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# MACEDONIAN PUBLIC PROCUREMENT SYSTEM: EXPERIENCES

**Marjan Nikolov**

President of Center for economic analyses  
info@cea.org.mk

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## Abstract

*This paper gives an overview of the public procurement system in Macedonia as well as the experience of its operation since 2007 until 2017. The paper is based on the documents from the relevant Macedonian state bodies, SIGMA, EU progress reports and Civil Society Organizations (CSO) that are operating in the field of the public procurement. We present the institutional and legal aspects as well as the experience with the operation of the public procurement management and the proper remedy bodies. We also touch the aspects of corruption and the public procurement experience in Macedonia.<sup>2</sup>*

**Key words:** Public procurement system, corruption, remedy bodies in public procurement, 'Skopje 2014' project.

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## Introduction

The public procurement (PP) in Macedonia has been developing since 2007 and it was confirmed by SIGMA 2016 report and EU progress report from 2015 that the Law on Public Procurement (PPL) is broadly aligned with the *acquis*<sup>3</sup>. Namely, the Law on Public Procurement was adopted at the end of 2007, and entered into force on 1 January 2008. The PPL also regulates the legal protection in the procedures for awarding public procurement contracts, as well as for concessions and public private partnership.<sup>3</sup>

Further, the EU progress reports from 2015 and 2016 and the SIGMA 2016 report also noted that the level of alignment has been reduced through frequent amendments of the PPL since 2013. The country has not yet achieved alignment with the EU Directive on Defence and Sensitive Security Procurement or the 2014 EU rules on public procurement. The generalised use of the 'lowest price' criterion and the obligation for con-

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2) Some Information in this paper were collected for the purpose of the action called "Strengthening National Integrity Systems in the Western Balkans and Turkey, and tracking developments of anti-corruption efforts" (EC Reference: CN 2014/339-583) implemented by the PSD: <http://psd.hr/>.

3) For the concessions and public private partnerships there is a separate Law on concessions and public private partnerships.

tracting authorities to obtain approval from the Public Procurement Council (PPC) in case they wish to use non-price criteria when awarding contracts is not in line with the *acquis* and has detrimental effects on the quality of the offers. Keeping records on professional misconduct by businesses and excluding them from future tenders is equivalent to 'black-listing' and not in line with European Court of Justice case-law (EU progress report 2015). In 2017 the Government made a decision to cancel the PPC.

In 2015 EU report, it was emphasized also that Macedonia is moderately prepared for *"EU rules ensure public sector procurement of goods and services in any Member State is open to all EU companies on the basis of non-discrimination"* and that it is particularly vulnerable to corruption. Further, it was noted in 2015 EU Progress report that: *"Some progress was achieved, especially through the mandatory use of e-procurement, but recent amendments to the procurement law reduced the level of alignment with the acquis. More efforts are needed to prevent corruption during the procurement cycle. Significant efforts are needed to ensure an efficient and effective public procurement regime. Allegations of serious conflicts of interest and abuse of public office have not yet been investigated. In the coming year the country should in particular:*

- *increase the transparency of public spending by publishing real-time information on all public procurement contracts;*
- *remove inconsistencies with the acquis including on blacklisting companies, conditions for using awarding criteria; ensuring harmonisation with EU procurement rules on defence and security as well as the 2014 EU procurement Directives, especially on concessions;*
- *ensure that reports of irregularities are properly investigated."*

### **Institutional and legislative set up of Macedonian public procurement system**

The PPL in Article 1 regulates the manner and procedure for awarding public procurement contracts and the competences of the:

- Public Procurement Bureau (PPB),
- Public Procurement Council (PPC). Cancelled in 2018,
- State Appeals Commission upon Public Procurements (SACPP).

