

THE LEGISLATION OF THE REPUBLIC OF SERBIA IN THE FIELD OF PREVENTION OF CORRUPTION IN PUBLIC PROCUREMENT /

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Abstract: *The public procurement as a process by which governments, as well as other bodies governed by public law, purchase products, services, and work, create the cost to the state budget, and taxpayers. The high value of transactions and close interaction between public officials and businesses expose public procurement to corruption risk. According to the Serbian legislation, violation of public procurement rules can be qualified as misdemeanour or crime. The specific crime of abuse in public procurement has been introduced in the criminal legislation by 2012 amendments to the Criminal Code. In addition to the repressive response to the corruption in public procurement, the potential abuses can also be prevented by other measures. To prevent irregularities and decrease vulnerabilities to corruption, a new Law on Public Procurement was passed in December 2019.*

Therefore, in this paper, authors analyse criminal provisions aimed to deter possible offenders, but also assessed other non-criminal provisions and the functioning of control mechanisms, such as supreme audit and internal financial control in the Republic of Serbia. In the paper, authors strive to make recommendations for improving the prevention and repression mechanisms against abuse in public procurement procedures.

Key words: *prevention; abuse; public procurement; external and internal financial control*

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1. INTRODUCTION

Public procurement is the government activity most vulnerable to corruption (OECD, 2016). The 2014 EU Anti-Corruption Report highlights the significant risks of corruption in the context of public procurement, due to deficient control mechanisms and risk management in EU Member States (European Commission, 2014). As a major interface between the public and the private sectors, public procurement provides multiple opportunities for both public and private actors to divert public funds for private gain. Public procurement is also a major economic activity of the government, where corruption has a potential high impact on taxpayers' money. In the European Union, public authorities spent approximately 2 trillion annually on public procurement, which

represents around 14% of the GDP (European Commission, 2021). In OECD countries, existing statistics suggest that public procurement accounts for 12% of GDP, and 29% of government expenditure (OECD, 2019). In addition to the volume of transactions and the financial interests at stake, corruption risks are exacerbated by the complexity of the process, the close interaction between public officials and businesses, and the multitude of stakeholders.

Significant corruption risks arise from a conflict of interest in decision-making, which may distort the allocation of resources through public procurement. Moreover, bid rigging and cartelism may further undermine the procurement process (OECD, 2016, p. 6). Lack of transparency and accountability were recognized as a major threat to integrity in public procurement (OECD, 2005).¹

Public procurement is increasingly recognized as a central instrument to ensure efficient and corruption-free management of public resources. In this context, the role of procurement officials has changed dramatically in recent years, to cope with the demand for integrity in public procurement. Countries have devoted efforts to ensure that public procurement procedures are transparent and promote fair and equal treatment; public resources linked to public procurement are used in accordance with intended purposes; procurement officials' behaviour and professionalism are in line with the public purposes of their organization; systems are in place to challenge public procurement decisions, ensure accountability and promote public scrutiny.

In Serbia, public procurement continues to be perceived as an area particularly vulnerable to corruption (European Commission, 2020, p. 28). One of the challenges that Serbian authorities are facing is realistic planning of public procurement and monitoring of contract awards and contract implementation. An additional problem is a small number of bidders per public procurement, which raises concern of trust in the system. For example, in Serbia on average there was 2.5 bidders per public procurement. However, positive trends should be noted. The use of negotiated procurement procedures is significantly reduced from 17% of all public procurements in 2013 to 4% in 2019.² Public authorities in Serbia on average spent 3.7 billion euro annually, which is around 8% of the GDP. Having in mind value of public procurement, it is clear this area contains corruption risk, but also state is interested to ensure protection against possible abuses.

It is important to note that in the defence and security sector, special provisions apply, and they are excluded from the general rules on public procurement.³ This is especially important, having in mind the values of these procurements.

¹ Corruption thrives on secrecy. Transparency and accountability have been recognized as key conditions for promoting integrity and preventing corruption in public procurement. However, they must be balanced with other good governance imperatives, such as ensuring an efficient management of public resources – “administrative efficiency” – or providing guarantees for fair competition. In order to ensure overall value for money, the challenge for decision makers is to define an appropriate degree of transparency and accountability to reduce risks to integrity in public procurement while pursuing other aims of public procurement.

² Annual report of the Public Procurement Office for 2019, available at: <http://www.ujn.gov.rs/izvestaji/izvestaji-uprave-za-javne-nabavke/> (accessed on 17.06.2021).

