

MARINA MATIĆ BOŠKOVIĆ

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AN ANALYSIS OF THE REGULATORY
FRAMEWORKS IN SELECTED
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**An Analysis of the Regulatory Frameworks
in Selected Western Balkan Countries**

Marina Matić Bošković, PhD

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INSTITUTE OF COMPARATIVE LAW

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List of Abbreviations

BiH	Bosnia and Herzegovina
CEE	Central and Eastern Europe
CEFTA	Central European Free Trade Agreement
CIDS	Centre for Integrity in the Defence Sector of Norway
CJEU	Court of Justice of the EU
CoE	Council of Europe
CPRPPP	Commission for Protection of Rights in Public Procurement Procedures
CSR	Corporate Social Responsibility
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DPP	Directorate for Public Procurement Policy
EAPC	Euro-Atlantic Partnership Council
ECTHR	European Court of Human Rights
EU	European Union
ESJN	Electronic system of public procurement
ESPD	European Single Procurement Document
ESPP	Electronic System for Public Procurement
FBiH	Federation of Bosnia and Herzegovina
GDP	Gross Domestic Product
GRECO	Group of States against Corruption
MDD	Medical Devices Directive
MoF	Ministry of Finance
NATO	North Atlantic Treaty Organization
OECD	Organization for Economic Cooperation and Development
PPB	Public Procurement Bureau
PPL	Public Procurement Law
ReSPA	Regional School of Public Administration
SIGMA	Support for Improvement in Governance and Management
SAI	State Audit Institution
SME	Small and Medium Size Enterprises
TFEU	Treaty on Functioning of the EU
TI	Transparency International
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
VAT	Value Added Tax

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1. INTRODUCTORY REMARKS

Public Procurement is the government activity most vulnerable to corruption.¹ Good public procurement practice requires a sound regulatory framework related to the procedures and institutional structures and arrangements that ensure that the regulatory system functions properly with sufficient level of integrity.

Effective and clear procedures play strategic role for avoiding mismanagement and loss of public funds. Procedures that enhance transparency, good management, prevention of misconduct, accountability and control contribute to prevention of corrupt practices.

Institutional structures are needed at the central level with a clear mandate to initiate, design, implement and monitor public procurement policy. Role of the central institutions as well as review bodies is to ensure application of the public procurement rules.

This study focuses on the selected international standards related to the regulatory framework and institutional structure and assess its application in the four Western Balkans countries, which were former SFRY republics. The analysis covers Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia.

The key public procurement standards discussed in detail are:

- Compliance of public procurement legislation with standards of transparency;
- Compliance of public procurement legislation with equal access and non-discrimination standards;

¹ M. Matić Bošković, J. Kostić (2021) The Legislation of the Republic of Serbia in the Field of Prevention of Corruption in Public Procurement, *Bratislava Law Review*, Vol. 5, No. 1, pp. 145-158.

- Compliance of public procurement legislation with competition rules;
- Right to challenge public procurement decision is guaranteed in the legislation;
- Adequacy of the legal framework to ensure capable institutions.

The key public procurement standards are similarly implemented in all analysed national public procurement system, but they are incorporated in different ways. The regulatory frameworks of the analysed countries show a significant degree of compliance with international standards.

The Study is built on the previous research on cross-cutting integrity issues in the selected Western Balkan and CEE countries conducted by the Institute of Comparative Law in 2013² and a subsequent study aimed at guiding and facilitating the training of civil servants in ReSPA (Regional School of Public Administration) member states, also conducted by the Institute of Comparative Law in 2018.³ Further, the study was informed by the findings of the analysis conducted by the Institute of Comparative Law at the request of the Centre for Integrity in the Defence Sector from Norway.⁴

The countries were selected due to their shared legal heritage, since all of them were former SFRY republics and due to common aspiration towards the EU membership. The EU accession process is influencing reform of public administration, institutional set-up and legislative framework with the aim to ensure alignment with the EU requirements, standards and *acquis*.⁵ In the accession process the EU is applying the policy of conditionality in which the EU promise rewards, including financial assistance and membership on the

² A. Rabrenović (ed.) (2013) *Legal Mechanisms for Prevention of Corruption in Southeast Europe with Special Focus on the Defence Sector*, Institute of Comparative Law, Belgrade.

³ A. Rabrenović, A. Knežević Bojović (Eds.) (2018) *Integrity and Good Governance in the Western Balkans* (eds.), Regional School of Public Administration, Danilovgrad.

⁴ <https://portal.cids.no/>.

⁵ M. Matić Bošković, J. Kostić (2020) How to build common features of the justice systems in candidate countries and EU member states, Bratislava legal forum – Legal Challenges for the new European Commission, pp. 101-113.

condition that the state fulfil set conditions, such as compliance with the EU policies, legislation and institutional change.⁶

Although, all countries included in the study have status of the candidate for EU membership, they are at the different stages in the process. Montenegro has acquired candidate status in 2010,⁷ Serbia in 2012,⁸ North Macedonia in 2005, but opened negotiations only in 2020,⁹ while Bosnia and Herzegovina have just received candidate status in December 2022.¹⁰ The EU accession process and the negotiations dynamics influenced on the legislative and institutional framework in each country, so their legal frameworks could be at the different level of alignment with the international standards and EU acquis.

Main focus of the research is on the legislative framework and its compliance with the international standards, while application and implementation in the practice were not part of the study. Only occasionally the reference to the implementation shortcomings is highlighted to illustrate challenges in the application in the practice.

In addition to the general framework, the part of the study has focus on special rules on public procurement applicable on sector of police and military. Since transparency is the one of the internationally recognized public procurement principles, it was important to assess how public procurement is regulated in

⁶ F. Schimmelfennig, U. Sedelmeier, (2008) Candidate Countries and Conditionality, In: P. Graziano et al. (Eds.) *Europeanization*, Pagan Machmillan, pp. 88-101.

⁷ In June 2012 the European Council endorsed the Commission's assessment that Montenegro complies with the membership criteria and can start accession negotiations and negotiations started on 29 June 2012. See: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/montenegro_en

⁸ In June 2013 European Council endorsed the Commission's recommendations to open negotiations with Serbia and first Chapter was opened in December 2015. See: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/serbia_en

⁹ Although Council grants candidate status to the country in December 2005, the decision to open accession negotiations was adopted by the Council only in March 2020. See: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/north-macedonia_en

¹⁰ See: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/bosnia-and-herzegovina_en

the sector which is governed by the secrecy standards and to determine which rules are prevailing.

The public procurement legislation in four analysed countries was developed under the scrutiny of EU accession process and harmonization with the EU Directives were used as a benchmark for alignment. Therefore, the national legislation on public procurement is very similar between the countries and to international documents and standards.

Public procurement legislation exists in all fourth countries for more than two decades, which present sufficient time to revise rules and adjust to the national context. North Macedonia adopted the first Law on Public Procurement in 1998,¹¹ Montenegro in 2001,¹² Serbia in 2002,¹³ and Bosnia and Herzegovina in 2004.¹⁴ All countries amended legislation several times over the two decades to ensure alignment with EU standards and especially to prevent corruption and corruption perception during public procurement process. In addition to laws, all countries adopted relevant secondary legislation to establish necessary framework for application of laws in the practice.

However, there is still a room for further alignment with international standards due to legal gaps, vague norms or lack of harmonization with other legal acts. In some cases, the challenges exist in relation to unjustified exceptions to the application of open public procurement. According to legislation of Bosnia and Herzegovina contracts which are exempted from the scope of the public procurement law include contracts “for natural and legal monopolies that may include procurement of water, electricity, gas, heating and other services until the relevant market is open for competition”. The Law

¹¹ Balkan Tender Watch (2013) *Системот на јавните набавки во Република Македонија*, See: <http://balkantenderwatch.eu/local/uploaded/MKD%20local/BLS/Baseline%20survey%20-%20MKD.pdf>

¹² Balkan Tender Watch (2014) *Sistem javnih nabavki u Crnoj Gori – polazno istraživanje*, See: [http://balkantenderwatch.eu/local/uploaded/MNE%20local/BLS/Baseline%20survey%20-%20Analiza%20sistema%20javnih%20nabavki%20u%20Crnoj%20Gori%20v3%20\(oct2014\).pdf](http://balkantenderwatch.eu/local/uploaded/MNE%20local/BLS/Baseline%20survey%20-%20Analiza%20sistema%20javnih%20nabavki%20u%20Crnoj%20Gori%20v3%20(oct2014).pdf)

¹³ See: S. Varinac, (2012) *Korupcijska mapa javnih nabavki*, Misija OEBS, Beograd.

¹⁴ Transparency International (2015) *Analiza novog Zakona o javnim nabavkama BiH i pratećih podzakonskih akata*, Transparency International Bosna i Hercegovina.

of Montenegro provides that contracts which are exempted from the scope of the Public Procurement Law include contracts concluded in line with international agreement, specific objects, for bidding postal services, electronic communication sector. In addition, the Law excludes purchase and procuring the water electricity, gas, heating and other services, until the relevant market is open for competition.

Furthermore, the fragmented approach and reference to other legal acts present a challenge for full alignment with international standards. For example, the legislation in Bosnia and Herzegovina refers to other laws in relation to conflict of interest which creates problem in the application, although recent amendments partially solve the problem. The references made in the PPL to the provisions of the regulations on conflict of interest at different levels of government is problematic, as BiH does not have laws that are mutually aligned and address conflict of interest in a uniform manner, so the implementation of the mentioned provisions of the PPL cannot be ensured. Therefore, there is a need for some additional changes of public procurement legislation to become fully harmonized with international standards.

2. PUBLIC PROCUREMENT AND INTEGRITY

2.1. Public Procurement and Governance

Integrity is a cornerstone of good governance and critical for maintaining trust in government. A sound management of procurement contracts is critical for transparent and accountable spending of taxpayer's money.

Public procurement, as the process by which public authorities purchase work, goods or services, is the government activity most vulnerable to corruption.¹⁵ 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.¹⁶ Deficient control mechanisms and ineffective risk management increase the risks of corruption in the public procurement.

Public procurement is estimated to account for 15-30 percent of the gross domestic product (GDP) of many countries.¹⁷ Scandinavian welfare economies with a mixed-economy approach, large public health and education sectors and large redistributive tax bases have even more of their GDP generated by public purchasing. Specific sectors in these countries, such as defence, education, transportation and health services are particularly important areas of public procurement.¹⁸

This share is lower in the Western Balkans economies, according to the data provided by respective central procurement offices in their annual reports. It

¹⁵ OECD (2016). Preventing Corruption in Public Procurement.

¹⁶ M. Matić Bošković, (2017) Krivično delo zloupotreba u javnim nabavkama – izazovi u primeni, In. I. Stevanović, V. Čolović, (Eds.), *Privredna krivična dela*, Institut za kriminološka i sociološka istraživanja i Institut za uporedno pravo, pp. 215-229.

¹⁷ UNODC (2013). Good practices in ensuring compliance with article 9 of the United Nation Convention against Corruption.

¹⁸ T. Torvatn, L. de Boer, (2017) "Public procurement reform in the EU: start of a new era?", *IMP Journal*, Vol. 11 Issue: 3, p. 432.

is estimated that the value of contracts awarded in North Macedonia amounted to 10.0% of gross domestic product (GDP) in 2016. In Montenegro, public procurement represented 12.33% of GDP (in 2017); but the figures are much lower in Bosnia and Herzegovina (7.84% in 2016, although in 2012 it was 12.95%), Serbia (7.68% in 2017), Kosovo (7.35% in 2017) and Albania (7.0% in 2017).¹⁹

The reform of public procurement with the aim to prevent corruption and abuses of public finances is recognized by development agencies, since shortcomings in public procurement present risk for foreign investments.²⁰ Gaps in the public procurement legislation are increasing costs of public procurement and risk of corruption. The public procurement creates risk for corruption even in the countries with stronger administration, since decision makers do not recognize relevance of the systematic accountability and introduction of control mechanism throughout the whole procurement procedure.²¹ Challenges exist in understanding when contractual relationship exists or when the passing of information on the process constitutes breaches of confidentiality.²² Even where these weaknesses are exposed, it will commonly be on an occasional and exceptions basis despite the problems sometimes being ongoing and endemic. Very often the legislation could cause additional challenges for accountability and sanctioning of abuses in public procurement.²³

Many countries across the globe have similar management objectives for public procurement. Such common objectives are constructed from the

¹⁹ See: <https://www.oecd.org/south-east-europe/programme/SMEPI-Pocketbook-2019.pdf>

²⁰ D.S. Jones, (2002). Procurement Practices in the Singapore Civil Service: Balancing Control and Delegation. *Journal of Public Procurement*, 2 (1): 29-53.

²¹ P. O'Brien, M., Webb, (1991). *The Executive State: WA Inc and the Constitution*. Perth, Australia: Constitutional Press.

²² J. Finn, (1997) Major Changes in Tendering Law – the Hughes Case. *Legal Briefing*, Issue 33, pp. 1-4.

²³ 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. See: M. Matić Bošković, J. Kostić (2020) The application of the *ne bis in idem* related to financial offences in the jurisprudence of the European Courts, *Journal of Criminal and Law*, Vol. 25, No. 2, pp. 67-77.

principles of public confidence, which incorporates accountability, transparency and equality in public procurement; and efficiency and effectiveness, which is based on the value for money and efficiency in delivering procurement results. Although, objectives appear simple, experience is that implementing them into practice and legislation involve issues that are frequently in conflict. For example, countries that put in focus public confidence usually develop highly regulated framework, without any discretion to minimize risk of undue influence and corruption. Result of a highly regulated framework is lack of flexibility in managing contracting authority needs, and increasing the tension with performance and efficiency.²⁴ Pressure to respond on needs and to improve performance, provided impetus for reforms that were focused on improving public procurement efficiency, effectiveness and outcomes,²⁵ which often made shift to decentralisation.²⁶

Easy access to public procurement markets can help small and medium-sized enterprises (SMEs) to unlock their potential for job creation, growth and innovation, while having a positive impact on the economy. Greater SME involvement in public procurement also allows contracting authorities to broaden their potential supplier base, securing the positive effects of greater competition for public contracts as a counterbalance to dominant market players.²⁷

Public procurement is both economically important and used as an instrument of public policy.²⁸ Across the developed countries it could be seen that public procurement is used for promotion of environmental solutions through green

²⁴ J. A. Pegnato, (2003). Assessing Federal Procurement Reform: Has the Procurement Pendulum Stopped Swinging?, *Journal of Public Procurement*, Vol. 3(2), pp. 145-175.

²⁵ G. Callender, D. Matthews, (2002). The Economic Context of Government Procurement: New Challenges and New Opportunities. *Journal of Public Procurement*, Vol. 2 (1), pp. 55-71.

²⁶ C. P., McCue, G. A. Gianakis, (2001). Public Purchasing: Who's Minding the Store?, *Journal of Public Procurement*, Vol. 1 (1), pp. 71-95.

²⁷ Finn, *Idem*.

²⁸ K. Thai, (2001), Public procurement re-examined, *Journal of Public Procurement*, Vol. 1 No. 1, pp. 9-50.

procurement²⁹ and improvement of working conditions to promote worker health and safety,³⁰ corporate social responsibility (CSR)³¹ and competitive markets.³²

Recently, the focus in public procurement policy is directed toward the possibility to promote innovation.³³ A primary approach to promote innovations through public procurement has been through public-private partnerships.³⁴ The relevance of the innovation in the public procurement within the EU was discussed by many authors, from Lember³⁵ to Georghiou.³⁶

2.2. Corruption Challenges

Although the costs of corruption are difficult to measure, due to its concealed nature, the corruption in public procurement has an enormous negative impact on government spending. Various studies suggest that an average 10-25 percent of public contract's value may be lost to corruption.³⁷ Corruption risks are exacerbated by the complexity of the process, the close interaction between public officials and businesses, and the multitude of stakeholders.

²⁹ P. K. Humphrey, Y.K. Wong, F.T.S. Chan, (2003), Integrating environmental criteria into the supplier selection process, *Journal of Materials Processing Technology*, Vol. 138 Nos 1-3, pp. 349-356.

³⁰ M.B. Charles, R. Ryan, C.P. Castillo, K. Brown, (2008), Safe and Sound? The public value trade-off in worker safety and public infrastructure procurement, *Public Money & Management*, Vol. 28, No. 3, pp. 159-166.

³¹ L. Albareda, J. Lozano, T. Ysa, (2007), Public policies on corporate social responsibility: the role of governments in Europe, *Journal of Business Ethics*, Vol. 74 No. 4, pp. 391-407.

³² N. Caldwell, H. Walker, C. Harland, L. Knight, J. Zheng, T. Wakeley, (2005), Promoting competitive markets: the role of public procurement, *Journal of Purchasing & Supply Management*, Vol. 11 Nos 5-6, pp. 242-251.

³³ E. Uyarra, J. Edler, J., J. Garcia-Estevez, L. Georghiou, J. Yeow, (2014), Barriers to innovation through public procurement: a supplier perspective, *Technovation*, Vol. 34 No. 10, pp. 631-645.

³⁴ A. Waluszewski, S. Wagrell, (2014), Public purchasing policy as innovation killer?, *The IMP Journal*, Vol. 7 No. 1, pp. 1-11.

³⁵ V. Lember, T. Kalvet, R. Kattel, (2011), Urban competitiveness and public procurement for innovation, *Urban Studies*, Vol. 48 No. 7, pp. 1373-1395.

³⁶ L. Georghiou, J. Edler, E. Uyarra, J. Yeow, (2014), Policy instruments for public procurement of innovation: choice, design and assessment, *Technological Forecasting and Social Change*, Vol. 86, July, pp. 1-12.

³⁷ Finn, *Idem*.

Corruption in public procurement occurs in different forms and different stages of the process. In general, the manifestation of corruption in public procurement manifest in disregards of procurement procedures and misuse of public resources.³⁸ However, it was identified through the researches that effective sanction system is not a strong deterrent against corruption in public procurement,³⁹ while in some countries the lack of proper procurement strategies presented barrier for ensuring value for money.⁴⁰

In the US the main deficiencies were found in procurement planning, contract award and contractor surveillance processes.⁴¹ Shortcomings in the control mechanism⁴² decreased the trust in the government accountability⁴³ and capability to prevent corruption.⁴⁴

Significant corruption risks arise from conflict of interest in decision making, which may distort the allocation of resources through public procurement.⁴⁵ Moreover, bid-rigging and cartelism may further undermine the procurement process.⁴⁶ Lack of transparency and accountability were recognized as a major threat to integrity in public procurement.⁴⁷

³⁸ B. C. Basheka, P.N. Oluka, G. K. Karyeija, (2013) The nature and forms of public procurement corruption in Uganda's local government systems: implications for good governance debate, *International Journal of Procurement Management*, Vol. 6, No. 6, pp. 684–701.

³⁹ L. Nesti, (2014) The 2010 'agreement on mutual enforcement of debarment decisions' and its impact for the fight against fraud and corruption in public procurement, *Journal of Public Procurement*, Vol. 14, No. 1, pp. 62–95.

⁴⁰ R. Eadie, C. McKeown, K. Anderson, (2013) The impact of recession on construction procurement routes, *International Journal of Procurement Management*, Vol. 6, No. 1, pp. 24–38.

⁴¹ Department of Defense Inspector General (DoDIG) (2009) *Summary of DoD Office of Inspector General Audits of Acquisition and Contract Administration*, DoD IG Report No. D-2009-071, DoD, Washington, DC.

⁴² Government Accountability Office (GAO) (2006) *Contract Management: DoD Vulnerabilities to Contracting Fraud, Waste, and Abuse*, 7 July, Author, Washington, DC [online] <http://www.gao.gov> (accessed 18 July 2014).

⁴³ Department of Defense Inspector General (DoDIG) (2012) *Contingency Contracting: A Framework for Reform 2012 Update*, DoDIG, Washington, DC.

⁴⁴ J.S. Gansler, (2011) *Democracy's Arsenal: Creating a Twenty-First-Century Defense Industry*, The MIT Press, Cambridge, Massachusetts.

⁴⁵ A. Di Nicola, A. McCallister, (2007) Existing experiences of risk assessment, *European Journal of Criminal Policy and Research*, Vol. 12, No. 3–4, pp. 179–187.

⁴⁶ OECD (2016) Preventing Corruption in Public Procurement, p. 6.

⁴⁷ OECD (2004) Global Forum on Governance: Fighting Corruption and Promoting Integrity in Public Procurement. Corruption thrives on secrecy. Transparency and accountability have been recognized as

Already, during the invitation for bids the procurement authorities could be engaged in corruption practices. The procurement authority may narrowly define specification to ensure that only one supplier is able to meet the requirements.⁴⁸ Although it is the good practice to publish all invitations for bids, in many developing countries, the government will publish the notification of the bidding opportunity in the smallest circulation source to prevent competition and favour one bidder.⁴⁹

Common form for corruption is abuse of emergency procurement. The contracting authority may claim that the procurement is necessary due to an emergency and that there is not enough time for competitive procedures to take place. Direct negotiations are permitted in some countries, where direct negotiations are conducted due to claims of extreme urgency, national security, additional needs for an existing contract, or the availability of only one supplier. In these instances, the government may be justified in choosing to negotiate directly with a supplier.⁵⁰

It is important to note that public procurement regulation is not about anti-corruption *per se*, the common objectives of most procurement systems include value for money, integrity, accountability, fair treatment, and social/industrial development.⁵¹

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.

⁴⁸ S. Varinac, I. Ninić, (2014) *Korupcijska mapa sistema javnih nabavki u Srbiji*, Udruženje profesionalaca u javnim nabavkama Republike Srbije, Misija OEBS, Beograd.

⁴⁹ J. Pope, (2000) *Confronting Corruption: The elements of a National Integrity System*, Transparency International, p. 208.

⁵⁰ *Idem*, p. 210.

⁵¹ See, e.g., S. Arrowsmith, J. Linarelli, D. Wallace, (2000). *Regulating Public Procurement: National and International Perspectives*. Dordrecht, The Netherlands: Kluwer Law international.

3. PUBLIC PROCUREMENT – MAIN SOURCES OF INTERNATIONAL STANDARDS

3.1. UN Legal instruments

At the international level the most relevant document is 2003 United Nation Convention against Corruption,⁵² which provides a framework for shaping national public procurement legislation. Article 9 of the Convention requires from state parties to develop appropriate systems of public procurement based on the fundamental principles of transparency, competition and objective criteria in decision-making.

According to the UN Convention States Parties must have clear and comprehensive procedures that cover all aspects of contracting, including the role of public officials, which explicitly promote and maintain the highest standards of probity and integrity in all dealings. States Parties must also have similar requirements governing any deviation from stated procedures, with documented and publicly recorded reasons to justify this. It is essential that all decisions taken are transparent and accountable, and can withstand scrutiny by monitoring agencies, the legislature and the public. Transparency includes development and publication in advance of all information that enables effective participation in the procurement process, including: all relevant laws, rules and regulations, the conditions for participation, including selection and award criteria, and establish ceilings and conditions for the alternative methods of procurement. Furthermore, State Parties should publish objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures.

⁵² United Nations Convention against Corruption, New York, 31 October 2003, Doc. A/58/422.