Related to the e-procurement, the Electronic System for PP (ESPP) was set up and running in 2006 in Macedonia (part of a pilot project of the USAID e-government project) as an application for electronic submission of tenders. At the beginning it was used only by several contracting authorities as a pilot project, but in the course of time its scope was extended to all contracting authorities. In 2008 the web information system was prepared by the PPB for publication of contract notices and contract award notices and ESPP was upgraded at same time with e-auction module. Finally, in 2012 the two systems integrated into one ESPP system. Nowadays, ESPP is unique centralized system for public procurement that is being used by all contracting authorities in Macedonia, through which it is possible to fill and to publish the contract notices for awarding public procurement contracts, calls for bids, notifications for concluded contracts, records for a bid-seeking request, annulment of procedures, implementation of procedures for awarding public procurement contracts using electronic means (use of electronic equipment for processing and storing data) as well as conducting auctions. In accordance with the new provisions of the PPL, the contracting authority is obliged to conduct the open procedure, the restricted procedure and the procedure with a request for collection of offers for use of electronic means through the electronic system for public procurement: at least 30% from the announced notices from January 1st 2016, at least 50% of the announced notices from January 1st 2017 and in 100% of the announced notices from January 1st 2018.

However, the EU progress report from 2015 stated that the obligation for contracting authorities to obtain consent from the PPC before publishing a contract notice gives them access to specialised expertise when drafting terms of reference but makes the procurement process more complex, expensive and time-consuming. The challenges are two dimensional. First, the PPC as an institution lacks specialized professional at a level to perform as expert pool for the contracting authority and second, the contracting authorities in order to avoid the complex nature of the institutional set up of the PP with the PPC are choosing not the value for money principle i.e. the economically most favourable offer in PP but simply go for the lowest price criteria for selection of the operator in order to avoid the procedure with the PPC. As an illustration of the lack of human capacity at PPC and possible lack of specialized expertise, as the PPC staff needs to decide upon complex and diverse subjects, we illustrate the fact that the average number of cases per day per member of the PPC was 13 in 2015 and 11 in 2016 (or monthly this is 270 cases per month per member of PPC to decide in 2015 or 223 cases per month per member of PPC to decide in 2016).

As for the lowest price it is a mandatory criteria and the economically most preferred offer criteria should be used as an exception (as of May 1st, 2014 amendments to the PPL). Since then the economically most preferred offer criteria announcements dropped dramatically from 584 in 2014 (first half of 2014) to only 17 announcements in 2015 (compared to 18,404 with the lowest price as single criteria in 2015) and only 16 announcements in 2016 (compared to 18,404 with the lowest price as single criteria in 2016) which makes less than 0.1% of economically most favourable offer criteria announcements in 2015 and 2016 (PBB 2015 Annual report). For comparison, in 2011 the economically most favourable offer criteria were used in 36% of the cases and 56% in 2010. In 2008 the economically most favourable offer was used in 84% of the cases.

The EU progress report also noted in 2015 that there is insufficient cooperation between the PPC and the PPB. It seems that the very purpose for establishing the PPC which is increased efficiency in the PP in Macedonia was undermined with the very PPC. This statement was also supported with the latest State Audit Office of Macedonia (SAO) performance report from 2017 on the PP in Macedonia where literally it was stated (p.2 and p.3): *“...the mandatory use of the lowest price as the only criteria for selecting the best offer combining with the obligation to ask for permission from the PPC, diminishes the real competition of quality offers and have impact on the quality of the goods and services procured by the contracting authorities as well as upon the quality of the services provided by the public sector”*.

The Civil Society Organization (CSO) Center for Civil Communication monitoring the PP in Macedonia has also highlighted the additional burdens, both administrative and financial, on the operation of the PP system and has also reported on problems arising from the decision – making of the PPC. For example, in their report from number 28 from May 2017 they report on page 4 that in 2016 the contracting authorities paid 1.8 million Euros to the PPC for more than 16 thousand requests for consent (or 3.3 million euros in 2015 which was 0.29% of the total value of procurement in 2015). Further, the SIGMA report through the questionnaire concluded that: *“...The average time the contracting authorities spend on the preparation of the approval process takes more than 20 days (not including the preparation of tender documents). This time equals or is longer than the average duration of the simplified procurement procedure, counting from the publication of the contract notice up to the conclusion of a contract.”*

Also, the efficiency that was expected for the PPC to bring did not happen because the total number of appeals submitted to SACPP did not decrease. However, in 2015 the total number of appeals against decisions of contracting authorities has increased while the proportion of appeals accepted by the SACPP has increased significantly (39.02 % of appeals were grounded in 2015 while in 2014 it was 29.78 % and 31.06% in 2013) thus, indicating possible discrimination and favouritism on the market. The SACPP developed the latest Strategic plan for 2016 where it recognizes the need for quality and transparency by enhancing the capacity of the human resources, improving the website and other. Here again, there is no overall supervision of implementation, reporting mechanisms, budget and detailed timeline for implementation of the Strategy.