³ At the EU level the “Defence” Directive 2009/81/EU was adopted on July 13, 2009 (the full name is: Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security). The Directive is applied to all contracts concluded by the contracting authorities in the field of defence and security.

The research subject in this paper are shortcomings of the Republic of Serbia anticorruption rules in public procurement. Over the last two decades, Serbian authorities implemented broad legislative reform in public procurement area to decrease corruption risk.⁴ To prevent corruption in public procurement, amendments to the Criminal Code were adopted in 2012, and a new criminal offence was introduced with the aim to criminalize abuse in public procurement. In addition, in 2019, a new Law on Public Procurement was passed. Having in mind European Commission's assessment of the progress in prevention of corruption, it seems that in the upcoming period, it is necessary to make additional efforts in public procurement area to align public procurement legislation with the 2014 EU directives on public procurement, and continue strengthening capacities of relevant institutions (European Commission, 2020, pp. 28, 73). Therefore, we start with the hypothesis that national regulations still contain provisions that may contribute to violations of the general principles of public procurement, and there is a need to strengthen rules on prevention of corruption in the public procurement. To confirm this assumption and provide options for improvement, authors in the first part of paper highlight the reasons for the adoption of the new Law on Public Procurement in 2019. Then, by using the dogmatic-legal method, authors identify the advantages of the new rules compared to the previous and highlighted disadvantages of certain provisions in the new Law. In the second part, authors analyse the provisions related to the fight against corruption in the field of public procurement. In the same chapter, authors refer to the competence and results of the work of special departments of higher public prosecutor's offices for the fight against corruption, based on the analysis of the annual report on the work of the Republic Public Prosecutor's Office. A special part of the paper is dedicated to the assessment of control mechanisms, specifically civil supervision in the field of public procurement, external audit, and internal financial control in public sector institutions. Bearing in mind that the Republic of Serbia is the EU candidate country, in the last section, we analyse the alignment of Serbian legislation with EU *acquis* in the field of public procurement. In that chapter, authors analyse the content of the Screening report from 2015, which provides direction for legislative amendments and preparation of 2019 Law on Public Procurement. To assess the progress in the field of public procurement after the adoption of the new law, the paper also looks at the content of the European Commission's Progress Report on Serbia from 2020.

2. SHORTCOMINGS OF ANTI-CORRUPTION MEASURES

The Serbian legislation incorporates preventive and repressive measures against corruption in public procurement. Part of the preventive measures are included in the Law

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- for the supply of *military equipment* including any parts, components and/or subassemblies thereof as well as works, supplies and services directly related to the equipment for any and all elements of its life cycle;
 - for the supply of *sensitive equipment*, including any parts, components and/or subassemblies thereof as well as works, supplies and services directly related to the equipment for any and all elements of its life cycle;
 - *works and services for specifically military purposes or sensitive works and sensitive service.*

⁴ Direction of reforms in public procurement were defined in several policy documents: Public Procurement Development Strategy for period 2011-2014, next Strategy was adopted in 2014 and the latest Program in 2019 for period until 2023. In 2002, Serbia adopted first Law on Public Procurement. To address challenges identified in implementation new Law was adopted in 2008. 2012 Law on Public Procurement was adopted with the aim to prevent corruption. In addition, Serbian authorities were discussion options of addressing corruption risk through criminal law provisions.

on Public Procurement,⁵ while repressive measures are regulated by the Criminal Code,⁶ and as misdemeanour offences regulated by the Law on Public Procurement.

Strengthening integrity in public procurement was identified as one of the Government's priorities, which was reflected in the adoption of the Public Procurement Development Strategy for the period of 2014-2018. As one of the strategic goals of public procurement reform, the full harmonization of domestic regulations with EU *acquis* and their full implementation in practice was identified.⁷ The harmonization of national legislation with EU directives in the field of public procurement should have aimed at increasing the transparency and flexibility of public procurement procedures, reducing administrative burdens, using electronic means and the way of proving criteria for qualitative selection of economic entity, issued by the competent authorities.

The new Law on Public Procurement was adopted in 2019, with the aim to overcome shortcomings identified in 2012 Law on Public Procurement.⁸ The 2012 Law on Public Procurement was adopted to prevent corruption, however some of the instruments envisaged in the Law did not produced expected results or did not get needed support (i.e. civic monitor). One of the key challenges of 2012 Law was an effective control of public procurement contract performance.