The UN Convention takes each country's characteristics into consideration by noting that certain measures, such as the regulation of procurement personnel, should be applied where appropriate. In addition, Article 9, section 2 places the requirements for promoting transparency and accountability within the framework of each State's fundamental legal principles. Lastly, section 3 also places the civil and administrative measures aimed at preserving the integrity of public expenditure documents within the realm of each State's domestic law. As a result, Article 9 permits flexibility for each state to apply the UN Convention's principle effectively.

In addition, to the UN Convention as binding document, there are soft law instruments, such as the UN Anti-corruption Toolkit.⁵³ The Toolkit discusses situational prevention and explains that "procurement requirements, rules and decision-making criteria should be readily accessible to all potential suppliers and contractors" preferably being announced as part of the invitation to bid. In addition, the UN emphasizes efficiency, accountability, competence and integrity so that States may prevent corrupt acts, and it outlines key principles for preventing corruption: create public awareness, criminalize bribery, unify the procurement code, establish transparent procedures and practices, open bids publicly, and delegate authority appropriately. The UN relies on Transparency International's "islands of integrity" theory, which states that, if a government agency is not corrupt, bidding parties are assured that they will not lose any advantage by following the correct procedures and rules. Addressing local corruption within specific agencies and specific groups reduces corruption directly and helps "restore healthy public norms, to reverse the perception of what constitutes normality".⁵⁴ Once corruption is no longer the norm, all participating actors will adapt to transparent practices.

⁵³ UN, (2004) The Global Programme against Corruption, Anti-corruption Toolkit.

⁵⁴ I. Hors, (2000) Dealing with Corruption in Developing Countries, in *Longer Business as Usual: Fighting bribery and corruption*, OECD, p. 163.

The other soft law instruments were developed within the OECD. OECD Council adopted in 2015 Recommendation on Public Procurement,⁵⁵ which defines the main principles of public procurement: transparency of the public procurement system at all stages of the procurement cycle, the integrity of the public procurement system through general standards and procurement-specific safeguard, facilitate access to procurement opportunities for potential competitors of all sizes, foster transparent and effective stakeholders participation, develop processes to drive efficiency throughout the public procurement, use of digital technologies to support appropriate e-procurement innovation throughout the procurement cycle, develop a procurement workforce with the capacity to continually deliver value for money efficiently and effectively, integrate risk management strategies for mapping, detection and mitigation throughout the public procurement cycle, apply oversight and control mechanisms to support accountability throughout the public procurement cycle, support integration of public procurement into overall public finance management.

An attempt to standardise procurement regulations is the 1994 *Model Law on Procurement of Goods, Construction and Services* developed by the United Nations Commission on International Trade Law (UNCITRAL) through its Working Group on the New International Economic Order. The UNCITRAL Model Law is designed for the use of countries introducing procurement laws, or reforming their procurement systems, with the aims of achieving economy and efficiency in public procurement and reducing corruption. The Model Law also seeks to promote international competition in public procurement markets. States should in general seek these objectives by advertising and holding a competition for procurements, and awarding contracts through transparent procedures.

⁵⁵ OECD (2015) Recommendations of the Council on Public Procurement, OECD/LEGAL/0411.

3.2. Council of Europe Legal Instruments

For setting public procurement standards are also relevant SIGMA Principles of Public Administration⁵⁶, which define what good governance entails in practice and outline the main requirements that countries should follow during the European Integration process, including a monitoring framework. Public procurement is recognized as public financial management instrument. The Methodological framework for the Principles of Public Administration were adopted in May 2019 and are accompanied with the set of indicators that could be used for assessment of legislation and practice in the EU accession countries. The Methodology recognized public procurement as one of the key areas relevant for the accountability of public administration. Principles and indicators relate to the efficiency, non-discrimination, transparency and equal treatment in legislation and practice, alignment with EU Directives, capacities of the central institution, availability and competence of the complaints handling system, capacities of contracting authorities, etc.

At the regional level the relevant document referring to the public procurement rules is Council of Europe Resolution (97)24 on the Twenty guiding principles for the fight against corruption. Principle no. 14 calls countries to adopt appropriately transparent procedures for public procurement that promote fair competition and deter corruptors. The monitoring of compliance with these principles is entrusted to the Group of States against Corruption (GRECO) through a dynamic process of mutual evaluation and peer pressure.

⁵⁶ The Principles of Public Administration 2017 edition, available at <https://www.sigmaxweb.org/publications/Principles-of-Public-Administration-2017-edition-ENG.pdf>

3.3. European Union Legal Instruments

Since all Western Balkan countries, including the four countries analysed in the study, are aspiring towards EU membership, it is important to understand EU standards on public procurement. At the EU level the first public procurement directive was adopted in July 1971 and covered public works contracts. Over the time new instruments were adopted to create a level playing field for businesses across Europe and to set minimum harmonized public procurement rules. These rules govern the way public authorities and certain public operators purchase goods, works and services. They are transposed into national legislation and apply to tenders whose monetary value exceeds a certain amount. For tenders of lower value, national rules apply. Nevertheless, these national rules also have to respect the general principles of EU law.

Public procurement plays an important role in the economic stability of the European Union. The public procurement process and the main mechanisms are governed by three EU Directives: Directive 2014/24/EU on public procurement,⁵⁷ Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors,⁵⁸ and Directive 2014/23/EU on award of concession contracts.⁵⁹ The EU Directives focus primarily on competition, prevention of discrimination and promotion of free trade of goods and services.

The main EU General Principles at issue are non-discrimination and equal treatment, transparency, proportionality, mutual recognition, free movement

⁵⁷ 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 L 94 from 28.03.2014, p. 65-242.

⁵⁸ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, Official Journal L 94, p. 243-374.

⁵⁹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, Official Journal L 94, p. 1-64.

of goods, right of establishment and freedom to provide services. The European Commission has published guidance on how these principles will apply throughout all of the stages of an award procedure.⁶⁰ The EU Directives obligate the Member States to regularly publish their offers and requests in the Official Journal of the European Union, implement public procurement in accordance with open and transparent procedures, applying clear and objective criteria known to all interested public procurement participants, and to respect the principle of equal treatment.

The basic principles behind the EU directives on public procurement have always centred on the idea of creating open and fair competition among as many suppliers as possible.⁶¹ The procedures have been simplified and should be easier to implement, e.g., reducing some of the publicity obligations, and allowing the purchasers more freedom and flexibility.

The need to address a range of policy goals is more clearly reflected in the new rules and procedures. The EU Public Procurement Directive recognizes the need “to enable procurers to make better use of public procurement in support of common societal goals”.⁶² The Directive permits the inclusion of environmental consideration at various stages of the public procurement procedure, such as in technical specification, contract awards and the performance stage.⁶³ However, it is up to the EU member states and contracting authorities to decide if environmental considerations are actually included.⁶⁴

⁶⁰ European Commission Interpretative Communication on the Community Law Applicable to Contract Awards Not or Not Fully Subject to the Provisions of the Public Procurement Directives, 23 June 2006.

⁶¹ S. Arrowsmith, (2012) The Purpose of the EU Procurement Directives: Ends, Means and the Implications for National Regulatory Space for Commercial and Horizontal Procurement Policies, *Cambridge Yearbook of European Legal Studies*, Vol. 14, pp. 1-47.

⁶² European Parliament and the Council (2014) Public procurement and repealing Directive 2004/18/EC, Official Journal of the European Union, 2014/24/EU.

⁶³ K. Pouikli (2021) Towards mandatory Green Public Procurement (GPP) requirements under the EU Green Deal: reconsidering the role of public procurement as an environmental policy tool, *ERA Forum*, Vol. 21, pp. 699-721.

⁶⁴ A. Sapir, T. Schraepen, S. Tagliapietra (2022) Green Public Procurement: A Neglected Tool in the European Green Deal Toolbox?, *Intereconomics*, Vol. 57, No. 3, pp. 175-178.

The 2014 Directive makes easier for SME suppliers to bid for public contracts as one of the typical difficulties for these suppliers, the required turnover criterion, is relaxed. The EU Study showed that measured resulted in the increase of participation of the SMEs due to implementation of measures such as e-procurement, simplifying process and documentation requirements, providing guidance to SMEs, encouraging the division of contracts into lots, etc.⁶⁵

Additionally, the Directive introduced an entirely new procedure, called the innovation partnership. Recital 49 of the 2014 Directive stressed that the former procedures available under the repealed 2004 Procurement Directive were not suitable for conducting and innovative public purchase. The aim of the innovation partnership is to enable contracting authorities to have specific new procedure when they need both to develop and purchase solutions that are not available on the market.⁶⁶

Other changes introduced by 2014 Directive are related to preventing corruption and favouritism. Specifically, requirement of transparency, open electronic access to contract notices and invitations to tender are promoted and required under the 2014 EU Public Procurement Directive. The question of third-party access to concluded contracts has become more current as the adoption of the 2014/24 Procurement Directive includes first codified EU rules on limiting the material modifications of procurement contracts.

Although 2014/24 Procurement Directive promotes transparency, it also emphasizes the importance of the protection of confidential data of tenderers. According to Art. 21 (1) the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the

⁶⁵ P. de Bas, P. Hausemer, T. Kruger, L. Rabuel, J. M. de Vet, M. Vincze (2019) *Analysis of the SMEs' participation in public procurement and the measures to support it – Final report*, European Commission.

⁶⁶ R. Caranta, P. Cerqueira Gomes, (2021) Public Procurement and innovation, *ERA Forum*, Vol. 22, Issue 3, pp. 371-385.

confidential aspects of tenders unless otherwise provided in the 2014/24 Procurement Directive or under national law. Thus, despite of the objective to protect confidential data, the provision seems to leave a lot of discretion to Member States on the disclosure rules.

The EU Directive on public procurement from 2014 give special importance to the issues of conflict of interest (integrity) and corruption. Transparency International defines a conflict of interest as a situation in which an individual or legal entity, whether it is a government, business, media or civil association, is confronted with a choice between the demands and obligations of their position and their private interests.⁶⁷ It is therefore a situation that may call into question the impartiality of decision-making, which is why the conflict of interest is considered grey zone of corruption, and measures to prevent conflicts of interest are among the basic measures of corruption prevention.

According to OECD estimates, corruption makes procurement contracts more expensive by an average of 20% - 25%, and in some cases the losses are over 50% of the total value of the contract.⁶⁸ Certainly, there are also situations where these costs are multiple, which is achieved by annexing the initial contract, by showing false needs for additional goods, services and works, unjustified multiplication of the estimated value of purchases and others.

The Directive defines a conflict of interest (Article 24) as a situation in which persons involved in, or able to influence, the contract award procedure by the contracting authority has a direct or indirect financial, economic or other personal interest that may threaten the impartiality and independence of the procedure; and mandates member states to take steps to prevent, identify and resolve conflicts of interest.

The Directive further recognizes the process of prior (technical) consultations as particularly risky for the emergence of corruption. Namely, within the

⁶⁷ See: <https://www.transparency.org/en/corruptionary/conflict-of-interests>

⁶⁸ OECD (2016) Preventing Corruption in Public Procurement, p. 7.

framework of the preparation of calls for tenders, contracting authorities may be in a situation where they must first consult companies that have relevant information and expertise. Such consultations can lead to situations that favour the consulted companies in relation to other potential participants in the proceedings, thus distorting competition. Therefore, the Directive determines the following measures related to prior consultations – preliminary market consultations (Article 40) and prior involvement of candidates or tenderers (Article 41). However, the contracting authorities must take the necessary steps to ensure that the participation of previously consulted companies does not affect the competition within the tender procedure and does not bring the procedure into question, while any information in the creation of which a certain company participated as a result of previous consultations, must be sent to other companies, participants in the tender.

As a way of ensuring that all interested companies have access to all information, some countries have prescribed that the process of prior consultations takes place via the Internet, by publishing the basic elements of the tender documentation⁶⁹ and by giving the opportunity to interested business entities to make comments and suggestions for at least five days. After that, the contracting authority is obliged to consider all received comments, prepare a report on accepted and unaccepted objections and proposals, and publish it on the Internet.

Conflict of interest, if it is not possible to remove it by other, less extreme measures, is also a basis for the exclusion of economic entities from public procurement procedures (Article 57 of Directive 2014/24/EU - Grounds for exclusion).

⁶⁹ I.e. description of the subject of procurement, technical specifications, qualification conditions of candidates or bidders, criteria for selecting offers and special conditions for the execution of the contract, which is prescribed by the Law on Public Procurement of the Republic of Croatia, Article 198 - Preliminary market analysis.

However, any company that is excluded from the procedure can demonstrate its reliability by providing evidence of the steps it has taken to eliminate the problem or the resulting damage, except in cases where the competent court has made a different decision.

Criteria for selection from Article 58 of the Directive gives the contracting authorities the possibility to assume that the business entity does not have the necessary expertise, if that contracting authority has determined that the business entity is in a conflict of interest, which may negatively affect the performance of the contract.

Amendments to contracts during their duration, without publishing a new tender procedure, also often lead to violations of public procurement rules.

In addition, the Directive in the Article 83 prescribes obligations of three-year reporting, among other things, on cases of fraud, corruption, conflict of interest and other serious irregularities in public procurement. Individual reports on procedures for awarding contracts (Article 84) also include a section on revealed conflicts of interest and subsequent measures taken.

The 2014 Concession Directive sets out a basic framework for the award of works and services concessions in the public and utility sector, subject to certain exemptions in respect of water with a value of 5,350,000 euro or more. The choice of the most appropriate procedure for the award of concession is left to contracting entities, subject to basic procedural guarantees.

In January 2008, a new directive dealing with remedies under the public procurement rules came into force, the Directive 2007/66/EC⁷⁰ to improving the effectiveness of review procedures concerning the award of public contracts. The 2008 Remedies Directive applies to awards made under the 2014 Directives, and amends both the Public Sector Remedies Directive and Utilities

⁷⁰ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, Official Journal L 335, p. 31–46.

Remedies Directive, which was criticized for not providing adequate level of protection of contractors' rights. The minimum remedies include ineffectiveness.

The Directives do not seek to impose a *common* regulatory regime on EU Member States in the field of procurement, and Member States can continue to apply their national procedures as *adapted* to the Directives. They thus permit Member States to maintain or adopt substantive and procedural rules to the extent that these rules are not in conflict with the Directives or with Treaty provisions. As a result, Member States remain free to regulate a number of issues, mainly practical matters.

Rather than seeking to regulate with precision all public procurement contracts within the EU, the EU legislator chose to regulate in the Directives only those contracts that were most clearly capable of affecting trade between Member States. Those falling within this broad definition include the following:

- contracts that are of a sufficiently high value to attract economic operators from other Member States (i.e., where the potential benefits of winning the contract outweigh the extra costs of providing the goods, works or services from a greater distance);
- contracts concerning objects that are amenable to cross-border trade.

Additional legal source for public procurement in the EU is jurisprudence of the Court of Justice of the EU. The requirement for transparency was considered in C-532/06 *Lianakis and Others*.⁷¹ Here the Court of Justice confirmed that potential tenderers had to be in a position to ascertain, when preparing their tenders, all of the elements to be taken into account by the contracting authority in identifying the most economically advantageous

⁷¹ Court of Justice, (2008), C-532/06 *Lianakis and Others*, (ECLI:EU:C:2008:40).

tender. The Court of Justice also confirmed in C-532/06 *Lianakis and Others* that the contracting authority could not apply weighting rules and/or sub-criteria that it had not previously brought to the tenderers' attention.

The requirement for non-discrimination was assessed in several decisions of the Court of Justice of the EU. In cases such as C-45/87 *Commission v Ireland*,⁷² C-359/93 *Commission v Netherlands*⁷³ and C-59/00 *Vestergaard*,⁷⁴ the contracting authorities required special trademarks or certificates of compliance with national standard specifications. The requirements were set down without the accompanying words "or equivalent". The Court of Justice concluded that those requirements were contrary to article 28 of the Treaty (currently article 34 of TFEU), as they had the effect of restricting the contracts to suppliers intending to use the systems specifically indicated.

In the case C-225/98 *Commission v France*,⁷⁵ the Court of Justice held that the principle of equal treatment prohibited not only overt discrimination on grounds of nationality but also all covert forms of discrimination that had the same effect. In the *Commission v France* case, the contracting authority required compliance with a French standard. The Court held that the specifications drafted by the contracting authority were so specific and complex that only national bidders were able to immediately understand their relevance. In consequence, the use of those references could have the effect of supplying more information to domestic companies, making it easier for those undertakings to submit tenders.

Technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public

⁷² Court of Justice (1988) *Commission of the European Communities v Ireland* C-45/87, (ECLI:EU:C:1988:435).

⁷³ Court of Justice (1995) *Commission of the European Communities v Kingdom of the Netherlands* C-359-93, (ECLI:EU:C:1995:14).

⁷⁴ Court of Justice (2001) *Bent Moustén Vestergaard v Spøttrup Boligselskab* C-59/00, (ECLI:EU:C:2001:654).

⁷⁵ Court of Justice (2000) *Commission of the European Communities v French Republic* C-225-98, (ECLI:EU:C:2000:494).

procurement to competition. In *C-6/05 Medipac - Kazantzidis*⁷⁶ and *C-489/06 Commission v Greece*,⁷⁷ the Court considered the issue of competition and public procurement in the context of the interface between the public procurement rules and the Medical Devices Directive (MDD). Under the MDD, medical devices meeting specified standards were required to be lawfully admitted for sale in all Member States. The Court held that the particular practice in Greek hospitals of refusing, on safety grounds, to accept medical devices meeting the standards specified under the MDD was in breach of equal treatment and transparency obligations.

Technical specifications must be sufficiently precise to allow tenderers to determine the subject matter of the contract and understand all of the requirements of the contracting authority. The Directive requires express mention of the detailed environmental characteristics required. Reference to a particular label is not sufficient (*C-368/10 Commission v the Netherlands*)⁷⁸.

The procurement directives do not allow the contracting authority to negotiate tenders that do not comply with the mandatory requirements laid down in the technical specifications (*C-561/12 Nordecon and Ramboll Eesti*).⁷⁹

⁷⁶ Court of Justice (2007) *Medipac-Kazantzidis AE v Venizeleio-Pananeio* C-6/05, (ECLI:EU:C:2007:337).

⁷⁷ Court of Justice (2009) *Commission of the European Communities v Hellenic Republic* C-489-06, (ECLI:EU:C:2008:638)

⁷⁸ Court of Justice (2012) *European Commission v Kingdom of the Netherlands* C-368/10, (ECLI:EU:C:2012:284).

⁷⁹ Court of Justice (2013) *Nordecon AS and Ramboll Eesti AS v Rahandusministeerium* C-561-12, (ECLI:EU:C:2013:793).

4. KEY INTERNATIONAL STANDARDS IN THE AREA OF THE PUBLIC PROCUREMENT

The international sources (instruments) are used by governments as guidance with the respect to the conduct of public procurement. These instruments have contributed to the development of internationally accepted principles of public procurement.⁸⁰ The application of principles in the legislation and practice is leading to the public procurement as an effective tool that can contribute to the good governance. However, the various instruments have different objectives, whether to build confidence, promote international trade, establish a common market, prevent corruption or other purposes with a socio-economic objective.

Despite harmonization at the level of principles, there are no universally accepted international standards of public procurement. Traditionally, public procurement has had three main goals:⁸¹ equity – or providing fair access to all bidders; integrity – or avoiding corruption; and economy and efficiency.

From its origins, one of the main objectives of the EU has been to create a common market that eliminates barriers to trade in goods and services between EU Member States. Creating a common procurement market means removing any barriers to trade arising from the procurement context. However, the approach was reduction of costs and price-criteria became a main driver behind public procurement decisions.

Barriers to trade can be erected by means of legislation or by the actions of contracting authorities or economic operators. Legislation can create barriers by imposing requirements to buy national. Contracting authorities can impose

⁸⁰ M. Matić Bošković, (2018) Public Procurement, In: *Integrity and Good Governance in the Western Balkans*, ReSPA, p. 155.

⁸¹ S. Kelman, (1990), *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*, University Press of America, Lanham, MD, p. 11.

barriers by making discriminatory award decisions. Economic operators can also create barriers by colluding to arrange tender prices dishonestly. All of these barriers have the effect of distorting competition in the common procurement market. One of the primary purposes of public procurement legislation is to eliminate existing barriers and prevent the erection of new barriers. It does so by applying the basic principles flowing through the legislation.

At the global level Governments need to respond to increasing pressures to accomplish aims with efficiency and at low cost. Consistent with these pressures, it has been suggested that two principles of high-quality public procurement are value for money and fairness in the treatment of suppliers and contractors.⁸² In addition, the goal that governments have to fulfil in the procurement process is transparency.⁸³ Reasoning for introduction of transparency as one of the goals is need to address emerging challenges of corruption perception and loss of public resources. Increasing request for competition should ensure guarantees of the lowest and reasonable price,⁸⁴ while the restriction of competition is notably associated with criminality in public sector procurement.⁸⁵ The concept of fairness in public procurement is linked with the understanding that no one can have control over a public process and its outcome.⁸⁶

Inherent in the competitive bidding process is a desire of the government to protect the interests of the taxpayers from corruption or carelessness of public officials. The competition should ensure the level playing field, so that no

⁸² D. S. Jones, (2012) Reforms to promote competition in government procurement in Southeast Asia: Achievements and constraints, *Asia Pacific Journal of Public Administration*, Vol. 34, Issue, 2, p. 113.

⁸³ P. Adjei-Bamfo, T. Maloreh-Nyamekye, A. Ahenkan, (2019) The role of e-government in sustainable public procurement in developing countries: A systematic literature review, *Resources, Conservation & Recycling*, p. 142.

⁸⁴ R. Berrios, (2006). Government contracts and contractor behavior. *Journal of Business Ethics*, Vol. 63, p. 120.

⁸⁵ B. Nowrousian, (2019). Combatting public procurement criminality or simple rules for complex cases. *Journal of Financial Crime*, Vol. 26, Issue 1, pp. 203–210.

⁸⁶ J. L. Harrison, J. Theeuwes (2008). *Law and economics*. New York, NY: Norton

vendor has an unfair advantage over any other, and as the result the best deal, for the lowest price should win the contract. Notices about intended projects are public, so potential vendors may be aware of the opportunity. Competition forces contractors to perform at a high level.⁸⁷

While they are all interlinked, these principles can be reduced to a series of core principles.

4.1. Competition

Competition is, defined by the OECD as a principle whereby all enterprises are provided a level playing field with respect to a state's ownership, regulation or activity in the market.⁸⁸ A level playing field will allow the most efficient firms with the best products to enter market and expand. State intervention can distort the level playing field in a number of ways, disrupting market dynamics and softening competition by favoring some market players over others.

Keeping competition fair or maintaining a level playing field is a key concern for achieving efficient and economic procurement results. Procurement legislation seeks to prevent any distortions or restrictions of competition within the EU, and any attempt to prevent economic operators from being able to tender is to be prohibited. Such attempts can take many forms and can affect the products or services or the economic operator itself. As a result, the legislation prohibits barriers to the free movement of goods, such as import restrictions and buy national policies, and barriers to the freedom to provide services, such as attempts to restrict foreign economic operators from tendering through the use of local registration requirements.

⁸⁷ S. H. Amey, (2012). Contract design failures lead to bad deals. *Public Administration Review*, Vol. 72(5), p. 697.