Related to the strategic development of the PP system a Strategy for developing the public procurement system from 2013 has been developed but includes only the strategic priorities of the Public Procurement Bureau. However, there is no overall supervision of implementation, reporting mechanisms, budget and detailed timeline for implementation of the Strategy.

## Public procurement management

Not much has been done to control for corruption in Macedonia in general and there is no centralized inspection system to monitor the contract award process in the PP system in Macedonia more specifically. The system of corruption control relies on the State Commission for Protection of Competition and the SAO but the SAO carries annual audits as per their annual program and internal criteria and as per the resources they have, thus, there is no central competent body to supervise the implementation of legal provisions on publishing and completing public procurement plans in Macedonia on regular basis.

In this regards, even though the possibility for e-auction for economically most favourable was made available in 2011 providing for increased transparency in the PP and even though the contracting authorities are obliged to prepare annual plans for PP<sup>4</sup> still, the contracting authorities are not obliged to publish the procurement plans publically and not to mention that the annexes are not drafted until after contracts have been awarded and are not included in the ESPP.<sup>5</sup> Even though the ESPP is in place and it provides for transparency, still the upgrade to include changes in contracted amounts and linking annexes to contracts is not completed. On the other hand, the mandatory use of e-auctions is not only not in line with the acquis, but also seems to hinder the procurement system (EU progress report 2016). Also, detailed requirements prevent competition in tenders and tender requirements remain too complex for small and medium-sized enterprises to participate (EU progress report 2016).

The existence of adequate management of public procurement plans provide opportunities for market protection mechanisms to react on detected anomalies. It is not enough for the contracting authorities to only prepare the procurement plans but to publish them transparently because timely published public procurement plans allow the economic operators predictability in the market and to conduct preparation for participation, higher probability for participation in the tender and in long run it can provide for more competition and more efficient market economy.

Related to the integrity of the system, existing of effective mechanisms to monitor the government agents in charge of the process and constraining particularistic manner and favouritism in allocating the public resources the EU progress report 2015 also reports insufficient cooperation between PPB and State Commission for Protection of Competition and the State Commission for Prevention of Corruption undermining the way that procurement principles are implemented and the fight against corruption. Namely, it is stated in the Annual PPB report for 2015 that the State Commission for Protection of Competition years in a row are sending information to the PPB that there are no serious allegations or irregularities related to the PP in Macedonia. The PPB is literary stating on p. 35 that: *“...the information we get are not fully corresponding with the facts and the conditions and the information that we receive from the economic operators illustrate that they appeal to unrealistic low prices or hindering competition...”*.

Even in the Strategy with priorities for further development the public procurement system from 2013 from the PPB, it is only declaratively stated on page 19 that: *“PPB can contribute with exchange of information*

4) Article 26 of the PPL where it is stated: On the basis of determined sources of financing, the contracting body shall adopt a procurement plan covering its total procurement needs for the current year by types of goods, services and works. The contracting body shall adopt the plan by the end of January of the current year but it can make modify it during the year in accordance with the planned and provided funds for public procurement, as per the PPL.

5) Note however, that the PPB sent recommendation to contracting authorities to publish their annual public procurement plans on their web sites with aim to increase the transparency in the procedures for public procurement on 17th of December 2015.

*and techniques on how to detect cartels in public procurement cases in cooperation with the Commission for Protection of Competition*” also that “... the PPB should analyse the annual reports of the State Appeals Commission and make necessary amendments to the Law on Public Procurement to strengthen the competition aspect”. Finally it recognizes that “...a guideline should be issued for economic operators on how to complain against illegal behaviour of contracting authorities in such cases”. Such a Guideline was prepared in 2016. In the Guideline it is emphasised that the corruption was recognized with the Law on fighting corruption and that the main institution to fight corruption in Macedonia is the State Commission for Prevention of Corruption established in 2002. The Guideline is very shallow and doesn't have any practical value though.