To overcome the identified challenges, the 2019 Law on Public Procurement established a new mechanism for improvement of effective control of public procurement contract performance. It also includes rules on application of the principle of transparency, competition and establishment of public procurement e-portal. According to the article 154, paragraph 2 of the Law on Public Procurement the procuring entity is obliged to control the execution of the public procurement contract in accordance with the conditions specified in the procurement documentation and the selected bid. The manner of monitoring the contract implementation is not prescribed by the Law on Public Procurement, but it is left to be regulated by the internal rulebook of the public sector institutions. Criteria and guidelines regarding the manner of checking the quantity and quality of delivered goods, provided services or performed works, could be established and published by the Public Procurement Office bearing in mind its jurisdictions. In accordance with the principle of transparency, it is necessary to include the obligation to publish minutes or reports on the performed control on the public sector institutions website. Mentioned criteria and guidelines should be established and published in accordance with the jurisdiction of the Public Procurement Office of the Republic of Serbia. The Law on Public Procurement also prescribes the obligation to communicate and exchange data electronically through the public procurement portal between public procurement authorities and bidders. Public procurement portal should contribute to increase flexibility of public procurement procedures and reduction of administrative burdens.

Although the new Law was adopted to overcome shortcomings identified in the previous Law, there are still remaining challenges. The key issue are exemptions from regular public procurement procedure that are envisaged in the special laws (i.e., the Law on Special Procedures for the Realization of Projects for Construction and Reconstruction of Line Infrastructure Facilities of Special Importance for the Republic of

⁵ The Law on Public Procurement, *The Official Gazette of the Republic of Serbia*, no. 91/2019.

⁶ Abuse in public procurement, Article 228 of the Criminal Procedure Code, *The Official Gazette of the Republic of Serbia*, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

⁷ Public Procurement Development Strategy in the Republic of Serbia for the period 2014-2018, *The Official Gazette of the Republic of Serbia*, no. 122/2014.

⁸ *The Official Gazette of the Republic of Serbia*, no. 91/2019.

Serbia).⁹ The exemptions introduced through special laws enable the most valuable public procurement to be implemented outside the rules prescribed by Law on Public Procurement. Although the new Law was supposed to increase competitiveness in the public procurement procedure in accordance with EU standards, its provisions still leave an opportunity to distort the principles of competition. Such regulations are common in the field of infrastructure construction and reconstruction projects. Articles 37 to 48 of the Law on Public Procurement prescribe that in urgent cases, as well as in cases of jeopardizing the implementation of the project if a preliminary feasibility study has been done, the Government may decide not to apply public procurement rules to the project or its individual phases and activities. In that case, a special project for the selection of a strategic partner is being applied to implement a project of special importance for the Republic. In accordance with Article 39, paragraph 3 of the Law on Public Procurements, the Government shall issue a regulation on the manner of selection of a strategic partner for each project individually. These exemptions can jeopardize principle of transparency and competition and create opportunities for abuses.

Instead of exemptions from regular public procurement envisaged in the special laws, the rules related to public-private partnerships should be applied in line with EU *acquis*. To implement infrastructure project through public-private partnership, it is necessary to strengthen anti-corruption guarantees in the Law on Public-Private Partnerships, and align it with the EU Directive 2014/23/EU. Rules on transparency should be strengthened, including introduction of the obligation to publish all concluded contracts on websites of the public sector institutions.

3. REPRESSIVE MEASURES AIMED AT COMBATING ABUSES IN PUBLIC PROCUREMENT PROCEDURES

The crime of abuse in public procurement has been introduced in the criminal legislation of the Republic of Serbia by 2012 amendments to the Criminal Code. The crime of abuse in public procurement contains a blanket disposition that refers to the definitions incorporated in the Law on Public Procurement, which was amended several times since 2012 (Stojanović, 2013). The Criminal Code identifies different modus of execution of crime of abuse in public procurement, first group of actions performed with the aim to influence the decision making and selection of the bidder, while second group of actions could be performed only by contracting authority official, which are abusing own position and violate law on public procurement or other legislation, and cause damage to public funds.

