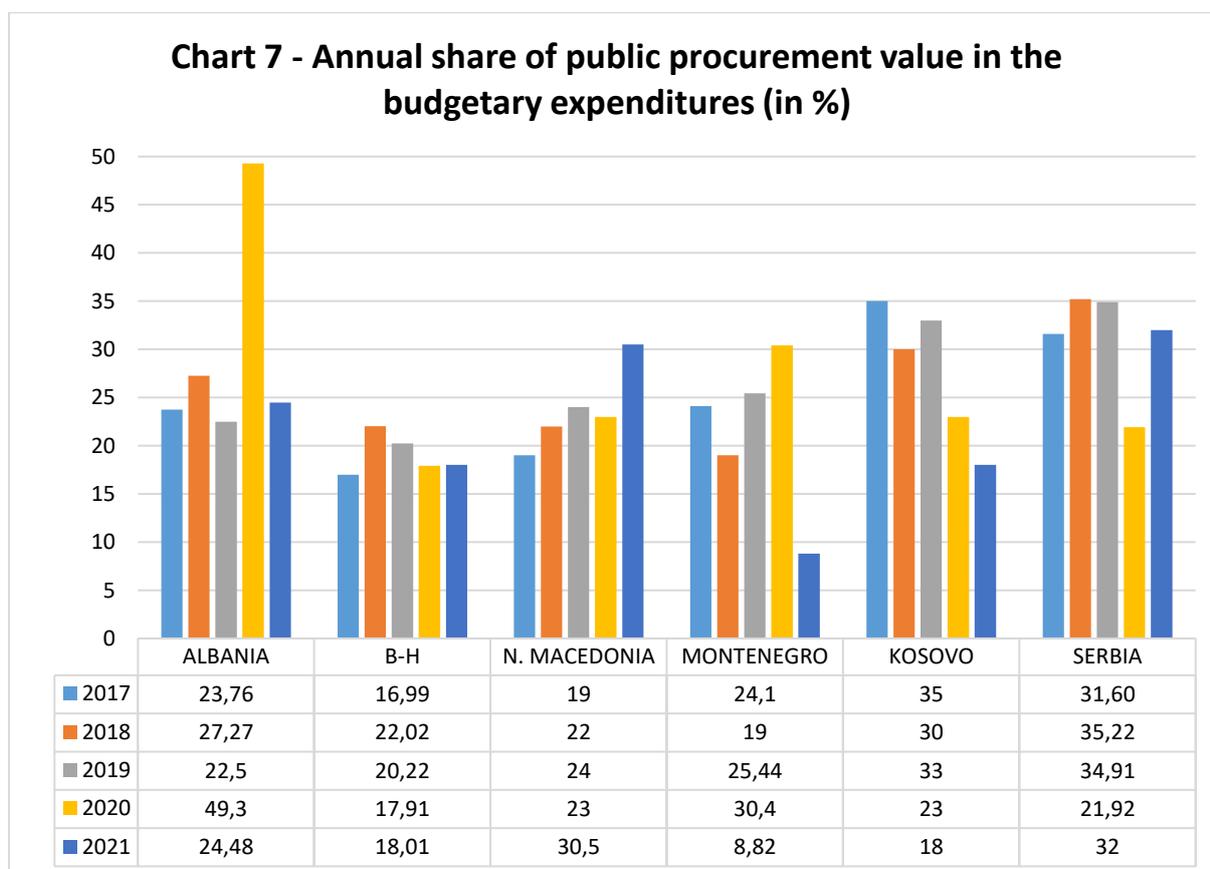
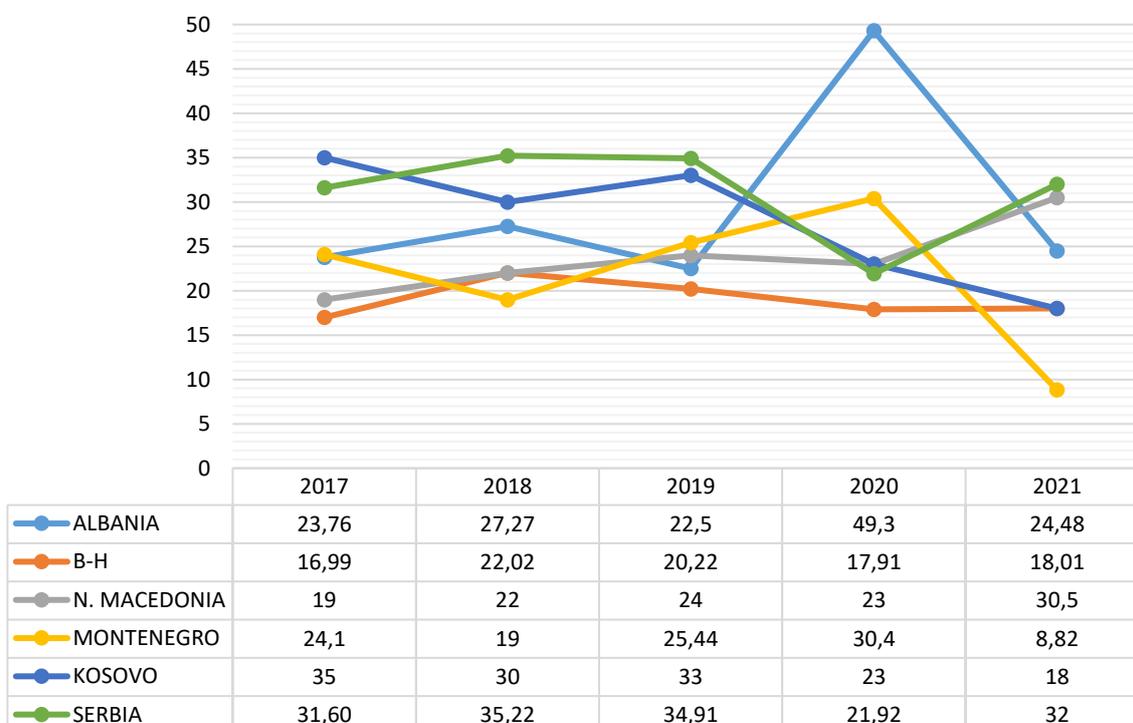


Chart 8 - Annual share of public procurement value in the budgetary expenditures (in %)



Chart 9 - Trends in annual share of public procurement value in the budgetary expenditures (in %)



Thus, in 2021 on average approximately **one-fifth** of budgetary expenditures are spent on public procurement and around **7.7%** of the gross domestic product is redistributed through state purchases. Although these figures were quite balanced in the first four observed year significant decrease is recorded in 2021 that clearly confirms assertions of our Coalition - our countries have limited possibilities to achieve development goals and strengthen the economy through public procurement.

VALUE OF PUBLIC PROCUREMENTS IN TERMS OF THE TYPE OF PROCUREMENT

A comparison of data on public procurement values in terms of the type of procurement reveals that in all countries covered by the research, the procurement of goods prevails. In average more than **50%** of total funds disbursed for public procurement in 2021 in six WB countries were disbursed for the procurement of goods. The allocations for goods were highest in Serbia with more than **60%** of total value and lowest in Kosovo – **38.8%**. In 2020 average was similar - **49.7%** and highest allocations for goods were highest in Albania and North Macedonia with around **59%** and lowest in Kosovo – **39.7%**

Average share of public procurement contracts related to services in 2021 was around **22%**. Allocations for services were highest in Albania (**28%**) and lowest in Kosovo – **17.9%**. Average share related to public procurement of services in 2020 was slightly lower – **21%** while highest value was recorded in Serbia (**28.4%**) and lowest again in Kosovo – **13.4%**.

Average share of public procurement contracts related to works was around **27.3%** in 2021 and around **30%** in 2020. They were highest in Kosovo in both consecutive years - above **42%** in both years and lowest in Albania in both years- **17%** in 2020 and **21%** in 2021.

In Bosnia and Herzegovina, the value structure of public procurement in terms of the types of procured items were the most balanced during all five observed years.

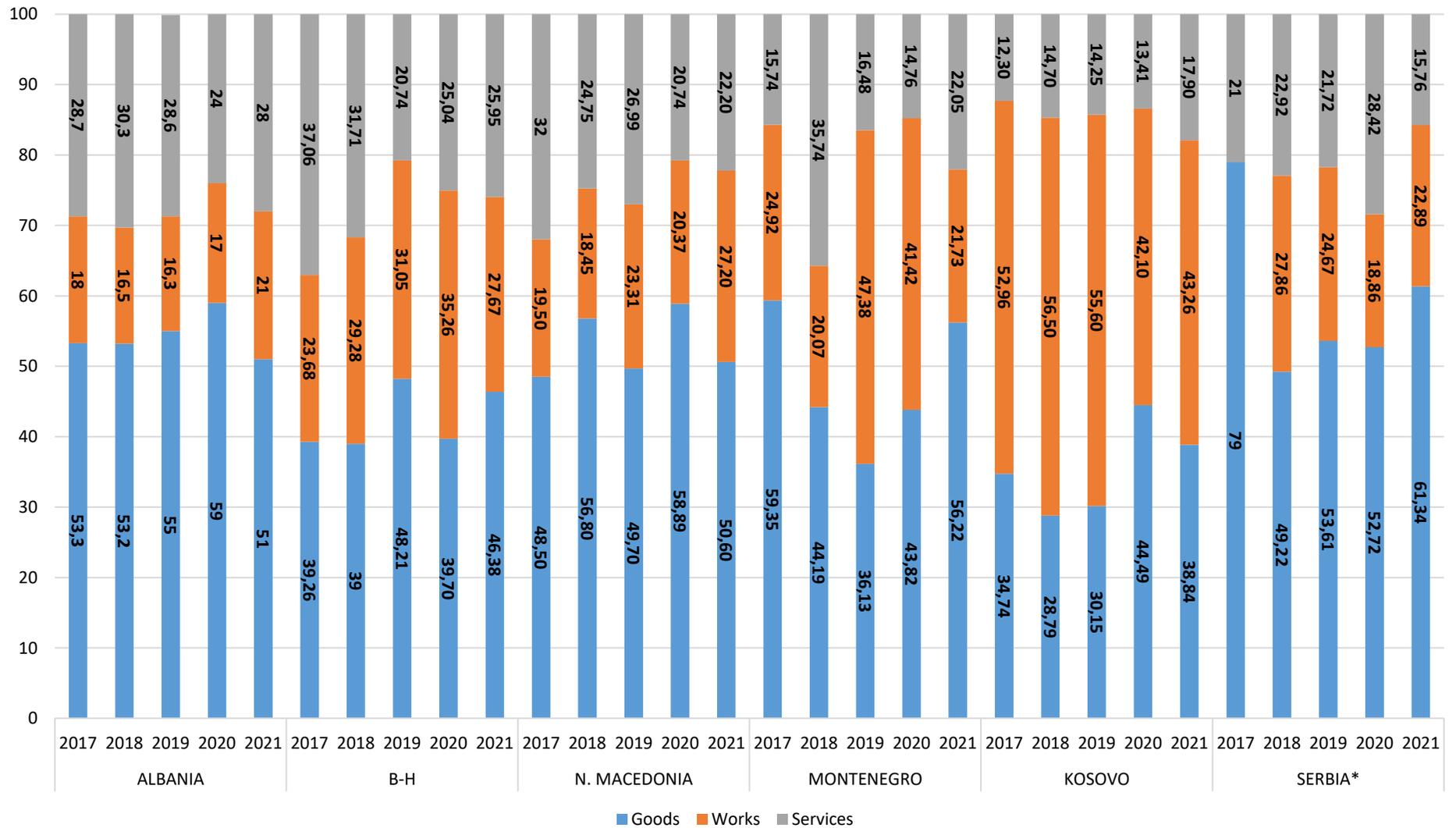
Two following tables illustrates mentioned average shares and “rankings” of the countries based on set average - below or above.

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

2021	GOODS Average - 50.7%		SERVICES Average – 21.9%		WORKS Average – 27.2%	
	Below average	Above average	Below average	Above average	Below average	Above average
<i>Albania</i>		×		×	×	
<i>Bosnia and Herzegovina</i>	×			×		×
<i>North Macedonia</i>	×			×		×
<i>Montenegro</i>		×		×	×	
<i>Kosovo</i>	×		×			×
<i>Serbia</i>		×	×		×	

2020	GOODS Average - 49.7%		SERVICES Average – 21 %		WORKS Average – 29.2%	
	Below average	Above average	Below average	Above average	Below average	Above average
<i>Albania</i>		×		×	×	
<i>Bosnia and Herzegovina</i>	×			×		×
<i>North Macedonia</i>		×	×		×	
<i>Montenegro</i>	×		×			×
<i>Kosovo</i>	×		×			×
<i>Serbia</i>		×		×	×	

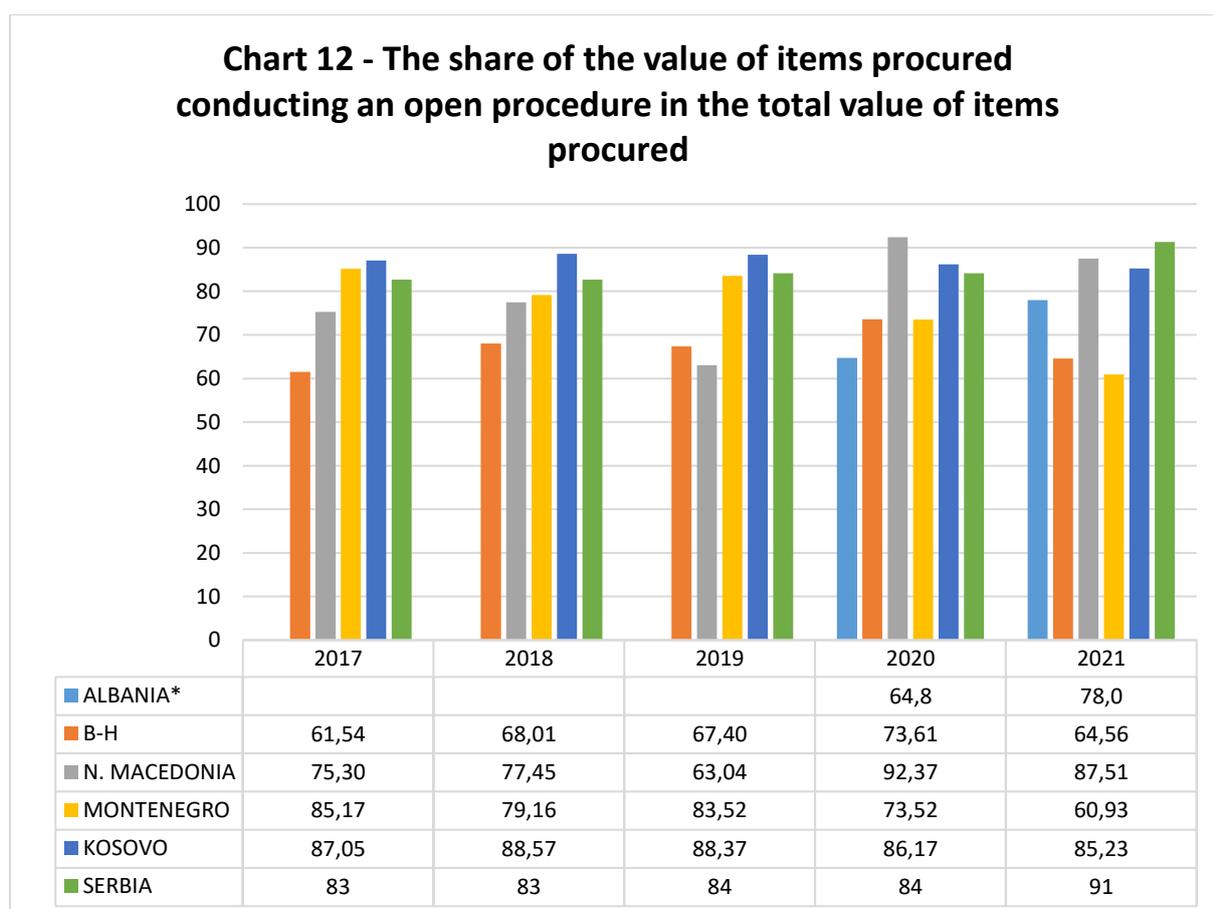
Chart 11 - Value structure of public procurement according to the subject of public procurement contract (in %)



VALUE OF PUBLIC PROCUREMENT IN TERMS OF THE CHOICE OF THE PROCUREMENT PROCEDURE

The type of the applied public procurement procedure is the greatest indicator of transparency of the procedure and possibilities for abuse. The open procedure is recommended as the default procedure for conducting public procurement - precisely because of the highest level of transparency of the procedure. This rule applies to all six countries covered by the research. In addition to the open procedure, each individual national system also applies other procedures as the negotiated procedure with or without publication of a procurement notice and several other standard and specific types of procedures. Thorough research that has encompassed analysis of procedures applied in five of six countries (Albania has been added to the research in 2021) can be found in the previous Comparative Evaluation Reports². Although level of transparency undoubtedly increased during the time and open procedure became predominant, Covid-19 crisis strongly endangered transparency and application of open procedure as default one. Precisely because of this and bearing in mind that open procedure should be used in the majority of cases, in this Report we concentrated on the application of open procedure and values that are being distributed using this procedure.