Further, in the same Strategy it is said that there is a need for strengthening the material and staff conditions for more efficient operation of the State Appeals Commission (number of staff, training, and budget).

For the Commission for protection of competition it is stated that it should together with PPB develop a guideline on detecting cases of collusion in public procurement. Such a Guideline was prepared in December 2014 following the principles of Organization for Economic Cooperation and Development (OECD) (as stated in the Guideline p.2). In the Guideline it is emphasised the roles of the Commission for Protection of Competition: finding and sanctioning illicit contracts, finding and sanctioning dominant positions and assessing concentration in the market. Again, this Guideline is very shallow and doesn't have any practical value though.

### **Legal protection of bidders in public procurement procedures and remedies body**

Legal remedy mechanisms are established to protect participants in public procurement procedures (bidders/competitors), therefore, their performance depends on the overall competitiveness of the system. In Macedonia the competent body for legal protection of participants in public procurement procedures is the SACPP.

Related to the SACPP in 2014, it upheld complaints in 66 of the 575 cases it reviewed (11%) and the court delivered 66 judgments on cases brought against decisions of the commission, ruling against it in 13 instances (27% as per SACPP Annual report for 2014 and increased compared to 2013). In 2015 the SACPP upheld complaints in 91 of the 610 cases (15%) it reviewed and the court delivered 66 judgments on cases brought against decisions of the commission, ruling against it in 24 instances (26% as per SACPP Annual report for 2015). This high rejection rate remains an issue of concern as per the EU progress report 2015. On implementation capacity, the capacity of the SACPP and the court to deal with an increasing number of appeals needs to be strengthened. Even though the President of the State appeal commission on public procurement is elected by a Decision of the Assembly of Republic of Macedonia still appointments to SACPP need to be freed from political interference and improving access to the commission's decisions would increase transparency (EU progress report 2015).

Related to the PPC, in 2014 (it started operation in May 2014) until end of calendar 2014 the PPC received 5,963 requests for consent and it turns down 2,989 (50%). Contracting authorities complaining to the SACPP upon PPC decision were 110 in 2014 and the SACPP ruled against the PPC in 24 of the cases (22%). In 2015 and 2016 there were 19,407 and 16,068 requests consequently submitted by the contracting authorities. The average time for issuing consent decreased from 13 days in 2014 to 8 days in 2016. In the period May 2014-April 2017 there were total of 256 complaints against the PPC and in 54 cases (21%) the ruling was against the PPC. Still in 2016 again, the EU states that the implementation capacity of the SACPP and the courts needs to be strengthened and appointments freed from political interference (EU progress report 2016).

### **The supervising body of PP in Macedonia**

The competent body to supervise the implementation of regulations linked to public procurement in Macedonia is PPB. PPB in Macedonia enforces procurement legislation and the standards set by law, and conducts the administrative checks/investigations in contracting authorities. PPB on their website emphasises that the main functions are to: regulate, advise, train, monitor and develop the PP in Macedonia. The Director is appointed by the Government on proposal of the Minister of finance for 4 years and it is responsible in front of the Minister and the Government for her/his work.

PPB have developed Risk Management Strategy as of March 2017. Further, the risk of the conflict of interests of the Director of the PPB is regulated with the Law on prevention of conflict of interests. In cases when there are suspicions for existence of conflict of interest, the responsible person of the contracting authority, persons in charge of the public procurement, including the members of the commission for public procurement, should be exempted from the decision making on the specific public procurement. In the procedure for granting a public procurement, the president, the vice president, members and vice members of the commission for public procurement are obliged to sign a statement for absence of conflict of interest. These statements represent a mandatory document of the tender procedure.

The system of PP in Macedonia is such that each tender documentation has to be published on the electronic system for public procurement and this is obligatory for each contracting authority. The system itself doesn't allow publication of a call for public procurement without publishing the complete tender documentation. On the other side there is no obligation to publish the public procurement contract in an appropriate register under the PPL. The PPL in Macedonia doesn't prescribe sanctions if there are:

- Departure in the technical specifications in the tender for competition from those described in the contract
- Concluding a contract which deviates from the technical specifications described in the tender competition
- Violation of prescribed deadlines by the contracting authority.