Envisaged sanction for abuse in public procurement is imprisonment from six months to five years, while for serious form of crime, when value of public procurement is higher than 1.2 million euro, it could be 10 years of imprisonment. The Criminal Code envisages leniency program, if the responsible person from the bidding company voluntarily discloses the fact that the offer is based on false information or restricted agreement with other bidders, or that he has undertaken other unlawful actions with the intent to influence on the decision of the contracting authority prior to issuance of decision on selection of bid, may be remitted from punishment (Matić Bošković, 2017). The introduction of leniency program is in line with the EU *acquis* in the area of competition protection, where impunity from fines and reduction of fines in cartel cases is envisaged. The European Commission will grant immunity to company, which is the

⁹ The Official Gazette of the Republic of Serbia, no. 9/2020.

first to submit evidence that in the Commission's view may enable it to adopt a decision to carry out an investigation in connection with an alleged cartel.¹⁰

In addition to substantive criminal law provisions, reforms were focused on improvement of the institutional structure to fight abuses of public funds. From March 2018, the specialized departments for fight against corruption were established in four higher prosecutor offices in Belgrade, Novi Sad, Kraljevo and Nis.¹¹ Goal of the establishment of these specialized departments was to put special focus on fight against corruption and specialization of prosecutors for these specific crimes, as well as better coordination with other authorities responsible for detection, prevention and investigation of corruption. If the value of public procurement is higher than 6.8 million euro, the case will be within competence of the Specialized Prosecutor Office for Organized Crime. However, in 2019, the Specialized Prosecutor Office for Organized Crime did not have any case of abuse in public procurement. It is too early to conclude if the establishment of specialized departments in the higher prosecutor offices resulted in a better track record in the fight against corruption. According to the 2019 Annual Report of Republic Prosecutor Office¹² there is an increase in number of investigated cases of abuse in public procurement as well as in number of indictment and number of convictions. In 2016, the prosecutor offices received charges against 68 persons for abuse in public procurement, while in 2019, specialized departments received 262 criminal charges. The specialized departments were dealing with 10,516 criminal charges in 2019, so abuse in public procurement presented¹³ only 2,5% of their total workload. Numbers of convictions in the same period also showed significant increase from only two in 2016 to nine in 2019. However, prosecutors did not conduct financial investigations in parallel with criminal, and there was no seizure of assets, as one of the most important tools for fight against corruption.

The new Law on Public Procurement prescribes misdemeanour sanctions for both procuring entity and bidders who act contrary to the provisions of the Law. However, that approach could cause problems in practice, since the legal description of the misdemeanour overlaps with the content of criminal offence of abuse in public procurement prescribed by Article 228 of the Criminal Code.

The Criminal Code prescribes criminal liability for a person who violates the law or other regulations on public procurement by using his position, exceeding the limits of his authority or failing to perform his duty, and thus causes damage to public funds. Article 236 of the Law on Public Procurement prescribes as misdemeanours activities that represent a violation of the law by the person employed in the procuring entity, the responsible person and the representative of the procuring entity. However, the Criminal Code does not prescribe any circumstance or amount of money, due to which such conduct of the said persons, which would undoubtedly cause damage to public funds, would justify criminal sanction.

Article 228, paragraph 1 of the Criminal Code prescribes a criminal sanction for a person who, in connection with public procurement, submits a bid based on false information, or contrary to the law agrees with other bidders, or takes other illegal actions, in order to influence the decisions of the contracting authority. However, Article 237 of

¹⁰ Similar solution is envisaged in the article 69 of Serbian Competition Protection Law, *The Official Gazette of the Republic of Serbia*, no. 51/2009, 95/2013.

¹¹ The Law on organization and jurisdiction of state bodies in suppression of organized crime, terrorism and corruption, *The Official Gazette of the Republic of Serbia*, no. 94/2016, 87/2018.

¹² 2020 Annual report was not available in the moment of writing article.

¹³ Annual reports on work of public prosecution are available at: <http://www.rjt.gov.rs/sr/informacije-o-radu> (accessed on 17.06.2021).

the Law on Public Procurement prescribes many activities of bidders that can be simultaneously subsumed under the legal description of the criminal offense of abuse in connection with public procurement.

Overlapping criminal offenses and misdemeanours can contribute to double criminal sanction or, through application of the *ne bis in idem* principle, someone could avoid criminal sanction. This situation can lead to legal uncertainty. Therefore, it is necessary to amend Article 228 of the Criminal Code of the Republic of Serbia, according to which only serious violations of the provisions of the Law on Public Procurement should constitute a criminal offense.¹⁴

4. PREVENTIVE MEASURES AIMED AT COMBATING ABUSES IN PUBLIC PROCUREMENT PROCEDURES

In addition to principles of transparency and competition that should ensure level playing field and prevent corruption in public procurement, the Serbian legislation also introduced additional instruments. Some of these instruments received support from the public and civil society organizations, however, never produced expected effects, while other solutions were more traditional like oversight of State Audit Institution and internal financial control, but also had limited effects.