⁸⁸ See: <https://oecdonthellevel.com/2021/11/29/the-important-role-of-competition-authorities-in-promoting-competitive-neutrality/>

Public procurement legislation may establish requirements or processes that favour specific types of companies, like state-owned enterprises or domestic businesses, over others. Where measures are adopted to support certain companies, such as small and medium enterprises on public-policy grounds, they should be carefully considered in terms of their effectiveness and their likely impact on competition.⁸⁹

Protecting competition is also a question of maintaining equality of treatment, avoiding discrimination, applying mutual recognition principles (of equivalent products and qualifications), and ensuring that any exceptions are proportional.

The principle of competition has received more and more attention lately in the context of EU public procurement law. This is partly a result of the Court of Justice (CJEU) extensive case law on the matter which has repeatedly emphasized that one of the fundamental purposes of EU public procurement rules is to ensure open and undistorted competition in the member states as well as to develop effective competition in the field of public contracts.⁹⁰

According to the CJEU the purpose of EU law is to open up undistorted competition in all the Member States (C-213/13 *Impresa Pizzarotti*;⁹¹ C-70/06 *Commission v Portugal*;⁹² C-213/07 *Michaniki*;⁹³ C-251/09 *Commission v Cyprus*;⁹⁴ C-336/12 *Manova*; C-450/06 *Varec*⁹⁵ and C-26/03 *Stadt Halle*⁹⁶). In addition, the CJEU has concluded that the purpose of the EU Procurement Directives is to

⁸⁹ OECD (2021) Recommendation of the Council on Competitive Neutrality, OECD/LEGAL/0462.

⁹⁰ A. Sánchez Graells, (2016) A Deformed Principle of Competition? – The Subjective Drafting of Article 18(1) of Directive 2014/24. In: Olykke, G. S., Sánchez Graells, A. (eds.) *Reformation or Deformation of the EU Public Procurement Rules*, Edward Elgar Publishing, pp. 80-100.

⁹¹ Court of Justice of the European Union (2014) C-213/13 *Impresa Pizzarotti* (EU:C:2014:2067)

⁹² Court of Justice of the European Union (2008) C-70/06 *Commission v Portugal*. (EU:C:2008:3).

⁹³ Court of Justice of the European Union (2008) C-213/07 *Michaniki*. (EU:C:2008:731).

⁹⁴ Court of Justice of the European Union (2011) C-251/09 *Commission v Cyprus*. (EU:C:2011:84).

⁹⁵ Court of Justice of the European Union (2008) C-450/06 *Varec SA v Belgian State*. (EU:C:2008:91).

⁹⁶ Court of Justice of the European Union (2005) C-26/03 *Stadt Halle and RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall-und Energieverwertungsanlage TREA Leuna*. (EU:C:2005:5).

develop effective competition in the field of public works contracts (C-138/08 *Hochtief and Linde-Kca-Dresden*).⁹⁷

The risk of competition distortions may increase both, if too much information is disclosed or if confidential information is disclosed. This interpretation is highlighted in case C-450/06 *Varec*, in para 35, where the CJEU considered maintaining fair competition in the context of public contract award procedures an important public interest and concluded that “*in order to attain that objective it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an on-going procurement procedure or in subsequent procedures*”. According to CJEU the disclosure of trade secrets for example during or after a contract award may affect the competition conditions in current or subsequent procedures.

In addition, the CJEU underlined that contract award procedures are based on a relationship of trust between the contracting authorities and participating economic operators, with the aim to enable communication of any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them.⁹⁸

The preservation of fair competition in the public procurement raises question of two conflicting standards – competition and transparency. Primarily there is a need to protect confidential information due to the private interests of the owner of such information, since disclosure of a trade secret could damage the business activities and thus decrease interest of economic providers in public procurement. Furthermore, even the disclosure of non-confidential information is could increase the risks of distortions of competition. Also, the OECD has expressed its concerns regarding excessive transparency in public

⁹⁷ Court of Justice of the European Union (2009). *C-138/08 Hochtief and Linde-Kca-Dresden*. (EU:C:2009:627).

⁹⁸ C-450/06 *Varec*, para 36.

procurement as an increasing risk for antitrust violations.⁹⁹ Through award decisions, evaluation reports and the offers of competitors, economic actors gain knowledge on each other's prices, identities of other bidders, business practices and contractors and could lead to development of bid rigging cartels.

4.2. Equal treatment and non-discrimination

Numerous countries incorporate in their legislation provisions on protection of their national sovereignty to protect national economy. Such provisions usually take into account the country's industrial policy, social policy or protection of a country's strategic economic objectives such as regional integration. These provisions although considered needed, especially for developing countries, have implications on free trade,¹⁰⁰ and present discrimination of foreign economic operators.

Discrimination refers to a government's tendency to favour its own domestic industry's supplies and disregard foreign firm supplies. Discrimination could appear in explicit and implicit forms. Explicit forms of discrimination can take various forms, two of which are the preferential price margin and domestic content requirement. Under preferential price margin, purchasing entities accept bids of domestic suppliers over foreign suppliers as long as the difference in price does not exceed a specific margin of preference.¹⁰¹ Under the domestic content requirement, government purchases from foreign sources only if the foreign companies commit to purchase some components from domestic firms.

⁹⁹ OECD (2011). Competition and Procurement, Competition Committee. Available at <http://www.oecd.org/regreform/sectors/48315205.pdf>.

¹⁰⁰ S. Arrowsmith, J. Linarelli, D. Wallace, (2000) *Regulating Public Procurement: National and International Perspectives*. Dordrecht, The Netherlands: Kluwer Law international.

¹⁰¹ F. Naegelen, M. Mougeot, (1998) Discriminatory Public Procurement Policy and Cost Reduction Incentives, *Journal of Public Economics*, Vol. 67, Issue 7, pp. 349-367.

Even without provisions in the domestic law, countries usually have biases that are not formal. This is the implicit form of discrimination. Formal respect of the tendering procedures is no guarantee of fair treatment to foreign firms, as the discrimination behaviour is usually tacit.¹⁰²

The concepts of equal treatment and non-discrimination are not the same. In general terms, all procurement legislation will seek to maintain equality between economic operators. In the EU context, however, that equality will also be based on nationality.

Equal treatment is a concept that generally requires identical situations to be treated in the same way or different situations not to be treated in the same way, and it requires the identical treatment of identical people. In a sense, it implies that contracting authorities will not take into account the different abilities or difficulties faced by individual economic operators but will judge them purely on the results of their efforts, i.e., on the basis of the tenders they submit. It provides for an objective assessment of tender prices and tender qualities and ignores any considerations that are irrelevant to the discovery of the economically efficient tender.

In the EU context, the concept of equal treatment requires yet another definition, as in that context the concept of equality is, in addition, based on nationality or on the origin of the goods. As a result, all economic operators of EU nationality and all bids, including goods of EU origin, must be treated equally in line with the principle of non-discrimination.

This concept of non-discrimination is more than simply an extension of the concept of equal treatment. It implies that any condition of eligibility or origin (based on nationality or local provenance) will automatically give rise to unequal treatment, since those conditions will, by definition, discriminate against a certain group of (foreign) economic operators or favour another

¹⁰² F. Trionfetti, (2000) Discriminatory Public Procurement and International Trade, *The world Economy*, Vol. 23, Issue 1, pp. 57-79.

group. However, while discrimination in a given context will produce unequal treatment, unequal treatment does not always give rise to discrimination.

4.3. Transparency

Transparency provides extensive benefits for government such as economic growth through cost-savings, an enhanced confidence in the public procurement system, and increased government integrity.¹⁰³ Transparent procurement results in increased economic benefits for the government as well as suppliers as they compete for public contracts.

Increased government disclosure on bidding opportunities and increased information about the bid requirements lead to improved bids and more supplier confidence. Clear information on the various steps involved in the procurement process can empower potential suppliers to make informed decision whether to bid and how to improve the relevance of their bids. In addition, the public also may develop increased confidence in the government. As companies increase confidence in the procurement process, the number of bidders expands and competition is strengthened.¹⁰⁴ Consequence of stronger competition is budgetary savings for governments. Transparency increase competition by making the bid evaluation process clear, especially with respect to the bid announcement and an evaluation criteria. The bid criteria should be clear and an impartial review authority should be established so that supplier have the opportunity to raise objection in advance if they consider that criteria are not appropriate.¹⁰⁵

Transparency requires active disclosure of opportunities, which requires efforts of the governments to publicize and provide the media with bidding

¹⁰³ Working party of the Trade Committee, OECD, (2003) Transparency in Government Procurement: The benefits of efficient governance and orientation for achieving it, TD/TC/WP(2002)31/Final, pp. 6.

¹⁰⁴ *Idem.*, p. 4.

¹⁰⁵ J. Pope, *Confronting Corruption: The elements of a national integrity system*, p. 208.

opportunities and results. The predictability that results from an open procurement system and consistent evaluation processes helps the government to purchase good products and services and, as a result, improves taxpayers' support as citizens become aware that practices are legitimate and the government is getting the best deal for its money.¹⁰⁶

Transparency of public procurement is an important element of anti-corruption measures, in establishing trust towards public authorities as well as in securing access to remedies in public procurement. Adequate and transparent justifications of contract award decisions are necessary in order for the economic operators that have taken part in a competitive procedure to evaluate their own legal standing and equal treatment in comparison to other bidders in the contract award.

Transparency emerged more recently as a principle in its own right, although it is probably better to think of it as a tool to be used to achieve other objectives. For example:

- Publication and accessibility of the legislation provides clarity and certainty for all stakeholders and enables contracting authorities and economic operators to be aware of the rules of the game.
- Advertising requirements guarantee transparency in the discovery process.
- Publication in advance of the technical specifications and the selection and award criteria permits stakeholders to verify that these specifications and criteria are fair and non-discriminatory.
- Recording and reporting requirements ensure that the actions of the contracting authorities may be verified where appropriate.

Recording and reporting requirements are also a fundamental aspect of accountability, i.e., holding procurement officers accountable for their

¹⁰⁶ A. J. DeAses, (2005) Developing Countries: Increasing transparency and other methods of eliminating corruption in the public procurement process, *Public Contract Law Journal*, Vol 34, No. 3, p. 565.

decisions and actions. Accountability is also often an explicit objective of national procurement systems, and the transparency provisions reinforce this accountability.

The access to public procurement contracts is vital for the remedies' system of EU procurement law to actually function. This requires that interested parties must be able to challenge infringements of EU procurement rules that may occur after the conclusion of the contract. For this purpose, the contract information must be public or accessible - otherwise, the remedies' system lacks the required effectiveness.¹⁰⁷

4.4. Economy and efficiency and value for money

Some of the above principles are articulated differently or combined in national legislation. It is possible to find, for example, principles stated in legislation, such as economy and efficiency, value for money, and integrity.

Economy and efficiency as principles for public procurement relate to how the procurement function contributes to the best allocation of resources by a public agency in the performance of its mandate.¹⁰⁸ It refers not only to the methods and procedural rules that affect the procurement of a single contract, but also includes: the broader administrative control mechanisms that affect the management of the procurement function, the competence of public officers responsible for procurement, the efficiency of markets and whether they enable the public agency to purchase from the most competitive source, the ability to procure the best quality of goods, works and services on terms

¹⁰⁷ C. Ginter, N. Parrest, M. A. Simovart, (2013) Access to the Content of Public Procurement Contracts: The Case for a General EU-Law Duty of Disclosure. *Public Procurement Law Review*, Vol. 4, pp. 156–164.

¹⁰⁸ Matić Bošković, M. (2018) Public Procurement, In: *Integrity and Good Governance in the Western Balkans*, ReSPA, p. 158.

and conditions that reflect a satisfactory handling of risks, and the need for a robust contract and asset management.

The above elements are often used to describe the technical efficiency of the procedure itself, i.e., whether the planning has been appropriate and carried out on time; whether the various responsibilities have been engaged the way they should; whether sufficient time has been given to economic operators to prepare suitable tenders; whether the procurement is made in a timely manner. At a policy level, the two principles may be used to analyse the allocative efficiency of transactions and of the system as a whole and help to determine whether there is room to optimise the system further.

Value for money overlaps with the concept of economy and efficiency so that the procurement procedure is carried out with the least waste in terms of cost and time and with as much benefit as possible. A key economic driver underlying procurement process is the need to ensure that all purchasing represents value for money. The EU Directives do not specifically address the issue, but it is important to not lose sight of the need to ensure that value for money will be one of the main outcomes of the procurement process. In this sense, value for money broadly equates, in EU terms, the award criteria that represent the best price-quality ratio or cost, using a cost effectiveness approach which falls within the criterion of the most economically advantageous tender as redefined in the 2014 Directive.

The term value for money means the optimum combination between the various cost-related and non-cost-related factors that together meet the contracting authority's requirements. The elements constituting the optimum combination of these various factors differ from procurement to procurement and depend on the outputs required by the contracting authority for the procurement exercise concerned.

The basic premise is that the government should only buy what is actually needed. While it is for the contracting authority to decide what to buy, the

point is that the specifications must match the real needs of the contracting authority.

4.5. Security sector standards

Security procurement is the process through which authorities in the field of security acquire the various goods, services, works they need to perform their duties and missions.¹⁰⁹ The public procurement in the security sector could be defined in a wide and in a narrow way.¹¹⁰

Security procurement widely defined covers any procurement carried out by contracting authorities in the field of security. In this sense the notion of security procurement covers all the procurements: procurement of stationery, IT equipment, aircraft, etc.

Security procurement narrowly defined covers only the goods and services manufactured or intended to be use for purely security purposes (procurement of fighter jets, armoured vehicles, munitions, missiles, etc.). It could be argued that security procurement narrowly defined also covers the procurement of “dual-use” technologies, i.e., technologies that could be used, in principle, for both security and non-security purposes.

The distinction between the security procurement narrowly and widely defined reflects the fact that some procurement activity in the security field is more closely linked with the core of what could be termed as national security and is often characterized by the complex nature of the relevant technologies, whereas other procurement activity in the same sector is less sensitive. This

¹⁰⁹ For example, these authorities acquire stationery and IT equipment in order to perform their administrative duties; they purchase food for their soldiers; they procure cleaning services for their premises; they acquire submarines, fighter jets, armoured vehicles, munitions, missiles and other defence material for protecting national security, territorial integrity or for fulfilling other international commitments, for example, participation in peacekeeping operations abroad; they also procure the relevant maintenance services in order to keep defence material ready for action in a continuous and seamless manner.

¹¹⁰ S. Eriksen, F. Cordona (2015) Criteria for good governance in the defence sector – international standards and principles, Centre for Integrity in the defence sector, pp. 41-48.

distinction further highlights the fact that more sensitive procurement needs to be subject to a regulatory regime that acknowledges its specificities and tries to strike a balance between transparency of the procurement process and protection of the core security concerns.

The environment of secrecy and lessened transparency, together with a wider field of discretion for contracting authorities, lends itself to becoming a fertile ground for protectionism, corruption and inefficient use of public resources.¹¹¹

Transparency International (TI) has partnered with North Atlantic Treaty Organizations (NATO) nations in developing an integrity self-assessment process for defence and security. This self-assessment includes assessing the strength of their integrity systems in areas such as anti-corruption laws and policies and procurement as well as engaging with defence companies.¹¹²

Additionally, the Geneva Centre for the Democratic Control of Armed Forces (DCAF), a global leading institution in the areas of security sector reform and governance, has developed a compendium of best practices for building integrity and reducing corruption in defence.¹¹³ DCAF identified process capability as well as process integrity as key for reducing the potential for procurement-related corruption.

Furthermore, NATO, under the sponsorship of the Euro-Atlantic Partnership Council (EAPC), sponsors the Building Integrity Initiative which “seeks to raise awareness, promote good practice, and provide practical tools to help nations build integrity and reduce risks of corruption in the security sector by

¹¹¹ Transparency International (2011) *Building Integrity and Countering Corruption in Defence and Security: Twenty Practical Reform*.

¹¹² Geneva Centre for the Democratic Control of the Armed Forces (DCAF) (2010) *Building Integrity and Reducing Corruption in Defence: A Compendium of Best Practices*, Procon Ltd., Geneva, p. v.

¹¹³ Geneva Centre for the Democratic Control of the Armed Forces (DCAF) (2010) *Building Integrity and Reducing Corruption in Defence: A Compendium of Best Practices*, Procon Ltd., Geneva.

strengthening transparency and accountability”, especially in procurement processes.¹¹⁴

4.5.1. European Union

Within the EU there is special regulation related to the public procurement in the security sector. Certain procurements may be excluded from the scope of the 2014 Directives on the grounds of secrecy and security. Procurements of defence equipment and services related to such equipment can also be excluded based upon the general exemption set out in Article 346 of the Treaty on Functioning of the EU (TFEU).¹¹⁵

A specific directive, Directive 2009/81/EC on the procurement procedures in the fields of defence and security, which entered into force on 21 August 2009 (and had to be incorporated in EU countries' national law by 21 August 2011), sets out specific rules for the procurement of arms, munitions and war material, plus related works and services for defence purposes, as well as for procurement of sensitive supplies, works and services for non-military security purposes.¹¹⁶

By adopting this Directive, the EU sought to introduce the transparency and competitiveness standards in the fields of defence and security. Specifically, before the adoption of the Directive, the EU Member States applied mainly Article 346 of the TFEU which allowed them to deviate from the principles of transparency and competitiveness in the public procurement procedures in the fields of defence and security to protect their security interests. This exemption is still possible, provided that the security interests are interpreted

¹¹⁴ NATO Conference Report (2011) *NATO Building Integrity Conference*, Monterey California, USA, 23–25 February 2011, pp. 9–30.

¹¹⁵ SIGMA (2016) *Defence Procurement, Brief 23 – Public Procurement*, OECD.

¹¹⁶ 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, and amending Directives 2004/17/EC and 2004/18/EC, Official Journal L 216, on 20.8.2009

in a restrictive way. However, the contracting authority have margin of discretion in determining whether the exclusion is necessary in light of the extent of any potential security and secrecy concerns.

The Defence and Security Directive covers two major areas: military equipment, associated services and works contracts; and sensitive procurement for security purposes (not only defence) or procurement involving classified information.¹¹⁷

Due to the sensitivity and complexity of defence and security procurement, the Defence and Security Directive allows EU Member States to use the simplified negotiated procedure and publish a prior contract notice as a standard procurement procedure. Furthermore, the contracting authorities can use the competitive dialogue and the negotiated procedure without prior notice on specific grounds.¹¹⁸

The grounds for the use of the negotiated procedure without prior notice include two additional circumstances: procurement contracts that deal with the provision of air and maritime transport services for armed or security forces deployed abroad when the contracting authority has to procure these services from economic operators that guarantee the validity of their tenders only for such short periods that the time limit for the restricted procedure or the negotiated procedure with prior notice cannot be complied with; the urgency that ensues from a crisis.

In addition, the Defence and Security Directive contains specific provisions on security of information and security of supply and sets out several safeguards and exemptions to ensure the protection of vital national security interests or

¹¹⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – European Defence Action Plan, COM(2016) 950 final, 30.11.2016.

¹¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a more competitive and efficient defence and security sector (COM(2013) 542 final, 24.7.2013).

public security, and excludes certain contracts altogether from the new regime.

The applicable financial thresholds are 428,000 euro for supply/service procurements and 5,350,000 euro for works procurement. Another important innovation of the Defence and Security Directive is the inclusion of specific provisions linked with security of information. Because of the sensitive subject matter of defence and security procurement contracts, the handling of classified information is extremely important. The Defence and Security Directive includes the provisions that try to tackle this issue.

Security of supply in the context of defence and security procurement is of fundamental importance. The Defence and Security Directive provides that contracting authorities must specify any security of supply requirements in the contract documents.

The Defence and Security Directive is complementary to the European Defence Agency's Code of Conduct on Defence Procurement, launched in July 2006. This is non-legally binding regime applicable in the cases of procurement contracts where the conditions of article 346 TFEU are met (not covered by the Defence and Security Directive). The Code of Conduct is applicable only to defence procurement contracts whose value exceeds 1 million euro. Contracts should fulfil some publication requirements that are much more relaxed than those established by the Defence and Security Directive.¹¹⁹

In addition to the EU Directive, there are international standards on the public procurement in the defence sector developed in 2015 by the Centre for Integrity in the Defence Sector.¹²⁰ According to these standards procurement

¹¹⁹ Commission Staff working document – Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security – Accompanying the document Report from the Commission to the European Parliament and the Council on the implementation of Directive 2009/81/EC on public procurement in the fields of defence and security, to comply with Article 73(2) of that Directive (SWD(2016) 407 final, 30.11.2016).

¹²⁰ See: S. Eriksen, F. Cordona (2015) Criteria for good governance in the defence sector – international standards and principles, Centre for Integrity in the defence sector.

of non-sensitive and non-military equipment, works and services in the defence should be regulated by the general public procurement law. However, exceptions may be made when the general rules do not sufficiently protect classified information and/or secure the supply of particularly important goods and services, particularly in times of crisis or armed conflict. The scope of military procurement should be clearly and exhaustively defined.

5. METHODOLOGICAL APPROACH TO STANDARDS AND INDICATORS

The approach taken in the study is to provide detailed legal analysis of the applicability of international standards on regulatory frameworks of the four Western Balkan countries in selected aspects related to public procurement. Particular attention was given to the aspects relevant for prevention of corruption and strengthening of integrity in the public procurement process. Specifically, the focus was made on issues that regulate the procedure of public procurement, and the way in which the integrity standards are applied as well as corruption prevention rules and measures.¹²¹

The limitations of the transparency of the public procurement procedure were assessed through whole process, including publication of all relevant information and decision and use of modern technologies. In addition, focus was put on non-discrimination rules and equal treatment of all bidders, as well as application of competition rules. To ensure assessment of the whole system the review procedure was analysed as well as institutional set-up (independence and regulatory framework).

In addition to the legislative analysis the analysis consists of a detailed qualitative assessment of the level of alignment of the national regulatory frameworks of the four countries with the relevant international standards, based on the defined indicators. The assessment takes into account the provisions of national regulatory framework, specifically relevant laws and bylaws. The qualitative assessment is also quantified for each indicator and standard.

¹²¹ A. Knežević Bojović, M. Reljanović (2022) *Free Access to Information – An analysis of the regulatory frameworks in selected Western Balkan countries*, Institute of Comparative Law, p. 24.

To provide a benchmark for the assessment, the study identifies key international standards and indicators in the area of public procurement. Indicators were developed for each standard in order to facilitate and guide the assessment. The standards and indicators drew considerable inspiration from the indicators used in the SIGMA/OECD rating methodology, and were also informed by the hard- and soft-law documents that outline the relevant standards. While, focus of SIGMA/OECD methodology is on compliance with the EU directives and assessment of the practice and operational capacities of public procurement institutions, the study put in focus legislative framework and institutional set-up. The taken approach was to identify major issues and compared them among selected Western Balkan countries. Qualitative assessment of compliance with relevant standards is not informed by SIGMA/OECD methodology and may differ from it.