In that regard it is indicative to emphasize that for example in 2015 as per the PPB Annual report for 2015 it is stated that most frequent reasons for cancellation of the PP procedure are:

- Not one offer is submitted
- Not one acceptable offer is submitted
- Not one proper offer is submitted
- Contracting authority finds out that the tender document contains shortcomings and irregularities
- Economic operators offered prices and conditions not proper and in accordance with the market prices and conditions at the time

The cancelled procedures go up to 34% in the Ministry of interior, 31% in the government owned JSC Macedonian railway, 28% for the PC Macedonian roads, 28% for the government owned JSC Macedonian Posts, 24% for the AD ELEM (government owned electricity generation company) etc. and this should be of concern for the PPB.



## Information management of public procurement

The new EU Directive on public procurement from 2014 prescribes more than 30 standardised forms for reporting on public procurement established to assist procurement management and monitoring systems in the country. These contribute to the prevention and detection of capture/corruption. In Macedonia there are 6 kinds of notices prescribed: publication of contract notices and notifications, prior indicative notifications, notice for awarding procurement contract, notification related to a concluded contract, notification regarding design content notice and notification regarding annulment of a public procurement procedure.

As per the PPL (Article 51) in Macedonia a Rulebook on the form and content of notices and notifications on the award of public procurement contracts has been prepared back in 2008. The notices are published on the ESPP and are available to the public. Further, if the estimated value of the public procurement contract, excluding VAT, exceeds euros 50,000 for goods and services, i.e. euros 200,000 for works, the notice for awarding a public procurement contract is also mandatorily published in the "Official Journal of the European Union" (Article 54 of the PPL). Finally, as per the PPL, the Official Gazette of the Republic of Macedonia and the PPB are obliged to publish the notice for awarding a contract within a time period of 5 working days as of the day of receipt of the contract notice. Thus, from this point of view we can say that the PPL of Macedonia is effective.

The forms are prescribed in by-laws, they are applied in national systems, are published (in pdf) but could be improved with standardised e-forms so that the information is available for further digital use, are obligatory and available to the general public, media and civil society but it can be further improved by making them in a user friendly form (pro-active publishing, not freedom of access to information requests). Each individual in Macedonia can, without prior registration, access the electronic system for public procurement and review each public procurement procedures. Moreover, they can apply advanced filters and research the available content by contracting authority, economic operator, number of notice, subject of public procurement, type of contract, type of procedure etc.

## The integrity in the pre-bidding stage

If the persons in charge of developing tender documentation and technical specifications are appointed by a politically appointed official (mayor, minister etc.), then the risk of political influence (giving orders to such staff) is high. If the person is simply employed and appointed by a committee that is not governed by political appointees, then the risk is lower. Therefore, the risk of influence can be assessed with the opportunities and barriers to abuse of political power for the purpose of gaining political control over the pre-bidding stage of the public procurement. In Macedonia the following persons are involved for the production of competition documentation for the contracting authority: the person responsible for the public procurement, members of the commission for public procurement and experts from the body for which the public procurement has been implemented. Namely, this is a responsibility of the organizational unit and the persons in charge with the preparation and implementation of procedures of public procurement contracts.

There is a high risk of influence in Macedonia because the decision for appointment of a person or persons for producing competition documentation for the contracting authority is made by the management (for example the director of the public company, the Minister or the Mayor). On the other hand regulation and acts are regulating the prevention of conflicts of interest for persons authorised to implement public procurement procedures in Macedonia (Article 62 from PPL and Article 63 from Law on prevention of conflict of interest). The tenders and storing documentation until the selection decision is made by the public procurement commission (Article 28 of the PPL) and there is a clear procedure for receiving and storing documents (Article 170 of the PPL) and thus, there is a clear procedure and a clear point of responsibility for the PP documentation in Macedonia.