From the aspect of preventive measures, the very important institute in public procurement procedure was a civic monitor, established by 2012 Law on Public Procurement. The role of monitor was to oversee the high value public procurement process, which included continuous oversight of the procedure and access to all documentation. The object of supervision, according to previous Law on Public Procurement, were public procurements whose estimated value was more than a billion dinars (approximately 10 million euros). In addition to the fact that all documents from the public procurement procedure were available to the civic monitor, he could present his opinion and recommendation to the procuring entity, but he could also request additional explanations from the procuring entity. In accordance with previous Law on Public Procurement, during such procedure, the civic monitor had two roles: monitoring and analysis on the procedure, as well as indicating on the regulation violations, which was reflected in the submission of requests for protection of rights and reporting of corruption cases.¹⁵

However, the institute of civic monitor has not achieved full potential in practice. One of the reasons was the lack of reaction of state bodies that received civic monitors' reports on the irregularities. That fact, as well as the high costs of supervision, which was

¹⁴ About the problem of overlapping criminal offenses and misdemeanour see Matić Bošković and Kostić (2020).

¹⁵ Article 28. of the Law on Public Procurement of the Republic of Serbia, *The Official Gazette of the Republic of Serbia*, no. 124/2012, 14/2015 and 68/2015. In accordance with the mentioned article, as a civic monitor could be appointed a person from the ranks of prominent experts in the field of public procurement or in the field related to the subject of public procurement, as well as an association dealing with public procurement, prevention of corruption or conflict of interest may also be appointed as a civic monitor. The conditions and criteria for the appointment and manner of work of the civic monitor were regulated in more detail by the Public Procurement Administration (since the entry into force of the new Law on Public Procurement Procedure, its name is the Public Procurement Office), which also appointed him. Prior to the appointment of the civic monitor, the procuring entity could not initiate a public procurement procedure. This type of control was supposed to be an effective means of controlling the legality of conducting public procurement procedures, and thus public spending. The institute of civic overseer was regulated by the Ordinance on the civil overseer, *The Official Gazette of the Republic of Serbia*, no. 29/2013. More about the institute of civil overseer in Dobrašinović (2013).

performed without monetary compensation, had a demotivating effect on civic monitors (Šarić and Stojanović, 2018). The new Law on Public Procurement abandoned the mentioned institute.

The abuses in public procurement can also be prevented by internal financial controls and external audit. Internal financial controls, which means the financial management and control and internal audit, should support users of public funds to perform public procurement in accordance with regulations, internal acts and contracts. Financial management and control mean a system of policies, procedures and activities that are established and regularly updated by the manager of the public funds user. However, in the Republic of Serbia, financial management and control has not been established for most public funds users, although the obligation to establish it was prescribed already in 2007.¹⁶ If we assess the reports of the State Audit Institution on the audit of the final account of the Republic of Serbia budget in the last five years, and the reports on the audit of financial reports of direct budget funds users during 2019, it seems that the system of financial management and control in the public sector is not fully implemented. Given the competences of internal audit and the fact that it is established in some public funds users much earlier than financial management and control, a question arises whether it exercises its powers in an adequate manner. The findings and opinion presented in the audit report should be an instruction for further actions of the audited entity to prevent further irregularities (Šuput, 2012, p. 162). Therefore, it is important to improve the system of financial management and control in each public sector institution and to establish a professional and efficient organizational unit for internal audit. Internal audit action is important for the prevention of irregularities within the institution, but their possibilities in terms of reporting irregularities to the competent authorities are limited. Employees in certain institutions are unable or in fear to report certain criminal activities of their superiors. The reason for that is often fear from their revenge (Šuput, 2014, p. 322). Bearing in mind that persons performing internal financial control and internal audit in public sector institutions are persons employed in these institutions, they could be easily in the above-mentioned situation.