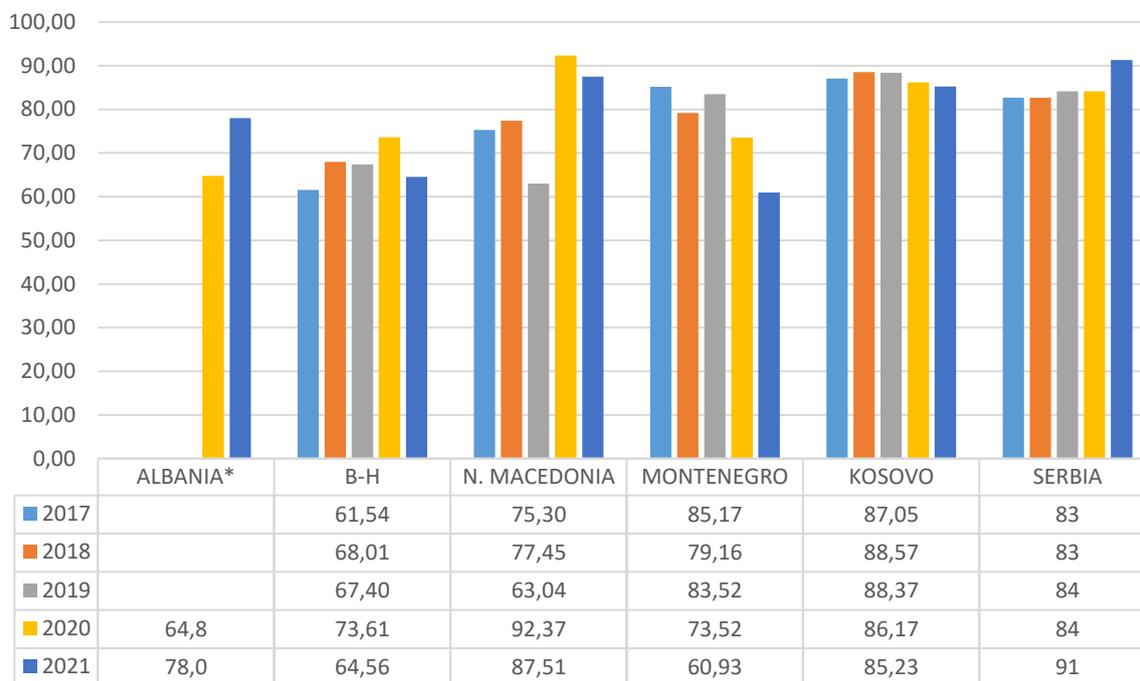
Chart 12 - The share of the value of items procured conducting an open procedure in the total value of items procured



*Relevant data for Albania for 2017, 2018 and 2019 are not available.

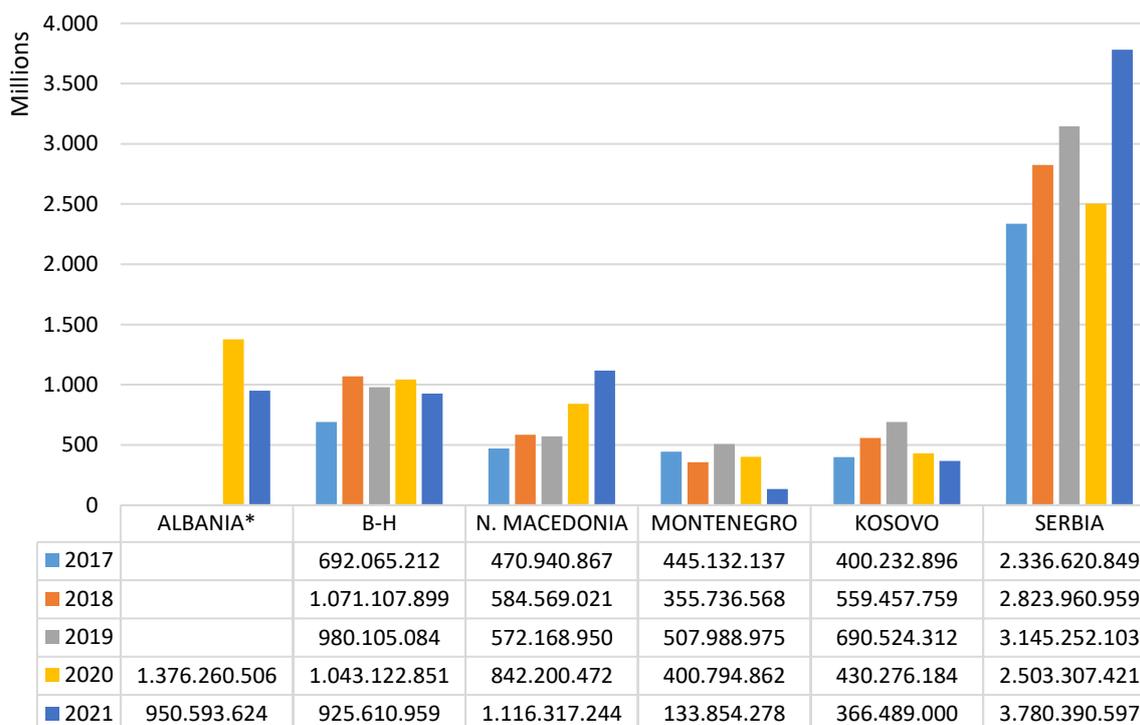
² [Documents Comparative | Balkan Tender Watch](#)

Chart 13 - The share of the value of items procured conducting an open procedure in the total value of items procured



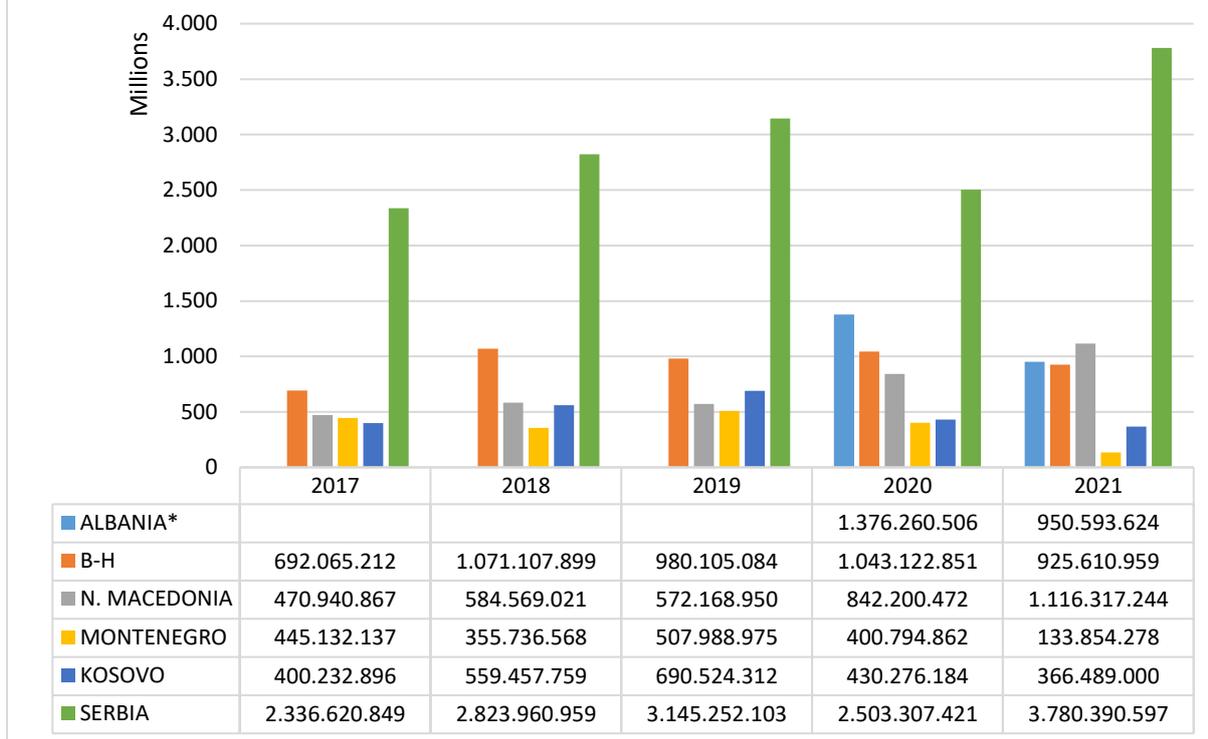
*Relevant data for Albania for 2017, 2018 and 2019 are not available.

Chart 14 - The value of public items procured conducting an open procedure



*Relevant data for Albania for 2017, 2018 and 2019 are not available.

Chart 15 - The value of public items procured conducting an open procedure



*Relevant data for Albania for 2017, 2018 and 2019 are not available.

As we mentioned, the open procedure prevails among procedures applied to conduct public procurement in all six selected countries in all five years. The value structure of public procurement shows that in last two years of our monitoring, the share of the open procedure in North Macedonia, Kosovo and Serbia was over **85%** and as much as **91%** in Serbia in 2021. If we illustrate this percentage from Serbia with amount, it means that more than 3,7 billion of euros was distributed using open procedure. Record share that was recorded in all five observed years was in 2020 in North Macedonia with share of open procedure as much as **92.37%**. On average, application of open procedure in 2021 and in 2020 was **77.9%** and **79.1%**. Like we stated before Covid-19 pandemic brought many problems and strongly affected transparency in public procurement³. Continuation of that trend is still visible in Bosnia and Herzegovina and Montenegro, where percentage of application of open procedure is on the record low level – **60.9%**. Although Bosnia and Herzegovina is “second worst” with “score” at **64.56%** we need to remember that back in 2015 in the share of the open procedure in this country was barely over 50% - **51.5%**, which was the lowest share of this procedure among other observed countries. Although significant progress was made in the meantime, of more than 22 percentage points – to **73.6%** in 2020, current value is still more than **13%** below the average for 2021. In 2020, above mentioned Bosnia and Herzegovina, Albania, and Montenegro were below average while in 2021 we have situation in Bosnia and Herzegovina and Montenegro.

³ Separate part of this Report is dedicated to the state of affairs in public procurement during Covid-19 pandemic.

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

In 2021, like it was stated before, average was **77.9%** and Serbia with **91%**, North Macedonia with **87.5%**, Kosovo with **85.2%** and Albania with **78%** were above average. In 2020 average share was higher – **79.1%** and above average results were recorded in North Macedonia – **92.3%**, Kosovo – **86.1%** and Serbia with **84%**. Kosovo and Serbia have “most stable” share during the five observed years on with an average of **87%** and **85%**.

In the end, it is necessary to underline that ending of described trend in some of the countries is essential. Transparency of public procurement systems is the prerequisite for legality and prevention of illegal and corrupt acts and practices.

INTENSITY OF COMPETITION

The public procurement systems which apply less transparent types of procedures, such as those without issuing the call for competition, are characterized by expectedly lower intensity of competition among bidders, precisely due to the low level of information and impossibility of bidders to submit their bids. The intensity of competition is best graded in terms of an average number of bids per tender i.e., the awarded contract and the percent of contracts awarded to the single bidder. The competition intensity is an important indicator because a higher level of competitiveness leads to lower prices i.e., higher quality of procured items, as well as to lower and more purposeful public spending on procurement. The following charts show the data on the average number of bids per tender in Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Kosovo, and Serbia. In all observed countries, except Bosnia and Herzegovina the data indicate that there was a decrease of competitive intensity over the past five years of our monitoring. In Serbia the average number of bids per tender in last four years remained almost unchanged. Average number of bids per tender in 2021 was the same as it 2020 was **2.9**. In 2021 North Macedonia, Montenegro and Kosovo were above average, all other countries were below average while in 2020 only North Macedonia and Kosovo were above average. Kosovo had by far the best result with **4.8** bids per tender in 2020 but in 2021 had decrease of **0.8** (but still remained best ranked) and now is far away from the “standard” from 2015 where there were almost 6 bids per tender (**5.8**). Still, Kosovo has more than 1.5 and 1.8 bids compared to Albania, Serbia and Bosnia and Herzegovina.

Chart 16 - Average number of bids per tender

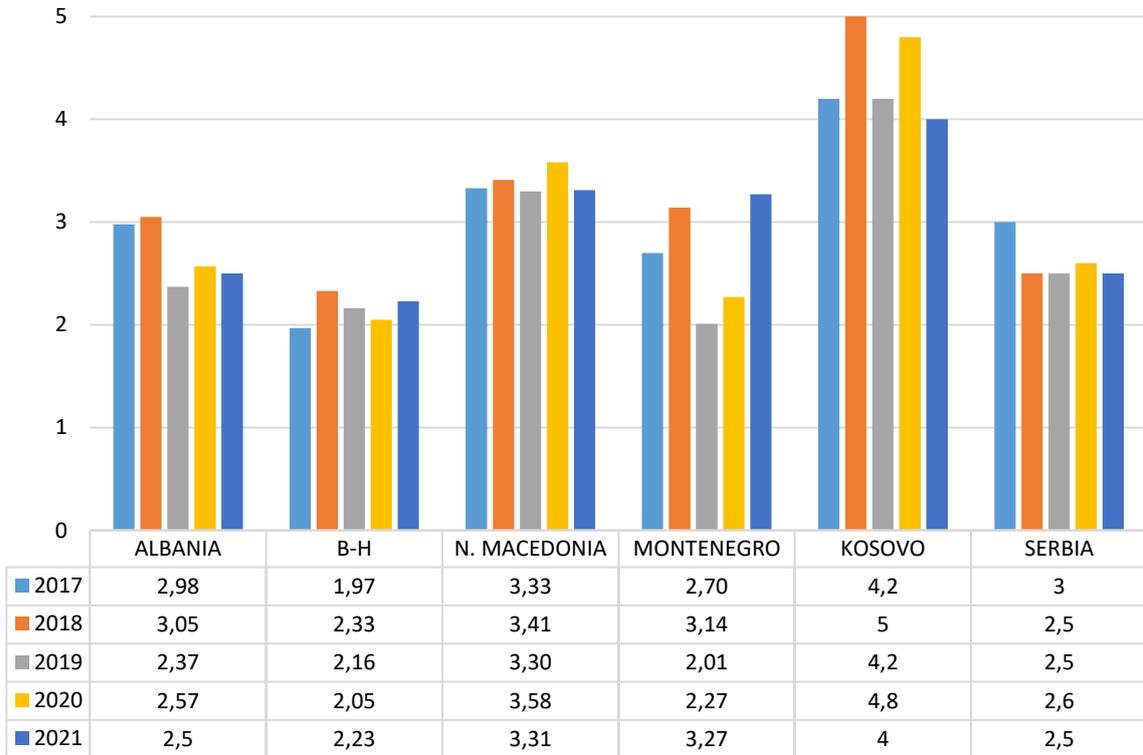


Chart 17 - Average number of bids per tender

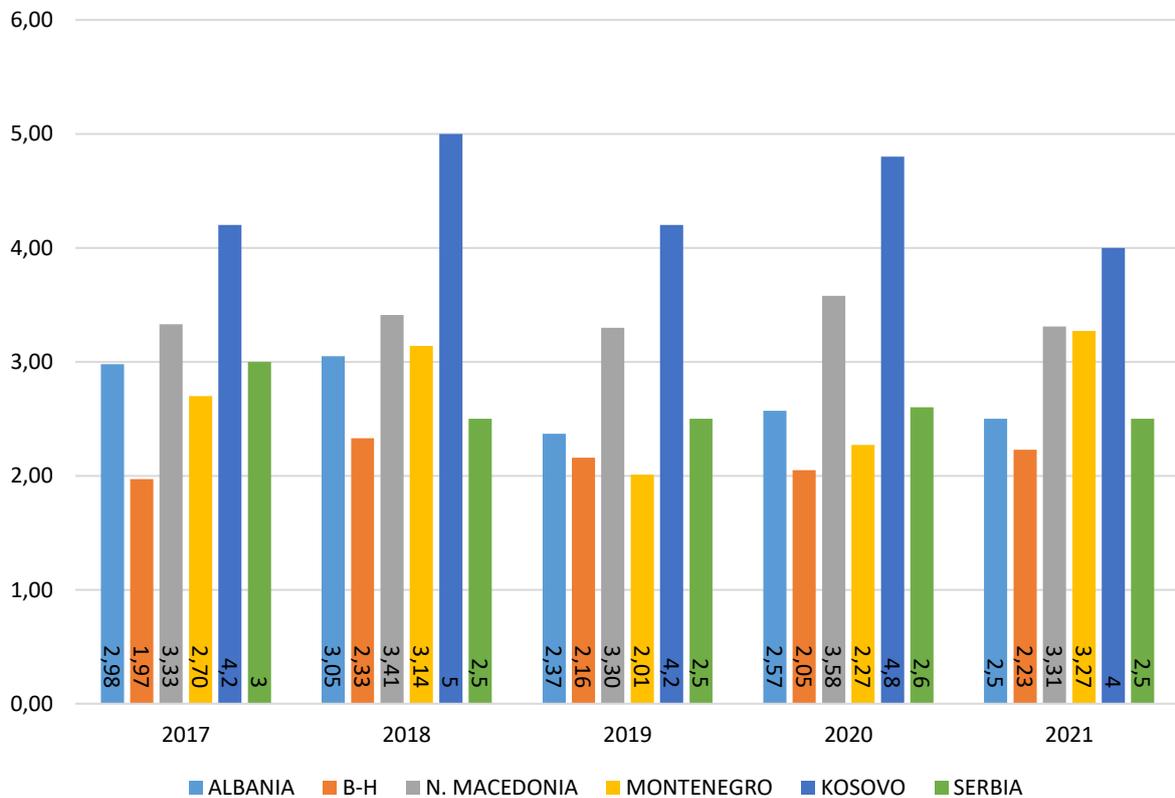
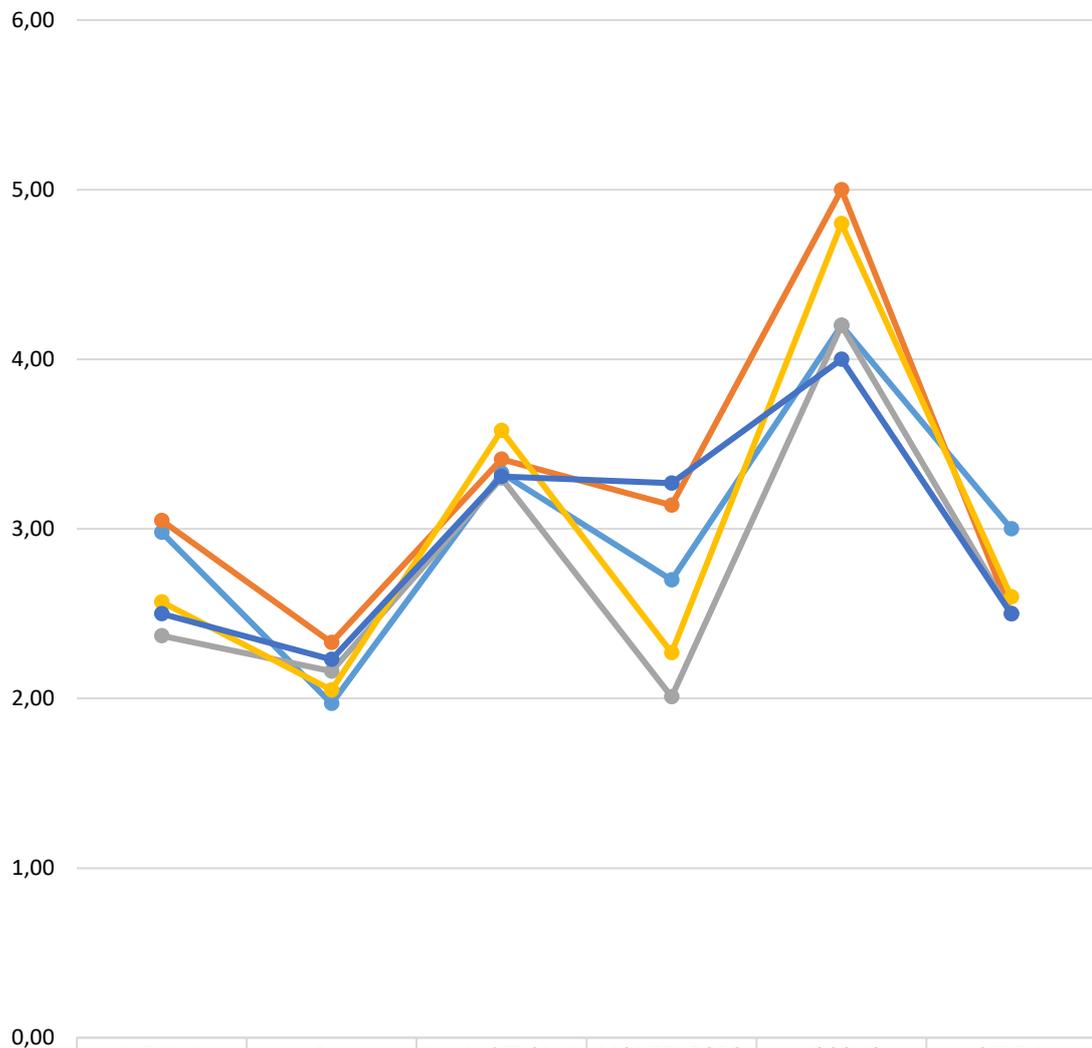