## Deciding and contracting phase of the public procurement

Persons in charge of developing the tender or those in charge of receiving and storing documentation should not be the same as those in the evaluation committees (although they may share one or two persons). Evaluation committees are usually consisted of internal staff but external experts as well, depending on the complexity of the procurement. Although they may decide on substantial resources, conflict of interest legislation usually does not cover members of the evaluation committees, especially in the countries that are exposed to capture/corruption as Macedonia is. It is stated in Article 28 of the PPL that the contracting body shall appoint the chairman and members of the public procurement commission, their number and their deputies so, it is the PP commission that makes decision on the selection of the most favourable tender in the public procurement procedure. Also, there is the Law on prevention of conflict of interest that regulates the matter.

## Public procurement and corruption

Related to the fight and control of corruption it is only declaratively stated in the Strategy on page 23 that the State Commission for Prevention of Corruption, the State Commission for Protection of Competition, the Police, the Public Prosecutor's Office and PPB staff should work together in using this database of the ESPP. There are also two other recommendations in that Strategy related to the control of corruption:

- to oblige the contracting authority to have an anti-corruption clause in every contract signed after the public procurement procedure is conducted and
- The State Commission for Prevention of Corruption in cooperation with PPB to issue a Guideline on prevention of corruption and conflict of interest for contracting authorities and how to award public contracts in a transparent, non-discriminatory way, avoiding conflict of interest (this Guideline is not yet prepared).

As per the 2015 Annual Report of the PPB the number of corruption allegations related to the PP submitted to the State Commission for Prevention of Corruption for the period 2011-2015 are as illustrated in the next table.

2011	2012	2013	2014	2015
45	29	14	25	10

The State Commission for Prevention of Corruption submitted 2 out of 10 allegations in 2015 submission for possible criminal activities to the Public prosecutor. The PPB states in its Annual Report that the decreasing number of possible corruption in PP can be explained with the continuing training of the contracting authorities and this might be true for the small profile corruption while on the other hand the reality is different.

Namely, the State Commission for Protection of Competition has lost its credibility over the high profile corruption by not detecting and reacting upon the alleged irregularities reported by the municipality of Centar about the 'Skopje 2014' project, of allegations of serious irregularities in the award of some large infrastructure and health contracts, or of other allegations of serious conflict of interest and abuse of public office noted also in the EU progress report 2015. These allegations doesn't come to surprise after the wire tapped scandal, opposition's protests, CSO protests as the EU Commission confirmed that the protests were against the lack of transparency and the level of state capture in Macedonia (EU progress report 2015 p. 8). In 2015 the European Commission recruited a group of independent senior rule of law experts to carry out a rapid analy-



sis of the situation and provide recommendations to address the issues of the large number of illegally intercepted communications in Macedonia, which have been published at regular intervals since 9 February 2015. The group of experts came out with the so-called Priebe report from 2015. In that report it is stated on p.6: *“...Apparent direct involvement of senior government and party officials in illegal activities including electoral fraud, corruption, abuse of power and authority, conflict of interest, blackmail, extortion (pressure on public employees to vote for a certain party with the threat to be fired), criminal damage, **severe procurement procedure infringements aimed at gaining an illicit profit, nepotism and cronyism...**”*

Even though unit of the Special Prosecutor Office was established as a direct result of the Priebe report and consequently the agreement signed among the four largest Parliamentary political parties to implement the recommendations from that Priebe report, there was no investigation on the alleged irregularities in the ‘Skopje 2014’ project, on the award of certain large infrastructure and health contracts, or on serious conflicts of interest and abuse of public office. The rule of law and the criminal justice system as the final measure against capture/corruption in public procurement and the ultimate measure of horizontal accountability failed in Macedonia and that is why the Special Prosecutor Office was established.