The standards examined in the study are the following:

1. Compliance of public procurement legislation with standards of transparency
2. Compliance of public procurement legislation with equal access and non-discrimination standards
3. Compliance of public procurement legislation with competition rules
4. Right to challenge public procurement decision is guaranteed in the legislation
5. Adequacy of the legal framework to ensure capable institutions

The core of the study consists of a detailed qualitative assessment of the level of alignment of the national regulatory frameworks of the four countries with relevant international standards, based on the defined indicators. The study assessment covered the provisions of national constitutions, primary and secondary legislation. The qualitative assessment is also quantified for each indicator and standard.

The quantification of the assessment is based on the approach used by SIGMA. Consequently, the methodology consists of two layers of quantified assessment.

The first layer includes assessment per indicator within each standard. Within this assessment, points are awarded to each indicator on a 0-3 scale as per Table 1. The 0-3 scale was chosen since the indicators are, for the most part, defined in the straightforward terms, often not allowing for a nuanced approach to the assessment of compliance with the relevant standard.

Table 1: Points awarded per indicator

Point	Point description
0	Not in line with standards
1	Mostly not in line with standards
2	Mostly in line with standards
3	Fully in line with standards

The second layer of assessment is completed, once all the indicators within one standard are awarded their respective points. Then, the average point is calculated per standard. The average point per standard is calculated by dividing the sum of all points awarded with the number of indicators for the given standard. The average point for the standard is then translated to a quantified standard value on a 0-5 scale, as per Table 2. Since standards, as a rule, comprise two or more indicators (with some exceptions), and were purposefully defined to be more complex, the selected six-tier scale allows for nuances to be assessed and identified when it comes to compliance with or departures from the standard.

Table 2: Standard values

Average point	Standard value	Description of indicator
0 - 0.50	0	Not in line with standard
0.51 - 1.00	1	Mostly not in line with standard
1.01 - 1.50	2	Significant departures from standard
1.51 - 2.00	3	Some departures from standard
2.01 - 2.50	4	Mostly in line with standard
2.51 - 3.00	5	In line with standard

The quantification is presented in tables at the level of each standard. The intention of the quantification is rating of countries, but rather to provide a simplified, yet informative outlook on the state of play with regard to each of the relevant regulatory frameworks, and to identify the respective strengths and weaknesses. The study does not offer a definitive quantitative assessment, but rather offers a qualitative interpretation of the data collected in the conclusion.

Further, the analysis aims to identify the differences between the regulatory regimes generally applicable and special regulatory regimes applicable in defence sector and in the police. However, the specific rules applicable to the defence and police sector only were singled out and described, but were not quantified.

6. COMPLIANCE OF THE LEGISLATION OF ANALYSED COUNTRIES WITH KEY INTERNATIONAL STANDARDS

6.1. General Civil Service

Legislative assessment is based on selection of 5 standards and 22 indicators. Main criteria for selection of standards are based on the need to assess only legislative framework and its compliance with international standards.

Standard 1. Compliance of public procurement legislation with standards of transparency

Providing an adequate degree of transparency throughout the entire public procurement cycle is critical to minimizing the risk of corruption. The publishing of information, participation of stakeholders with no conflict of interest and dissemination of all relevant decisions are essential to transparency in public procurement.

Public availability of procurement information is determined by the type of information. All relevant information should be available, from pre-tendering and tendering phases of the procurement cycle, including laws and policies and selection and evaluation criteria. Furthermore, the best practices include publishing of information about events that occur post-award, such as justification for awarding contract, contract modification or information that allows tracking of procurement spending.

The national legislation on public procurement should comply with standards on transparency of the procurement system at all stages of the procurement cycle. That requirement includes obligation by law to published information and notice at all stages of the public procurement cycle. The purpose of the standards is to assess if the regulatory framework includes obligation of transparency of all stages of the public procurement.

Indicator 1

The national legislation should incorporate obligation for contracting authorities to publish a contract notices and contract award notices either in the national official journal or on a national website.

In Bosnia and Herzegovina, the Public Procurement Law (PPL)¹²² requires that procurement notices be published for all public procurement procedures, except for direct agreement procedures and negotiated procedures without prior publication of a notice.

In accordance with the PPL,¹²³ public procurement notices are published on the Public Procurement Portal (PP Portal).¹²⁴ The Public Procurement Agency (PPA) is responsible for maintaining the PP Portal.

To publish procurement notices on the PP Portal, contracting authorities must be registered. Registration for contracting authorities is free of charge. Notices must be prepared and sent for publication electronically in the form, manner and within the limits defined by the PPA director in the implementing regulation. Notices are publicly available on the PP Portal within 24 hours of being sent for publication (exceptionally within 72 hours). Notices are not checked by the PPA before their publication.

The contracting authority is obliged by the PPL¹²⁵ to publish a contract award notice based on the results of the contract award procedure, for open procedure, restricted procedure, negotiated procedure with or without publication of a notice, competition for drafting a conceptual design or competitive dialogue. The deadline for publishing is 30 days from the date of conclusion of the contract of framework agreement.

¹²² Law on Public Procurement, Official Gazette BIH, No. 39/2014 and 59/2022, see: <https://www.paragraf.ba/propisi/bih/zakon-o-javnim-nabavkama.html>

¹²³ Law on Public Procurement, Article 36 (1).

¹²⁴ See: <https://www.ejn.gov.ba/>.

¹²⁵ Law on Public Procurement, Article 74.

Information on contract notices is also summarised in the *Official Gazette of Bosnia and Herzegovina*.¹²⁶ Contracting authorities may also publish notices in other publications and websites, after having posted them on the PP Portal, but any additional publication must not differ from the notice published mandatorily on the PP Portal.

However, the PPL stipulates possibility of using preliminary (technical) consultations and there is no strict provision on the transparency of preliminary consultations, nor even in relation to large-value procurements.

In Montenegro public procurement-related material is published on the Public Procurement Portal maintained by the Directorate for Public Procurement Policy.¹²⁷ Information is submitted by contracting authorities registered on the portal and is reviewed by the portal administrator before final publication.¹²⁸ The Law on Public Procurement particularly stipulates the publication of public procurement plans, contract notices, decisions on candidates' qualifications, decisions on selection of the most favourable bid, decisions on suspension of public procurement procedures, decisions on annulment of public procurement procedures, public procurement contracts, changes or amendments to public procurement plans, contract notices, decisions or contracts, and other decisions referred to in the Law on Public Procurement.

The obligation to publish procurement notices (and other documents) depends on specific threshold values. The Law on Public Procurement requires for contracts reaching (on the annual basis) EUR 20,000 for supplies and services and EUR 40,000 for works, full compliance with the procedural requirements of the Law.¹²⁹ Contract notices must be published in the Official

¹²⁶ See: www.sluzbenilist.ba

¹²⁷ Law on Public Procurement, Official Gazette Montenegro, No. 74/2019, see: <https://portal.ujn.gov.me/delta2015/search/noticeSearch.html>

¹²⁸ Public Procurement Law in Montenegro, Official Gazette, No. 74/2019, Article 9, 93. <http://www.ujn.gov.me/2015/06/english-uputstvo-za-objavljivanje-dokumenata-na-portalu-za-javne-nabavke/>.

¹²⁹ Public Procurement Law, Article 27 (2).

Journal of the EU for thresholds defined by the EU. For contracts valued less than these amounts (referred to by the Law on Public Procurement as 'simple procurement'), contracting authorities may apply simplified procedures established by the Ministry of Finance (MoF). Contracting authorities may also (but are not obligated to) apply regular procurement procedures.

In North Macedonia the Law on Public Procurement provides for all types of procurement-related notices required by the 2014 EU Directives,¹³⁰ and it also requires the publication of notices on performed contracts. The thresholds for notice publications are relatively low: EUR 1,000 for supplies and services in the public sector and EUR 5,000 for works. For lower value contracts, the Law provides for a "small-value" procurement procedure¹³¹ and a "simplified open procedure".

Contracting authorities publish notices on the Public Procurement Bureau (PPB) - managed Electronic System for Public Procurement (ESPP); however, the PPB does not verify the content of notices before they are published.

Contract notices are also published in the Official Gazette¹³² for simplified open procedures; open procedures; restricted procedures; competitive procedures with negotiation; negotiated procedures with publication of a contract notice; competitive dialogues; and innovation partnerships. Contract notices and design contest notices must be also published in the Official Journal of the EU,¹³³ provided that the estimated value (without VAT) is equal to or greater than the defined thresholds.

Contracting authorities/entities must pay a fee of MKD 600 (appx. 9.6 Euro) to publish procurement notices on the ESPP, and a higher fee of MKD 6,150 (appx.

¹³⁰ Public Procurement Law in North Macedonia, Official Gazette, No. 24/2019 and 87/21, Article 63-64.

¹³¹ Public Procurement Law, Article 49, Simplified open procedure, applies to contracts where the value does not exceed EUR 70,000 for services or supplies and EUR 500,000 for works.

¹³² See: <http://www.slvesnik.com.mk/jn.nspk>

¹³³ Public Procurement Law, Article 41 (3).

99 Euro) is charged to publish notices on the qualification system and about concessions.

Access to the ESPP, including to the content of notices, requires prior registration. It is possible to view contract notices in the Official Gazette free of charge, but it does not offer any search tools and notices are published in pdf format.

In Serbia the Public Procurement Law¹³⁴ requires that public procurement notices are published on the Public Procurement Portal (PPP) in accordance with the standard form of notice defined by the Public Procurement Office (PPO).

Notices for public procurement procedures reaching the threshold of RSD 5,000,000 are also published on the Portal of the Official Gazette of the Republic of Serbia and the Legislation Database.¹³⁵

A contracting authority that does not have a web page is not obliged to create one for the sake of publishing public procurement notices. However, under the Public Procurement Law, contracting authorities are also required to publish notices of procurement procedures in the Official Journal of the European Union when they reach the EU procurement thresholds, but this obligation will apply only after Serbia's accession to the European Union.¹³⁶

The Public Procurement Office is responsible for maintaining the Public Procurement Portal, which is part of its internet services.¹³⁷ The Public Procurement Portal started with the basic function of enabling the publication of public procurement notices as well as other related information (such as Public Procurement Office's opinions on the application of negotiated procedures).

¹³⁴ Official Gazette of Republic of Serbia, No. 91/2019, Article 105 (6) of the Law.

¹³⁵ Article 105 (7).

¹³⁶ Public Procurement Law, Article 105 (10).

¹³⁷ See: <http://jnportal.ujn.gov.rs>

Portal access is free of charge and searching it does not require previous registration. Interested parties can seek information simply by filling in the relevant fields to search all available data – for example name of contracting authority, municipality, locality, type of procurement (goods, services, works), subject matter, date of publication (from – to), CPV code, etc.

Indicator 2

In accordance with the international standards the law should impose requirement to the contracting authority to inform each candidate or tenderer of decisions reached, including the grounds for any decision.

In Bosnia and Herzegovina, the contracting authority is obliged by the Law on Public Procurement¹³⁸ to simultaneously, and no later than seven days from the date of decision, notify in writing the candidates or bidders who submitted requests or bids in a timely manner about the decision made regarding prequalification, evaluation of bids or annulment of the procedure. The notification on the results of the procedure has to be accompanied with the appropriate decision.

In Montenegro, the Public Procurement Law¹³⁹ stipulates that all decisions are published in Public Procurement Portal (ESJN) and publishing of decision considers as submission of information to all candidates. If decision is not published on portal, it cannot create legal effects. In situation that certain data from the decision are secret in accordance with legislation governing confidentiality of data, the decision will be published in a way that will adequately protect this data.

In North Macedonia, the contracting authority is obliged by the Law¹⁴⁰ to inform the candidates and bidders about the decision, including the reasoning of the decision. The notification has to be sent within three days from the day of

¹³⁸ Public Procurement Law, Article 71.

¹³⁹ Public Procurement Law, Article 141.

¹⁴⁰ Public Procurement Law, Article 113.

making the decision. The notification is also sent through the ESJN. In addition, the economic operators that participated in the procedure have the right to inspect the entire documentation of the procedure, including the submitted bids or application for participation, except those documents that are marked as business secret.

In Serbia, the contracting authority is obliged by the Law on Public Procurement,¹⁴¹ to publish all decision in Public Procurement Portal and publishing of decision considers as submission of information to all candidates. The contracting authority has duty to publish decision no later than three days from the date of decision. In addition, the contracting authority will not publish part of decision on contract award if it is contrary to the provisions of the Law on Public Procurement or to general interest or if it would harm the justified business interest of a particular business entity of could lead to distortion of competition in the market.

Indicator 3

To ensure transparency, the national legislation must set obligation to the contracting authority to prepare and store individual reports on procedure, including key information, and to make reports publicly available.

In Bosnia and Herzegovina, the contracting authority is obliged by the Law¹⁴² to submit to the PPA reports for open procedure, restricted procedure, negotiated procedure with or without publication of a notice, competition for drafting a conceptual design, competitive dialogue, competitive request for submission of bids and direct agreement, as well as in case of contract award. After the contracting authority submits a report to the PPA, it is obliged to publish on its website. Contracting authority is also obliged to published any changes to the contract that occurs during the implementation of the contract.

¹⁴¹ Public Procurement Law Article 146.

¹⁴² Public Procurement Law, Article 75.

In Montenegro data collection and data analysis are monitored through the reporting application in the portal, which enables tracking of planned and conducted procedures. Procurement records include procurement types and methods, contracts values and volume, processing time, suppliers, and bidders' name and origin.¹⁴³ They are maintained for most types of procurements for goods, works, and services by the PPA. This is due primarily to the fact that by legislation changes in 2017, which prescribe that it is not mandatory for small value procurement to publish procurement information. This caused a drop from 2017 to 2018 (around 17 percent) in publicly recorded information.¹⁴⁴

In North Macedonia the registry of public procurement procedure is kept in special books in the electronic form, as part of ESJN.¹⁴⁵ The functionality of electronic record of procedures – e-Archive in the ESJN has been active now. A separate record book is kept for public procurement procedures on the ESJN, thus public procurement documents are no longer printed and archived. This solution resolves the need of printing electronic documents and electronic signature that are not valid in printed form. This ensures greater security, integrity of the data and provides an audit trail on the manner of spending public funds and implementation of public procurement procedures.¹⁴⁶

In **Serbia**, the contracting authority is obliged to publish all relevant reports on the Public Procurement Portal. The contracting authorities shall publish public procurement plan and all amendments to the plan on Public Procurement Portal and their website within ten days since its adoption or amendment.¹⁴⁷

¹⁴³ Public Procurement Law, Articles 180-182.

¹⁴⁴ World Bank, (2020) *Public expenditure and financial accountability (PEFA) – Performance assessment report – Montenegro*, p. 90.

¹⁴⁵ PPL, Articles 128-129.

¹⁴⁶ World Bank, (2022) *Public expenditure and financial accountability (PEFA) – Performance assessment report – North Macedonia*, p. 95.

¹⁴⁷ Law on Public Procurement, Article 88.

Contracting authorities are no longer obliged to submit data on the execution of concluded public procurement contracts to the Public Procurement Office. As a result, this information will not be available on the Public Procurement Portal. The new Law on Public Procurement provides for significantly more possibilities of amending the contract without re-conducting the public procurement procedure. The Law on Public Procurement¹⁴⁸ under the certain conditions allows changes envisaged in the contract, changes in terms of additional goods, services or works, changes due to unforeseen circumstances, changes of contracting party, increase in scope of procurement and replacement of subcontractors. Despite the fact that the Law provides six grounds for amending the contract without conducting a new procedure, the contracting authority is obliged to publish a notice on amending the contract on the Public Procurement Portal only in case of changing the contract due to additional goods, services or works, or due to unforeseen circumstances.

Indicator 4

To prevent bias among decision makers, the national legislation should include obligation to the contracting authorities/entities to ensure that their representatives in a procedure have no conflict of interest.

In Bosnia and Herzegovina, disqualification due to conflict of interest is regulated by the Law.¹⁴⁹ Amendments of the Law from 2022 improved provision on conflict of interest. Prior to the amendments the Law on Public Procurement provided that, in the event that a request or tender that the contracting authority receives in the course of a public procurement procedure causes or may cause conflict of interest in line with the applicable regulations on conflict of interest in BiH, the contracting authority should have acted in line with the BiH regulations. The references that had been made in the 2014 PPL to the provisions of the regulations on conflict of interest at different levels of

¹⁴⁸ Law on Public Procurement, Articles 156-161.

¹⁴⁹ Law on Public Procurement, Article 52.

government was problematic, as BiH did not have laws that are mutually aligned and address conflict of interest in a uniform manner, the regulations on conflict of interest were numerous, complicated, inconsistent and inefficient, and the laws are not applied at some administrative levels, so the implementation of the mentioned provisions of the Law could not be ensured. To overcome mentioned shortcomings, the 2022 amendments removed that provision from the Law.

Furthermore, the PPL explicitly forbids concluding the contracts with an economic entity if the head of contracting authority or a member of the administrative or supervisory board of that contracting authority simultaneously performs management tasks in that economic entity or is the owner of a business share. The share was set in 2014 at 20%. The threshold was significantly reduced by 2022 legislative amendments from 20% to 0.5%. Furthermore, provisions are extended to include also family members.

In addition, 2022 novelty is introduction of the nullity of the contract concluded in a conflict-of-interest situation, which represents an international standard and an integral segment in handling conflict of interest.

Bidders are not eligible if they have directly or indirectly participated in technical consultations in the preparation of the public procurement.

In addition, the Law¹⁵⁰ envisages exemption due to conflict of interest of the members of the Procurement Review Body (PRB) or another person involved in proceedings. Conflict of interest exist if these persons are in a business relationship, in a direct or indirect family relationship, in a marital or extramarital union or in-law relationship up to and including with the third degree; or if these persons were in the employment relation with the bidder or contracting authority.

¹⁵⁰ Law on Public Procurement, Article 114.

In **Montenegro**, conflict of interest rules is comprehensively regulated by the new Public Procurement Law,¹⁵¹ including making distinction between conflict of interest between contracting authority and economic operator and conflict of interest due to previous activities of economic operator and contracting authority.

A conflict of interest between the contracting authority and the economic operator exists if a representative of contracting authority has a direct or indirect financial, economic or other personal interest that may affect its impartiality and independence in conducting the public procurement procedure, especially if participates in the management of an economic entity or has an ownership share or shares in the amount of more than 2.5% of the economic operator. In addition, the conflict of interest exists if authorized person of economic operator has an ownership share or shares of the contracting party in the amount exceeding 2.5% of the value of the capital, or is with the representative of the ordering party a marital or extramarital partner, regardless of whether the community still exists, a relative in the direct line or in the collateral line up to the fourth degree, in-law up to the second degree or as an adoptive parent or adoptee.

A conflict of interest due to previous activities of economic operator and contracting authority exists if economic operator is a person who has prepared or participated in the preparation of technical documentation or audited technical documentation and an economic entity whose authorized person or expert has participated in the preparation or revision of technical documentation, which is used to prepare technical specifications in tender documentation and person who has participated in technical consultations or providing technical advice to the contracting authority.

¹⁵¹ Law on Public Procurement, Articles 40-43.

In **North Macedonia** the new Law addressed the conflict of interest in a more detailed manner, enhancing the mechanisms related to detecting and combating cases of conflicts of interest, favouritism, and corruption.¹⁵²

The members and chairperson of the Public Procurement Commission, their deputies and the responsible person in the institution must sign statements declaring the non-existence of conflicts of interest, and in the event of any conflict, they must withdraw from the decision-making process and new persons are appointed. A novelty is that the members and the president of the State Commission for Public Procurement Appeals may be exempted from working on a specific case. The employment and engagement of, business cooperation with and acquisition of ownership by a person from the contracting authority in a tender-awarded company is prohibited, if the person has participated in the procurement procedure with that company and if its share is greater than 5% of the value of all contracts of the contracting authority. Illegal influence by the responsible individuals and management over those responsible for public procurement in the institutions is also prohibited. Those participating in the preparation of the tender documentation must not be bidders in the public procurement procedure.

The Law further refers to application of the Law on the Prevention of Conflicts of Interest to resolve conflicts in the public procurement procedures. That law, which in the meantime has been annexed to the Law on the Prevention of Corruption and Conflicts of Interest, defines a conflict of interest as a situation in which an official has a private interest that affects or may affect the impartial performance of his public powers or official duties.

The issue of conflicts of interest in public procurement is left to be managed at the level of the contracting authorities, which in turn do not have established internal procedures, nor do they have the practice of resolving issues related to this. On the other hand, the State Commission for the

¹⁵² Law on Public Procurement, Article 169.

Prevention of Corruption, which is responsible for dealing with cases of conflict of interest, acts only on reports received and on its own initiative when the issue receives public attention.

In Serbia conflicts of interest is regulated by Article 50 of the Law on Public Procurement. According the Law, the conflict of interest between the contracting authority and the business entity includes situations in which the contracting authority's representatives, who are involved in the implementation of the procedure or who may influence the outcome of the procedure (i.e. the contracting authority's managers, founders' representatives, consultants, etc.) have a direct or an indirect financial, economic or other private interest, which could raise into question their impartiality and independence during the proceedings. Some situations are further cited as examples, and not as the only possible forms of conflict of interest (if the client's representative participates in the management of the business entity or the client's representative has more than 1% shares of the business entity). The Law defines who is considered a representative of the contracting authority (and related parties) in the context of a conflict of interest, and who is considered a business entity.

The Article 50 of the Law clearly stipulates that the representative of the contracting authority (not only members of the public procurement commission) is obliged to be exempted from the public procurement procedure if at any stage of the procedure the conflict of interest becomes known to him/her.

Also, the Law prescribes that, after opening of the bids or applications, the representative of the contracting authority (member of the public procurement commission, the person conducting the public procurement procedure) signs a statement on the existence or non-existence of a conflict of interest.

Article 111 of the Law, which regulates the grounds for exclusion of an economic entity from the public procurement procedure, states that the contracting authority is obliged to exclude the economic entity if there is a conflict of interest in accordance with the Law, which cannot be eliminated by other measures (paragraph 1, item 4).

In accordance with Article 95 of the Law on the Prevention of Corruption,¹⁵³ public authorities and organisations are required to adopt integrity plans, indicating the measures and activities envisaged to mitigate the risks of corruption, conflicts of interest and other ethically and professionally unacceptable behaviour. The employees of public authorities may take part in training on integrity, organised free of charge by the Agency for Prevention of Corruption. The adequate mechanisms for ensuring integrity are adopted, but still, there is room for improvement.¹⁵⁴

Indicator 5

To increase transparency of the procedure and cost-effectiveness the national legislation should provide use of modern procurement techniques and methods (electronic public procurement).

In **Bosnia and Herzegovina**, the public procurement strategy plans for a gradual implementation of electronic procurement. The Public Procurement Portal (PPP) was launched in November 2014, to merge functionalities that had been introduced earlier: “Go-Procure” for publication of procurement notices, “WisPPA” for reporting by contracting authorities, and the Registry of contracting authorities and bidders.¹⁵⁵ E-submission (for submission of tenders by electronic means) and e-assessment (electronic evaluation of tenders) are also available. New version of the application is operational since April 2020.

¹⁵³ Law on the Prevention of Corruption in Serbia, Official Gazette, No. 35/2019 and 88/2019.