Chart 18 -Trends in average number of bids per tender



	ALBANIA	B-H	N. MACEDONIA	MONTENEGRO	KOSOVO	SERBIA
● 2017	2,98	1,97	3,33	2,70	4,2	3
● 2018	3,05	2,33	3,41	3,14	5	2,5
● 2019	2,37	2,16	3,30	2,01	4,2	2,5
● 2020	2,57	2,05	3,58	2,27	4,8	2,6
● 2021	2,5	2,23	3,31	3,27	4	2,5

STATE OF AFFAIRS IN PUBLIC PROCUREMENT SYSTEMS OF THE WESTERN BALKAN COUNTRIES - EU PERSPECTIVE

1. BOSNIA AND HERZEGOVINA

The Progress Reports prepared by the European Union from year to year have been repeating almost the same recommendations for years, while the interest of the European Commission in this area is changing from year to year. However, very little was said about the pervasive corruption in the field of public procurement, and the field of public procurement was viewed only in terms of compliance with the EU *Acquis* in terms of rules and procedures governing the public procurement system. Only in the last report in 2021, there is more talk about ubiquitous corruption or the "pandemic" of corruption in public procurement, as we called it.

Looking at the Progress Report of Bosnia and Herzegovina for 2018, it can be concluded that *"There are significant shortcomings in the mechanisms of internal control of institutions at all levels, which makes the system vulnerable to inefficiencies and losses, especially in public procurement. Ministries of finance at various levels do not have the administrative capacity to further implement public financial management reforms"*. The same Report also states that *"There are no regulations governing lobbying, and the capacity to control public procurement remains weak. The state should introduce a fully functioning e-procurement system to improve transparency and reduce opportunities for abuse"*. Speaking on the fight against corruption and law enforcement in this area, the Report emphasizes that *"Capacities to investigate economic, financial and public procurement crime remain weak and need to be significantly improved in terms of numbers, levels of specialization and equipment. The police and the judiciary need to specialize further."*

The Analytical Report of the European Commission from May 2019 states that Bosnia and Herzegovina has a certain level of preparedness in the field of public procurement. At the same time, it is stated that special attention should be paid to the harmonization of legislation with the EU directives from 2014 in the field of traditional procurement, procurement of utility services and concessions. The country should also strengthen the functioning of the system of legal remedies, so that complaints are handled and resolved in a timely, efficient, and competent manner that will improve legal certainty and transparency in this area.

According to the report, in the coming year, Bosnia and Herzegovina should primarily:

- adopt the new Law on Public Procurement and establish the position of a specialized procurement officer within the contracting authorities;
- strengthen the administrative capacity of the Public Procurement Agency and the Complaints Review Office by increasing the number of employees and appropriate training,
- make the procurement process more transparent;
- establish a formal coordination mechanism within the Complaints Review Office to ensure consistent decision-making by their three branches.

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

Regarding the ability to apply and execute the envisaged competencies, according to the Report, the administrative capacities of the Public Procurement Agency are assessed as insufficient to fulfill all the envisaged tasks. At the same time, there is a need to establish a specialized procurement function in each contracting authority, with the involvement of staff with appropriate skills and expertise.

Looking at the European Commission's Report on Bosnia and Herzegovina for 2020, it is stated that Bosnia and Herzegovina has a certain level of preparedness in the field of public procurement, but that there was a serious setback due to the Decision of the Council of Ministers of Bosnia and Herzegovina in May 2020, which requires the application of preferential treatment for domestic bidders, at a rate of 30%, for a period of one year and starting from June 1, 2020. It also states that BiH should harmonize its legislation in the field of public procurement and communal services with the EU *Acquis* and start the process of harmonization for concessions where the legal framework is very fragmented and should be harmonized to avoid overlaps, inconsistencies, and uncertainties. At the same time, the recommendations from the Analytical Report of the European Commission from May 2019 were not followed at all, and it was concluded that in the coming period the most important thing is that Bosnia and Herzegovina:

- withdraw the decision on preferential treatment of domestic bidders when awarding public contracts in order to ensure compliance with the Stabilization and Association Agreement in this area;
- adopt a new Law on Public Procurement;
- Strengthen the administrative capacity of the Public Procurement Agency and the Complaints Review Office by increasing staffing levels, providing appropriate training, and making the procurement process more transparent.

It is interesting to note that this report omits the 2019 recommendations regarding the establishment of a specialized procurement officer within contracting authorities as well as the recommendation to establish a formal coordination mechanism within the Complaints Review Office to ensure consistent decision-making by their three branches.

The Progress Report published in October 2021, points to all the previously mentioned shortcomings, most emphasizing the need to pass a new Public Procurement Law that has been planned for several years. However, what characterizes this report is the fact that greater emphasis has finally been placed on corruption, which is seen as one of the most significant problems facing Bosnia and Herzegovina. The report states that "*No progress has been made in the fight against corruption and organized crime in the reporting period. Urgent measures are needed to pass laws on public procurement and conflicts of interest. During the pandemic, the negative effects of widespread corruption and signs of political clientelism continued to show strongly, directly affecting the well-being of citizens. The selective and non-transparent prosecution and initiation of judicial proceedings in cases of corruption are a matter of concern....*". It is also stated that "*Poor functioning of the judicial system still prevents citizens from exercising their rights and undermines the fight against corruption. Indicators of corruption have further deteriorated, and all levels of government are showing signs of political captivity, which directly affects the daily lives of citizens. The selective and non-transparent prosecution and handling of cases of corruption by the judiciary has continued, which affects the public interest, but also business entities and investors.*"

2. NORTH MACEDONIA

The country is moderately prepared in the area of public procurement and national authorities should implement more effective anti-corruption measures into the procurement cycle. These are the two key assessments on the state of public procurement in North Macedonia that are reflected in the last few European Commission's country reports.

North Macedonia launched the reform of the public procurement legal framework in 2017 by drafting the new Law on public procurement, which was finally adopted and whose implementation started in the first half of 2019.

The new law aimed at approximating to the 2014 EU Directives on public procurement, but also addressing the many accumulated problems in implementation of public procurement according to the previous legal framework that changed so often that in the end did not even allow the realization of basic principles in public procurement.

In parallel with its support for the new Law, the European Union has repeatedly stated that substantial efforts are still needed to ensure a stable, transparent, efficient, and effective public procurement system. In that context it was pointed out that the country needs to increase efforts that prevent irregularities and corruption during the procurement cycle and that ensure a more effective public procurement system, following the principles of transparency, equal treatment free competition and non-discrimination.

What the EC is paying particular attention to in its assessments is highlighting the need to:

- improve the co-ordination among key players in public procurement and strengthen their capacities and independence to implement the principles of transparency, free competition, equal treatment, and non-discrimination; and
- improve control of public procurement procedures through efficient follow-up and the reporting of irregularities, cases of conflict of interest and fraudulent practices.

In its country reports for North Macedonia, the European Commission meticulously notes the investigations opened by the Public Prosecutor for Prosecuting Organized Crime and Corruption that concern violation of procurement rules.

However, the EC states that the regulatory and institutional mechanisms on integrity and conflict of interest are still insufficient and that there is no risk assessment system incorporated into the procurement cycle to ensure timely information on possible corruptive practices or irregularities, including bid rigging.

As per the remedy system in public procurement, the EC assess that the legislation on the right to legal remedy is broadly aligned with the EU *Acquis*. However, the implementation capacity of the SAC remained insufficient.

Given the significantly increased number of appeals compared to the past years, there is a need for additional qualified staff to ensure timely processing of the appeals. There is no considerable backlog of decisions. However, most of them cover exclusively legal and administrative matters rather than issues related to the technical substance of the appeals.

3. MONTENEGRO

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

What characterizes each EC report on Montenegro's progress in public procurement for the observed period in the previous four years are criticisms. Montenegro's negotiations in Chapter 5 - Public Procurement, within the process of the country's accession to the European Union, have been ongoing since December 2013 and for all this year's very little has been done, significant progress has been made only in the previous year.

The European Commission then defined three binding criteria for closing Chapter 5, as follows:

- Montenegro must harmonize the entire legislative system of public procurement with the EU *Acquis* in all areas, with a special focus on concessions, public-private partnerships, and defense procurement.
- Montenegro must establish and strengthening the administrative capacity, institutional capacity at all levels and take adequate measures to ensure the application of the law before accession to the European Union.
- Montenegro must show a good balance of results of fair and transparent functioning of the public procurement system that provides value for money, competition, and effective protection against corruption.

In its 2018 Progress Report⁴ the European Commission has criticized the amendments to the Public Procurement Law, which were adopted in mid-2017, assessing that they constitute a backsliding in terms of alignment with the EU *Acquis*. Montenegro remains moderately prepared on public procurement, which is an area particularly vulnerable to corruption. Several of the amendments to the Law on Public Procurement have reduced the level of compliance with EU rules. Prepared by an ad-hoc task force, and without public consultation, the amended Law no longer applies to low-value procurement and procurements in the area of defense and security. The changes also introduced several new exemptions that are not in the EU *Acquis* states the European Commission's Report. Also, what remains, inspection capacity in public procurement needs to be further improved.

The European Commission recommended that in 2018 Montenegro should in particular:

- adopt legislation that is aligned with the 2014 EU Procurement Directives, including on concessions;
- prepare a detailed and comprehensive plan for the roll-out of e-procurement;
- improve the functioning of the remedies system, including its coverage of low-value procurements, concessions, and defense procurement, and improve the administrative capacity and IT infrastructure of the State Commission for the Control of Public Procurement.

In Progress Report for Montenegro 2019⁵, EC stated that Montenegro remains moderately prepared on public procurement within a limited progress which was achieved in 2018, as preparations continued for new laws on concessions and public procurement, aimed at alignment with the 2014 EU Procurement Directives. Institutional

⁴ <https://ec.europa.eu/neighbourhood-enlargement/system/files/2019-05/20180417-montenegro-report.pdf>

⁵ <https://ec.europa.eu/neighbourhood-enlargement/system/files/2019-05/20190529-montenegro-report.pdf>

changes concerning public procurement administration, introduced at the end of 2018, may have an impact on the country's implementation and enforcement capacity. The introduction of full e-procurement is still ongoing and a new Law on public procurement planned for adoption in 2019. E-procurement is expected to help achieve more transparency and reduce opportunities for abuses in public procurement procedures. However, checks on the overall public procurement cycle remain a cause for concern. The previous year's recommendations were partially addressed. In the coming year, Montenegro should in particular:

- Adopt and implement the laws on public-private partnerships and public procurement;
- Prepare a detailed and comprehensive plan for the rollout of e-procurement;
- Further improve the functioning of the remedies system as well as the administrative capacity and IT infrastructure of the State Commission for the Control of Public Procurement

In Progress Report for Montenegro 2020⁶ EC stated that Montenegro makes some progress in 2019, with the adoption of the laws on public-private partnerships and public procurement where is legal framework on public procurement is broadly aligned with the *Acquis*. In 2019 The Public Procurement Administration is now a part of the Ministry of Finance's Department for Public Procurement, which has a lead role in developing public procurement policy. Capacity to manage public procurement processes has improved, although the high number of contracting authorities is not conducive to efficiency. A regulatory and institutional framework is in place on integrity and conflict of interest mechanisms in public procurement. On data management systems, the new regulatory framework for public procurement provides a basis for the introduction of an electronic public procurement system in Montenegro. From 2021, the current public procurement portal and traditional, paper-based procurement procedures should be replaced by the e-procurement system (EPPS). Activities for the implementation of EPPS, financed by an EU project, are progressing smoothly, with a test-version of the new software made available in September 2019. The pilot phase of the e-procurement system is to be launched in the third quarter of 2020, with the participation of selected contracting authorities. But still remains moderately prepared on public procurement. Last year's recommendations were partially fulfilled.

In the coming year, Montenegro should:

- Start implementing the laws on public-private partnerships and public procurement and adopt implementing legislation on public procurement, including on defense procurement;
- Fully respect the EU public procurement principles when awarding the concession to operate Airports of Montenegro;
- Further improve the functioning of the remedy system.

In 2021 Progress Report⁷ EC stated Montenegro has made progress in part of Legal framework as well as on Electronic Public procurement system. The Legal framework on public procurement is well aligned with the EU *Acquis*. The new laws on public procurement and on public-private partnership entered into force in July 2020. Secondary legislation to both laws (some 30 different legal acts) was adopted as scheduled, despite COVID-19

⁶ https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/montenegro_report_2020.pdf

⁷ https://ec.europa.eu/neighbourhood-enlargement/montenegro-report-2021_en

crisis, including on defense and security procurement. The 2019 action plan for reforms in this area has been completed. The electronic public procurement system has started operating in Montenegro in January 2021. The new electronic system introduces new quality and transparency in the Montenegrin public procurement system.

In the next year, Montenegro should:

- fully implement the electronic public procurement system;
- fully respect the EU public procurement principles when awarding the concession to operate Airports of Montenegro.

4. KOSOVO

The yearly EU progress report about public procurement is almost the same every year. There were only small changes from 2017-2021 in the public procurement system. According to the latest country report Kosovo has some level of preparation and is moderately prepared in public procurement. There was some progress during 2021. Transparency of public procurement has further increased with the addition of two new e-procurement modules and improved monitoring of contract implementation. Enhanced coordination and information exchange between the Procurement Review Body (PRB) and the Public Procurement Regulatory Commission (PPRC) is positive and should be further enhanced with other relevant stakeholders. However, public procurement remains prone to irregularities and vulnerable to corruption during the procurement process and contract implementation.

Kosovo's legal framework on public procurement is partly aligned with the 2014 EU Directives on classical and utility procurement. However, legislation adopted on defense and security procurement remains partially aligned with the EU *Acquis*. Kosovo's public procurement strategy (2017-2021) and action plan (2020-2021) are coming to an end and an assessment of their implementation is still pending, while a new strategy is yet to be approved.

In the 2021 country report the EU has several recommendations and the main ones are:

- adopt a public procurement law in line with the EU *Acquis* on public procurement, including concessions, and ensure its proper implementation;
- increase the capacity of all public procurement institutions and the cooperation between them to ensure consistent implementation of the public procurement regulatory framework;
- ensure that the PRB is fully operational, independent, and professional, and that staff capacity limitations are addressed.

The PRB is not functional since March 2021, because the board members mandate expired. Since that time the Government of Kosovo has failed to make PRB fully operational. Because of this all complaints that were submitted by economic operators during 2021 and 2022 were not reviewed, which created a chaos. Because of this the spending through public procurement as a percentage of GDP is lower in 2021, compared to previous years.

Being faced with constant repeated performance challenges in public procurement and the need to accommodate technology advancement needs, the Government of Kosovo in 2019 initiated the review of the

current legislative framework for public procurement. However, due to the COVID-19 implications and changes to the government leadership, there were multiple delays, and only in the second half of 2022 the work on drafting a new Law on Public Procurement will continue. The new law will closely be aligned to the EU Directives on Public Procurement.

5. SERBIA

According to the EU Progress Reports which were prepared for the last five years, Serbia is **moderately prepared** on public procurement. For some years, the EU Commission have outlined that there was **no progress made in this area** (Progress Report for 2018 and 2019) or that **limited progress has been recorded** (Progress Report for 2020 and 2021). Progress Reports are outlining that significant efforts are needed to further improve competition, efficiency, and transparency in public tenders.

Main recommendations issued by the Commission in this period have remained unfulfilled. Namely, Serbia failed to ensure full alignment with the 2014 EU directives on public procurement and to adequately strengthen capacities of competent institutions in this area (i.e., the Public Procurement Office and the Republic Commission for the Protection of Rights in Public Procedures).