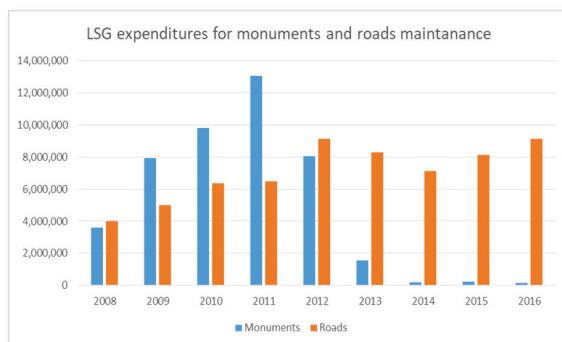
The mechanism in Macedonia proves not to be working because many other parts of the system were not working well. Important areas, such as the judiciary, security or media, in Macedonia require systemic reforms based on an inclusive, transparent and cross-party process and more: *“...The control and misuse of the judicial system by a small number of judges in powerful positions to serve and promote political interests has not diminished in any significant respect. These judges have continued to bring pressure on their more junior colleagues through their control over the systems of appointment, evaluation, promotion, discipline, and dismissal which have been used to reward the compliant and punish those who do not conform. This has been described as a type of “state capture” but is perhaps more precisely characterised as the capture of the judiciary and prosecution by the executive power...”* (Priebe report 2017 p.4 and p.5). Thus, we can clearly state that the criminal justice system was not effective and efficient in preventing corruption and capture in public procurement as well.

As an illustration we present the Local Self Government (LSG) expenditures in Euros for monuments and local roads maintenance in Macedonia for the period 2008-2015. The monuments are part of the Skopje 2014 project. One can easily see that the expenditures for monuments in 2011 were more than double than the expenditures for local roads maintenance. Further, more than 90% of these expenditures for monuments happened in the LSG Centar which is the LSG with the 3rd smallest area of all LSGs in Macedonia.

### Graph.

LSG expenditures for monuments (part of the so-called ‘Skopje 2014’ project) and local roads maintenance in Macedonia for the period 2008-2015

Source: Author’s calculations on the Ministry of finance Treasury data on LSGs



That is why the EU 2016 progress report (p.36 and p. 37) classifies Macedonia as a country that is moderately prepared in this PP area and that is particularly vulnerable to corruption. The EU 2016 progress report further states that there is no progress in the reporting period and that none of the recommendations in the PP were implemented. It urges for significant efforts to ensure a transparent, efficient and effective PP regime. Even, that more needs to be done to prevent irregularities and corruption during the procurement

cycle. It urges for investigations into allegations of serious conflicts of interest and abuse of public office that need to be followed up. It recommends in the coming year that Macedonia should in particular:

- reconsider the mandatory use of e-auction and the role of the Public Procurement Council;
- ensure the equal treatment of EU procedures and align fully to the *acquis* especially in the area of concessions;
- ensure that reports of irregularities are properly investigated.

Even though the legislation and the bodies are on place still, there is insufficient cooperation between the PPC, the PPB, and the State Commission for Protection of Competition and the State Commission for Prevention of Corruption and this undermines the fight against corruption and the proper implementation of the PP principles. That is why a monitoring the conclusion of contracts on public procurement could prove efficient in reducing the risk of corruption and capture in Macedonia.

In Macedonia there is a Law on prevention of conflict of interest (Official Gazette No. 6p.128/09 from 22.10.2009) and there is no special body that is competent to render decisions on conflicts of interest in public procurement procedures. State audit office (SAO) carries regularity and performance audits as per their annual program and internal criteria and as per the resources they have and they regularly publish their annual program and the audit reports. SAO produced performance report on the PP in Macedonia in 2017. The assessment of legislative and regulatory provisions related to the work of SAO in Macedonia illustrates that the Head of the SAO is the Auditor General, who has a deputy (see more at Center for economic analyses 2016). The Auditor General and his deputy are elected by the Assembly. Even though the cooperation between SAO and the authorities: the State Commission for Prevention of Corruption, the Public Prosecutor and the Ministry of Interior is enabled and prescribed in the State Audit Law (Article 35) still, according to the Law, there is no further prescription for activities that SAO should undertake, or if any information or reports should be provided to the SAO as a feedback, after informing the authorities.

Despite the efforts of the SAO to have its independence and autonomy embedded in the Constitution of the Republic of Macedonia, in compliance with international standards and good practice in EU countries, and the recommendations of the Lima Declaration on the leading principles of audit, this matter has not been resolved yet, although it is one of the major preconditions for further accession to the EU. Further, although the legal framework regulates the SAO independence and autonomy, and gives appropriate operational independence as the power necessary for conducting audits, given the fact that the SAO abides by the same regulations as any other budget user, in practice the independence and the autonomy of the institution are limited from legal and financial aspects. This delays the process of

SAO's dynamic development and the harmonization of its operation with the best European practices regarding enhanced security and accountability of public funds financial management. The existing legal framework does not clearly define the obligation of the authorized organs to act upon notification of the authorized state auditor on their reasonable suspicion for a misdemeanour or a crime, and to inform the SAO on regular basis about the measures taken until a final decision is reached by the Public Prosecution Office or the authorized judicial organs on a previous SAO notification (Center for economic analyses 2016 report).