External audit of budget funds performed by the State Audit Institution of the Republic of Serbia is an important mechanism for controlling public spending. In accordance with international standards, these institutions are independent bodies that audit the legality and purposefulness of public spending and in all modern democracies are an indispensable part of the institutional control of public spending (Šuput, 2015). The procedure of filing a criminal charge is regulated by the Criminal Procedure Code. In accordance with it, state bodies are obliged to report criminal acts, which are prosecuted *ex officio*, and which they found out about while exercising their powers.¹⁷ Bearing in mind the independence of the State Audit Institution, it can be expected that its auditors will be more objective in their work and without fear to report the irregularity to competent

¹⁶ The basis for its establishment was first defined in 2006 by the Budget System Law. Its provisions define the elements of internal financial control in the public sector: internal audit and financial management and control, while it is regulated in more detail by two ordinances adopted in 2007: Rulebook on Joint Criteria and Standards for Establishing, Functioning and Reporting of the System of Financial Management and Control in the Public Sector and the Rulebook on Common Criteria for Organization and Standards and Methodological Instructions for Internal Audit Acting and Reporting in Public Sector. The report on the audit of the final account of the budget of the Republic of Serbia for 2016, no 400-534/2017.03/31, Belgrade, 29th of December 2017, 11; The report on the audit of the final account of the budget of the Republic of Serbia for 2017, no 400-575/2018-03/36, Belgrade, 14th of December 2018, 23, 43 and 37, Audit report on financial reports and regularity of operations of the Ministry of Youth and Sports for 2018, no 400-213/2019-03/12, Belgrade 2nd of December 2019.

¹⁷ Article 281 of the Criminal Procedure Code of the Republic of Serbia.

authorities. However, the only question is whether that institution will be willing to do so in the case of irregularities in procedures that are exempt from the application of the Law on Public Procurement in accordance with a special law or government decision.¹⁸

5. EUROPEAN ACCESSION AS AN INCENTIVE TO STRENGTHEN PUBLIC PROCUREMENT IN SERBIA

Public procurement is important for the EU single market and creation of a level playing field for businesses across Europe.¹⁹ In the process of EU accession, the public procurement is not only one of the foundations on which the EU internal market rests, but also the foundation of system of integrity and accountability, which is essential for the consolidation of the rule of law and functioning of the democracy. Whole chapter of the EU accession negotiation is devoted to public procurement – Chapter 5. However, Chapter 5 is closely related to Chapter 23 – Judiciary and Fundamental Rights, in the segment related to the fight against corruption.

Relevance of the public procurement for EU and prevention of any corruption or fraud during the procedure is confirmed through the establishment of European Public Prosecutor's Office, as the first EU independent and decentralized prosecution office with the power to investigate, prosecute and bring to justice crimes against the EU budget, such as fraud, corruption, or serious cross-border VAT fraud. Article 3(2) of Directive 2017/1371 defines the criminal offences of fraud affecting the Union's financial interests in respect of non-procurement and procurement-related expenditure. These rules show readiness of the EU to fight against abuses in public procurement and prevent future crime, through sending message that criminal justice system is engaged in the prevention and fight against any abuses in this area. It is expected that Serbia as the EU candidate country has the same approach to public procurement.

The general principles governing the area of public procurement in the EU originate from the founding treaties and the jurisprudence of the Court of Justice of the EU, and relate to the principles of the transparency, equal treatment, competition and non-discrimination.

On the basis of the Screening report prepared by the European Commission in early February 2015, it was assessed that Serbia has reached a sufficient level of alignment with the EU *acquis*, as well as that the negotiation on Chapter 5 can be opened (2015). A key challenge in the coming period is to strengthen capacity to plan, monitor and oversight all phases of public procurement and enforcement of legislation. When it comes to achieving full compliance of legal regulations, it is advised that Republic of Serbia should closely track the latest changes in European legislation in the field of concession and public procurement. In addition, Serbia allows for exemptions, which are not in line with the EU *acquis*, such as the exemption of procurement conducted in pursuant to international agreements, which under EU law are only permitted exceptionally, and in case these agreements have been concluded in conformity with the Treaties (European Commission, 2015, p. 13). The same opinion and concern was expressed in the 2019 EU Report on Serbia, where it was recommended that intergovernmental agreements concluded with third countries and their implementation should not unduly restrict competition, and should comply with the basic principles of

¹⁸ This does not refer to the control of actions in accordance with the provisions of the Law on Public Procurement, but to the legality of spending public funds. In such situations, it is not possible to assess the justification of exemption from the application of the provisions of the Law on Public Procurement.