Going back to the legal framework, in the EU Progress Reports it is stated that the legal framework is broadly in line with the *Acquis*. One of the main shortcomings of the old law on public procurement was that it contained too many exemptions, which were excessively applied in practice. The new law on public procurement, which was aiming to align domestic legislation with the 2014 EU directives on public procurement was officially adopted in December 2019. New law was considered as an important step forward in aligning with the *Acquis* because it introduced obligatory e-procurement practices, strengthened provisions related to principles of equal treatment, non-discrimination, and transparency in public procurement area. However, new legislation and amendments were introduced in other horizontal laws which are undermining the effective implementation of the law on public procurement. Namely, these laws are allowing, for instance, that national public procurement legislation can be suspended for the entire lifetime or for particular phases of a project, and the government is empowered to select a strategic partner in circumstances deemed as urgent.

This type of bypassing of relevant legislation could be seen in practice as well, which is eventually causing that those main problems in the public procurement process remained the same. Situation with public procurement processes was even worse during the first waves of COVID-19 pandemic. Almost no information was provided to public about procurement of ventilators, medical equipment, or COVID-19 vaccines. This untransparent procurement process of COVID-19 related equipment and vaccines in some cases even derogated the new public procurement legislation. Namely, majority of these equipment were procured under the strictly confidential lance and without implementing relevant articles from the newly adopted public procurement legislation. This was able primarily due to the fact that competent public procurement institutions enabled the use of exceptional procedures to expedite procurement processes.

When it comes to strengthening capacities of competent institutions in this area (i.e., the Public Procurement Office and the Republic Commission for the Protection of Rights in Public Procedures) there has been

small progress in increasing the number of staff members (this is standing both for PPO and RCPRPP). Starting from 2017 PPO received approval to hire additional staff members. According to the EU Progress Report for 2021, number of staff members has been increased from 28 to 38 staff members. However, with its wide range of responsibilities and competences, the PPO still lacks the administrative capacity to carry out many of its tasks. When it comes to RCPRPP, which is an independent state body, the number of staff members remained similar throughout the years. As a consequence, there were years in which RCPRPP did not issue a single fine to contracting authorities for failure to comply with its decisions and orders or to even initiate and conduct misdemeanor procedures. All of this is pointing that the problem of inefficient oversight and control of concrete public procurement cases and especially contract execution is still present. Main public institutions who have competences in monitoring public procurements and the entire system are not performing their task in adequate number of cases, even with relevant changes and improvements in procurement legislation.

STATE OF AFFAIRS IN PUBLIC PROCUREMENT SYSTEMS OF THE WESTERN BALKAN COUNTRIES – BALKAN TENDER WATCH PERSPECTIVE

1. BOSNIA AND HERZEGOVINA

Legislative Framework

The existing Law on Public Procurement of Bosnia and Herzegovina was adopted on May 19, 2014, and its implementation began on November 27, 2014. In terms of institutional set-up and legal framework, the 2014 Public Procurement Law is largely in line with the 2004 EU legislation, but not with the 2014 EU legislation. The biggest objection regarding compliance with EU principles relates to the existence of preferential domestic treatment, and non-compliance with Directive 2014/24/EU on public procurement, Directive 2014/23/EU on the award of concession contracts and Directive 2014/25/EU on procurement by contracting authorities in the field of water management, energy, transport, and postal services. However, it can be said that the application of the PP Law is far from EU practice.

In October 2017, the BiH Council of Ministers adopted the Decision on the Establishment of a Working Group for the Drafting of the Law on Amendments to the Law on Public Procurement⁸. The working group, in addition to representatives of the Public Procurement Agency, the Complaints Review Office and the Directorate for European Integration, consisted of experts in the field of public procurement from various ministries and agencies in Bosnia and Herzegovina. In addition to the members of the working group, representatives of non-governmental organizations also participated in the drafting of the law through numerous consultations, especially giving their contribution regarding the improvement of anti-corruption elements within the said law.

The draft law was finalized in mid-2018 and submitted to the Public Procurement Agency, which requested an opinion from the competent institutions (BiH Legislation Office, BiH Ministry of Justice, BiH Ministry of Human

⁸ 117th session of the Council of Ministers of BiH, which was held on October 10, 2017.

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

Rights and Refugees, BiH Directorate for European Integration, BiH Ministry of Finance and Treasury), and the Agency for Personal Data Protection of BiH), as well as the European Commission. After certain amendments, the draft law received positive opinions and the conditions for its referral to further procedure were met. Amendments to the Law were presented to the general public at the end of 2018 and the beginning of 2019 in the form of a preliminary draft, but the BiH Council of Ministers did not further initiate a formal procedure for its adoption. It should certainly be noted that the most important amendments to the law proposed by the draft were in:

- Adaptation to the provisions of the EU directives on public procurement, awarding concession contracts, conflicts of interest and procurement of contracting authorities in the field of water management, energy, transport and postal services;
- Professionalization of public procurement activities and appointment of public procurement officers, with increased quality of their competencies;
- Further development of e-procurement and creation of a legal basis for improving the position of small and medium enterprises based on the requirements of the Small Business Act;
- Adding competencies for inspection supervision in order to improve the supervisory and control function in the implementation of public procurement procedures; and
- Tightening sanctions while defining a framework for raising criminal charges related to irregularities in the conduct of public procurement.

When considering the fight against corruption in public procurement, the draft amendments to the Law on Public Procurement contain important provisions related to the introduction of inspection supervision, the adoption of which would enable the prosecution of abuses in public procurement. Under these provisions, the Public Procurement Inspector would be empowered to issue and serve a fine, issue a misdemeanor warrant, file a misdemeanor order, and ultimately file a criminal charge and notify another authority for taking measures within the competence of that body (police, prosecutor's office, audit, etc.).

The step forward made within the prepared Law on Amendments to the Law on Public Procurement obviously did not correspond to certain political structures, and in mid-2020 information appeared in the public that the Banja Luka Regional Chamber of Commerce and the Federation of BiH Chamber of Commerce formed an expert team to draft a new Law on Public Procurement, without official participation of state institutions in its drafting. According to this draft of the law, which was presented to the public in November 2020, there is no mention of the introduction of inspection supervision, the introduction of the possibility of filing criminal charges or tougher sanctions for violators of the Law on Public Procurement. Therefore, it can be said that the obvious intention was to minimize the anti-corruption provisions of the Draft Law on Amendments to the Law on Public Procurement from 2018.

The adoption of the Draft Law on Amendments to the Law on Public Procurement of BiH in the first reading by the House of Representatives of the Parliamentary Assembly of BiH at the 18th session held on March 30, 2021 indicates that the intention of the state legislator is to minimize anti-corruption mechanisms in the field of public procurement. According to the above proposal, the following amendments to the Public Procurement Act are envisaged: changes in exemptions from the application of the provisions of the Public Procurement Act, regulates

the appointment of public procurement officers, introduces the obligation of prior market verification, division of procurement into lots, regulates in more detail the institute of the procurement plan, defines an interim procurement plan, introduces the legal basis for conducting electronic procurement, specifies in which cases tenderers may be excluded from public procurement procedures for 36 months, introduces changes in the determination of conflicts of interest with the head of the contracting authority, a member of the Public Procurement Commission, and other persons involved in the public procurement procedure, introduces changes in the implementation of the competition request procedure and direct agreement, changes in the system of legal protection, regulates the issues of attorney's fees.

From the above, it can be concluded that the Draft Law on Amendments to the Law on Public Procurement defines significant changes in public procurement procedures in relation to the procedures defined by the provisions of the Law on Public Procurement from 2014, but still does not address impunity for pervasive abuses and irregularities in public procurement.

Institutional framework

Institutions responsible for monitoring the implementation of the BiH PPL and bylaws are the BiH Public Procurement Agency and the Complaints Review Office. The Public Procurement Oversight System defines the role of the Council of Ministers as the body in charge of the work and results of the Public Procurement Agency (PPA), and the BiH Parliamentary Assembly as the body that hears members of the Complaints Review Office (CRO). The PPA of BiH is obliged to regularly, most often through annual work reports and reports on the number of conducted public procurements, inform the Council of Ministers of BiH on the functioning of the public procurement system in the country. At the same time, the annual reports on the work of the CRO are considered by the representatives of the BiH Parliamentary Assembly.

The PPA is the body authorized to initiate, implement and monitor public procurement reform in all sectors, but for years it has been assessed that the administrative capacity for the entrusted competencies is insufficient. Thus, for example, the Rulebook on the internal organization of the PPA from 2005, amended in 2015 and 2018, systematized 32 jobs, while the number of employees is actually 1/3 lower (22 employees). This institution is obliged to regularly, most often through annual work reports and reports on the number of conducted public procurements, inform the Council of Ministers of BiH on the functioning of the public procurement system in the country. The most important instruments of the PPA are monitoring the contracting authorities regarding the application of the PPL BiH and giving opinions on specific procedures. However, the oversight role of the PPA has been completely neglected and the opinions of the PPA are not binding.

The institutions responsible for legal protection procedures are the contracting authority, as the first instance body, then the Complaints Review Office, as the second instance body, and the Court of Bosnia and Herzegovina as the third instance body. The implementation capacities of the CRO, with branches at three locations (Sarajevo, Banja Luka and Mostar), still rely on 34 employees, which is not enough for the efficient work of this institution. According to the rulebook on internal organization it should have 55 employees.

Implementation

Numerous analyses show that the public procurement system in BiH has not been significantly improved by the 2014 Law on Public Procurement of Bosnia and Herzegovina. Employers, small and medium enterprises, as well as civil society organizations, constantly warn of problems that arise during the implementation of the Law, which is why it needs to be improved. In addition, the Law needs to be constantly harmonized with the principles and procedures of the European Union's public procurement system and to ensure control of the procurement system in BiH.

The EU Directive on Public Sector Procurement⁹ introduces additional requirements regarding the monitoring of the operation of the public procurement system. Article 83 of the Directive requires Member States to ensure that the application of public procurement rules is carried out by "one or more authorities or bodies" (monitoring bodies). Monitoring bodies must be empowered to report "certain violations or systemic problems" that they notice. These reports may be prepared for the reporting of "national audit bodies, courts or other relevant bodies or structures such as the Ombudsman, national parliaments or their committees". Member States therefore have some discretion to decide on the most appropriate reporting structure when certain breaches or systemic problems are identified, but they must allow monitoring bodies to report on these issues.

The Rulebook on Monitoring Public Procurement Procedures in BiH defines the system of monitoring the implementation of the Law on Public Procurement and bylaws in Bosnia and Herzegovina by the Public Procurement Agency. It is based on the examination of the compliance of individual public procurement procedures conducted by contracting authorities in Bosnia and Herzegovina with the Law and bylaws.

The most problematic aspect of the Rulebook on Monitoring Public Procurement Procedures relates to the fact that civil society and the media are almost excluded as sources of information on the basis of which the PPA conducts monitoring. Namely, the analysis of procurement plans of contracting authorities is cited as the only source of monitoring within which non-governmental organizations "may" appear. This 2016 rulebook represents a "step backwards" in terms of enabling civil society and the media to base their reports on monitoring by the Public Procurement Agency. That this is not a coincidence is indicated by the intention from 2019 to adopt an even more restrictive rulebook which leads the work of NGOs and the media only to "publicly available reports", which derogates from the watch dog role of NGOs, as well as legislation regulating whistleblowers.

Finally, we should mention the constant problem that appears from year to year, which concerns "impunity" for obvious abuses in public procurement. Regular reports of the Office for Audit of Institutions of BiH, the Office for Audit of Institutions in the Federation of BiH and the Main Audit Office of the Public Sector of Republika Srpska continuously point to numerous abuses and illegalities in public procurement procedures. Identical data with direct examples of abuses in public procurement are published daily by the media and non-governmental organizations. In order to investigate the reaction of judicial institutions in BiH to such reports, an activity was initiated to obtain data on court proceedings and verdicts for abuses in public procurement. On two occasions, requests for free

⁹ "Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC," Official Journal of the European Union L 94/65, 28.3. 2014., <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>

access to information were sent to 27 regular courts in the Republika Srpska (22 basic courts, 6 district courts and the Supreme Court of the Republika Srpska) as well as 2 courts in the Brcko District (Basic Court and Brcko District Court of Appeals). The results are devastating because only one verdict was recorded, while the sentence was more than "symbolic".

2. NORTH MACEDONIA

After criticism from all stakeholders, the old and non-functional Law on Public Procurements – adopted in 2008 and frequently amended thereafter - is finally replaced with a completely new law, which entered into effect on 1 April 2019. In addition to alignment with the EU Directive on Public Procurement from 2014, the new law attempts to "correct" a series of problems in the system of public procurements in North Macedonia.

In particular, it addresses the two problems that have been indicated by all stakeholders as the most burning issues under the old law: mandatory use of lowest prices as the single criterion for tender award and mandatory organization of electronic auctions. Hence, except for lowest price, the new legal provisions introduced other selection elements, while e-auctions became optional with an idea to be organized in cases when there is standard and equal quality and therefore it is logical for the selection to be based on prices offered.

In general, the new law liberalizes all public procurements and introduces new possibilities for contracting authorities to procure what is truly needed by getting the best value for the money spent. Under the law, but also previously, a series of measures had been introduced to increase transparency in public procurements. The new law introduced the long-awaited administrative control (ex-ante) conducted by the Bureau of Public Procurements in the case of large-scale tender procedures and based on risk assessment.

Three years later, having in mind advantages brought about by the new legislation on one hand, and the manner in which institutions implement public procurements on the other hand, it could be concluded that time, knowledge and better practices are still needed in order to feel any significant effects from enforcement of the new law.

Irrespective of the fact that great portion of 2020 and entire 2021 went by under "pandemic conditions", the following are the general flaws in respect to public procurements:

1) Still dominant use of 'lowest price' as single criterion for selection of the most favorable bid. While both, contracting authorities and companies, continuously underline 'lowest price' as the biggest problem in public procurements, the same is still used as single criterion for bid selection in over 95% of the tenders. Such behavior on the part of contracting authorities does not only confound, but also seems not to have any justification. Disconcerting is the fact that, when lowest price was the single and mandatory selection criterion, many contracting authorities complained thereof and used this argument to justify poorly organized public procurements. Nowadays, when price is not mandatory and other criteria can be used, they still use lowest price for the same type of procurements as before.

2) Electronic auctions were organized in over 90% of tender procedures although the new law stipulates optional use of this instrument by contracting authorities on the account of evidence that mandatory use of e-auctions does not necessarily yield positive results. Nevertheless, like in the case of price, in this regard as well, contracting authorities continue to use e-auctions in almost all tender procedures, thereby bringing under question

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

the overall quality of goods, services and works being procured. Also, price and auction are two risk factors for corruption and rigging of tenders. On the other hand, 50% of surveyed companies reported that e-auctions undermine quality of what is being procured. 62% of companies believe that in cases when e-auctions have not resulted in lower prices there had been previous arrangements among bidders before the organization of downward bidding.

3) The share of annulled tenders reached record-breaking levels of over 30%, which means that almost every third tender procedure was annulled. In over 60% of annulled tender procedures, the reason concerned no bids received or no acceptable bids received. In this regard, high 13% of all bids (69,111 in total) submitted to all tender procedures in the country have been rejected in the bid evaluation stage, i.e., they were not taken into consideration in the further course of procurement proceedings. The problem of frequency and ease of tender annulments is as old as the public procurements in the country. No measures implemented thus far have yielded any results, which means that new and more efficient measures are needed, especially those implying fines for contracting authorities with high share of annulled tender procedures, which in some cases ranges up to over 50%. Although some persons responsible for public procurements view tender annulment as “safest option” when they are not fully convinced in their selection of the most favorable bid, there are numerous examples in the monitoring of public procurements that suggest annulments based on other, risky motives.

4) Insufficient track record on fight against corruption and conflict of interest in public procurements. Corruption in public procurements remains to be serious problem that is often discussed in the public. Over half of surveyed companies that participate in public procurements believe that corruption is present in public procurements, while the media regularly report on irregularities and alleged abuses. Contrary to this situation, there are no significant movements in the field of fight against corruption in public procurements in spite of certain efforts made in that regard. First and foremost, it seems that at institutional level, i.e., at the level of individual contracting authorities (there are total of 1,332 public sector institutions) specific measures are not taken to prevent and protect against corruption and conflict of interests. In this sense, rarely any institution covers corruption risks in public procurements as part of their performance risk assessment; there are almost no cases in which an officer has reported conflict of interests; internal auditors rarely audit public procurements organized by the institution; and at least in the public, there are no information on persons being sanctioned on the account of determined abuse of public procurements. As regards fight against corruption in public procurements at systemic level, first it seems that not all competent institutions fully perform their powers, and second, there is continuous lack of necessary level of coordination among these institutions to enhance and bring their efforts to fruition. Non-functionality of mechanisms for reporting irregularities and corruption in public procurements is a completely different issue in its own right. The National Strategy for Prevention of Corruption and Conflict of Interests 2021-2025, adopted by the State Commission for Prevention of Corruption in December 2020, enlists public procurements at the top of the several priority and horizontal areas marked by high risk of corruption. Correspondingly, series of measures are anticipated to fight corruption in public procurements, whose implementation by all institutions is expected over the next five years. From 2019, the Bureau of Public Procurements conducts the so-called administrative control, i.e., pre-emptive control of public procurement procedures during their implementation. Such controls identify irregularities

in over 20% of all tender procedures controlled. In that, it should be noted that subject of control are only tender procedures whose estimated value exceeds 500,000 euros for goods and services and 2,000,000 euros for works. Moreover, BPP can perform such controls on any other procurements based on random selection, as well as based on risk assessments for violation of the Law on Public Procurements, but controls on these two legal grounds are not implemented due to lack of capacity at the Bureau.

5) Besides these persistent problems, the business community representatives point out a problem that lasts ever since second half of 2020 related to the performance of contracts signed under fixed prices for goods, services and works whose market value has significantly increased in the meantime.