¹⁵⁴ Balkan Barometer (2021), *Business Opinion*, Regional Cooperation Council, Figure 113. Some 18% of respondents answered “frequently” or “always” “to obtain a government contract” in response to the question: “Thinking now of unofficial payments/gifts that companies like yours would make in a given year, could you please tell me how often would they make payments/gifts for the following purposes?”

¹⁵⁵ See: <https://www.javnabavke.gov.ba/bs-Latn-BA/eProcurement> and <https://www.ejn.gov.ba/>

The PPP is owned and managed by the PPA, and is financed from the state budget and from donations. Its use is free for charge for all users.

In **Montenegro**, the electronic system of public procurement (ESJN) was launched on January 1, 2021.¹⁵⁶ Ministry of finance and social policy is responsible for maintaining the ESJN. To ensure proper functioning several bylaws were adopted and guides for users were prepared.¹⁵⁷ One of the main improvements introduced by 2019 Law is that simplified public procurement (below the lowest PPL threshold) now needs to be published in the e-procurement system, which represents a significant improvement in the transparency of the overall public procurement system.¹⁵⁸ During 2020, 101,852 simplified public procurement contracts were awarded, constituting 13.7% of the total public procurement spending for that period.¹⁵⁹ The obligation of the contracting authorities to publish all of the simplified public procurement procedures in the electronic procurement system will facilitate an increase in competition among the tenderers.

In **North Macedonia**, the Public Procurement Bureau (PPB) fully regulates electronic communication and exchange of information between contracting authorities and economic operators.¹⁶⁰ The PPB manages and operates the Electronic Public Procurement System (ESPP). The ESPP facilitates to use modern procurement techniques and methods for the award of contract both above and below the EU thresholds, such as downloading all tender documents, e-submission, e-evaluation and e-auctions. The ESPP covers the entire tendering process from publication of tender notices, to bid submission, evaluation, and contract award.

¹⁵⁶ See: <http://www.ujn.gov.me/2020/03/obavjestenje-za-narucioca-registracija-na-esjn-2/>

¹⁵⁷ See: <http://www.ujn.gov.me/wp-content/uploads/2021/01/Pravilnik-o-nacinu-rada-i-koriscenja-elektronskog-sistema-javnih-nabavki.pdf>

¹⁵⁸ Article 4(1) of the Rulebook on the Manner of Implementing Simple Procurement.

¹⁵⁹ Directorate for Public Procurement Policy Annual Report for 2020, p. 33.

¹⁶⁰ See: https://www.bjn.gov.mk/wp-content/uploads/2018/12/Priracnik-EO_Dekemvri_2017_EN.pdf

All procurement notices and tender documents must be published on the ESPP, including those for low-value contracts. The ESPP can be used to fill in and publish: the contract notices; notices for simplified competitive procedures; contract award notices; records on simplified competitive procedures; cancellation of procedures; carrying out contract award procedures using electronic means (using electronic devices for data processing and storage); as well as conducting electronic auctions and submission of the final price.

In addition, the ESPP provides the e-Appeals function as an efficient and transparent system for the submission and conduct of appeals. The decisions of the SAC are published promptly on both the SAC website and the ESPP e-Appeals pages. The search facilities on the ESPP e-Appeals pages allow interested parties to search decisions using specific fields, but there is no free text search facility, which restricts the nature of the analysis available.

In Serbia the Law on Public Procurement provides for a Public Procurement Portal,¹⁶¹ which is defined as a single information system dedicated to public procurement. The new Portal, compliant with the new Law on Public Procurement, was launched on 1 July 2020 when the application of the new Law has started.

The Office for IT and E-Government, in charge of the electronic administration system's design, harmonization, development and functioning, is obligated to provide the technical conditions for its application. In particular, it is tasked with maintaining and upgrading the Public Procurement Portal and with ensuring technical support, availability and security for its users.

The electronic procurement is a functionality of the new Public Procurement Portal, with the system enabling the preparation and submission of electronic tenders; the replacement, completion and recall of tenders; the opening of tenders; and communication between contracting authorities and bidders

¹⁶¹ Law on Public Procurement, Article 183.

after the opening of tenders (for tender clarifications, the correction of computational errors, justification for abnormally low tenders, the submission of evidence to prove fulfilment of qualification criteria, etc.).

The Public Procurement Portal is comprehensive, designed to support the entire public procurement process by enabling electronic communication among all parties involved at all stages of the procedure. Its five components are: 1) public procurement planning (activities related to contracting authorities' annual procurement plans: their preparation and publication, modifications and amendments, searches by economic operators); 2) public procurement announcements (publication of notices and procurement documentation: uploading by contracting authorities and downloading by economic operators); 3) electronic tender submissions and communications between contracting authorities and bidders; 4) electronic techniques and instruments (awarding contracts within framework agreements, establishing and operating dynamic purchasing systems, using electronic catalogues); 5) legal protection (the new portal enables the electronic submission of complaints to the Republic Commission for protection of Rights in Public Procurement Procedures (RCPRPP) – although submission by the traditional means is still possible – as well as against contracting authorities' decisions on appeal resolutions).

The e-tender module contains information about bidders, prices and other elements, which are evaluated in accordance with contract evaluation criteria. It also contains documents such as a declaration of fulfilment of qualification criteria established by the contracting authority; technical solutions; descriptions of elements evaluated under the contract award criteria; plans; tender securities; contact models; a cost structure form; and a tender-preparation cost form.

The PPO and the Office for IT and E-Government have also prepared a Manual for Public Procurement Portal use. Users are cautioned that they must use the Portal in accordance with the provisions of the Law and the Manual, and they are solely responsible for the veracity and accuracy of data entered.

SUMMARY ASSESSMENT FOR THE STANDARD

According to the regulations of all four countries that were the subject of the analysis, the transparency standard can be considered to be mostly incorporated in the national legislation. However, it seems that the procedure of publishing could be improved in certain countries.

The legislation of all countries prescribe obligation for contracting authority/entity to inform each candidate or tenderer of decision reached including the grounds for any decision. Each country took specific approach towards methods of informing, but this indicator is fully in line with international standards. There are differences mainly in terms of notification deadlines and the manner of submitting notifications. The regulations of Montenegro and the Republic of North Macedonia contain provisions emphasizing the protection of data that is a business secret, which is in line with the EU Directive. Having in mind that standard of transparency might be in conflict with competition standard through revealing of business secret.

According to the legislation of all countries, the contracting authority/entity is obliged to prepare and store individual reports on the procedure, including key information and to make the reports publicly available. The assessed national legislation contains provisions which obliges contracting authorities/entities to ensure that their representatives in a procedure have no conflict of interest. Although, BiH legislation has been recently amended to mitigate gaps in the rules on conflict of interest, there is still room for improvement. In line with international standards, legislation of all countries provides use of modern procurement techniques and methods (electronic public procurement) which increase transparency and access to information.

Overall, the regulatory frameworks of all four countries show high alignment with the standard. The legislations of BiH have some departures from the standard.

No	Indicator	Max	BIH ¹⁶²			NMK	MNE	SRB
			BIH	FBIH	RS			
1	Publication of contract notices and contract award notices is required by law, either in the national official journal or on a national website	0-3	2	N/A	N/A	3	3	3
2	The contracting authority/entity is obliged by law to inform each candidate or tenderer of decisions reached, including the grounds for any decision	0-3	3	N/A	N/A	3	3	3
3	The contracting authority/entity is obliged by law to prepare and store individual reports on the procedure, including key information, and to make the reports publicly available	0-3	3	N/A	N/A	3	3	3
4	The law obliges contracting authorities/entities to ensure that their representatives in a procedure have no conflict of interest	0-3	2	N/A	N/A	3	3	2
5	The law provides use of modern procurement techniques and methods (electronic public procurement)	0-3	3	N/A	N/A	3	3	3
Total points			13			15	15	14
Average points			2.6			3	3	2.8
Standard value			0-5	5		5	5	5

¹⁶² Public procurement legislation is regulated only on the state level so there is no assessment for the level of entities.

Standard 2. Compliance of public procurement legislation with equal access and non-discrimination standards

One of the cornerstones of a public procurement system is the principle of equal treatment for all economic operators which have the capacity and resources to provide goods or perform services for the public administration, regardless of their origin or organisational form. This implies that legislation should ensure that contracting authorities cannot take into account the different abilities of individual economic operators but will judge them purely on the results of their efforts, notably on the basis of the tenders they submit. Legislative framework should provide for an objective assessment of tender prices and tender qualities and ignores any considerations that are not relevant.

The purpose of the standard is to assess the extent to which public procurement legislation comply with basic principles of equal treatment and non-discrimination.

Indicator 1

The national legislation should include provision to ensure that description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trademarks, patents, types or a specific origin or production, unless such a reference is justified by the subject matter of the contract and accompanied by the words “or equivalent”.

In Bosnia and Herzegovina, the technical specification according to the Law¹⁶³ must give all tenderers equal and non-discriminatory access to tender. The technical specification may not refer to a specific manufacturer, origin or special procedure, trademarks, patents, types or specific origin. In case that procurement cannot be described with sufficient precision and

¹⁶³ Law on Public Procurement, Article 54.

comprehensibility, it is allowed to include such remarks, but without exception they must be marked with the addition “or equivalent”.

In Montenegro, the PPL¹⁶⁴ requires that the technical specification or technical characteristics, cannot include description and essential characteristics of the subject of procurement that are adapted to a certain economic entity or a certain subject. If it is not possible to accurately and comprehensively describe the subject of procurement, elements such as trademarks, patent, type or manufacturer may be specified, provided that such statement is accompanied with the words “or equivalent”.

In North Macedonia, the Law¹⁶⁵ regulates content of the technical specification to ensure its neutrality and comparability of the bids. The technical specification must provide equal access to public procurement for all economic operators. The law is aligned with the standards not to allow defining technical specification that refer to a specific production, performance, process or trademark, patent, type of specific origin of goods. Only exception is accepted in the case where it is not possible to give a sufficiently precise description of the subject of the contract and should be accompanied by the words “or equivalent”.

In Serbia, Article 98 of the Law specifically stated that technical specifications must provide equal access to all economic operators and must not unduly restrict competition in the public procurement procedure.

Technical specifications may not refer to a specific brand or source or to a specific process that characterizes the products or services provided by a particular economic operator or to trademarks, patents, types or certain origins or production, which would result in favouring or eliminating certain economic operators or certain products, unless the subject of the contract justifies it. In case that procurement cannot be described with sufficient

¹⁶⁴ Law on Public Procurement, Article 88.

¹⁶⁵ Law on Public Procurement, Article 82.

precision and comprehensibility, it is allowed to include such remarks, but without exception they must be marked with the addition “or equivalent”.¹⁶⁶

Indicator 2

The national legislation should in line with the international standards guarantee equal access for economic operators.

Most of the assessed countries provide for equal treatment of foreign companies in public procurement: economic operators enjoy free access to public procurement procedures regardless of the country of their origin, while domestic suppliers are not given privileged treatment. However, Bosnia and Herzegovina outline “domestic preferences” in their public procurement provisions, i.e., preferential treatment for offers submitted by domestic economic operators.

In **Bosnia and Herzegovina**, the Law makes it mandatory to apply preferences to domestic bidders via a special implementing regulation adopted by the Council of Ministers. Accordingly, prices given in bids submitted by domestic bidders are calculated with an added preference factor: 10% for procurement procedures in the period 2017-2018 and 5% until the end of 2019.¹⁶⁷ Only domestic bidders – understood as natural or legal persons resident in Bosnia and Herzegovina, and established in accordance with the economy’s binding regulations – have access to this preferential treatment. However, according to the 2013 Stabilisation and Association Agreement (SAA) between Bosnia and Herzegovina and the European Union (EU), companies from the EU not established in Bosnia and Herzegovina should have equal access to the domestic public procurement market no later than five years after the entry into force of the agreement (Article 74, No. 4) (EC, 2015[10]).

The application of domestic preferences was supposed to be phased out on 1 June 2020, but in response to the COVID-19 pandemic the Council of Ministers

¹⁶⁶ Law on Public Procurement, Article 100.

¹⁶⁷ Council of Ministers extended its decision on 29 May 2020 until 1 June 2021.

of BiH decided to temporarily extend preferential domestic treatment of 30% until 1 June 2021.¹⁶⁸ Preferential treatment is not applied for tenders submitted by bidders from Central European Free Trade Agreement (CEFTA) countries, while there is no such exemption for economic operators from the EU.¹⁶⁹ The application of domestic preferences is not in line with the fundamental principle of equal treatment, and it leads to discrimination against EU companies in BiH.

In Montenegro the Public Procurement Law¹⁷⁰ has explicit provisions to ensure observation of the basic principles of good public procurement: cost-effectiveness and efficiency in competitions; transparency; non-discrimination; and bidder equality.

In North Macedonia the Public Procurement Law¹⁷¹ refers to the principle of non-discrimination and equal treatment of economic operators. The contracting authority is obliged by the Law to ensure equal treatment of the economic operators at all stages of the public procurement procedure and in relation to all elements of the bid, taking into account the mutual recognition and proportionality of the requirements related to the subject of the procurement.

In Serbia, Article 7 of the Law on Public Procurement regulate principle of the competition and defines that contracting authority may not prevent any economic entity from participating in the public procurement procedure by using discriminatory criteria for qualitative selection of economic entity, technical specifications and criteria for contract award.

The legislation provides for equal treatment of foreign companies in public procurement: economic operators enjoy free access to public procurement

¹⁶⁸ Decision on Obligatory Application of Domestic Preferences of 29 May 2020, Official Gazette of BiH No. 34/2020.

¹⁶⁹ *Ibid.* Article 2.

¹⁷⁰ Law on Public Procurement, Article 10.

¹⁷¹ Law on Public Procurement, Article 7.

procedures regardless of the country of their origin, while domestic suppliers are not given privileged treatment.

Indicator 3

The national legislation should guarantee appropriate time limits for expression of interest and for submission of offers to enable economic operators to prepare necessary documentation.

In Bosnia and Herzegovina, the Law¹⁷² establishes adequate timeline for the preparation and submission of tenders and it clearly spells out such timelines for each procurement method. The longest time is required for the open procedure, where minimum deadline for receipt of bids is 45 days from the day of sending the publication of the procurement notice on the public procurement portal. The shortest time is 15 days for the restricted procedure, a negotiated procedure with publication of a notice and a competitive dialogue. As an exception to the above provision, the Law¹⁷³ describes special rules for setting a time limit for the receipt of tenders for a public contract covered by an Indicative Notice which reduces the time limits considerably, from 45 days to 25 days.

In Montenegro, the Law does not established timeline for preparation and submission of tender. Instead, the Law includes provision on method of setting deadlines.¹⁷⁴ According to the Law the procuring entity is obliged to determine the deadlines for submitting the application for qualification depending on the complexity of the subject of procurement and the time required for the preparation of the application in accordance with the Law. The Law includes possibility of shortening deadlines for submitting application for qualification and bids only in the cases provided by the Law on public procurement.

¹⁷² Law on Public Procurement, Article 40.

¹⁷³ Law on Public Procurement, Article 41.

¹⁷⁴ Law on Public Procurement, Article 115.

In North Macedonia the Public Procurement Law determines that timeline for preparation and submission of the tender, a specifically indicate timeline for each procurement method.¹⁷⁵

In Serbia, the Law on Public Procurement established timeline for the preparation and submission of tenders and it clearly spells out timelines for each procurement method. However, the time limits are relatively short. The longest time is required for the open procedure, where the minimum deadline for receipt of bids is 35 days from the day of sending the publication of the procurement notice on the public procurement which value is equal or higher than European threshold.¹⁷⁶ The minimum deadline for receipt of bids for public procurement which value is lower than European threshold is 25 days from the day of sending the publication of the procurement notice.

The Law is setting two additional time limits which are very short: 15 days from the day of sending the publication of the procurement notice on the public procurement of works which value is lower than 30,000,000 RSD (approx. 250,000 EUR), and 10 days from the day of sending the publication of the procurement notice on the public procurement of goods and services which value is lower than 10,000,000 RSD (approx. 85,000 EUR).

As an exception to the above provision, the Law describes special rules for setting a time limit for the receipt of tenders which allows contracting authority to reduce time limits from 35 days to 15 days if an Indicative Notice was published. In addition, the time limits of 35 and 25 days could be reduced for 5 days (to 30 and 20 days respectively) if the tenders can be submitted electronically. Also, the reasons of urgency could be used for reduction of time limits for submission of bids from 35 and 25 days to 15 days.

Indicator 4

The national legislation establishes an adequate review mechanism to effectively guarantee compliance with the basic standards of non-discrimination.

¹⁷⁵ Law on Public Procurement, Articles 47-55.

¹⁷⁶ Law on Public Procurement, Article 52.

In Bosna and Herzegovina, the Law¹⁷⁷ envisages right of the bidder to appeal to PRB in case of non-compliance of tender documentation with the Public Procurement Law or bylaws, which has led to a violation of the basic principles of the Law, including non-discrimination.

In Montenegro, the Public Procurement Law¹⁷⁸ ensures right to appeal by the economic entity no later than 10 days before the day set for opening of application for qualification or bids. However, the Law does not explicitly listed discrimination as ground for review, but it could be interpreted as part of the significant violation of the procedure.¹⁷⁹

In North Macedonia, the Public Procurement Law establishes right to appeal in case of discrimination,¹⁸⁰ specifically in the case if tender documentation has led or could have led to discrimination of economic operator or restriction of market competition.

In Serbia, the Law¹⁸¹ envisages right of the bidder to submit request for protection of rights in the public procurement in case of non-compliance with the Law on Public Procurement which has led to a violation of the basic principles of the Law, including non-discrimination.

SUMMARY ASSESSMENT FOR THE STANDARD

The legislations of the four analysed countries generally prescribe and guarantee the equal access and non-discrimination rules. The notable exception is Bosnia and Herzegovina, which includes preference to domestic companies.

The legislations of the analysed countries are broadly in line with relevant international standards with regards to time limits for expression of interest and submission of offers, which should provide sufficient time for preparation of both.

¹⁷⁷ Law on Public Procurement, Article 103.

¹⁷⁸ Law on Public Procurement, Article 186.

¹⁷⁹ Law on Public Procurement, Article 195.

¹⁸⁰ Law on Public Procurement, Article 141.

¹⁸¹ Law on Public Procurement, Article 204.

In all four countries, there are rules for appeal and review mechanism in case of violation of non-discrimination rules.

Overall, the legislation of Montenegro, North Macedonia and Serbia are mostly in line with the standards, while the regulatory framework of Bosnia and Herzegovina show some departures from the standard due to the legally protected preference of domestic companies.

No	Indicator	Max	BIH			MKD	MNE	SRB
			BIH	FBIH	RS			
1	The law ensures that description of the characteristics required of a product or service should not refer to a specific make or source, or a particular process, or to trademarks, patents, types or a specific origin or production, unless such a reference is justified by the subject matter of the contract and accompanied by the words "or equivalent"	0-3	3	N/A	N/A	3	3	3
2	Equal access for economic operators is guaranteed by law	0-3	1	N/A	N/A	3	3	3
3	Appropriate time limits for expression of interest and for submission of offers is guarantee by law	0-3	3	N/A	N/A	3	3	2
4	An adequate review mechanism is established to effectively guarantee compliance with the basic standards of non-discrimination	0-3	3	N/A	N/A	3	3	3
Total points			10			12	12	11
Average points			2.5			3	3	2.75
Standard value			0-5	4		5	5	5

Standard 3. Compliance of public procurement legislation with competition rules

Keeping competition fair or maintaining a level playing field is a key concern for achieving efficient and economic procurement results. Procurement legislation should seek to prevent any distortions or restrictions of competition and prohibit any attempt to prevent economic operators from being able to tender. As a result, the legislation should prohibit barriers to the competition such as restrictions and exemptions from use of open or competitive procedures.

The purpose of the standard is to assess whether the national legislation is in line with international standards and incorporates competition rules.

Indicator 1

The national legislation includes obligation to the contracting authority/entity to use competitive procedures (launched by a notice).

In all countries covered by the assessment, the open procedure is obliged by law. As a control mechanism public procurement offices in North Macedonia still verify and approve selection by contracting authorities of the negotiated procedure without previous publication of a contract notice.

In **Bosnia and Herzegovina**, according to the Public Procurement Law,¹⁸² the contracting authority is obliged to apply open or restricted procedure for the award of public procurement contracts, as basic and regular procedures. Negotiated procedure with or without publication of a notice, as well as competitive dialogue may be applied as an exception, only if the conditions set out in this Law are met.

In **Montenegro**, the Ministry of Finance (MoF) issues opinion to the procuring entities on the application of the negotiated procedures both with and without

¹⁸² Law on Public Procurement, Article 19.

prior publication.¹⁸³ The MoF must decide on the request of the contracting authority, without conducting the examination procedure, within eight days of receipt of the duly submitted request. The approval is valid until the end of the fiscal or financial year in which the request was submitted.

In **North Macedonia**,¹⁸⁴ the contracting authority may initiate the negotiated procedure without prior publication of a contract notice only upon receiving a prior opinion from the Public Procurement Bureau (PPB), with the exception of cases involving a direct threat to human safety, life and health. The PPB must issue the opinion within ten working days of the day of receipt of the request, or five working days in cases where the negotiated procedure is justified by extreme urgency. If the PPB fails to issue the opinion within the prescribed deadline, the contracting authority may initiate a procedure without the opinion.

In **Serbia**, according to the Law on Public Procurement,¹⁸⁵ the contracting authority is obliged to apply open or restricted procedure for the award of public procurement contracts. Negotiated procedure without publication of a notice, as well as competitive dialogue with or without negotiation, and partnership for innovations may be applied if the conditions set out in this Law are met.

However, the threshold for the application of public procurement procedure is set relatively high. In the new Law on Public Procurement the threshold for public procurement of goods and services is set at 1,000,000 RSD (approx. 8,500 EUR) and for public procurement of works at 3,000,000 RSD (approx. 25,000 EUR).¹⁸⁶

¹⁸³ Law on Public Procurement, Article 44.

¹⁸⁴ Law on Public Procurement, Article 45 (1), indent 5.

¹⁸⁵ Law on Public Procurement, Article 51.

¹⁸⁶ Law on Public Procurement, Article 27.

In addition, for public procurement of social and other special services defined in the Article 75 of the Law (i.e., services of hotels, restaurants, legal services, services of unions, association of youth, political organizations) the threshold is set at 15,000,000 RSD (approx. 125,000 EUR).

Indicator 2

The national law doesn't contain unjustified exceptions to the application of the open public procurement.

In **Bosnia and Herzegovina** contracts which are exempted from the scope of the Public Procurement Law¹⁸⁷ include contracts “for natural and legal monopolies that may include procurement of water, electricity, gas, heating and other services, until the relevant market is open for competition”. Undoubtedly, it would be impractical to require the application of competitive procedures in these situations (when for technical reasons there is only one economic operator capable of fulfilling a particular contract). However, the EU legislation, instead of exempting such contracts, offers another solution, which is the application of the negotiated procedure without prior publication.

In **Montenegro**, contracts which are exempted from the scope of the Public Procurement Law¹⁸⁸ include contracts concluded in line with international agreement, specific objects, for bidding postal services, electronic communication, sector. In addition, the Law excludes purchase and procuring the water, electricity, gas, heating and other services, until the relevant market is open for competition.