¹⁹ About the importance of public procurement in the EU see Kalesná (2019, p. 69).

public procurement, such as transparency, equal competition and non-discrimination. The legislation on defence and security procurement contains too many exemptions that are excessively applied without justification, and remain to be aligned with the relevant EU Directive (European Commission, 2019, pp. 59–60).

In 2020 Report European Commission (2020, p. 73) noticed that the adopted Law on special procedures for linear infrastructure projects could seriously undermine the effective implementation of the Law on Public Procurement as it allows for the exemption of projects “of special importance for the Republic of Serbia” from public procurement procedures. The new Law undermines the added value and effective implementation of the new Law on Public Procurement. Through allowing the circumvention of national legislation, as well as EU rules and standards in the mentioned way, Serbia, according to the EU opinion maintains serious discriminatory rules in the field of public procurement (European Commission, 2020, p. 73). In addition, Serbia did not ensure full alignment with the 2014 EU directives on public procurement and amendments of the Law on Public-Private Partnerships and Concessions is needed to align with EU *acquis*. Aim of the amendments is to ensure that projects financed from public funds are subject to public procurement procedures and that intergovernmental agreements concluded with third countries do not restrict competition. In addition to legislative amendments, Serbia should improve administrative capacities of relevant institutions, specifically the Public Procurement Office, the Commission for Public-Private Partnerships and Concessions, the Republic Commission for the Protection of Rights in Public Procedures, and the Administrative court.

The State Audit Institution of the Republic of Serbia found irregularities in 9,6% of inspected procuring entities in 2019, marking a significant decrease from 12,1% in 2018, and a notable increase from 7,4% in 2017. The Government’s Anti-Corruption Council has noted that current framework of internal and external control over the expediency of public procurements in large public utility companies is both inadequate and prone to abuses. Such contracts represented 27% of the total number and 44% of the total value of concluded contracts in 2019. The relevant institutions should investigate these claims and continuously monitor these processes on both state and local level (European Commission, 2020, p. 74).

Bearing in mind the abovementioned, it can be concluded that the Republic of Serbia needs to further harmonize the Law on Public Procurement with the EU *acquis*, as well as the Law on Public-Private Partnership and Concessions. The process should not be viewed exclusively from the aspect of harmonization with European standards, but primarily from the aspect of protection of public finances and taxpayers’ money.

6. CONCLUSIONS

In this paper, authors have started with the hypotheses that national regulations still contain provisions that may contribute to violations of the general principles of public procurement, and that it is needed to make additional efforts to improve corruption prevention measures in public procurement procedures. Authors identified shortcomings in the legislative framework, so the hypotheses have been confirmed.

Despite the fact that the new Law on Public Procurement of the Republic of Serbia contains certain solutions important for improving legality, efficiency and transparency of public procurement, its provisions still contain shortcomings. The key issues are exemptions from regular public procurement procedure that are envisaged in the special laws in the field of infrastructure construction and reconstruction project. These exemptions enable the most valuable procurement to be implemented outside the

procedure prescribed by Law on Public Procurement, which is not in line with EU standards and principle of competitiveness in the public procurement procedure. The mentioned approach should be limited and instead of exceptions, the public-private partnership should be used to implement infrastructure project. However, it requires strengthening of anti-corruption guarantees in the Law on Public-Private Partnerships and Concessions, including introduction of the obligation to publish all concluded contracts on websites of the public sector institutions.

Serbian legislation provides adequate repressive measures for investigation, prosecution, and sanctioning for abuses in public procurement procedures. However, the overlap of criminal offences and misdemeanours can contribute to double sanctioning or avoidance of criminal sanction through the application of the *ne bis in idem* principle, so it is necessary to amend Article 228 of the Criminal Code of the Republic Serbia to ensure that only serious violations of the Law on Public Procurement constitute a criminal offense, either through the introduction of a threshold for the value of public procurement, or the caused damage.

Instead of improvement of rules regulating the civic monitor system as a control mechanism, the new Law of Public Procurement abandons that institute. However, the Serbian legislation incorporates other repressive tools, but their application in practice should be ensured. According to the Serbian State Audit Institution's reports, financial management and control in the public sector almost do not exist. Bearing in mind the importance of financial management and control for the prevention of irregularities, these institutes should be established in all public sector institutions. In addition, managers of public sector institutions should further improve existing knowledge about the role and importance of internal financial controls.

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