Broken down into public procurement cycle, the initial and the final stage of public procurement implementation, i.e. assessment and planning of procurement needs and performance of procurement contracts remain the most problematic, especially in respect to control and accountability.

Regarding the remedies in public procurement, even though the annual report of the State Commission for Appeals in Public Procurement is not published yet, some preliminary analyses can be done based on the data from the Electronic System for Public Procurement. The share of appealed procedures slightly dropped in 2021 to 4.4% from 5.0% in 2020. Also, a decline is noticed in the share of approved appeals (43% in 2021 compared to 52% in 2020). The latest company survey from January 2022 showed high percentage of companies that have never or rarely appealed tenders (94%) mainly due to the distrust in the Appeal Commission (46%), high fees for the appeal procedure (21%), and fear of elimination in future tenders by contracting authorities whose tenders they appeal (15%).

3. MONTENEGRO

Within the framework of the accession negotiations with the European Union, Montenegro has opened a chapter on PP at the end of 2013.¹⁰ At that time, Montenegro was obliged to enter into its national legislation the standards of the EU directives, but Montenegro through the years has been facing with criticism from EC and all relevant stakeholders due to delays in fulfilling these tasks. Measures for improvement of transparency and control in the system of PP are foreseen by the Action Plan for the Chapter 23 – Judiciary and Fundamental Rights¹¹. Additionally, PP is recognized in the Operating Document for the Prevention of Corruption in the Areas Exposed to Special Risk as one of seven fields particularly prone to corruption. An average number of bidders participating in PP is foreseen by the Public Finance Management Reform Programme 2016-2020 as one of the indicators of establishing efficient, transparent, and competitive PP system in Montenegro.¹² However, even though the

¹⁰ <https://www.skupstina.me/en/eu-accession/montenegro-and-the-european-union>

¹¹ 1 /Measures from 2.1.6.1 to 2.1.6.5 of the Action Plan for the Chapter 23, 19 February 2015, available at:

<https://www.eu.me/en/poglavlje-23-pravosudje-i-temeljna-prava#:~:text=The%20Action%20Plan%20for%20Chapter,achieved%20through%20prescribing%20certain%20measures.>

¹² [https://www.google.com/search?q=Public+Finance+Management+Reform+Programme+2016-2020+\(innovated+version\)%2C+Ministry+of+Finance%2C+June+2017&rlz=1C1GCEA_enME1004ME1004&oq=Public+Finance+Management+Reform+Programme+2016-2020+\(innovated+version\)%2C+Ministry+of+Finance%2C+June+2017&aqs=chrome..69i57.599j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=Public+Finance+Management+Reform+Programme+2016-2020+(innovated+version)%2C+Ministry+of+Finance%2C+June+2017&rlz=1C1GCEA_enME1004ME1004&oq=Public+Finance+Management+Reform+Programme+2016-2020+(innovated+version)%2C+Ministry+of+Finance%2C+June+2017&aqs=chrome..69i57.599j0j7&sourceid=chrome&ie=UTF-8)

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

Government is officially dedicated to improvement of transparency, competitiveness and control in the system of PP, the practice shows the opposite. Trough years, Montenegro has no concrete results in the fight against corruption in PP, and its procurement system chronically suffers from numerous legal, personnel and technical shortcomings, despite its PP Law being based on some of the basic principles that are present in EU practice, such as cost-effectiveness and efficiency of public funds, competition, equality, or transparency. There are still shortcomings in planning PP in a proper manner, procured goods and services often do not justify their purpose, technical specifications are often adjusted in a way that favors individual bidders, contracts are changed by the conclusion of an annex after their signing, and monitoring of their implementation is almost completely absent. Insufficient regulation of low value procurement and wide discretion of the contracting authorities to independently regulate this procurement, is one of the reasons why Montenegro got the rating three for harmonization of our legislation with the European in the SIGMA 2017 report on implementation of the EU Principles of Public Administration.¹³ From January 1, 2019, Public Procurement Administration¹⁴ became a part of the Ministry of Finance as Directorate of PP Policies. In practice, such decision means that PP will have a smaller degree of control, i.e., situation that the Government will control itself in an area prone to corruption. In 2018 Report on PP in Montenegro, the public was denied a number of data that were found in reports from previous years prepared by the PP Administration. The law stipulates that the contracting authority shall collect and record certain data in the field of PP and submit it to the Directorate for further processing. The information obtained and their illogicalities should, among other things, alert the competent authorities to respond in a timely manner (Public Procurement Inspection Directorate, State Audit Institution). Annexes that provide detailed information on institutions that act irresponsibly and uncoordinatedly, i.e., on the contracting authorities who often change the procurement plan, were removed from the report. Frequent changes to the procurement plan are known to be an item prone to corruption. Of particular concern is the data on the number of PP procedures and contracted works in which only one bidder submitted a bid. One bidder means that the procurement process is carried out with no other person included in the process. According to the Law on PP, only the interested party, i.e., bidders may have access to the complete documentation and file a complaint to the tender procedure. Reports from previous years included information on savings achieved, the most common mistakes made by contracting authorities, bidders, and stakeholders. These data were extremely useful for preventive detection of irregularities and useful for the preparation of better-quality legislation. Still the lowest price offered is the criterion for choosing the best tender. The criterion of the most economically advantageous tender was used very rarely. The most favorable price as a criterion does not guarantee that the quality and optimum features of PP will be achieved. In addition to price, the cost of maintenance, servicing, repairs and transportation play a very important role in the procurement of goods or works. Therefore, the percentage of participation in the selection criteria was a useful piece of information in evaluating the procurement process. Despite of recommendations received from NGOs, EC or institutions of the system indicate the need for quality PP planning. It is well known that contracting authorities are often late in making their plans for the coming

¹³ <https://www.sigmaweb.org/publications/Monitoring-Report-2017-Montenegro.pdf>

¹⁴ Decree No. 08/18 on the Organization and Method of Work of the State Administration, Official Gazette of 31 December 2018.

year that they make inadequate plans because they are planning more or less than their actual needs. Such attitude towards the plan results in unused funds or the lack of funds, which force the contracting authorities to conduct urgent procurement or lose necessary goods or services.

Since the start of monitoring of the PP in Montenegro, the largest government spending in this area was achieved in 2019. In percentage terms, compared to the previous year, the value of PP increased by 35%. Competent institutions see the explanation for such a big growth in numerous infrastructure projects, realized through contracted works. However, one should take into account the fact that 2019 is a pre-election year and that part of the infrastructure projects will end in 2020, the election year. Of particular concern is the small number of bids received per tender procedure. While in 2018 the number of bids per tender was 3.14, in 2019, it dropped to 2.01. A very large number of PP procedures had only one bidder.

In December 2019, the Parliament of Montenegro adopted an amended Law on PP and a new Law on public-private partnership, both with the aim of harmonizing with the EU directives on PP. Monitoring of the implementation of PP procedures with the applied 'lowest bid price' criterion shows the participation of 89.18%, while implementation of PP procedures with the applied 'most economically advantageous tender' criterion is 10.82%. When we look at the structure according to the agreed value, then the participation with the applied 'lowest bid price' criterion is 66.52%, while the participation with the applied 'most economically advantageous tender' 33.48%. The new legal solution leaves the possibility of only the criterion of the most economically advantageous tender, which has proven to be the best in practice, i.e. for the contracting authorities to receive the best offer. 2020 year was very challenging and difficult both because of the Covid-19 pandemic and the fact that the change of government in Montenegro took place after 30 years, as well as the implementation of the new Law on. Institutions continuous with poor planning dispute the clear Legal provisions to be conducted, a PP procedure has to be included in the PP Plan of the individual contracting authority, and relevant funding has to be secured.¹⁵ Besides being a precondition for conducting PP, the Plan is an important source and document for the purpose of oversight and monitoring of this segment of public spending and an instrument for providing timely information to tenderers about the contracting authority's intentions concerning procurement for the current year. It is therefore important that pp are adequately planned and follow the plan to a maximum extent. However, most of the time still that was not the case. We are still do not have the analyses of the market also the lowest offered price should only exceptionally serve as the decisive factor determining the winning tender; however, this persists in practice. The report on contract performance is a novelty in the Montenegrin PP system and in practice this is instrument for greater security and confirmation that the procurement will be carried out to the end and in accordance with the contract. The report does not include a narrative part or any photo documentation or annexes that would support the data included in the report and provide a clearer picture of the course of contract performance and the final product. This is of particular importance in relation to the procurement of works for the purposes of capital projects. Also the report template does not include data on the contracting authority or the responsible person at the contracting authority, so it is not clear who is responsible for the contents of the report. The reports on contract

¹⁵ The Public Procurement Law (Official Gazette of Montenegro 074/19 of 30 December 2019).

performance do not include, for instance, data on the essential characteristics of the subject-matter of procurement, in terms of quantity, quality, dimensions, type of procurement of goods, or proof of receipt of goods. Ultimately, the report does not include any conclusions as to whether the procurement was conducted in accordance with the contract, or if that was not the case, whether a contract termination procedure or another appropriate action was launched to remedy the consequences of failed performance. Simple procurement procedures replaced low-value procurement, which had been introduced into the Montenegrin PP system in 2017.¹⁶ The new PPL raised the thresholds for simple procurement to 20,000 euros for goods and services and 40,000 euros for works. These procurements were exempt from the application of the PP Law¹⁷, except with regard to the inspection and reporting to the Ministry of Finance. In comparison with them, the simple procurement procedures are less expensive, shorter, with shorter deadlines for tender submission, and involve simpler tender preparation. On the other hand, there is more room for discretionary decision-making and possible abuse. The PPL, therefore, lays down that contracting authority must not divide the subject-matter of procurement to circumvent the application of the Law. The key novelty related to simple procurement is the single regulation, namely the Rulebook on the method of conducting simple procurement, which stipulates a uniform method of procurement for all the contracting authorities in the system. Unlike that, the regulation of low-value procurement allowed for discretionary decisions under the internal regulations of contracting authorities, and therefore the existence of various rules. A public debate on the draft law on amendments to the Law on PP is announced during April 2022, and it is finished by the end of May 2022. Long-awaited amendments are necessary for greater transparency, alignment with the EU *Acquis* and their procedures. Namely, the Ministry of Finance and Social Welfare of the previous Government announced a public debate, in meantime we have a new Government and bearing in mind that a new Government has been formed recently, we are still waiting for their moves related the new amendments to the Law on PP. As a reason for amendments to this law, the Ministry stated the need to remove the noted limitations and ambiguities in the practical application of the law, as well as the implementation of further reforms in this area. A special focus is on the part that regulates the PP Contract in more detail, deadlines for submitting of bids in PP procedures, determining the amount or percentage of the bid guarantee in case of concluding a framework agreement, manner of submitting the bid guarantee, specifying the possibility of subcontracting, as well as verification of the statement of the legal person. Also, these amendments define the preparation and submitting of bids in electronic form through the electronic public procurement system (ESJN), as well as submitting of reports through the ESJN. Strengthening the electronic PP system aims to both simplify the PP procedure and increase the transparency of the entire system.

¹⁶ Under the 2017 amendments, low-value procurement was defined as procurement of goods and services of the Estimated value of up to 15,000 euros and procurement of works of the estimated value of up to 30,000 euros.

¹⁷ Article 23 and 26 <https://mia.gov.me/wp-content/uploads/2021/12/Proposal-of-the-PPL-February-2019-with-comments-1-1-1.pdf>

4. KOSOVO

According to the Global Corruption Barometer, 65% of respondents believe that corruption is one of Kosovo's biggest problems. In the Corruption Perception Index from Transparency International, in 2020, Kosovo is 104th place out of 180 countries with a score of 36 points out of 100. The low score means there is significant corruption with no clear improvements from previous years' score. Another survey by Transparent, Effective and Accountable Municipalities (TEAM) Activity found that Mayors of Municipalities are the most corrupt, where 46% of respondents answered Yes, followed by Procurement Officers at 43%, Municipal Directors at 41%, and the least corrupt according to this survey are Contract Managers at 31%.¹⁸

According to the same report, the perception of corruption in public procurement activities remains relatively high compared to previous years, with over 50% of respondents believing that corruption is very present in public procurement activities. Overall, 89.7% of respondents believe that corruption is present to some extent in public procurement activities, with a small proportion of the remainder of respondents who do not know of it, and no respondent who reports that corruption is not present at all in the public tender process.

Another report states a lack of fight against corruption from State Prosecution regarding corruption in public procurement. Kosovo Law Institutes says that state prosecutors, apart from one case, have not made requests for confiscation of property obtained through criminal deed. According to KLI, regarding the punitive policy in corruption cases related to public procurement, the number of effective imprisonment sentences is equivalent to the number of sentences issued. In contrast, the fine sentence is less pronounced¹⁹.

According to a report from the International Monetary Fund, some of the key weaknesses in Public Investment Management are as follows: (i) project appraisal, selection, and management; (ii) national planning and central-local coordination, (iii) multi-year budgets and their comprehensiveness; and (iv) ex-post independent auditing and assessment of large-scale projects²⁰.

Lack of provisions in current legislation regarding contract management means that authorities are unable to penalize irresponsible suppliers, who thus continue to fail to fulfill contracts while remaining part of the bidding process.

One of the problems continuing to face public procurement is PPRC's decision to combine regulations with guidelines that have created unclarity as to what is a rule and what is a guideline, in addition to excluding clear legal steps on how to meet rules and regulations according to implied situations.

The Auditor's report for 2020 highlights systematic problems in all procurement phases across all budgetary organizations. However, besides the many issues identified, no NOA performance audit was concluded to analyze the root cause of such failures in this vital government activity.

During the analysis of the current legal framework about management and accountability of public expenditures, we further see there are no legal dispositions that regulate Improper Procurement Actions and

¹⁸ Citizens' Perception Survey on Corruption And Transparency In Public Procurement 2019, page 32. TEAM Activity

¹⁹ Corruption in Public Procurement. Kosovo Law Institute. 2020.

²⁰ Republic of Kosovo : Selected Issues, International Monetary Fund, February 2018 (available at: <https://www.imf.org/en/Publications/CR/Issues/2018/02/05/Republic-of-Kosovo-Selected-Issues-45613>)

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

Unauthorized Procurement Actions, hence creating a vulnerable environment for abuse and mismanagement of public funds, a concern also raised by the NOA on the 2020 annual report.²¹

While transparency in public procurement is at some satisfactory level, another continuing challenge remains the lack of interinstitutional cooperation, lack of shared institutional responsibility, and limited accountability, which provide a favorable environment for corruption and poor performance of public procurement in Kosovo.

Additionally, there is no clear guideline or knowledge in interinstitutional responsibilities and cooperation when engaged in a procurement process. There is no clear idea of digital tools and their architecture to eliminate human error. Lack of law on digitalization of processes and procedures imposes another barrier to a maximized digital procurement process. Kosovo's Government must engage in maximizing digitalization of the public procurement from its beginning through the end.

Part of this digitalization process is also the interoperability of different currently active platforms. The Information System on Management Public Finances (KFMS) and the e-procurement platform need to "talk" to each other to minimize human error as much as possible. This means, for example, that a procurement activity cannot be initiated if funds are not pledged, and payments cannot be made without all the requested documents such as the invoice, project manager report, purchase order, etc. In the current situation, many procurement activities are initiated without the funds being fully available. This can lead to potential corruptive behavior. In many cases, the economic operator will need to implement the contract with their own funds, promising that future contracts will be awarded to them.

The e-procurement platform needs to be connected to the court system to check if the proposed economic operator to win the contract is responsible according to Article 65 of Public Procurement Law. One of the critical elements of this Article is that an economic operator is unable to sign the contract if the economic operator or one of the directors, managers, and owners is found guilty during the last 10 years for criminal activity (including corruption). Right now, the court is unable to verify this. This means there is a high chance of corruption if an economic operator is unable to win the contract according to Article 65 but does win it anyway. This has happened at least 7 times during the past 10 years. The court only issues a certificate that the economic operator has not been bankrupted or liquidated during the past two years. The integration of those two systems will eliminate the possibilities of human error and prevent companies that are ineligible from winning contracts, according to Article 65 of PPL. As it is now, the court is unable to verify that a company or the owner, managers, and directors were convicted in the past 10 years. As a result, EOs can win contracts in public procurement even if they are convicted. Connecting the e-procurement system, the court system, and the Business Registration Agency will ensure that convicted persons and companies cannot win public contracts.

The e-Procurement platform also needs to be connected to the Kosovo Tax Administration system and the Kosovo Pension Savings Trust to check if the economic operator who has not paid taxes and pension contributions is winning public contracts. The current interpretation of PPRC is that Economic Operators who have

²¹ Auditor General report on the government annual financial report on the budget of the Republic of Kosovo 2020, page. 44.

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

not paid taxes but are in agreement with KTA can bid and win public contracts. But this means that some companies who have not paid taxes for several years can win contracts by signing an agreement with KTA; tax evasion usually is only possible through bribes and corruption. Moreover, that interpretation from PPRC includes only the taxes. At the same time, Article 65 of PPL says that an economic operator cannot win public contracts if they are not paying social security contributions (in the pension fund). This part is not verified before the signing of the contract. The PPRC should change the interpretation only to allow companies that fully paid taxes and pension contributions to bid in public tenders.

In 2021, two additional modules were added to the e-Procurement platform, the module on Contract Management and the Contractor Performance Review. Those two modules will further digitalize the work of contracting authorities and will increase the transparency and accountability in public procurement.

The Procurement Review Body (PRB) is the institution where complaints from economic operators are decided. The number of complaints has increased every year, but notably, there was a sharp increase in complaints about public procurement procedures. In 2019, 981 complaints were filed, which has raised to 1,184 in 2020. The PRB for several years has been functioning with three board members (out of five). From 2017 to 2021, all three board members reviewed all complaints. This means the power to decide was in the hands of three people. According to Democracy Plus's PRB Decisions Database²², when comparing the money involved, the estimated tender value of complaints in 2019 was over 400 million euros. This means that there is a high chance for corruption because all that money was decided only by three people, with no oversight about their decision-making.