In **North Macedonia** the Public Procurement Law does not have specific exclusions. The Law covers the classic and utility sectors, and regulates the award of contracts both above and below the EU threshold.

¹⁸⁷ Law on Public Procurement, Article 10.

¹⁸⁸ Law on Public Procurement, Article 13-23.

In **Serbia** contracts which are exempted from the scope of the public procurement include contracts concluded in line with international agreement, services of arbitration, certain legal services, financial services, for bidding TV and radio time, railway and metro transport services.¹⁸⁹

In addition, the National Assembly adopted in February 2020 “*lex specialis*” that suspends application of Law on Public Procurement. The Law on special procedures for the implementation of projects for construction and reconstruction of line infrastructure facilities of special importance for Republic of Serbia¹⁹⁰ should speed up construction of infrastructure projects such as highways and subways, and which should shorten the time for resolving property relations. The Law applies to projects of construction and reconstruction of public transport line infrastructure and the Government decides which projects are of special importance for Republic of Serbia.

Under the Law on Special Procedures, procurement necessary for project implementation shall be in principle conducted based on Public Procurement Law, but with some major changes and exceptions – such as lack of prior notices, manner of proving mandatory and additional conditions for participation in the public procurement procedure, deadlines for submission of bids and a possibility to conclude the contract before the deadline for submitting the request for protection of rights to the Republic Commission for the Protection of Rights in Public Procurement Procedures (RCPRPP) (no standstill period). Moreover, in cases of projects carried out based on international agreements and bilateral agreements, the procedure for selecting the contractor, the provider of design and control of planning and technical documentation or the provider of project management or part of the project management, as well as expert supervision of the execution of works and technical inspections are to be governed by the rules defined in those

¹⁸⁹ Law on Public Procurement, Articles 11-12.

¹⁹⁰ Law on special procedures for the implementation of projects for construction and reconstruction of line infrastructure facilities of special importance for Republic of Serbia , Official Gazette, No. 9/2020.

agreements. Bearing in mind all the above-mentioned derogations, the application of the Public Procurement Law to these projects is highly limited. The lack of transparency in procurement based on special Law and bilateral agreements is perceived as the major obstacle in procurement development.

In addition, the projects which estimated value is higher than 50 million euro and which will be implemented in the form of public-private partnership will be considered as projects of special importance and the Law on Public Procurement will not be applied.

Indicator 3

The law ensures compliance with the principles of competition even in procedures in which the Law on Public Procurement doesn't apply.

In Bosnia and Herzegovina, the Public Procurement Law¹⁹¹ specifies that contracting authority will prepare and publish a contract notice for open procedure, restricted procedure and negotiated procedure with prior procurement notice. The publication is not needed for the negotiated procedure without prior publication, however, after the selection of the bid, the contracting authority may publish a voluntary *ex ante* transparency notice explaining the fulfilment of the conditions set out in the Public Procurement Law that justify the application of the negotiated procedure without publication of a notice and expressing its intention to conclude a contract with the most successful bidder.¹⁹²

In Montenegro, the Public Procurement Law envisages that the contracting authority prepares and publishes a contract notice.¹⁹³ The procuring entity is obliged to publish the tender documentation, except for the tender documentation for conducting the negotiation procedure without prior publication of the invitation to tender.

¹⁹¹ Law on Public Procurement, Articles 25-27.

¹⁹² Law on Public Procurement, Article 28.

¹⁹³ Law on Public Procurement, Article 93.

In North Macedonia, the Public Procurement Law¹⁹⁴ envisages that contracting authority is publishing an announcement also in the restricted procedure, the innovation partnership, the competitive negotiate procedure and the negotiate procedure. In addition, the Law introduces obligation for the contracting authority to invite the economic operators that have expressed interest to confirm their interest in case that contracting authority for public procurement from the sectoral activities uses periodic indicative notification as a substitute for an announcement.¹⁹⁵

In Serbia, the Law on Public Procurement specifies that contracting authority will prepare and publish a contract notice for open procedure,¹⁹⁶ for the first phase of restricted procedure,¹⁹⁷ competitive procedure with negotiations,¹⁹⁸ competitive dialogue,¹⁹⁹ partnership for innovations,²⁰⁰ and negotiated procedure with prior procurement notice.²⁰¹ The publication is not needed for the negotiated procedure without prior publication, however, the contracting authority is obliged to publish a notice that justify the application of the negotiated procedure without publication of a notice and to submit to Public Procurement Office reasoning and all necessary documentation.²⁰²

Indicator 4

The national law doesn't contain unjustified exceptions to the application of the open public procurement regarding public procurement procedures in the field of defence and security.

¹⁹⁴ Law on Public Procurement, Article 63.

¹⁹⁵ Law on Public Procurement, Article 73.

¹⁹⁶ Law on Public Procurement, Article 52.

¹⁹⁷ Law on Public Procurement, Article 53.

¹⁹⁸ Law on Public Procurement, Article 55.

¹⁹⁹ Law on Public Procurement, Article 57.

²⁰⁰ Law on Public Procurement, Article 59.

²⁰¹ Law on Public Procurement, Article 63.

²⁰² Law on Public Procurement, Article 62.

In Bosnia and Herzegovina, the Public Procurement Law also covers defence and security procurement contracts as defined in the EU Defence and Security Directive 2009/81. The Public Procurement Law requires that defence procurement should be regulated by special provisions adopted by the Council of Ministers. Relevant provisions were adopted at the end of February 2015.²⁰³

In Montenegro procurement in the area of defence and security is covered by the Public Procurement Law,²⁰⁴ but details concerning relevant contract procedures are defined in the Decree adopted by the Government in July 2020.²⁰⁵

In North Macedonia there is also separate legislation for procurement in the area of defence and security. The North Macedonia adopted special Law on 27 August 2019²⁰⁶ to transpose the provisions of EU Defence and Security Directive 2009/81.

In Serbia, the Law on Public Procurement also covers defence and security procurement.²⁰⁷ However, the details concerning this type of procurement are regulated by the Government Decision on Procurement in the Field of Defence and Security.²⁰⁸

The contracting authority is not obliged to apply provisions of the Law on Public Procurement to: the award of public procurement contracts and design competitions in the field of defence and security to which special procurement rules apply in line with international agreement relating to the deployment of forces and concerning the activities of the Serbia, EU member state or a third country; in which the application of the provisions of the Law would oblige

²⁰³ Official Gazette of BiH No. 60/15.

²⁰⁴ PPL, Article 174 – 177.

²⁰⁵ Official Gazette No. 76/20. See: <https://ujn.gov.me/podzakonska-regulativa-zakona-o-javnim-nabavkama-sluzbeni-list-crne-gore-br-074-19/>

²⁰⁶ Official Gazette No. 180/19.

²⁰⁷ Article 164, Law on Public Procurement.

²⁰⁸ Official Gazette No. 93/20.

Serbia to disclose information which represent essential interests of Serbia's security; for the needs of intelligence activities; within the framework of cooperation programs based on research and development of new project jointly implemented by Serbia and EU member state; concluded in a third country when forces are deployed outside the territory of Serbia and EU; concluded by Serbia with state, regional and local self-government bodies of other states and relate to procurement of military equipment or security-sensitive equipment, works and services directly related to such equipment or works and services exclusively for military purposes or security-sensitive works and security-sensitive services.

The Republic of Serbia is obliged to inform the European Commission of all international agreement and other acts that relates to deployment of forces.

SUMMARY ASSESSMENT FOR THE STANDARD

The legislation of all countries is mostly in line with international standards regarding the obligation of the contracting authority/entity to use competitive procedures. However, there are discrepancies in relation to unjustified exceptions to the application of the open public procurement. Serbia adopted special Law on special procedures for the implementation of projects for construction and reconstruction of line infrastructure facilities of special importance for Republic of Serbia, which highly limited application of public procurement standards and procedures.

Regarding the request that legislation must ensure compliance with the principles of competition even in procedures in which the Law on Public Procurement doesn't apply legislation of Bosnia and Herzegovina, the Republic of North Macedonia and Montenegro mostly is not in line with above-mentioned international standard.

Overall, the legislation of North Macedonia is mostly aligned with international standard, while legislation of Bosnia and Herzegovina, Serbia and Montenegro show some departures from standard.

No	Indicator	Max	BIH			MKD	MNE	SRB
			BIH	FBIH	RS			
1	The contracting authority/entity is obliged by law to use competitive procedures (launched by a notice)	0-3	3	N/A	N/A	3	3	3
2	The law doesn't contain unjustified exceptions to the application of the open public procurement	0-3	2	N/A	N/A	2	2	1
3	The law ensures compliance with the principles of competition even in procedures in which the Law on Public Procurement doesn't apply	0-3	2	N/A	N/A	2	2	2
4	The law doesn't contain unjustified exceptions to the application of the open public procurement regarding public procurement procedures in the field of defence and security	0-3	3	N/A	N/A	3	3	2
Total points			10			10	10	8
Average points			2.5			2.5	2.5	2
Standard value			0-5	4		4	4	3.5

Standard 4. Right to challenge public procurement decision is guaranteed in the legislation

A crucial mechanism for protecting the legality and integrity of the procurement process is guaranteeing access to review and to justice by organisations and businesses participating in public tenders. The main objective of a public procurement complaints review and remedies system is to enforce the practical application of public procurement legislation by ensuring that violations of the legislation and intentional or unintentional mistakes of contracting authorities can be corrected. A well-functioning procurement review and remedies system is in the interest of all stakeholders – economic operators, contracting authorities as well as the general public.

Key aspects of an effective resource system are timely access to legal remedy, independent review, efficient and timely resolution of complaints and adequate remedies, including judicial remedies.

Purpose of the standards is to assess compliance of the national regulatory framework in relation to the right to challenge public procurement decision with international standards.

Indicator 1

The national legislation should ensure to all economic operators having or having had an interest in obtaining a public procurement contract have the legal right to challenge decisions taken by contracting authorities/entities

In Bosnia and Herzegovina, the Public Procurement Law²⁰⁹ empowers all economic operators that have or had an interest in the award of a public procurement contract and which makes it probable that the damage caused by contracting authority's action was or could have been caused in the specific

²⁰⁹ Law on Public Procurement, Article 97.

procurement procedure by the contracting authority, to challenge decision taken by contracting authorities.

In Montenegro, the Public Procurement Law²¹⁰ authorizes all economic operators having an interest in obtaining a public procurement contract have legal right to challenge decision taken by contracting authorities. An economic operator is defined in the Public Procurement Law as an undertaking, entrepreneur, institution or other legal or natural person that offers the supply of products, the provision of services and/or the execution of works on the market.²¹¹ The 2019 Public Procurement Law provides a clear definition of the decisions of the contracting authorities against which a complaint can be lodged.²¹² Complaints should be submitted during the stages of the procedure when the contracting authorities take the challenged decisions. It is possible to file an e-complaint using the electronic procurement system.

However, according to the Public Procurement Law, economic operators submitting a complaint must simultaneously pay a fee amounting to 1% of the estimated value of the procurement, but no more than EUR 20,000.²¹³

The contracting authority is obliged to send the complaint and its own response to the CPRPPP, together with all documents related to the procedure, within eight days of receipt of the complaint. If the contracting authority determines that the complaint is founded, it may annul the challenged decision, correct the acts performed or terminate the entire procurement procedure. The contracting authority should inform the CPRPPP of its new decision. Decisions that the contracting authority takes may then be the subject of a new complaint to the CPRPPP.

²¹⁰ Law on Public Procurement, Article 186.

²¹¹ Law on Public Procurement, Article 4.

²¹² Law on Public Procurement, Article 185.

²¹³ Law on Public Procurement, Article 188.

The submission of a complaint results in the automatic suspension of the entire procurement procedure, until the CPRPPP has made its decision. According to the new Public Procurement Law, the CPRPPP's rulings must be adopted within a statutory time limit of 30 days from the time of receipt of the complete documentation.

The CPRPPP considers all infringements in the procedure that are mentioned in the complaint to be important, without checking whether those infringements have any influence on the rights of the complainant or the legality of the public procurement procedure.²¹⁴ Also, the Public Procurement Law requires the CPRPPP to consider 'serious violations' of the Law *ex officio*, regardless of whether or not they were indicated in the complaint. One additional problem is that when the CPRPPP finds infringements of the Law *ex officio*, it cancels the award decision or the tender documentation without checking the demands from the complaints. Under this approach, the contracting authorities do not know whether or not the demands in the complaint are justified, leaving them with the same or similar problems to handle in the following procurement procedures. A positive element is that the new Public Procurement Law has shortened the list of serious violations, meaning that the CPRPPP *ex officio* jurisdiction will be used less. Decisions that the CPRPPP takes are published promptly on its website.

The institutional set-up and mechanisms are in place for handling public procurement complaints. The role of the review body is defined by the PPL, which regulates protection of economic operators' rights in public procurement procedures.

In North Macedonia, the Public Procurement Law²¹⁵ envisages the right of any economic operator that has a legal interest in obtaining a public procurement contract or framework agreement and which has suffered or could suffer

²¹⁴ SIGMA/OECD (2021) Monitoring Report: Montenegro – Public Financial Management, p. 148.

²¹⁵ Law on Public Procurement, Article 138.

damage as a consequence of the possible violation of the Public Procurement Law, the Defence and Security Procurement Law may initiate a review procedure,²¹⁶ both against the contract award decision and at the earlier stages of the procurement procedure.²¹⁷

In addition, a review procedure may be initiated by the PPB and the state attorney.²¹⁸ The State Public Procurement Appeals Commission (SAC) is required to act *ex officio* with regard to major infringements, including major infringements listed in the Public Procurement Law.²¹⁹

The e-Appeals function of the ESPP became fully operational on 1 April 2019. As a general rule, appeals are submitted electronically using the e-Appeals function of the ESPP. The time limit for submitting appeals is ten days from the triggering event. In the case of simplified open procedure and small-value procurement, the time limit is five days. The e-Appeals system covers the full appeals process, including submission of the appeal and supporting documents, payment of the relevant fees, submission of supplemental information and publication of both the notification of the appeal and the decision of the SAC. The fees to be paid by an economic operator filing an appeal range between EUR 100 and EUR 200, plus an administrative fee of approximately EUR 4.²²⁰ The effect of an appeal is the automatic suspension of the conclusion of the public contract or framework agreement until the decision of the SAC becomes final.²²¹ Interim measures are available, as are the

²¹⁶ Law on Public Procurement, Article 138(1), Right of appeal; Defence and Security Procurement Law, Article 81(1), Competence of the State Commission; and Concessions and PPP Law, Article 54, Review procedures.

²¹⁷ Law on Public Procurement, Articles 144-150.

²¹⁸ Law on Public Procurement, Article 138(2), Right to appeal.

²¹⁹ Law on Public Procurement, Article 141, Actions of the State Commission and major infringements of the Law.

²²⁰ Law on Public Procurement, Article 165, Fee for conduct of the procedure.

²²¹ Law on Public Procurement, Article 157, Effect of appeal.

remedies of ineffectiveness and penalties, aligned with the EU Remedies Directives.²²²

In Serbia, the Law on Public Procurement empowers all economic operators that have or had have a legal interest have right to challenge decision taken by contracting authority, irrespective of the value of the procurement and type of procedure. The procedure of protection of rights in public procurements is regulated in articles 204-227 of the Law on Public Procurement. The Law regulates the review and remedies system, time limits for challenging decisions, effects of filing a complaint, and the mechanism for ensuring the ineffectiveness of the contract.

The procedure of reviewing the request for protection of rights is based on the principles of lawfulness, efficacy, accessibility and adversariality. The procedure consists of two steps. The first is a preliminary procedure conducted by the contracting authority/entity, and the second is a procedure before the RCPRPP. The person seeking the protection of rights is obliged to pay a fee as prescribed by the Public Procurement Law, depending on the stage of the procedure and its value. Proof of payment must be attached to the request for protection of rights under pain of dismissal of that request, and, in case of failure to do this, it cannot be supplemented.

The Public Procurement Law does not impose a mandatory model form for complaint, but it shall include minimal information.²²³ The RCPRPP website provides guidance and relevant information about formal requirements for lodging complaints (e.g., attachments required, fee payment, etc.). The request may be submitted electronically through the PP Portal or in writing. The Public Procurement Portal provides instructions on the preparation and submission of an e-request.

²²² Law on Public Procurement, Article 159, Interim measures; Article 163, Cancellation of public procurement contract or framework agreement, and Article 164, Penalties.

²²³ Law on Public Procurement, Article 217.

The institutional set-up and mechanisms are in place for handling public procurement complaints. The role of the review body is defined by the Law on Public Procurement, which regulates protection of economic operators' rights in public procurement procedures.

Indicator 2

The national law includes the right that should be ensured regardless of the type of procedure (also in single-source procedure and negotiated procedures).

In Bosnia and Herzegovina, the Public Procurement Law²²⁴ ensures right to challenge decision taken by contracting authority in all type of public procurement procedures listed in the law, including the restricted and negotiation procedure with or without prior notice.

In Montenegro, the Public Procurement Law ensures all interested parties to challenge decisions in all types of procurement procedure.²²⁵

In North Macedonia, the decision can be challenged for any public procurement contract of framework agreement.²²⁶

In Serbia, the Law on Public Procurement ensures right to challenge decision taken by contracting authority in all type of public procurement procedures, including the re restricted procedure and negotiation procedure with or without prior notice.²²⁷

Indicator 3

The national law enables right to claim damages in the event of illegal actions of contracting authorities/entities is granted in law

²²⁴ Law on Public Procurement, Article 93.

²²⁵ Law on Public Procurement, Article 186.

²²⁶ Law on Public Procurement, Article 138.

²²⁷ Law on Public Procurement, Article 214.

In Bosna and Herzegovina, the Law²²⁸ empowers every person who has suffered damage due to violation of the Law on Public Procurement has the right to initiate proceedings to exercise the right to compensation for lost profits before the competent court according to the general regulations on compensation.

In Montenegro, the Public Procurement Law²²⁹ empowers any person who has suffered damage due to violations of the Law has the right to file a lawsuit for damages before the competent court.

In North Macedonia the Law²³⁰ empowers every person who has suffered damage due to violation of the Law on Public Procurement has the right to compensation before the competent court in accordance with the general regulations for compensation.

In Serbia, the Law on Public Procurement empowers every person who has suffered damage due to the violation of the Law on Public Procurement has the right to initiate proceedings in front of competent court to exercise the right to compensation of damage.²³¹

Indicator 4

The national law enables right of the economic operator to challenge decisions of the review body in a court.

In Bosnia and Herzegovina, the PRB decisions can be challenged by the administrative dispute.²³² The contracting authority and participants in the procedure are empowered to initiate an administrative dispute against the decision of the PRB before the Court of Bosnia and Herzegovina within 30 days from the day of receipt of decision. The procedure in front the court is urgent.

²²⁸ Law on Public Procurement, Article 121.

²²⁹ Law on Public Procurement, Article 197.

²³⁰ Law on Public Procurement, Article 171.

²³¹ Law on Public Procurement, Article 229.

²³² Law on Public Procurement, Article 115.

However, the length of administrative disputes is excessive, from one to three years.²³³ Such long-time frames for the Court to reach a final decision brings into question the practical relevance of the ruling to the procurement procedure in question and manifestly discourages parties from seeking judicial protection. The length of judicial procedures is one of the mostly criticised aspects of the public procurement system in BiH.

In Montenegro appeals against the decisions of the CPRPPP can be made to the Administrative Court, but they do not automatically suspend procurement procedures. The procedure is rather lengthy, requiring more than a year to resolve such cases. Due to the relatively small size of the Administrative Court, there are no judges who specialise in public procurement cases. The CPRPPP's decisions are final and can be implemented immediately after their adoption. Therefore, contracting authorities may find themselves able to sign a contract without waiting for the Administrative Court ruling.

In North Macedonia appeals against the State Commission decisions can be made to the Administrative Court, which should adopt a decision on the administrative dispute within 30 days of receipt of a complete lawsuit.²³⁴ In case of an administrative dispute, the State Commission shall make available the entire file of the procedure on the case in electronic form through the ESPP within five days from the day of filing the lawsuit. If the Administrative Court annuls the decision of the State Commission, with its verdict it shall decide on the appeal in the public procurement procedure. The decision of the Administrative Court shall be published by the State Commission on its website without anonymization.

In **Serbia**, the decisions of the Republic Commission can be challenged by the administrative dispute.²³⁵ An administrative dispute may be initiated within 15

²³³ Annual Report of the Procurement Review Body for 2020, p. 10.

²³⁴ Law on Public Procurement, Article 170, Court protection.

²³⁵ Law on Public Procurement, Article 228.

days from the day of delivery of the decision to the applicant. An administrative dispute may also be initiated when the Republic Commission has not made a decision within the deadlines provided in the Law on Public Procurement. The deadline for initiating an administrative dispute shall begin to run after the deadline for making the decision expired.

Initiation of an administrative dispute does not delay the execution of the decision of the Republic Commission.

By rule the proceedings in the administrative dispute take a very long time, so until the verdict is rendered the disputed public procurements could have been fully realized. However, the Law on Public Procurement does not envisage the specific time limits for Administrative court when it is dealing with public procurement cases.

SUMMARY ASSESSMENT FOR THE STANDARD

The legislations of the four analysed countries are similar and are mostly in line with relevant international standards.

Regulatory framework of all countries ensures right to complain/review regardless of the type of procedure (also in single-source procedure and negotiated procedures), the right to claim damages of illegal actions of contracting authorities/entities, the right to judicial review of the decisions of the administrative review body. In addition, the procurement legislation lays down the mechanisms and institutional set-up for handling complaints.

Judicial protection against decisions of the review bodies is also envisaged in all four countries. Although the procedures in front of courts are urgent, all countries are challenges with judicial efficiency and decisions of the court could take several years, which makes it inefficient legal remedy. In addition, in Montenegro and Serbia administrative dispute does not have suspensive effect.

Consequently, the legislation of all analysed countries is mostly in line with the standard.

No	Indicator	Max	BIH			MKD	MNE	SRB
			BIH	FBIH	RS			
1	All economic operators having or having had an interest in obtaining a public procurement contract have the legal right to challenge decisions taken by contracting authorities/entities	0-3	3	N/A	N/A	3	3	3
2	The right is ensured regardless of the type of procedure (also in single-source procedure and negotiated procedures)	0-3	3	N/A	N/A	3	3	3
3	The right to claim damages in the event of illegal actions of contracting authorities/entities is granted in law	0-3	3	N/A	N/A	3	3	3
4	The decisions of the review body can be challenged in a court	0-3	3	N/A	N/A	3	2	2
Total points			12			12	11	11
Average points			3			3	2.75	2.75
Standard value			0-5	5		5	5	5

Standard 5. Adequacy of the legal framework to ensure capable institutions

An efficient public procurement system is founded on the availability of a professional, value-driven and integrity-conscious management function within contracting authorities and entities that delivers value for money by conducting all the key aspects of the procurement processes professionally and cost-effectively.

National regulatory framework has to ensure that the public procurement procedures are supported by efficient, well-managed organizational structures, and that effective preventive systems of management control are in place.

The international good practice calls for establishment of central authority / organizational structures to carry out functions related to the public procurement system as a whole. The establishment of central public procurement body by law, constitutes a major contribution to the successful development and favourable overall position of the public procurement system in a country.