Regarding the PRB as one of the leading institutions that deal with public procurement, there is a proposal in the new draft law on public procurement that the number of board members is increased from 5 to 9. This is done to decrease the dependency on only a few panel members. With this proposal, a review panel can be created from 3 to 5 board members. This assures that the number of complaints reviewed by a panel member is decreased compared to the current situation. This also means a lower chance for corruption because the number of complaints reviewed per board member will be lower, and the review panel will not always have the same board members.

Multiple reports by NGOs state that the biggest problem at PRB is inconsistent decisions which may come from incompetence or corruptive behavior²³. Inconsistency has a negative impact on many dimensions, including the creation of legal uncertainty in public procurement, loss of trust of parties in PRB, and increased suspected partiality when experts and the panel address cases²⁴. Inconsistent decisions raise suspicions about corruption because there were clear cases when one decision contradicted another decision²⁵. PRB should create mechanisms to ensure there are consistent decisions. One of the mechanisms is to create a table of the most common claims by economic operators and what decision they should expect. This way, economic operators should know if their complaint will be approved without submitting it.

²² www.oshp.dplus-ks.org

²³ Interview with Ardian Behra, Head of PRB Secretariat, 07.12.2021

²⁴ Unpredictability In Interpretation Of The Law On Public Procurement. Democracy Plus. 2019. [05-Raport-i-monitorimit-te-OSHP-ENG-06-1.pdf \(dplus.org\)](#)

²⁵ Ibid.

5. SERBIA

Despite numerous objections and suggestions for improvements that were coming from the professional associations and the civil sector, new Law on Public Procurement ²⁶in Serbia was adopted in 2019, entered into force on January 1, 2020, and its implementation began on July 1, 2020. New Law is being implemented for almost two years and its implementation already revealed many problems and inconsistencies in practice. In the following paragraphs we will concentrate on the most obvious ones that are causing biggest problems in practice so far.

The lack of competition. According to official data, the average level of bids per tender is 2.5, although by conducting field monitoring, we almost regularly receive a significantly lower number. But if we use official data published by the Public Procurement Office, 2.5 bids per tender, is more than twice less than the EU average. If we add to this that almost 60% of public procurements are conducted with only one received bid it is obvious that situation is alarming. Of course, we must ask ourselves “*Why is the current situation like this?*” Conversations with the representatives of the bidders, unequivocally gives the impression that the bidders simply do not trust the public procurement system, especially that Serbia does not conduct an adequate fight against corruption in public procurement and that no worth mentioning progress was made in this area. In a system in which anti-corruption mechanisms do not work, fair competition between bidders is excluded. And in the system like this competition is reduced to some other parameters, which do not concern the public but exclusively personal, and even more often the political interest. All above mentioned lead us to problem number two.

Decline in quality. Contracting authorities almost always procure only the cheapest goods, services or works, i.e., in 94% the lowest offered price is the deciding criterion which further distances us from the effective implementation of the principle “best value for money”. In addition, our market is practically “closed” for foreign bidders - 1% of all contracts were awarded to EU bidders. As much as the EU market is bigger than the Serbian, the amount of funds spent in Serbia through public procurement in normal circumstances would attract a much larger number of foreign bidders.

Impunity for the ones that violate the Law or conduct illegal or corrupt acts. If we leave aside that on a daily basis in the media that cover this topic, you can find news about “corruption”, “theft”, “abuse”, “... and stick only to the official data the situation is as follows. The State Audit Institution has determined that irregularities in public procurement in 2020 in 3 large state-owned companies amounted to more than 125.6 billion dinars, i.e., more than a billion euros. Irregularities refer to non-implementation of public procurement procedures, changes in conditions of the PP contracts without justified reasons, acceptance of bids that had to be formally rejected, because they contained a significant shortcoming, etc. Similar amounts of identified irregularities are presented from year to year and they get just higher and higher. And what about those responsible? In the end, does it matter whether it is someone's corrupt desire, ignorance, or pure arrogance? What happens to those responsible in practice? Absolutely nothing. Official data show that in 2017 there were 38 criminal charges, 4 conditional sentences, in 2018 there were 28 criminal charges of which 23 were rejected, in 2019 we had 12 criminal charges, one prison sentence,

²⁶ Law on Public Procurement (Official Gazette of the Republic of Serbia No. 91 of 24 December 2019)

3 conditional sentences and 1 "home prison" conviction and in 2020 based on 18 criminal charges, 12 conditional sentences and 1 "home prison" conviction. This is just clear evidence of what many civil society organizations claimed back in 2012 - we can prescribe 100 separate criminal acts regarding misuses in public procurement but if penal policy remains ineffective and represent a kind of incentive for the violators nothing will be changed in practice. The situation is more or less the same when it comes to misdemeanor proceedings, the PPO, that is in charge of initiating these proceedings simply does not do anything about it.

No oversight or control of the execution of public procurement contracts. The previous Law entrusted the oversight of public procurement contract to the Public Procurement Office. It was inefficient solution and based on the pressure that was coming from the civil society, during the process of preparation of the new Law, public hearing process, announcement from the Government was made that the new law will improve this and that will ensure that oversight is conducted on the highest possible level in order to ensure effective and efficient implementation of public procurement procedures and contract execution. As the result of the before mentioned we got the following wording in the new Law *"The contracting authority is obliged to control the execution of public procurement contracts, and the Ministry of Finance oversees the execution of public procurement contracts."* Almost two years after the application of the Law began, we still don't know which entity within Ministry of Finance is in charge of oversight, with what capacities and competences, how is it performed and is it performed at all...

Raised thresholds in the new Law on Public Procurement. In the time of the implementation of the previous Law on Public Procurement we had following situation. On each conducted public procurement case we had another 2.3 cases excluded from the application of public procurement rules, cases in which public procurement rules and procedures were not mandatory. After the adoption of the new Law, one public procurement case was followed by 46 exemptions which is an increase of -2,000%. In 2020, in the first 6 months of implementation of the new Law, in the period from July 1 to December 31, 2020, 10,741 contracts were concluded. In the same period, 495,719 procurements exempted from the application of the Law were conducted. According to the official data of the PPO, in the first six months of 2020, when previous Law was still in force, 124,281 contracts were concluded by applying that regulation, and the exceptions allowed by that law enabled another 285,219 procurements. When we compare these figures, it is obvious that the introduced trend can be called "**secret deals and direct contracts instead of public procurement**".

It is necessary to add to all this that new Law on Public Procurement also **excluded** from its provision very useful and effective mechanism – "**civic observer**" that enabled CSO to actively engage and monitor the biggest, most expensive, public procurement cases. By doing so in the past CSO managed to reveal some of the biggest misuses and irregularities in public procurement area. Bearing in mind the inefficiency of established control and oversight mechanisms performed by the competent authorities it is clear that absence of this useful mechanism in the Law only increases corruption risks.

Intergovernmental agreements. The problem that remains far from the eyes of the public are bilateral agreements that the state concludes. Although this issue is raised in every single EU Country Report as an issue that has to be solved, new Law has not changed anything. These intergovernmental agreements in 99% of the cases exclude the application of the provisions of the Law on Public Procurement, Freedom of Information Act, etc.

This practice is becoming more and more present, projects that are being implemented in this way are getting bigger and more expensive, and, of course, having no insight into the data and details of these agreement, we can only guess how much space they leave for illegal or corrupt behavior or acts.

WHAT COVID-19 PANDEMIC “REVEALED” IN THE PUBLIC PROCUREMENT SYSTEMS OF THE OBSERVED COUNTRIES?

1. BOSNIA AND HERZEGOVINA

The new corona virus pandemic (COVID-19) has posed a challenge to countries around the world that they have never faced before. As the disease progressed rapidly, BH authorities took a wide range of measures to slow the spread of the virus, prevent the collapse of the health system and save lives. It cannot be said that the public procurement system before the pandemic was fair and immune to machinations, but the pandemic contributed to bringing all the anomalies of the existing system to the surface in the short term, from the shortcomings of the existing legal framework and supervision over the application of the Law on Public Procurement to the evident abuse of procedures and impunity of responsible persons.

In the period from February 1, 2020, to July 31, a total of 5,156 public procurement contracts were concluded, while that number in the same period in 2019 was 4,709²⁷. At the same time, the number of negotiated procedures without publication of a notice in the period from February 1 to July 31, 2020, was 1001 (19.41% of all concluded contracts) while their number in the same period in 2019 was 600 (12.74% of all concluded contract). While many attributed the increase in the number of negotiated procedures without the publication of a notice to the COVID-19 pandemic, it is clear that this served only as an excuse for many procurements that could be procured through more transparent procedures required by the Public Procurement Act. Thus, through the negotiated procedure, procurement of accounting services, maintenance of premises, procurement of geo-research services, procurement of spare parts for motor vehicles, numerous procurements of construction works, procurement of fuel, procurement of various application software and other non-urgent or pandemic-related procurement were performed.

In the following section, we will present a couple of examples of abuses reported by NGOs, the media or even external audit services but which (yet) have not received an epilogue in judicial institutions. These procurements are interesting because the protagonists of the recorded abuses are the highest state leaders at the entity levels. Similar things have certainly happened in many other institutions at all levels of government.

- 1) The company "Srebrna mailina", registered for the sale of agricultural products, imported 100 respirators from China for more than 5 million EUR, and the authorization to purchase respirators was signed by the director of the Federal Civil Protection Administration based on the Federation BiH government's decision to purchase respirators. An exemption from the application of the PPL was used in the proceedings on the

²⁷ E-procurement portal, www.ejn.gov.ba

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

basis of the interpretation that this is possible with "contracts whose performance requires special security measures". However, pressure from the media and NGOs has greatly contributed to the affair in this case, given the fact that these respirators "do not have the characteristics for adequate treatment of patients in intensive care units", and that procurement permits are controversial, as well as the existing specification of respirators and the prices of these devices. The trial of those responsible, including the trial of the current Prime Minister of FBiH, is ongoing.

- 2) The company "TGT Tehnogas" Laktasi, whose director is the former Minister of Internal Affairs of RS, did not have a license for the trade of medical oxygen, so it imported and delivered technical gas to hospitals. The University Clinical Center of RS, and the hospitals in Dobož, Bijeljina and Trebinje, agreed to these machinations and adjusted the conditions of the tender to companies that worked against the law. Although the public reacted strongly, no one has yet been sanctioned for this terrible abuse in which there was a terrible deterioration in the health of patients who were treated in these institutions, especially in the period since the outbreak of the COVID-19 pandemic.
- 3) On March 21, 2020, the Government of the Republika Srpska passed, by urgent procedure, without announcing a public tender, the Decision on the procurement of a mobile hospital for the accommodation of patients infected with the corona virus. According to the decision of the Government of the Republika Srpska, the hospital was ordered through the RS Institute of Public Health from the company Global Balkan from Bijeljina, and over 2 million EUR was allocated for it. As only one mobile tent was delivered from everything that needed to be procured, on May 29, the Republic Emergency Headquarters gave its consent to the Institute of Public Health of the Republika Srpska to initiate the procedure of unilateral termination of the contract. However, it was a move that was conditioned by huge pressure from the public, civil society organizations and the media, as well as some representatives of opposition parties. No one was held accountable for these abuses.
- 4) The purchase of medical protective equipment worth 1.2 million EUR is also very interesting, while the contract for this job was awarded to the company "Travel for Fun" from Banja Luka, which is registered as a travel agency. It should be noted that this agency was not registered as a bidder in the database of the Public Procurement Agency (database on the e-Portal) nor has any recorded contracts in the previous period. Judicial institutions have yet to consider how the Republika Srpska Institute of Public Health "negotiated" with this company, bearing in mind that the main actors (owner and director of the agency and director of the institute) were detained on suspicion of abuse or corruption.

It can be concluded that the Law on Public Procurement of BiH was suspended during the COVID-19 pandemic, or more precisely, that all principles on which the law is based were violated in observed procurement (transparency, legality, non-discrimination, equal treatment, and competition).

2. NORTH MACEDONIA

Immediately after it became evident that North Macedonia, and the entire world, is under the threat of infection spread with the novel coronavirus, state institutions began to procure protection gear. It was a matter of unplanned public procurements that needed to be realized urgently and without any delay, whereby instead of regular procurement procedures the state institutions started organizing direct negotiation procedures without tender notice, pursuant to the Law on Public Procurement. Although procurements implemented under negotiation procedure without tender notice are subject to obtaining previous consent from the Bureau of Public Procurements, they can also be implemented directly, i.e., without obtained consent, when the safety, life and health of people are directly threatened.

On 18 March 2020, North Macedonia declared a state of emergency, which lasted until 23 June 2020. Nevertheless, COVID-19 procurements continued to be implemented as “utter urgency” even in the months after the state of emergency expired.

In the meantime, the Government has failed, directly or through the competent Ministry of Finance and the separate state body within this ministry, i.e., the Bureau of Public Procurements, to significantly intervene in the manner these procurements are implemented or generally in the system of public procurements during the COVID-19 pandemic. Large-scope centralized procurements were not organized and there was no pro-activeness respect to indicating and guiding the state institutions on how they should act when procuring goods for coronavirus protection.

In the beginning, almost half of these contracts were awarded under direct negotiations with one bidder, and every fifth procurement contract was published. Following recommendations from civil society organizations based on monitoring of such procurements and after numerous criticism and pressure from the media, these figures were greatly improved as early as August 2020. Hence, only 21% of procurement contracts were awarded under direct negotiations with one bidder, and 75% of such contracts were timely published.

Electronic Public Procurement System introduced a separate designation for COVID-19 related procurements in order to facilitate browsing and retrieval of such information, while the Ministry of Health started publishing all information and documents on COVID-19 public procurements in single location on its website. By the end of the summer in 2020, COVID-19 procurements were normalized and almost all of them were organized under open procedure instead of under direct negotiations.

Value of COVID-19 related procurement contracts in 2020 reached 13 million euros, of which 9.3 million euros were awarded under direct negotiations with companies.

In addition to the civil society organizations, the State Commission for Prevention of Corruption also started to monitor these public procurements, while the State Audit Office performed a compliance audit on public procurement contracts for protection against COVID-19 and published its audit report in July 2021.

Main problems related to these procurements arise from the fact that they imply negotiations with one or small number of bidders, significant difference in prices attained by institutions for procurement of same goods, late publication of contracts for urgent procurements, failure to elaborate procurement needs, failure to publish detailed

description and individual prices in procurement contracts, and absence of regulation on public procurements in emergency situations.

After the relative chaotic year of 2020, 2021 was the second consecutive year that features public procurements for COVID-19 protection. In particular, the CSOs' monitoring shows continued presence of many weaknesses in public procurements initially identified at the pandemic's onset and peak. However, old weaknesses are now complemented with new problems, some of which are specific to this type of procurements, while others are general problems that have persisted in the field of public procurements.

It seems that any country, but especially those with limited public funds such as North Macedonia, cannot afford further "loss" of significant funds under the veil of chaos, speed and human lives protection. At the beginning of the third consecutive year marked by implementation of COVID-19 public procurements it is high time for systemic measures to be taken towards more cost-effective public spending, not only in the light of the ongoing crisis, but also for possible future crisis of similar or different nature.

On the account of insufficient accountability among institutions in respect to implementation of public procurement contracts, the pandemic's impact on performance of signed procurement contracts is mainly unknown. However, 60% of surveyed companies reported that the crisis had a negative effect on their participation in public procurements.

3. MONTENEGRO

During the election year the country was facing a major crisis related to the Covid-19 virus pandemic, the Government of Montenegro has introduced urgent measures to reduce its negative effects on citizens and the economy included the part which is also referred to the procedure of conducting public procurement. They formed independent body called National coordinating body for the fight against communicable disease.²⁸ At the session of the Government of Montenegro, held on March 19 2020²⁹ a conclusion was adopted: Over a period of 90 days, the Ministry of Finance is instructed not to initiate new public procurement procedures for the needs of spending units of the state budget, except in the case of public procurements necessary for the functioning of the health system, national security and emergency procurement, in accordance with the provisions of the law. At the beginning of July, the new Law on Public Procurement entered into force, and instead of emergency procurements, their role was taken over by a negotiated procedure without prior publication of a call for competition.

Due to Covid crisis emergency procurement became the dominant type of procurement, since in that way, it is faster and easier for the contracting authorities to meet the needs for goods, works and services. There is a growing need for procurement that address the consequences of unforeseen events, risks for health and lives of citizens related to the effects of the coronavirus pandemic. The corona virus pandemic caused an increase in spending on emergency procurement during 2020, so this figure has tripled compared to 2018 and 2019.

²⁸ <https://www.gov.me/en/article/222099--national-coordination-body-for-communicable-diseases-montenegrin-health-system-is-capable-of-responding-to-global-coronavirus-ch>

²⁹ <https://ujn.gov.me/en/2020/03/15570/>

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

Transparency of emergency public procurement is significantly reduced compared to the open and regular public procurement procedure. Emergency procurement procedure is applied by the procuring entity in accordance with a special act, which must respect the principles of public procurement. Acting on them, the procuring entity is obliged to publish the following documents on its website and the Public Procurement Portal of the administrative body responsible for public procurement within 3 days from the end of the emergency procurement procedure:

- Decision on initiating emergency procurement procedure
- Notice of outcome of the proceedings
- Contract/invoice/bill

At the beginning of July, the new Law on Public Procurement from December 2019 entered into force and envisages a negotiated procedure without prior publication of a call for competition that does not oblige the contracting authority to publish the Decision on initiating the procedure. Publishing of this documentation were mostly timely. The Law on Public Procurement does not address the deadlines for submitting documentation for public insight. Instead, it is left to the contracting authorities to prescribe it in their internal acts. Also significant number of institutions also does not state in the contracts the agreed quantities or the agreed individual prices, which practically prevents insight into the essential parts of the offers. Total value of the contracts, concluded without prior publication of a call for competition, is 2.72 million euros. In the period March-August 2020, first six months of Covid, 60 contracts on emergency procurements and 7 contracts without prior publication of a call for competition were concluded. These procurements were announced by 15 state institutions. The greatest value of the concluded contracts has the Property Administration, which is in charge of centralized public procurement. The value of the announced tenders amounted to over 1.5 million euros, which is more than half (55%) of the value of all announced procurements.