In relation to review body the international standards²³⁶ have established the main requirements on which body responsible for providing remedies should be established by law as permanent and independent body, with compulsory jurisdiction and to apply *inter partes* procedures.

The purpose of the standard is to analyse national legislation in relation to the adequacy of the legal framework to ensure capable institutions.

Indicator 1

The national procurement legislation lays down the mechanisms and institutional set-up for handling complaints.

In **Bosnia and Herzegovina**, the Procurement Review Body (the PRB)²³⁷ is an independent and autonomous institution responsible for reviewing complaints. It is composed of 7 members. Branch offices (composed of 5 members each) do not have the status of legal persons. Responsibility for review is divided between the office in Sarajevo and the branch offices in

²³⁶ One of the most relevant cases of the Court of Justice of the EU is the case C-54/96, *Dorsch Consult GmbH v. Bundesbaugesellschaft Berlin*.

²³⁷ See: <http://urz.gov.ba/index.php?id=01&jezik=en>.

Mostar and Banja Luka depending on the value of procurement concerned and the type of contracting authority.²³⁸

The review of appeals comprises two stages, as prior to an appeal being submitted to the PRB, it is examined by the contracting authority in question.²³⁹

In 2020, the PRB upgraded its internal information system (OWIS) which is supposed to enable co-ordination of documentation and ensure a consistent, comprehensive and standardised approach to documents at all PRB locations. Nonetheless, the inconsistency of the PRB decisions is the most frequently criticised aspect of the work of the PRB.²⁴⁰

All PRB members are nominated by the Parliament of Bosnia and Herzegovina for a five-year term, with the possibility of only one additional reappointment.²⁴¹ Rulings adopted by the PRB are published on the Public Procurement Portal.²⁴²

In **Montenegro** the independent state Commission for the Protection of Rights in Public Procurement Procedures (CPRPPP)²⁴³ is the institution responsible for reviewing public procurement complaints from economic operators against the decisions of the contracting authorities. The CPRPPP is composed of a president and six members appointed by the Government through a public selection process. Their term of office is five years, with the possibility of reappointment. The CPRPPP submits annual reports to Parliament in accordance with the Public Procurement Law, no later than the end of June of the current year for the previous year, and publishes these on its website.

²³⁸ Law on Public Procurement, Article 93 (6) – (7).

²³⁹ Law on Public Procurement, Part III Legal protection.

²⁴⁰ SIGMA (2022) *Monitoring Report – The Principles of Public Administration – Bosnia and Herzegovina*, OECD, p. 177.

²⁴¹ Law on Public Procurement, Article 93 (10).

²⁴² See: <https://www.ejn.gov.ba/Resolution/ResolutionSearch>.

²⁴³ See: <http://www.kontrola-nabavki.me>.

In **North Macedonia** the State Public Procurement Appeals Commission (SAC) is the competent entity to resolve appeals concerning public procurement procedures prescribed by the Public Procurement Law and the Defence and Security Procurement Law. The SAC is an independent, five-member state-financed authority with the capacity of a legal entity.²⁴⁴ It resolves appeals of contract-award procedures, as prescribed by the Public Procurement Law, as well as appeals of procedures to award concessions and conclude PPPs. In addition, the SAC is required to act *ex officio* concerning six major violations listed in the PPL.²⁴⁵ Review procedures may be initiated by economic operators²⁴⁶ as well as the PPB and the state attorney when state or public interests are involved.²⁴⁷

In **Serbia** the RCPRPP is the first-instance review body for public procurement. It is autonomous and independent institution responsible for reviewing complaints. The RCPRPP is responsible only to the National Assembly. The Law on Public Procurement prescribes the status, responsibilities and composition of the Commission.

The Commission is composed of president and 8 members.²⁴⁸ The president and members can be appointed and removed only by the National Assembly in the cases specified by the Law. All members are appointed by the National Assembly based on the proposal of the National Assembly Committee for

²⁴⁴ Law on Public Procurement,, Article 130-132. State Appeals Commission website: www.dkzjn.gov.mk/

²⁴⁵ Law on Public Procurement,, Article 141: time allowances set by the contracting authority shorter than required by the PPL; non-publication of contract notice modifications when required; lack of exclusion of economic operators despite the existence of grounds for exclusion; conducting negotiations after expiry of time allowances for tender submissions in open or restricted procedures; use of qualification criteria contrary to the PPL; and discriminatory or competition-restricting provisions in procurement documents.

²⁴⁶ Any economic operator that has a legal interest in the award procedure and has suffered damage, or may suffer damage, consequent to violation of the PPL may initiate an appeal. Any economic operator having legal interest in obtaining the public contract or framework agreement, and which has suffered or could suffer damage by a possible PPL violation may initiate a review of the contracting authority's decisions, actions and failures to undertake action in the public procurement procedure.

²⁴⁷ Law on Public Procurement, Article 138 (2).

²⁴⁸ Law on Public Procurement, Article 189.

Finances. The Committee for Finances propose candidates selected in the public competition. The members are appointed for a five-year term.

The Commission makes final decision in panels comprised of three members. The President of the Republic Commission may, on his own initiative or at the request of a member of the Republic Commission, and if required by the complexity of decision-making in a particular case, make a decision to decide in chambers with a larger number of members, so the number of members is always odd.²⁴⁹

Indicator 2

The national legislation includes legal provisions to establish adequate authority and decision-making powers for the central procurement body.

In **Bosnia and Herzegovina**, the central authority responsible for public procurement is the Public Procurement Agency (PPA), whose headquarters are in Sarajevo, with two branch offices in Mostar and Banja Luka. The PPA reports to the Council of Ministers of BiH. The PPA is responsible for drafting procurement strategies and policies, preparing draft legislation, monitoring, and advisory and training activities in the field of public procurement. The PPA's functions and activities include legislative tasks, monitoring and control, providing opinions, training and support to contracting authorities and economic operators.

The PPA carries out monitoring of public procurement procedures.²⁵⁰ The monitoring proceedings may be initiated *ex officio* and on the request of an exhaustive list of authorised institutions or interested parties, but not anonymously. *Ex officio* monitoring is limited to checking compliance of published procurement notices, contract award notices or notices of cancellation of public procurement. If, upon assessment, the PPA comes to the conclusion that a violation of the Public Procurement Law has occurred, and if

²⁴⁹ Law on Public Procurement, Article 198.

²⁵⁰ Law on Public Procurement, Article 92 and the Rulebook on Monitoring of 5 October 2016, Official Gazette of BiH, No. 72/2016.

the contracting authority fails to rectify its behaviour accordingly, the PPA is obliged to bring an action before the courts of BiH.²⁵¹

The PPA is managed by the director, and its work is steered by the Board of five members. In accordance with the Law, the Board is competent to consider issues related to the functioning and improvement of the public procurement system. In practice, the Board limits itself to administering prior consents to enactments prepared by the PPA.²⁵²

In **Montenegro**, the MoF has the central competence for public procurement. The MoF discharges relevant functions through the Directorate for Public Procurement Policies (DPP), one of the organisational units of the MoF. The MoF is responsible for policy development for public procurement and is also the competent body for drafting legislation, co-ordinating implementation of the public procurement system and co-operating with international and other organisations.²⁵³ The DPP carries out a number of functions and activities, including: preparation of legal drafts; advice and support to contracting authorities; dissemination of information relevant to public procurement; organising professional development and training of procurement officers; data collection; and monitoring. The DPP also manages the Public Procurement Portal, which advertises public procurement procedures.

In **North Macedonia**, the central body responsible for co-ordinating and monitoring the public procurement system is the Public Procurement Bureau (PPB), which is a state administration body within the Ministry of Finance, with capacity as a legal entity and funded from the state budget. The PPB's competences are defined in Article 45 of the PPL. They concern legislative activities, monitoring and control, and providing opinions, training and

²⁵¹ Law on Public Procurement, Article 116.

²⁵² SIGMA, (2022) *Monitoring Report: The Principles of Public Administration - Bosnia and Herzegovina*, OECD, p. 172.

²⁵³ The DPP comprises five departments: Department for Public Procurement Regulatory-Legal Affairs and Monitoring; Division for Regulatory-Legal Affairs in the Field of Public Procurement; Division for Monitoring in Public Procurement; Department for Training, Professional Development and Professional Examination for Public Procurement; Department for the Improvement of the Public Procurement System and the Management of Electronic Public Procurement.

support to contracting authorities and economic operators, developing manuals and brochures, organizing and conducting training activities, managing and developing the ESPP, preparing reports on public procurement procedures, managing negative reference lists, performing administrative control and cooperating with international institutions. The PPB monitors procurement by using the ESPP, which is also used for reporting purposes.²⁵⁴ Information is freely available to the public from the ESPP, without specific registration.

Administrative *ex ante* control is a new task for the PPB, introduced by the PPL.²⁵⁵ The control concerns selected procurement procedures: those whose value exceeds EUR 500,000 (goods and services) and EUR 2 million (works), those flagged by the risk assessment system as “high-risk”, and other randomly selected procedures. In practice, due to staffing and expertise issues, administrative control has been limited to formalised consideration of contracts over the designated values.²⁵⁶ The PPB will also issue opinions on the application of the negotiated procedures without prior publication.²⁵⁷

As for legislative activities, the PPB is responsible for submitting proposals for the adoption of laws and other legal acts in the field of public procurement to the MoF. This, in turn, is responsible for submitting to the Government proposals for changes in the public procurement legislation.

In **Serbia**, the central authority responsible for public procurement is the Public Procurement Office (PPO), and the legal basis for its establishment is Article 178 of the Law on Public Procurement. The Public Procurement Office has separate legal entity status and legal personality. The PPO performs almost all functions of the central administrative body responsible for public

²⁵⁴ The PPB prepares and publishes annual reports. The Government adopts annual reports, which the PPB then publishes on its website.

²⁵⁵ Law on Public Procurement, Articles 172-179, Administrative control.

²⁵⁶ SIGMA/OECD (2021) *Monitoring Report: The Principles of Public Administration - Republic of North Macedonia* stated that the administrative controls undertaken are currently limited to contracts over the thresholds specified in the PPL, Article 172, Subject of the administrative control, and the process is rather formalised to identify non-compliance with legal provisions.

²⁵⁷ Law on Public Procurement, Article 45(1) Competence of the Bureau.

procurement. Its functions and activities include preparation of the strategy for development and improvements of public procurement, legislative tasks, monitoring and control, preparation of an annual report, and providing opinions, training and support for contracting authorities and economic operators. The PPO is responsible for the certification of public procurement officers.

The PPO is also responsible for managing the Public Procurement Portal – as mentioned above, a tool enabling the introduction and implementation of e-procurement in the Republic of Serbia – while the technical management is ensured by the government office in charge of the electronic administration system. PPO plays an important role in elaborating legislative drafts and holds the power to adopt several secondary legislative acts (such as the Rulebook on the Content of Tender Documentation in Public Procurement Procedures and the Statement on Fulfilment of the Criteria for Qualitative Selection of an Economic Operator).²⁵⁸ The Ministry of Finance is officially in charge of submitting proposals for changes in the primary legislation to the Government.

The PPO collects and disseminates data related to the public procurement process. From July 2020, the new Public Procurement Portal became operational, and all the procedures are announced there. The PPO undertakes preventive and control actions, on or without the request of competent bodies.²⁵⁹

Based on the data gathered, the PPO prepares annual reports and publishes them on the Public Procurement Portal. However, the PPO does not monitor or gather data on the procurement conducted in accordance with the special regime of the Law on Special Procedures. The contracts and their values are not included in the annual reports, and their importance and influence on the procurement system cannot be assessed.

²⁵⁸ The full list of legal acts adopted by the PPO is available at <http://www.ujn.gov.rs/propisi/podzakonski-akti/>.

²⁵⁹ SIGMA/OECD (2021) Monitoring report: *Monitoring Report: The Principles of Public Administration Serbia*, p. 158.

The PPO is accountable directly to the Government. The PPO is headed by a director appointed by the Government from among the ranks of public procurement experts through public competition.²⁶⁰ The PPO comprises two departments: the department for regulating and supervising public procurement, and the department for developing the public procurement system and economic and financial affairs.

Indicator 3

The national legislation defines the roles and functions of the review body in line with standards of independence and transparency (the review body is not under the operational control of administrative bodies).

In **Bosnia and Herzegovina**, the Law defines the PRB as independent and autonomous institution responsible for the review of complaint.²⁶¹ The members of the PRB are, in the performance of their functions, independent, equal and bound exclusively by the Constitution of BiH and the laws of Bosnia and Herzegovina.

In **Montenegro**, the CCPP is an autonomous government body responsible for reviewing and considering appeals in connection with public procurement procedures. It is independent, financed by the state budget, and reports to the parliament.

In **North Macedonia**, the Public Procurement Law defines State Appeals Commission as independent and autonomous body,²⁶² financed from the state budget and responsible for resolving complaints in the public procurement procedures, procedures for awarding concession and public-private partnerships.

²⁶⁰ Under the Law on Public Procurement, the director of the PPO must have held for at least four years a master's degree (or equivalent) in law, economics or a technical science, or higher education legally equivalent to the academic title of Master in Basic Studies, have at least seven years' experience in public procurement, and meet the other conditions normally required of candidates wishing to work in state administration.

²⁶¹ Law on Public Procurement, Article 93.

²⁶² Law on Public Procurement, Article 131.

In **Serbia**, the Republic Commission is defined by Law as independent and autonomous institution, finance by the state budget.²⁶³ The Republic Commission is responsible only to the National Assembly to whom it submits Annual report.²⁶⁴

The president and members of the Republic Commission have functional immunity and may not be held liable for an opinion expressed or voting for a decision within the competences of the Republic Commission. In addition, president and members of the Republic Commission may not be held liable for damage caused by expressed opinion or voting for a decision, unless it is a criminal offence.²⁶⁵

Indicator 4

The national law provides for an unlimited term of appointment of the members of the review body, or the term of office is not shorter than four years.

In **Bosnia and Herzegovina**, the Public Procurement Law regulates election of the PRB members.²⁶⁶ The Parliamentary Assembly of BiH appoints the members of the PRB for a period of five years, with the possibility of one reappointment.

In **Montenegro**, the CCPP has a president and six members, appointed by the government through a public announcement and serving a five - year term, with the possibility of reappointment.

In **North Macedonia**, the Public Procurement Law regulates the composition, appointment and term of president and the members of the State Appeal Commission.²⁶⁷ The president and the members of the Commission are appointed for a five years period with the right to one more term.

In **Serbia**, the Law on Public Procurement regulates procedure for appointment of president and members of the Republic Commission. The Law regulates

²⁶³ Law on Public Procurement, Article 186.

²⁶⁴ Law on Public Procurement, Article 203.

²⁶⁵ Law on Public Procurement, Article 194.

²⁶⁶ Law on Public Procurement, Article 93.

²⁶⁷ Law on Public Procurement, Article 132.

requirements for appointment of president and members of the Republic Commission, including education and previous work experience.²⁶⁸ The National Assembly appoints president and members of the Republic Commission for a period of five years.²⁶⁹

Indicator 5

The national legislation includes specified objectively justifiable cases for dismissal of a member of the review body.

In Bosnia and Herzegovina, the Public Procurement Law listed reasons for dismissal of the PRB member.²⁷⁰ The Parliamentary Assembly of Bosnia and Herzegovina may dismiss a member of the PRB only in cases if the member of the PRB resigns, has been convicted of a criminal offense and sentenced to imprisonment for a term exceeding six months, or permanently loses the ability to work and perform his function.

In Montenegro, the Public Procurement Law regulates the dismissal of the president and member of the Commission for the protection of rights.²⁷¹ Specifically, the term of office of the president and member of the Commission for the protection of rights ends upon the expiration of the term for which he was appointed, at personal request and by dismissal. President and a member of the Commission for the protection of rights shall be dismissed before the expiration of their term of office when he or she has been convicted of a criminal offense by an unconditional sentence of imprisonment for a term not less than six months; has been deprived of legal capacity by a final decision performs another public function or professionally performs another activity.

In North Macedonia, the president and the members of the Commission are dismissed by the Assembly of the Republic of Macedonian on the proposal of the Committee on Elections and Appointments of the Assembly of the Republic

²⁶⁸ Law on Public Procurement, Article 191.

²⁶⁹ Law on Public Procurement, Article 189.

²⁷⁰ Law on Public Procurement, Article 93.

²⁷¹ Law on Public Procurement, Article 203.

of North Macedonia.²⁷² The Assembly dismisses the president and member of the Commission before the expiration of the mandate on their request, if he permanently lost the ability to perform function, if has been sentenced by a final court decision for a criminal offense to an unconditional sentence of imprisonment of at least six month, or if he performs activities that are incompatible with the function of member or president of the Commission.

In Serbia, The National Assembly is competent for dismissal of president and members of the Republic Commission. National Assembly Committee for Finance is responsible to conduct dismissal procedure and submit proposal for dismissal and accompanying evidences to the National Assembly. Reasons for dismissal are regulated by the Law,²⁷³ and are possible only in cases if the president or a member of the Republic Commission has been convicted for a criminal offence that jeopardize exercise of his/her function and sentenced to imprisonment for a term exceeding six months, or has been convicted for criminal offence related to the Law on Public Procurement; if resigns; if loses work ability; if does not fulfil requirements for appointment; or by negligent conduct violates the reputation, impartiality and independence in the decision-making of the Republic Commission.

SUMMARY ASSESSMENT FOR THE STANDARD

In all four analysed countries the regulatory framework established adequate authority of the central procurement body. The roles and functions of the review body are in line with standards of independence and transparency, while the review body is not under the operation control of administrative bodies. The legislation guarantees an unlimited term of appointment of the members of the review body or the term of office is longer than four years, while the dismissal of the members of the review body is possible only in objectively justifiable cases specified by law.

²⁷² Law on Public Procurement, Article 133.

²⁷³ Law on Public Procurement, Article 197.

Consequently, the legislation of all four analysed countries is mostly in line with standard.

No	Indicator	Max	BIH			MKD	MNE	SRB
			BIH	FBIH	RS			
1	The procurement legislation lays down the mechanisms and institutional set-up for handling complaints	0-3	3	N/A	N/A	3	3	3
2	Legal provisions establish adequate authority and decision-making powers for the central procurement body	0-3	3	N/A	N/A	3	3	3
3	The legislation defines the roles and functions of the review body in line with standards of independence and transparency (the review body is not under the operational control of administrative bodies)	0-3	3	N/A	N/A	3	3	3
4	The law provides for an unlimited term of appointment of the members of the review body, or the term of office is not shorter than four years	0-3	3	N/A	N/A	3	3	3
5	The dismissal of a member of the review body is possible only in objectively justifiable cases specified by law	0-3	3	N/A	N/A	3	3	3
Total points			15			15	15	15
Average points			3			3	3	3
Standard value			0-5	5		5	5	5

6.2. Legal regime for police and military

Defence procurement represents a significant portion of total military expenditure, accounting for roughly half of the entire military budgets. However, given the secretive and closely-guarded nature of defence procurement, it is often one of the most opaque areas of the sector.

This lack of transparency is compounded by the corruption vulnerability of public procurement processes in general, leading to particularly high levels of corruption risk in defence procurement process. Procedures are often exempted from public procurement regulations, oversight institutions' powers of scrutiny are curtailed and standard disclosure practices are disregarded for defence purchases.

Corruption risks are heightened by restrictions on open competition and single-sourcing or secret procedures for acquiring military goods and services. Whilst reliable data on the share of open competition procedures of total procedures is difficult to find in some contexts, often owing to a lack of government transparency.

6.2.1. *Bosnia and Herzegovina*

In Bosnia and Herzegovina, the Public Procurement Law also covers defence and security procurement contracts as defined in the EU Defence and Security Directive 2009/81. The Law requires that defence procurement be regulated by special provisions adopted by the Council of Ministers. Relevant provisions were adopted at the end of February 2015.²⁷⁴

Article 8 of the BiH Law on Public Procurement, entitled Contracts to which a special regime applies, clarifies and defines which types of procurement are

²⁷⁴ Official Gazette of BiH No. 60/15.

covered by contracts in the field of defence and security (paragraph 4) to which the special regime applies. These are contracts related to procurement:

- a) military equipment, including any part, assembly and / or assembly thereof;
- b) safety-sensitive equipment, including any part, assembly and / or assembly thereof;
- c) works, goods and services directly related to the equipment referred to in points a) and b) of this paragraph for any and all elements of its duration;
- d) works and services for explicitly military purposes;
- e) security-sensitive works and security-sensitive services.

The law stipulates that the procedures, conditions, requirements, definitions, exemptions and other important issues related to the award of contracts in the field of defence and security for the procurement of the above regulates goods and works by a rulebook issued by the Council of Ministers of BiH, at the proposal of the Public Procurement Agency.

Military equipment is defined as equipment specially designed or adapted for military or police use and intended for use as weapons, ammunition, military and police material for dual or special purposes, as defined in the said Joint List of Military Equipment. Furthermore, the Law on Public Procurement provided an exemption from the application of the provisions of the Law on Public Procurement Contracts. These are contracts that have been declared a state secret by the laws of Bosnia and Herzegovina, as well as contracts whose execution requires special security measures, in accordance with the laws of Bosnia and Herzegovina (regulated by Article 10 of the Public Procurement Law). These special measures exist if the application of the rules would oblige the contracting authorities (all legal entities applying the Law) to disclose information that is marked as "top secret" and "secret" according to data protection regulations.

The possibility of corruption in public procurement in the security sector may appear at an early stage, both in the identification of needs and even more so in the phase of technical specifications. The aim of the technical specifications is to define the needs of the contracting authorities that apply to them. The specifications define the subject of the procurement and provide relevant parameters to inform the tenderers. Here it is necessary to provide an open possibility of competition, proof of equal value, as well as that the announced tenders reflect the diversity of the market. The problem arises because the result of a certain procedure is mainly influenced by certain technical needs. Here there may be a risk that the person involved in the development of the technical specifications cannot be independent of the manipulation of the tenderers. In such a case, it could happen that the technical needs are favoured in relation to the financial operator, that is, the specific bidder. In Bosnia and Herzegovina, the Minister of Foreign Trade and Economic Relations of BiH, based on Article 4 of the Law on Control of Foreign Trade of Goods and Services of Strategic Importance for the Security of Bosnia and Herzegovina, publishes and updates the official translation of the Joint List of Military Equipment and the Dual-Use List, and adopts the List of Special-Purpose Goods. Following the problems identified in the practical application of this law, its amendments are in progress related to the adoption of two laws that would separate these lists and facilitate the procedures of individual goods covered by the law in question.

6.2.2. Montenegro

In Montenegro procurement in the area of defence and security is covered by the Public Procurement Law.²⁷⁵ The new legal provisions from late 2019 singled out three types of security procurement:

²⁷⁵ Official Gazette of Montenegro, No. 74/19, Article 174 – 177.

- non-security public procurement for the security sector institutions (for instance, purchases of office paper supplies or staplers for the Ministry of Defence), which is conducted in line with the procedures from the Public Procurement Law;
- security procurement where the subject-matter is linked to the national defence and security objectives (for instance, firearms, ammunition, military vehicles etc.), which is conducted in line with the procedures contained in the Government Decree on the list of military equipment and products, procedure and method of conducting public procurement in the fields of defence and security;
- special security procurement, which is security-related and its subject-matter is linked to the national defence and security objectives, which is governed by specific regulations in conformity with international agreements, internal regulations of contracting authorities etc. (this includes, for instance, NSA procurement).

Details concerning relevant contract procedures are defined in the regulation adopted by the Government, Decree on public procurement in the security sector.²⁷⁶ The Decree specifically regulates the conditions that economic entities should meet in the security procurement procedure, as well as the type of procedure and the manner of initiating the procedures of these procurements.

However, the Government Decree on the list of military equipment and products, procedure and method of conducting public procurement in the fields of defence and security limited the arbitrary actions of contracting authorities only to a certain extent. The system of planning and reporting of these procurements was not significantly improved. Planning was not tied to the strategic objectives in the security and defence sector, while security procurements were envisaged to be reported only to the Ministry of Finance.

²⁷⁶ Official Gazette No. 76/20.

Other oversight instances, such as the National Security Council and in particular the Parliamentary Security and Defence Committee, were not integrated in the oversight system.

Security procurement can be carried out by a restricted procedure, a negotiated procedure with publication of a call for tenders, a competitive dialogue, a negotiated procedure without prior publication of a call for tenders, in a procedure where the contracting authority ensures that qualified candidates meet the requirements. protection of classified data and conditions of security of delivery, or to request an offer from an economic entity that meets these conditions. Pursuant to the aforementioned Decree, in line with the Law, a different manner of initiating the security procurement procedure is prescribed, as well as a different manner of publishing and reporting on the procedures.

As Article 176 of the Law on Public Procurement prescribes special security procurements, Article 5 of the Decree prescribes the manner of realization of each of these procurements, which enables their efficient initiation and implementation.

The regulation of the system of planning and reporting, as well as the oversight system, loosens from the top category down. The procurement categorised under security procurement is to be reported only to the Government, i.e., Ministry of Finance,²⁷⁷ but not to the Parliament or its Security and Defence Committee. Special security procurement is in particular subject to the contracting authorities' arbitrary actions and discretionary spending. The Decree does not envisage even the minimum requirements concerning planning, reporting and supervision; instead, it is left entirely to the contracting authorities to regulate by means of internal regulations. Neither the PPL nor the Decree provide the time-limit for adopting such internal

²⁷⁷ Article 7, paragraph 1 of the Decree on the list of military equipment and products, procedure and method of conducting public procurement in the fields of defence and security.

regulations for special security procurement, or any guidelines that contracting authorities would be obliged to comply with when developing the regulations. The internal regulations of the Ministry of Interior and Police Administration, the adoption of which is prescribed by the Government Decree,²⁷⁸ have not been adopted. The National Security Agency thought that the Government Decree did not oblige them to adopt a new regulation or to update the old one, although the PPL and the Decree categorise any procurement for the purpose of intelligence activities as special security procurement.

The Ministry of Defence was the only one of the four security institutions to have adopted an internal regulation on the special security procurement in line with the Decree.²⁷⁹ The Rulebook recognises the Procurement Plan for Special Security and Defence Procurement and allows for a security procurement procedure to be launched if financial resources have been secured and if it has been included in the Procurement Plan for Special Security and Defence Procurement. The Procurement Plan is to be prepared by the Ministry of Defence Procurement Office, on the basis of the proposals shared by the individual organisational units. However, no detailed planning procedure is envisaged, or any deadline for the preparation of the Procurement Plan. No form has been prescribed for the Procurement Plan, or the categories of data it should include. The Rulebook does not bring any progress with regard to reporting – similar to the Government Decree, it envisages that the Statistical Report on the Special Security and Defence Procurement should be delivered only to the Ministry of Finance.

The Rulebook indicates a very limited competition and a broad discretion on the part of the Ministry of Defence in conducting security procurement. Namely, a special security procurement is conducted by sending an invitation

²⁷⁸ *Ibid.*

²⁷⁹ Rulebook on conducting special procurement in the fields of security and defence No. 0705-426/20-5669/1 of 07 August 2020.

to tender to the addresses of the economic operators suggested by the Ministry of Defence organisational unit for which the procurement is being organised. The provisions of the Rulebook suggest that, before sending the invitation to tenderers' addresses, the Intelligence Security Directorate of the MoD should carry a security vetting. Specifically, the Rulebook allows for the invitation to be sent to a single tenderer "if the Directorate's assessment is such that it suggests that invitation to tender be sent to a single address".

The discretion is even greater as tenders are opened in the absence of the tenderers and complaints against the outcome of the procedure are not allowed. This falls short of both the Public Procurement Law and the Decree, which stipulates that remedies to security procurement are not only possible, but constitute a priority for the Commission for the Protection of Rights to act upon.

Unlike the new Law on public procurement, which stipulates that the contracting authority is obliged to choose the most economically advantageous tender, applying the principle of cost-effectiveness, based on the criteria of lowest price, price-quality ratio or life cycle costs, the Decree provides that the most favourable bid is selected by applying the criterion of the lowest bid price or the most economically advantageous bid, which essentially represents the retention of the bid evaluation system regulated by the previous Law on Public Procurement.²⁸⁰

When defining the manner of evaluation of security procurement bids, the provisions of Article 117, paragraph 8 of the Law on Public Procurement were taken into account, which stipulates that the contracting authority may determine the price as a criterion for selecting the most favourable security procurement bids.

²⁸⁰ Official Gazette of Montenegro, No. 42/11, 54/14, 28/15 and 37/17.

6.2.3. North Macedonia

In North Macedonia there is also separate legislation for procurement in the area of defence and security, the Law on public procurement in the defence and security sector adopted on 27 August 2019²⁸¹ with the aim to transpose the provisions of EU Defence and Security Directive 2009/81.

The Law on public procurement in the defence and security sector set principle of transparency in public procurements. As part of the procurement procedure, now in addition to the contract award notice the electronic procurement system shall also include the contents of the contract, the technical specification and the financial bid of the bidders. The value of the contract executed shall also be published. The objects of procurement are declassified. All procurement notices are publicly available, and only the technical specification can be classified. Procurements above a certain value threshold are also published in the European Public Procurement Gazette.

The Law envisages exclusion from the application of its rules in certain circumstances and the provision of the Law do not apply to contracts regulated by: special procedural rules in accordance with an international agreement or agreement concluded between the Republic of North Macedonia and one or more countries; special procedural rules in accordance with an concluded international agreement or agreement regarding the stationing of military forces and which refers to business entities from the Republic of Northern Macedonia or other countries; or special procedural rules of an international organization that procures for its own needs.

In addition, the Law envisages special rules for exclusion for agreements for which the application of the rules of this Law would oblige the Republic of North Macedonia to submit information whose disclosure it considers contrary to the basic interests for its security; for agreements for the purposes of

²⁸¹ Defence and Security Procurement Law, adopted on 27 August 2019, Official Gazette No. 180/19.

intelligence activities; for contracts awarded under a cooperation program based on research and development, implemented by the Republic of North Macedonia and another country.

The Law incorporates rules on conflict of interest and prevention of corruption, similar to those in the Law on public procurement.

The Defence and Security Council reviews annual defence procurements, and Parliament is involved in this process. The main tasks for the Defence and Security Council are to oversee general aspects of the plans rather than their specific details related to budgetary, commercial or financial aspects.

6.2.4. Serbia

In Serbia the Law on Public Procurement also covers defence and security procurement contracts as defined by EU Defence and Security Directive 2009/81. However, further details concerning this type of procurement, such as procedures, conditions and the manner of their implementation, as well as communication during the procedures, are defined in the implementing regulation adopted by the Government – a Decision on Procurement in the Field of Defence and Security.²⁸²

The Decision regulates the types of public procurement procedures in the field of defence and security, conditions and manner of their implementation, as well as communication in public procurement procedures.

The Decision defines which type of procurement are covered by Decree:

- a) military equipment, including any of its components, components or assemblies;
- b) safety-sensitive equipment, including any of its components, components or assemblies;

²⁸² Official Gazette No. 93/20.

- c) goods, services or works directly related to the equipment from item. 1) and 2) of this paragraph during any period or its entire lifetime;
- d) services and works exclusively for military purposes;
- e) security-sensitive works and security-sensitive services.

Contracting authorities in cases specified in the Decree shall conduct public procurement procedures for the procurement of goods, works or services. The thresholds are same as those defined in the Law on Public Procurement.

Public procurement in the defence and security can be carried out by a restricted procedure, a negotiated procedure with publication of a call for tenders, a competitive dialogue, a negotiated procedure without prior publication of a call for tenders.²⁸³ The contracting authority as a rule applies a restrictive procedure or a negotiated procedure with publication of a public invitation.

Pursuant to the aforementioned Decision and in line with the Law, a different manner of initiating the security procurement procedure is prescribed, as well as a different manner of publishing and reporting on the procedures.

The Decision is setting longer time for public procurement in the field of security and defence, where the minimum deadline for receipt of bids is 40 days from the day of sending the publication of the procurement notice on the public procurement which value is equal of higher than the European threshold.²⁸⁴ The minimum deadline for receipt of bids for public procurement which value is lower than European threshold is 15 days from the day of sending the publication of the procurement notice.

²⁸³ Article 5, Decision on Public Procurement in the Field of Defence and Security.

²⁸⁴ Article 14, Decision on Public Procurement in the Filed of Defence and Security.

7. REGULATORY DEVELOPMENTS IN PERIOD 2013-2022

As it was highlighted in the introductory remarks, the Institute of Comparative Law in Serbia, in cooperation with the Centre for Integrity in the Defence Sector of Norway (CIDS) conducted a comparative legal study of corruption prevention mechanisms set in place to reduce mistakes or improper behaviour in selected countries of the South-East Europe. The study, *inter alia*, covered arrangements for public procurement. The main findings of the study were that Western Balkan countries are putting efforts to harmonize legislative and institutional framework with the EU requirements and standards in relation to the integrity and prevention of corruption, however many challenges remain. Since 2013 a number of reforms were conducted both in the countries covered by the study and in the in the area of European standards. The key developments will be outlined below.

In the 2013-2022 period there were some legislative developments when it comes to international standard on public procurement. Firstly, the EU adopted package of Directives on public procurement²⁸⁵ on 17 April 2014 that member states were obliged to transpose into national legislation by 18 April 2016.

The purpose of the EU procurement rules, underpinned by the Treaty principles, is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition. The EU rules reflect and reinforce the value for money focus of the Government's procurement policy. This requires that all public procurement must be based on value for money, defined as "the best mix of quality and effectiveness for the least outlay over the period of use of the

²⁸⁵ Directive 2014/24/EU on public procurement, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and Directive 2014/23/EU on award of concession contracts.

goods or services bought”, which should be achieved through competition, unless there are compelling reasons to the contrary.

The new Directives provide a much more modern, flexible and commercial approach compared to the existing regime. Outdated and superfluous constraints have been removed, and many new features have been added to streamline and modernise public procurement. For contracting authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.

Novelties introduced by 2014 Directives:

- Facilitating SME involvement - Contracting authorities are encouraged to break contracts into lots to facilitate SME participation.
- Selection of suppliers - A much simpler process of assessing bidders' credentials, involving greater use of supplier self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status; Poor performance under previous contracts is explicitly permitted as grounds for exclusion;
- Improved safeguards from corruption - Requirements on contracting authorities to put in place appropriate safeguards against conflicts of interest. Time limits for the exclusion of suppliers (not more than 3 or 5 years depending on the reason for the exclusion);
- Procedure changes – Preliminary market consultations between contracting authorities and suppliers are encouraged, which should facilitate better specifications, better outcomes and shorter procurement times.

- Electronic procurement – electronic version of the procurement documentation must be available through an internet URL immediately on publication of the OJEU contract notice; Full electronic communication (with some exceptions) will become mandatory for public contracts; Electronic catalogues for public procurement are expressly permitted, removing any doubt as to their legality.
- Contract award - the full life-cycle costing can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which might save money over the long term despite appearing on initial examination to be more costly; legal clarity that contracting authorities can take into account the relevant skills and experience of individuals at the award stage where relevant (e.g., for consultants, architects, etc).

The OECD Council adopted in 2015 Recommendation on Public Procurement.²⁸⁶ Finally, SIGMA Principles of Public Administration, which define what good governance entails in practice and outline the main requirements that countries should follow during the European Integration process, were revised in 2017, while the underlying methodological framework was revised in 2019.

In **Bosnia and Herzegovina**, the Law on Public Procurement came into force in November 2015. Purpose of the Law was harmonization with the EU Directives from 2014, so that segment of EU public procurement reforms from 2014, related to integrity, remained to be subsequently transposed into the BiH legislation. Specifically, the mandatory application of domestic preferences remains incompatible with the *acquis*. While it is supposed to be gradually phased out, the application of domestic preferences is not in line with the principle of equal treatment, and leads to discrimination. The Law was amended in 2022, however, several challenging issues remain in the legislation.

²⁸⁶ OECD/LEGAL/0411.

In addition, particular attention should be paid to the exemptions from the scope of the Public Procurement Law. Contracts which are exempted include contracts “for natural and legal monopolies that may include procurement of water, electricity, gas, heating and other services, until the relevant market is open for competition”. The EU legislation, instead of exempting such contracts, apply of the negotiated procedure without prior publication.

Some provisions of the BiH Law use imprecise wording or excessively vague terms which risk allowing the decision maker a large margin of discretion or lead to misinterpretation (e.g., the ability to reject or permit bids, in addition to specific and clearly defined cases, “in other justified cases”).

Although the legislative framework has been improved since 2013, there is a need to further alignment with the EU Directives.

The provision of the EU Directives have not yet been fully incorporated in the Law on Public Procurement. The innovation partnership procedure, the concept of the best price/quality ratio and the possibility of taking into account full product life-cycle considerations, are not included in the Law. Also, the rules regarding grounds for exclusion are not fully transposed. The rules for the shortlisting of candidates in the restricted procedure do not fully comply with the 2014 Directives. The use of the competitive negotiated procedure, according to the Law, depends on certain conditions, although those conditions are not established explicitly in either the Public Procurement Law or secondary legislation. The general assessment is that the normative situation is more favourable than before 2022 amendments.

Compared to 2013, in terms of the standards and indicators examined in this study the legislation governing public procurement in **Montenegro** has undergone a major change and the new Law on public procurement was adopted in December 2019 and became applicable in July 2020. The provisions of the new Law have resulted in improved transparency and competitiveness of procedures. The new Law provides a legal basis for full implementation of

an electronic public procurement system, which should improve transparency of public procurement procedures and help to reduce corruption risks. Also, the new Law has brought Montenegrin legislation in the field of public procurement closer to the EU Directives. It is also important to mention that the Rulebook on the method of conducting simple procurement resolved the issues attached to low-value procurement.²⁸⁷ The 2019 Law introduced new mechanism that should contribute to the transparency and competition in public procurement such as market analysis, economically the most favourable bid as the only criteria for evaluation of bids, report on realization of contract and simple public procurement. It can be concluded that the Montenegrin legislation has improved compared to the state of affairs in 2013.

The regulatory framework of **North Macedonia** governing public procurement has undergone changes since 2013. The Law on public procurement, which came into force in April 2019, included several provisions to strengthen integrity, prevent corruption and conflict of interest in public procurement. The adoption of the new law did bring some improvements, bringing the regulatory framework more in line with international standards.

In addition, the new Law removes some shortcomings of the previous legislation, such as mandatory application of electronic auctions and use of the lowest price as the sole criteria for awarding the contracts; both of these are now optional for the contracting authorities. The Law also provides for a reduced administrative burden related to the award of contracts. Moreover, the new Law provides for the application of the 'single document for proving the capacity', which is similar to the European Single Procurement Document (ESPD).

A few inconsistencies with EU Directives persist in the new Law. One of the most important is the list of negative reference. As regards grounds for exclusion, the Law provides for a number of situations where the contracting

²⁸⁷ Official Gazette, No. 61/20.

authority is obliged to exclude tenderers or candidates; these are similar to the grounds for exclusion provided in the Directives. Nevertheless, the automatic exclusion for a given time period from public procurement procedures as a consequence of a negative reference does not comply with the provisions of the Directive or the case law of the EU Court of Justice. The overall conclusion is the legislation of North Macedonia has improved compared to the state of affairs in 2013.

In **Serbia** the application of the new Law on Public Procurement has been started on 1st July 2020. Purpose of the new Law was harmonization with the EU Directives from 2014. The Law on public procurement brings a new approach regarding the award of contracts, the contract is awarded to the most economically advantageous tender on the basis of price or cost by applying a cost-effectiveness approach or a price-quality ratio.

The Law on Public Procurement introduces a new public procurement procedure - innovation partnership, which contracting authorities can implement if they have a need for innovative goods, services or works, which cannot be realized by purchasing products, services or works available on the market.

The Law on Public Procurement no longer envisages a qualification procedure, as well as a small value public procurement procedure. The same public procurement procedures apply regardless of the value of the procurement, except for procurements to which, according to their value, the Law does not apply.

Also, a dynamic procurement system is regulated, as a technique and instrument in public procurement procedures that the procuring entity can establish and manage, using exclusively electronic means, for the purchase of common procurement items that are publicly available on the market and as such meet the needs of procuring entities.

The Law on Public Procurement introduces a rule that all communication and

exchange of data in the public procurement procedure is carried out by electronic means on the Public Procurement Portal. In that sense, with the proposed Law on Public Procurement, the Republic of Serbia is harmonized with the requirements from the directives of the European Union. The novelties brought by the Law on Public Procurement are also electronic submission of bids and applications for participation, electronic catalogues, as an opportunity for the contracting authority to request or allow bids to be submitted in the form of an electronic catalogue in public procurement procedures, in cases when electronic means are used. or that the offers contain an electronic catalogue.

However, the new Law on Public Procurement introduces exemption from public procurement procedures, such as international agreements, increase value for application of public procurement procedure. In addition, the special law on infrastructure investments presents additional non-justified exemption from public procurement procedures, which could decrease trust in the public procurement system.

The provision of the EU Directives have not yet been fully incorporated in the Law on Public Procurement.

8. CONCLUDING REMARKS

The regulatory framework of the analysed countries in the area of public procurement shows a considerable degree of compliance with international standards. Regulation of public procurements are relative novelty in the legal systems of the countries which legislation was the subject of this analysis and was developed under the strong influence of the European accession process.

According to the regulations of all countries that were the subject of the analysis, the obligation to publish contract notices and contract awarded is provided by the laws on public procurement. This standard can be considered to be fully in line with international standards in all countries, although the approach of countries differs. However, it seems that the way and procedure of publishing could be improved in certain countries. According to the Law on Public Procurement of Bosnia and Herzegovina, the Public Procurement Agency is not obliged to check notifications before they are published. In the Republic of North Macedonia contracting authorities must pay a fee in order to publish procurement notices. However, in the case of contracting authorities, such a solution seems to be inadequate in relation to them. Especially when it comes to public authorities.

The legislation of all countries prescribe obligation for contracting authority/entity to inform each candidate or tenderer of decision reached including the grounds for any decision. Each country took specific approach towards methods of informing, but this indicator is fully in line with international standards. There are differences mainly in terms of notification deadlines and the manner of submitting notifications. The regulations of Montenegro and the Republic of North Macedonia contain provisions emphasizing the protection of data that is a business secret.

According to the legislation of all countries, the contracting authority/entity is obliged to prepare and store individual reports on the procedure, including

key information and to make the reports publicly available. The Law of the North Republic of Macedonia from 2017 doesn't prescribe such an obligation for small value procurements.

The assessed national legislation contains provisions which obliges contracting authorities/entities to ensure that their representatives in a procedure have no conflict of interest.

In line with international standards, legislation of all countries provides use of modern procurement techniques and methods (electronic public procurement). In some countries, this system was established earlier, while in others later. It has been applied in Bosnia and Herzegovina since 2014 and the new version has been operational since April 2020. In Montenegro, the electronic procurement system has been applied since January 2021, and in Serbia since 2020.

The national legislation of all countries is in line with international standards regarding provisions to ensure that description of the characteristics required of a product of service should not refer to a specific make or source or a particular process, or to trademarks, patents, types or a specific origin or production, unless such a reference is justified by the subject matter of the contract and accompanied by the words "or equivalent". The same can be concluded in terms of equal access for economic operators.

In all countries has been established an adequate review mechanism to effectively guarantee compliance with the basic standards of non-discrimination.

The legislation of Bosnia and Herzegovina, Serbia and Republic of North Macedonia prescribe appropriate time limits for expression of interest and for submission of offers which are fully in line with international standards. However, the legislation of Montenegro in this regard is mostly in line with international standards, since it ensures flexibility.

The legislation of all countries is fully in line with international standards regarding the obligation of the contracting authority/entity to use competitive procedures. However, there are discrepancies in relation to unjustified exceptions to the application of the open public procurement. According to legislation of Bosnia and Herzegovina contracts which are exempted from the scope of the public procurement law include contracts “for natural and legal monopolies that may include procurement of water, electricity, gas, heating and other services until the relevant market is open for competition”. However, the EU acquis, instead of exempting such contracts, offers solution of applying the negotiated procedure without prior publication. Therefore, the legislation of Bosnia and Herzegovina is not fully in line with international standards. The legislation of Montenegro is also applying exceptions and from that reason are mostly not in line with international standards. The Law of Montenegro provides that contracts which are exempted from the scope of the Public Procurement Law include contracts concluded in line with international agreement, specific objects, for bidding postal services, electronic communication sector. In addition, the Law excludes purchase and procuring the water electricity, gas, heating and other services, until the relevant market is open for competition. Bearing in mind that mentioned law prescribes a large number of exceptions to application of its provisions it can be concluded that legislation of Montenegro is mostly not in line with international standards. According to legislation of Serbia public procurement procedures does not apply to contracts with international financing institutions and international contract. Bearing in mind that mentioned law prescribes a large number of exceptions to application of its provisions it can be concluded that legislation of Serbia is mostly not in line with international standards.

Regarding the request that legislation must ensure compliance with the principles of competition even in procedures in which the Law on Public Procurement doesn't apply legislation of Bosnia and Herzegovina, the Republic of North Macedonia, Montenegro and Serbia mostly is not in line with above-

mentioned international standard. Regarding to international standard the law shouldn't contain unjustified exceptions to the application of the open public procurement procedures in the field of defence and security, the analysis has also shown that Law on Public Procurement of all countries are fully in line with above-mentioned standard.

Legislation of all countries is also fully in line with all other international standards regarding public procurement: the right is ensured regardless of the type of procedure (also in single-source procedure and negotiated procedures), the right to claim damages of illegal actions of contracting authorities/entities is granted in law, the decisions of the review body can be challenged in a court, the procurement legislation lays down the mechanisms and institutional set-up for handling complaints, legal provisions establish adequate authority and decision-making powers for the central procurement body, the legislation defines the roles and functions of the review body in line with standards of independence and transparency (the review body is not under the operational control of administrative bodies), the law provides for an unlimited term of appointment of the members of the review body, or the term of office is not shorter than four years, the dismissal of a member of the review body is possible only in objectively justifiable cases specified by law.

It seems therefore that it will take some additional time for the international public procurement standards to become fully integrated in the national legal frameworks.

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