52% of the value of all concluded contracts was signed with five (5) companies, out of 29 that participated in emergency procurement for prevention and protection against the consequences of the pandemic.

Out of 67 signed contracts, in as many as 56 cases, there were negotiations with only one bidder. In only two cases, two bids were submitted for emergency procurement. Nine (9) contracts were concluded on a parity basis with bidders who submitted bids with a quantity of goods less than the quantity provided for in the request. Practice shows that the price of purchased products is lower when several offers are included in negotiations. In this case, there was no competitiveness and thus no cost-effectiveness. Abuses in the implementation of contracts are possible due to inaccurate description of the products procured under the concluded contracts.

The situation with coronavirus has imposed the need for emergency procurement of goods, services and works for prevention and protection against the consequences of the Covid 19 pandemic. These procurements, whether conducted under the old or the new Law on Public Procurement, are carried out in negotiated procedures without prior publication of a call for competition. On April 15 od 2020 the Property Administration made a decision on the emergency procurement of kitchen and laundry room equipment at the Clinical Centre of Montenegro, worth 300 thousand euros. The emergency of the procurement, which provided for a complete procedure to be carried out within ten days, was justified at that time by the epidemiological situation in the country. However, the

documentation obtained by the MANS Investigative Centre shows that the contract was signed only a day after decision to initiate the procurement was made. The job of procuring equipment for the Clinical Centre was given to the Podgorica company Pro Horeca, owned by Mirko Čarapić (son of Ranka Carapic, Supreme State Prosecutor) and the complete work was done in just two working days. According to the Rulebook for emergency procurement. Although the Law and the Rulebook on Emergency Procurement provide for the acquisition of at least three bids, there is no information in the decision on awarding the job to the company Pro Horeca that, apart from this one, some other bid was evaluated as well.³⁰

Bearing in mind that the negotiated procedures without prior publication of a call for competition is the least transparent procedure, they carry a higher risk of corruption for a reason. The speed with which they are implemented, the focus of the public on other issues, contracting with only one bidder, create the need for enhanced supervision of these procurements. Transparency and accountability are the remedies for successful, purposeful work that should be open to oversight by the government and civil society. Oversight that would help identify weaknesses in the public procurement process in a timely manner, find better solutions that protect public funds and the rational use of limited resources in the country.

Knowing that institutions are in difficult situation and with no choice, suppliers have the opportunity to use this period to increase prices above normal and real ones. In order to narrow the space for possible abuse of already modest public resources, it is necessary to make every effort to increase transparency, accountability and rationality of these procurements.

4. KOSOVO

Since the pandemic outbreak in Kosovo in March 2020, institutions started purchasing protective materials and disinfecting facilities in an effort to combat COVID-19. To purchase such supplies, institutions have largely used the negotiated public procurement procedure, i.e., without publishing a contract notice. Shortly after the first COVID-19 cases emerged, the Public Procurement Regulatory Commission (PPRC) issued a notification allowing Contracting Authorities (CAs) to apply emergency procedures for the procurement of supplies related to the pandemic response. By way of notification, the operators were exempt from certain requirements, such as court certificate, Tax Administration of Kosovo (TAK) certificate, and tender security. The decision was in effect until June 12, 2020, when it was repealed by the Public Procurement Regulatory Commission (PPRC).

The Law on Public Procurement (LPP) provides that in cases of extreme urgency, a contracting authority may use the negotiated procedure without publication of contract notice or, as it is broadly referred, the urgent procedure. Using such a procedure at the beginning of any emergency situation is quite appropriate, however the current pandemic has been stripped of the epithet of being a case of extreme urgency, by virtue of being an ongoing situation for more than two years. Nevertheless, institutions have continued to use the urgent procedure even in recent months when the response to the pandemic is not the same as in its initial stages. Considering that the

³⁰ <http://www.mans.co.me/en/emergency-procurement-without-delivery-deadline-how-the-contract-worth-e300000-ended-up-in-the-hands-of-ranka-carapics-son/>

prices offered through this procedure have proven to be much higher, their further use goes to the detriment of public funds. Competition was significantly reduced with the use of this procedure. On average in 2019, five bids were received for each tender. In 2020 and 2021 for 268 contracts that were signed using the pandemic as an excuse to use the negotiated procedure, an average of 1.6 bids were received.

Notwithstanding the urgency to conduct purchases or acquire services from economic operators, often such procedures were initiated inappropriately. One of the key reasons for using this procedure is to reduce the price through negotiation. However, the contracting authorities have failed to properly apply such procedures, as only some of them have asked economic operators to reconsider their bid price. On the other hand, even in cases where they engaged in negotiation, the achieved price reduction was slim.

The findings from multiple reports show that some institutions have taken positive steps in contracting supplies and services related to protection against COVID-19. However, procurement procedures continue to suffer from various issues spanning the entire chain and not just one link. Certain tenders had problems in the drafting of specifications; some during the evaluation of bids, often ignoring the shortcomings of bids, where in some cases unresponsive bids got the award. Certainly, findings in part focus on contract implementation, namely improper contract management ending with the delivery of products, which are not contracted at all.

Some of the contracts were concluded at exceedingly high prices, while there were institutions that entered into contracts at extremely low prices. On the other hand, many CAs required documents that do not correspond to the nature of initiated procurement and as a result, many EOs did not bid, resulting to marred competition. On the other hand, some CAs defined minimum requirements in the tendering procedure, allowing room for many non-specialized companies to submit bids. The associated risk is delivery of poor-quality products and services and inadequate implementation of award. The report also includes other violations that are tender specific.

5. SERBIA

In the previous sections we have outlined what are some of the most burning issues related to public procurement system in Serbia. COVID-19 pandemic only aggravated the cases where public institutions were not complying with the basic principles of public procurement, such as transparency, equal treatment, extremely low level of competition, etc. As previously mentioned, during the first waves of COVID-19 pandemic almost no information were provided to public about procurement of ventilators, medical equipment, or COVID-19 vaccines. Procurement of necessary medical equipment in some cases even derogated the new public procurement legislation. All important and large medical procurements of ventilators, vaccines and other medical equipment were made as a strictly confidential procurement and without implementation of relevant articles from the newly adopted public procurement legislation.

During COVID-19 pandemic we have witnessed numerous cases in which highest public officials have said that procurement of ventilators, for instance, was done on the black market³¹. In general, documents on

³¹ More information is available at <https://voice.org.rs/javne-nabavke-u-vanrednom-stanju-neobavezne-obavezne-informacije-sta-je-kupljeno-i-koliko-kosta/>

spending of public funds on the procurement of medical equipment were **hidden** in two ways- by marking them as strict confidential, from the Government, and by conducting procurement without the application of relevant legislation. The terms of urgency and non-transparency were often associated with the public procurement during COVID-19 pandemic, especially during introduced state of emergency. There were even cases in which passenger vehicles or ambulance vehicles were obtained without any single document published by relevant institutions or on the public procurement e-portal³². Urgency as a cause to derogate current public procurement legislation was often used in order to award the procurement to the desired and very often in advance *expected winner* of the procurement.

Cases related to procurement of medical equipment, were done under the non-transparency lance on a daily basis. The only source of information for these procurements were the highest public officials or members of the crisis management bodies who were in charge for the response to the COVID-19 pandemic. Even though, Serbia was the first country in the region which managed to obtain significant number of COVID-19 vaccines in a short period of time, until this day we are not aware of the prices for those vaccines³³. What is concerning is that there were numerous cases like this which could eventually lead to significant deteriorating of public procurement principles in Serbia once the pandemic is over.

To summarize the situation of public procurement during the COVID-19 pandemic it is important to mention that the new public procurement legislation was adopted during December 2019 with the implementation date set for July 2020. Due to pandemic of COVID-19 group of civil society organizations were advocating for delay of its implementation. Due to many novelties within the legislation, prospective bidders, procuring entities and competent institutions did not had adequate time for adapting to new solutions from the law or to organize adequate trainings for themselves concerning applying new legislation. Nevertheless, new legislation started with implementation since July 1, 2020, as originally foreseen.

³² More information is available at- <https://www.cins.rs/ministarstvo-zdravlja-krsi-zakon-skrivanjem-informacija-o-nabavci-saniteta-za-kovid-bolnice/>

³³ More information is available at- <https://www.danas.rs/vesti/drustvo/sve-je-tajna-i-sve-je-sumnjivo/>

IDENTIFIED CORRUPTION RISKS IN THE PUBLIC PROCUREMENT CYCLE IN THE OBSERVED COUNTRIES

1. BOSNIA AND HERZEGOVINA

Violation of integrity in public procurement, and consequently corruption itself, can occur at all stages of the implementation of public procurement procedures in Bosnia and Herzegovina. This is the general conclusion of the study "Black Book of Public Procurement in Bosnia and Herzegovina"³⁴, which was published by the Open Society Fund BiH in December 2020.

It is difficult to list all the illegalities and irregularities observed during this monitoring, but the following can be singled out:

Non-transparency in public procurement was observed at all stages of the procedure. Contracting authorities did not adopt and / or publish procurement plans; carried out procedures not provided for in the procurement plan or special decision; Procurement plans often did not contain even the minimum necessary information (type of procedure, estimated value, deadlines for initiating procedures, etc.). Tender documents were also published without sufficient information necessary for bidders to prepare bids on a competitive basis, which puts bidders with other "sources" of information in a more favorable position. When we look at the public procurement procedure itself (tendering and decision-making), we have noticed insufficient transparency, ranging from complete secrecy, ie non-implementation of any public procurement procedure when awarding contracts, to non-publication of procurement notices (present mainly during previous regulations). Also, domestic contracting authorities highly value direct agreements (which are in themselves non-transparent), so there are those for which this is almost the only applied public procurement procedure. It can also be concluded that the public procurement procedure becomes a "black box" at the moment of signing the contract between the contracting authority and the selected bidder. This practice is more than expressed in public procurement procedures in BiH due to inadequate control over contract execution, abuses that occur, as well as the non-transparency that accompanies contract execution (including the fact that most contracting authorities do not publish their contracts). It should be emphasized that the implementation of public procurement contracts is not regulated by the PPL, but by the laws on obligations, technical regulations, regulations on internal controls, etc.

Discrimination or favoring of bidders is one of the most pronounced risks to the integrity of public procurement. This risk may have various manifestations, which in most cases relate to the required conditions on the part of the bidder (personal, professional, or financial ability), then the required technical and other specifications of the subject of procurement or to the favoring criteria for awarding the contract. Conditions on the part of bidders represent a significant risk because they can provide an advantage to individual bidders, i.e., to prevent the participation of others, and through conditions that are not decisive for the required subject of procurement. An

³⁴ https://osfbih.org.ba/images/Progs/17+/LP/Pubs/Da_javne_nabavke_u_BiH_postanu_javne_bs-en.pdf

example of this is prescribing conditions that only one candidate can meet. Although this negative practice is mainly related to the previous pre-tender phase of the public procurement cycle, it is interesting that domestic institutions have very easily adapted to the new conditions of tender announcement. Namely, in order to avoid bidders' complaints about the conditions, criteria and technical specifications stated in the published invitations and tender documentation, the domestic contracting authorities have innovated the model of favoring bidders. They did so by simply not requiring the selected bidders to subsequently submit documentation proving the fulfillment of qualification requirements (confirmed by statements in the public procurement procedure), or submitting the required bank guarantees and other security instruments as conditions for concluding contracts, and even through contract awards, to bidders who do not meet the defined conditions.

The selection of an inadequate procedure for conducting a public procurement procedure as a risk of integrity primarily refers to the illegal selection of non-transparent procedures such as a direct agreement or a negotiated procedure without publication of a notice. The law says that the basic procedure that is preferred is open procedure, and that in justified cases there may be deviations from that rule. However, monitoring shows that many contracting authorities choose less transparent procedures without meeting the legal requirements for conducting these procedures. Of particular concern is the large number of cases of illegal use of the negotiated procedure without publication of a notice as the least transparent procedure.

Lack of competition is a risk that indicates that "something is wrong" with the tender itself. The lack of interest of bidders to submit bids in, often very generous, state affairs speak of the very low trust of bidders in the public procurement system. Few bids favor an increase in prices or a decrease in the quality of the delivered item. According to the previous PP Law, in most procedures it was necessary to collect at least three correct bids in order for the procedure to be completed. This led to a large number of annulled procurement procedures because not enough correct bids were collected. The 2014 PP Law allows contracting authorities to terminate the procedure, ie to award a contract, even when one correct bid has been received. It is a devastating fact that in BiH in the period 2017 - 2021 in the procurement procedures (where there is the largest number of bidders) the average number of bids was 2 or below. Finally, failure to submit a single correct bid in procurement procedures is a common excuse to award a contract through a negotiated procedure without publication of a notice.

Abuses in the execution of contracts are patterns of behavior in which, due to the manner in which the awarded contracts are implemented, the entire previously conducted public procurement procedure in which the most favorable bidder is selected is devalued. It is this feature that separates abuses from lack of control, because the former is about consciously changing important elements of the contract (price, delivery time, conditions in terms of quality, quantity, etc.), and not about the consequences of a poorly established control system. The most dangerous example of such abuse are (formal or informal) amendments to the contract that lead to situations where the selected bidder would not have been selected if the circumstances envisaged by the contract changes were part of his bid (e.g. the price determined by the contract changes is higher than the price of the second most favorable bidder).

In addition to the above, there are numerous other irregularities that seriously violate the legality of public procurement procedures. Thus, the contracting authorities apply the practice of simply resuming delivery under

expired contracts without conducting a new procedure; conducts fictitious procurement procedures, which is indicated by the absence of envelopes of submitted bids in the archives and protocol of the contracting authorities; subsequently amend the bids; accept offers submitted by fax in procurements worth millions; refuse to submit the minutes from the opening of bids to the bidders or do not sign / certify those minutes; do not explain the adopted decisions on contract award; and in many other ways severely violate the legality of the proceedings. It is also worrying that the responsible persons in the contracting authorities seriously violate the PP Law even when they are directly informed about the wrongdoing.

2. NORTH MACEDONIA

In-depth monitoring of the implementation of public procurement and data from the Electronic Public Procurement System enable to locate a number of points that are particularly risky for corruption in the entire procurement cycle - from procurement planning, through the implementation of procedures, to the conclusion and implementation of public procurement contracts. Hence, the European Commission in almost every report indicates that anti-corruption measures are needed throughout the procurement cycle.

In the procurement planning phase, one of the main risks is determining the need for procurement and its detailed explanation. In fact, the former Secretary General of the Government, who in 2020 purchased software for determining the speed of cars as a basis for imposing fines, "slipped" on this risk. It turned out that no one needed that software and that the secretary himself had previously patented the software which he later procured from state money through a friendly company. A trial is underway in which the Secretary of the Government is charged with abuse of office. Although the new Law on Public Procurement stipulates an obligation for contracting authorities to explain the need for procurement in the public procurement decision, in practice such an explanation is not given, or it is only general.

Inadequate needs assessment and the risk of external factors influencing procurement decisions are reflected in the frequent and significant changes to the annual public procurement plans, as well as the poor implementation of those plans.

One of the biggest risks at this stage is the unrealistically low or high cost of procurement. In this context, it is extremely important to determine the estimated value of procurement as realistically as possible. Related to that, one of the often-present indicators of possible corruption is the coincidence of the prices offered in the tenders with the estimated value, although it is not published. The suspicion is that it was obtained through insider information that puts that bidder in a privileged position over others. In order to alleviate this problem, the new Law on Public Procurement leaves room for contracting authorities to decide for themselves whether to publish the estimated value.

Avoiding market consultations is another common risk of corruption in public procurement in North Macedonia. The contracting authorities minimally use the possibility of the so-called technical dialogue, i.e., to publish the tender documentation that they plan to use in the tender (only in about 1% of the tenders). In that way, the companies can give suggestions and comments in order to improve the tender documentation and thus to

prevent in time the use of conditions that can lead to discrimination of the companies and favoring of a certain bidder.

In the implementation phase of the public procurement procedures, the main present risks of corruption are related to discriminatory elements in the tenders, either in the conditions for participation of the bidders, in the technical characteristics of the product or in the criteria for selection of the most favorable bid.

Practice shows that these risks are often present because close to 30% of the tenders are presented with only one or no bid, and 13% of all bids in the tenders were excluded in the evaluation phase.

The bid rigging is the next risk at this stage for which there are indications that it often happens, but there is no reaction from the institutions for its sanctioning and prevention. 62% of the surveyed companies believe that there is agreement between the bidders in the tenders, in the last survey from the beginning of 2022.

Improper management of conflicts of interest is another risk at this stage. Statements of non-existence of conflict of interest are signed only formally, there is no prior declaration of interests of persons involved in procurement, and it is not clear how this issue is regulated by the increasing use of outsiders to conduct procurement in institutions.

The high concentration of a company in the procurement of certain institution is one of the increasingly present indicators of possible corruption. There are cases when this concentration may arise from the real market conditions, but also cases when it indicates possible corrupt reasons.

Frequent, easy, and massive annulment of tenders in Northern Macedonia is another indicator that corruption may be a motive for annulment. Every third tender in the country is annulled, which indicates that annulment can be a safe option when the "rigging" of the tender fails.

In the last phase of the implementation of public procurement contracts, the main risk of corruption is the inconsistent monitoring of the implementation. If it is known that possible corruption in tenders is agreed in advance. But it is implemented in the phase of realization of the tender, then the absence of consistent monitoring of that realization can be directly related to corruption.

Unrealistically high individual tender prices are also considered one risk of possible corruption. The transparency of the Electronic Public Procurement System enables insight into the individual prices of the procurements and hence the comparison of those prices between the institutions. The large differences in prices at which institutions pay for the same products and services alone cannot be directly related to corruption but should certainly be an occasion to reconsider the way in which a particular public procurement procedure is conducted and to investigate whether is the price consequence of objective circumstances or subjective influences that are not in accordance with the legislation.

3. MONTENEGRO

In spite of good conclusions of Sigma Monitoring Report for Montenegro 2021 as well as the EC Progress Report where they stated that a well-established legislative framework for awarding public contracts is in place in Montenegro and the legislative framework is largely aligned with the *Acquis* on public procurement, with a few minor discrepancies also the legal framework creates conditions for increasing the overall transparency in public

procurement and the new e-system has been designed and is obligatory for all contracting authorities and economic operators as of 1 January 2021 (CEJN). But in practice this is not the case. Yes, we are going in a right direction, we have a relatively good Legislative but not enough capacity to implement the same solutions.

When we come to public procurement cycle, first thing to mention is **planning**. Through the years institutions in Montenegro struggling with inadequately planning. Inadequate planning and failure to deliver on the planed remain the key weaknesses in the management of this segment of public spending because public procurement planning in practice is meaningless by multiple and unexplained changes to plans many times through the year, also is conditioned by non-adoption of the budget on time as well as unspent funds for the previous year. More stringent obligations should be defined on the part of contracting authorities concerning the development of Public Procurement Plans. Such Plans should include the contracting authority's needs assessment for the previous three years, explanatory notes in case the envisaged needs differ radically from the past ones, and specific explanatory notes on any new procurement. Amendments to the Public Procurement Plan should include mandatory explanations. In its annual Public Procurement Report, the Ministry of Finance should clearly highlight the aggregate difference between the total planned and spent public procurement budget (of all purchasers).

The Public Procurement Law should stipulate the obligation (not the possibility) of conducting **market analysis**³⁵ and the relevant procedure, as well as the obligation of reporting on the conducted market analysis, to allow for equal treatment of all the interested tenderers, including those market players who did not take part in the consultations but are interested in taking part in the public procurement procedure. The secondary legislation should stipulate the mandatory contents of the template of the Report on Conducted Public Consultations.

Lowest offered price should not be the main criterion for selecting a bid and the contracting authorities should priorities the quality of works, goods and services in public procurement procedures, in line with the specific features of the subject-matter of procurement, in order to ensure extended lifespan and protect the budget especially now when that the new procurement regulations, which apply from July 2020, impose the application of the most economically advantageous criterion as a default option.³⁶

According to the official institutional data, there is no **conflict of interest in public procurement** in Montenegro. Up to two reports of potential conflict of interest get recorded per year; those are forwarded to the Administration for Inspection Affairs – Public Procurement Inspectorate for further action. The Inspectorate finds that no conflict of interest has occurred. The Public Procurement Law requires the contracting authorities to sign conflict of interest declarations ahead of a public procurement procedure, or during a procedure, should conflict of interest occur. On the other hand, the Template for the Declaration of the economic operator participating in a public procurement procedure includes a box concerning conflict of interest on the side of the bidder. All declarations are kept and registered only by the contracting authority, and neither the signed declarations of bidders' representatives (included in the tender) nor the declarations of contracting authority's representatives are published. The contracting authority keeps the records on identified conflict of interest and subsequent actions; implementation of anti-

³⁵ Article 85 Public procurement Law (Official Gazette of Montenegro, from 2019) <https://mia.gov.me/wp-content/uploads/2021/12/Proposal-of-the-PPL-February-2019-with-comments-1-1-1.pdf>

³⁶ Article 117 <https://mia.gov.me/wp-content/uploads/2021/12/Proposal-of-the-PPL-February-2019-with-comments-1-1-1.pdf>

corruption measures and prevention of conflict of interest in public procurement procedures are subject to inspections, but solely in terms of verification of compliance with the statutory obligations related to recording instances of conflict of interest and excluding relevant bidders from the procedure. One of the recent examples of this happened in the Municipality Budva where the mayor of Budva, Marko Carevic as a covert subcontractor, through his company “Carinvest”, participated in several tenders announced by the local government headed by him.³⁷ MANS is in May 2020 published information that Carević concluded as many as 11 contracts with the company “Asfalt Beton Gradnja” from Podgorica, with a total value of nearly two million euros, and that the company used the equipment of Carević’s private company to perform the works.³⁸ On that occasion, we submitted all the contracts that Carević concluded with Asfalt Beton Gradnja to the Special State Prosecutor’s Office, as well as extensive photo-documentation from several construction sites where it is clear that instead of that company, Carević’s company “Carinvesta” is doing the signed contracts. Part of the evidence was the confession of Carević himself from 2019, in which he does not deny that he rented his machines to the company with which he concluded deals as the President of the Municipality. In the information submitted to us in mid-July, Special Prosecutor Rutović did not state any specific reason for dismissing our criminal report, while the decision was issued only a month after it was filed. On that occasion, Rutović did not issue a decision with reasoning why he rejected the criminal report, what evidentiary actions he took, in what way he examined the evidence submitted with the report, and on the basis of which facts he made the final decision to dismiss the criminal report against Marko Carević. The case of Carević’s tenders is a **textbook example of conflict of interest and corruption**, which should not pose the slightest challenge even for the capacity of such Special State Prosecutor’s Office.³⁹

Increasing of competition in proceedings *must* be the priority in the future. Building trust in the public procurement system, with greater transparency, strengthening the administrative capacity for ensuring the application of the *Acquis*, efficient remedy system, increasing the capacity to manage public procurement processes, with strong administration will increase the number of bidders.

Monitoring the implementation of public procurement⁴⁰ contracts with the Report on the performance of public procurement contract should include all relevant information such as data on the execution of the contract for procurement of goods, services and works as per each essential characteristic of the subject-matter, and requirements concerning the method of execution, including any requirements related to environmental protection, energy efficiency, social protection and/or protection and transfer of intellectual property rights, as stated in the technical specifications of the selected tender that served as the basis for the contract, data on the deadlines and method of payment, with accompanying evidence, evidence of acceptance of goods and should also include a conclusion as to whether the contract was executed in full in line with the contract.

³⁷ <http://www.mans.co.me/en/asphalt-with-the-smell-of-corruption-how-the-mayor-of-budva-made-money-from-city-tenders/>

³⁸ <http://www.mans.co.me/en/the-evidence-against-carevic-is-indisputable-the-state-prosecutors-office-to-reconsider-the-decision/>

³⁹ <http://www.mans.co.me/en/the-ministry-of-capital-investments-managed-to-push-through-carevics-tender/>

⁴⁰ Article 152 <https://mia.gov.me/wp-content/uploads/2021/12/Proposal-of-the-PPL-February-2019-with-comments-1-1-1.pdf>

4. KOSOVO

In the pre-tendering phase, there are a lot of possibilities for corruption, and there are high risks that the entire procurement cycle will be corrupt. One of the corruption risks is the public procurement activity initiated without available funds – Currently, public institutions can begin a procurement activity without available funds. One of the first documents to be signed is the B04 Statement of Needs and Determination of Availability of Funds which confirms that there are available funds. But in practice, public institutions initiate procurement activity and make false claims that funds are available by signing the B04 form. One of the clearest examples of this is the tender for adaptation of the emergency clinic as Covid-19 hospital, with an estimated value of 18 million euros, which was canceled because of lack of funds. To mitigate this problem, there needs to be interoperability between the e-Procurement platform and the KFMIS to block the possibility of initiating a procurement activity without the fund's availability.

Another risk is the Shortening of the bid deadline – According to PPRC, the shortening of the bid deadline happened on around 16% of the value of contracts. The shortening of the deadline can happen for different reasons. The potential misuse is to shorten the deadline to gain an advantage against other EOs. A short deadline does not allow companies to prepare their bids in time while allowing companies with inside information to gain an advantage. Currently, CAs only provide a “reason” for shortening the deadline, included in the contract notice. To prevent the shortening of the deadlines without a convincing reason, PPRC should approve the shortening of deadlines for high-value procurement activities.

Another loophole in the Law is that PPL allows bidders with the same owners/ownership to bid and win contracts – Two or more companies with the same owners/directors to bid and win contracts. In contrast, the World Bank procurement rules prohibit companies with the same ownership from bidding in tenders. One of the recent examples of this happened in the Municipality of Gjakova, where a tender was rigged by two companies that had the same ownership. This loophole needs to be closed by including a legal provision in the Draft PPL to prohibit bidding by two companies with the same ownership. This loophole is also connected to the Lack of beneficial ownership disclosure - The term “beneficial owner” refers to the natural person, i.e., the real, living person, who ultimately owns or controls a company or another asset, or who materially benefits from the assets held by a company. Kosovo lacks regulation to disclose beneficial ownership. The disclosure of beneficial ownership should be mandatory for all companies and individuals who receive public funds such as contracts from public procurement, subsidies, state aid, etc.

During the tendering phase and bid evaluation one of the problems and corruptions risk is with abnormally low-price bids. Even though Public Pro has legal provisions to protect CA from abnormally low-price tenders, it isn't easy to always compare market prices and bid prices for products/goods/services. Around 10% of complaints to PRB are for claims about abnormally low prices. Abnormally low-price tenders are a corruption risk because a company tends to offer very low prices for some parts of the tenders and very high prices for others. To reduce the abuse, the government should create and maintain the National Catalogue of Prices which can be used by all parties to compare market and bid prices.

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

In the post award phase, a during contract management A wrong interpretation from PPRC allows Contract Authorities to exceed the contracted value without limits in unit price contracts – PPRC with interpretation number 68 has allowed contracting authorities to exceed the contract value in unit price contracts. The CA need only to provide a reasonable justification. The interpretation does not tell whom the justification should be sent. This interpretation has allowed CA to exceed the contracted value several times. One of the examples is the tender for maintenance of the bridges. The contract was signed for around 500,000 euros, but CA paid approximately 5.4 million euros in the end.

5. SERBIA

When we are talking about corruption risks, the universal cure for all of them is certainly transparency, transparency in every individual aspect of both the procedure and the public procurement system. Although the new public procurement Portal has brought some progress, transparency is still not at a satisfactory level, especially when we talk about the sphere of execution of public procurement contracts.

If we look at different parts of the public procurement cycle and start from the beginning, the first and basic corruption risk is the **lack of planning** and **inadequate market research**. Contracting authorities, as stated in the reports of the highest audit institution in the country, often conduct procurement that is not in their plan at all, in quantities that do not correspond to the plan, in a time interval different from the one envisaged by the plan. A special problem that this Coalition tackled in the past is purposefulness in the public procurement. We determined that the contracting authorities often procure unnecessary, in larger quantities than necessary, at a more expensive price than the market one, at an inadequate time, etc. The second mentioned problem, non-existent or inadequate market research, of course, opens large space for corruption risks, especial when it comes to the price of subject of procurement, as well as its quality.

In the phase of the public procurement cycle dedicated to the implementation of the procedure itself, the main corruption risks are hiding in the **tender documentation**, especially in the **technical specifications**. Prescribing tender documentation, i.e., technical specifications to restrict competition is more than a present practice, especially in public procurement of official cars. Although the technical specification seems neutral at the first glance, through the less important, usually peripheral item, it is “tailored” to correspond to only one, precisely specified item of procurement (e.g., “*volume of trunk cannot be larger or smaller than 4.2 liters*” which corresponds only one specific vehicle model of a particular manufacturer). The next negative practice is reflected in “braking” of larger procurement into several lots. This practice is very common in public procurement of medical equipment. This practice is suitable for cartel agreements between different bidders and thus price negotiations. It often happens that within one procurement we have 2 bidders of which first sends a bid only for lots 1,3 and 5, while the other sends a bid only for lots 2,4 and 6. What we have often witnessed in the past is also prescribing redundant, irrelevant criteria as important when submitting a bid or requesting inadequate guarantees - e.g., in procurement of maintenance of air conditioners, the bidder is required to have a business space of at least 200 m² in ownership or prescribing guarantees in the amount exceeding 50% of the total envisaged procurement price. We can often see additional “modalities” - other prescribed conditions that may restrict competition in order to favor a particular bidder

- e.g., prescribing unusually short delivery time of a certain good which obtaining, or production requires certain time while a specific bidder has a certain good "in stock".

In the phase of execution of public procurement contracts corruption risks are the biggest. First of all, this phase is covered with the “**veil of secrecy**”. For the start you do not have public procurement contracts publicly available on public procurement Portal. It is the same situation when it comes to their annexes. As it was mentioned earlier there is not effective oversight mechanism in practice in place which means that in addition to the fact that important documents are not available for oversight of wider public, but also that besides State Audit Institution there is no other competent authority that controls legality of this phase, especially procured amounts of goods, works of services, number of annexes and provisions and terms being amended in this way or paid amounts.

Besides public procurement cycle itself, as it was mentioned earlier, biggest corruption risks are hidden in **intergovernmental agreements** and increased **thresholds**. Both are conducted far away for the eyes of the public, exclude application of public procurement rules and procedures, and remain without any form of effective and reliable control.

REGIONAL RECOMMENDATIONS FOR IMPROVEMENT OF PUBLIC PROCUREMENT SYSTEMS

Having in mind everything we mentioned earlier in this Report and all the problems we pointed out it is obvious and easy to determine what has to be changed in each of the observed countries. Main question is “*Is there political will in place to introduce necessary reforms and to tackle noted problems?*” As we noticed many of the stated problems are common, observed countries share them. Because of this, in this last chapter of our report, below, we have formulated overall recommendations for all observed countries.

The prerequisite for satisfactory implementation of public procurement regulations in practice is establishment of **clear and consistent legal and institutional framework**. Further alignment with the *Acquis* requirements needs to be conducted seriously, not by simple copy/paste method but rather with deep analysis of country and systems specifics, needs and situation in practice. “Best practice” examples don’t mean much if they are unenforceable in practice.

The approximation of thresholds in systems with high level of corruption with requirements of the EU Directives already resulted in an increase of corruption risks. Further increase of thresholds values for the conduct of public procurement procedures will leave even more substantial proportion of public funds outside the reach of established, but in practice weak control mechanisms. It is necessary to reinforce all elements of the system of control of disbursement of public funds in order to reduce these risks.

The number of exemptions from the application of public procurement regulations must be reduced and exemptions should be interpreted extremely restrictively. Future amendments of national legislation should primarily take into consideration problems identified in practice and find adequate solutions for them. EU itself can help here and be harsher, especially in its Progress Reports when it comes to raised issues and recommendations related to

public procurement. Future amendments of national legislations need to eliminate “privileged position” of intergovernmental arrangements in public procurement and public-private partnerships.

Level of transparency is not negotiable! All the observed countries need to invest additional efforts in order to achieve the greatest possible level of transparency in the field of public procurement. The guarantee of transparency must find its place in legal texts not only in the form of tenets, but also in the form of concrete provisions on the manner of ensuring publicity of information. All documents pertaining to public procurement procedures should be accessible to the general public and enable stakeholders to gain an insight and exercise control over the process of public procurement from the stage of planning to the stage of performance of the awarded contract. This would narrow down the space for mismanagement of public funds and for corruption, and institutions would be liberated of their obligation to provide information upon request and would make savings in money, time and other resources spent on collecting information.

The aspiration should be to **establish, ensure and maintain purposefulness** of public procurements – from the initial stage of planning the budget to making public procurement plans, conducting the procedure to the contract execution. This implies the establishment of a system of monitoring and control consisting of a set of well-linked and coordinated institutions with clear lines of responsibility.

In order to **increase competition** in public procurements it is necessary to grant bidders with “the defense mechanism” which could defend them from the actions of the contracting authorities which are discriminatory, illegal or irregular. It is of essential importance that public procurement systems regain the trust of the bidders. To achieve this, competent authorities must be “supplied” with adequate competencies, capacities but also responsibility. Establishment of effective, efficient and trustworthy public procurement systems is prerequisite to make bidders themselves could become a controllers of the procedure and system itself.

Effective oversight of the execution of public procurement contracts needs to be in place. Through the years we, all together, managed somehow to improve transparency, legality, and many other things in public procurement systems of our countries but contract execution still causes strong headaches. Therefore, it is necessary to advance this stage of the procedure primarily in legal terms by introducing an obligation of regular reporting by the contracting authorities on the execution of the awarded contracts. This would establish control which could significantly help reduce the number of subsequently made modifications of the contract which have become an established trend in some of the observed countries and a very efficient way to bypass the law.

It is necessary to **ensure efficient work of all institutions** making up a public procurement system to reduce as much as possible the space for corruption and for disbursement of public funds in an unlawful, irresponsible and purposeless way. In addition to institutions for the protection of rights, it is necessary to boost capacities of inspection bodies as well as work on establishing a reliable internal audit. The role of supreme audit institutions is irreplaceable in the control of public procurements. The cooperation of all aforementioned institutions and prosecution offices and courts may eventually ensure efficient functioning of the public procurement systems as a whole.

COMPARATIVE EVALUATION REPORT ON PUBLIC PROCUREMENT SYSTEMS

In terms of the **protection of rights**, it is necessary to establish mechanisms accessible to bidders and ensure procedures the conduct of which requires proportional costs which will end in reasonable time frames. Additionally, it is very important that the protection of rights encompasses all stages of the procedure.

Eliminate impunity! As long as penal policy doesn't exist or is selective applicable it is not realistic to expect to have effective systems. Until the ones responsible for violating public procurement laws, conducting illegal, corrupt or irregular acts and behaviors are not sanctioned for this, level of trust in public procurement systems will remain low. Mild sanctioning policy in countries in the region was shown to be counter-productive, almost stimulating violations of the law. It is obvious that continuous trainings of institutions and courts in charge of processing cases in the field of public procurement is necessary.

And last but certainly not the least – **cooperation at all levels and between all relevant stakeholders**. Cooperation between CSO actors from the whole region is already in place and showed to be extremely important and productive, cooperation with stakeholders from the European Union and their support is already in place. What lacks most is the cooperation between CSO actors and competent authorities. Previous cooperation of our Coalition and State Audit Institutions clearly showed that cooperation like this can be extremely good and productive. “Main” competent authorities need to understand that CSO actors are natural allies in this “fight” and that we share the same ultimate goal - better, effective, efficient and corruption-free public procurement systems.