Finally, the last PEFA Report from 2015 notes that SAO does not have the resources needed to carry out a full financial and compliance audit of all its auditees every year, and therefore aims to cover most of them in detail over a period of several years. A consolidated annual report of all SAO's activities during the previous year is sent to the National Assembly in June each year. In addition to this, SAO is required to make an annual audit of the execution of the central government Core Budget, which excludes the social insurance funds, as well as operations financed from own revenues or external sources. The last audit is limited to revenue and expenditure statements, and does not cover assets and liabilities. It includes some sample testing of rev-

enues, but expenditures are covered only at the level of the Treasury, without any substantive testing of transactions at the level of the budget users" (PEFA 2015). The EU Progress report 2015 requires increased audit coverage of total public spending in order to improve accountability and transparency of the public finances.

Related to the soft mechanisms that prevent corruption/capture of the PP system in Macedonia, there is a full professionalization of the public procurement with certified and educated procurement officers that are only authorised to conduct public procurement and there is e-procurement as we already said. Namely, the contracting authority assigns a person that will work in the field of PP and the person should have certificates for passed exam for public procurement. Also, if there is a Unit for PP at the contracting authority all these persons should also be certified. Note that in Macedonia, persons that are certified may also be members of procurement commissions, but compulsory are members of commission for public procurement in cases when the estimated value of the public procurement agreement is above 130,000 euros for goods and services and 4,000,000 euros for works. The certification is done by the PPB after a successful written exam has been conducted and the certificates are valid for 3 years. Prior to the expiration of the certificate, the person should apply for one day re-certification training. After attending the training, the person takes a written exam again, after which she/he acquires a certificate for passed exam for person for public procurement, with a validity period of another three years.

Since the 2010 when the certification started in Macedonia there were around 3,000 persons attending the certification process. As per the Annual reports prepared by the Training department of the PPB, in 2014, 324 persons attended the regular certification training and 67 persons attended the recertification training. In 2015, 254 persons attended the regular certification training, while 144 persons attended the recertification training. During 2016, 338 persons attended the regular training, while 283 persons attended the re-certification.

### **Monitoring the conclusion of contracts on public procurement**

Usually, it is considered that public procurement ends with the signing of the contract. However, it was found by researchers that most of the deviations in public procurement in terms of corruption/capture happen before and after the contracting procedure. Therefore, monitoring of the execution of the contracts is one of the key instruments that need to be established in countries that want to seriously prevent corruption in this sense. The non-existence of regulation on monitoring the execution of the contracts which is the case in Macedonia, represents higher risks to corruption/capture. Monitoring of the execution of the contracts is novella even in the EU legislation.

However, even though the PPL doesn't foresees any measures for monitoring the implementation of the contracts for public procurement still, the contracting authority in its internal policy can assign a person responsible for monitoring the implementation of the public procurement contracts.

Unfortunately, to the best of our knowledge we are not aware of such a person being assigned for monitoring the implementation of the public procurement contracts in Macedonia yet. The relevance of why it is important to assign a person responsible for monitoring the implementation of the public procurement contracts is tested these days in Macedonia with the information provided through the journalist investigation from NOVA TV of the drugs import in Macedonia. Namely, in 2013 the Minister of health started a new policy of *"parallel importation of drugs"* in order to influence a decline of the average prices on the drug market. The pharmaceutical companies were complaining that this policy introduced a practice on the Macedonian market for importation of fake drugs and further, as stated in the Article by the journalist, informer pharmaceutical company states that *"...40% of the imported drugs with the parallel importation regime are fake..."*

### **Petty procurement by type of procurement and type of contracting authority**

The PPL in Macedonia applies when the value of the contract is above 500 euros and then the contracting authority is obliged to implement one of the procedures for awarding a public procurement and in cases when the contract is directly financed or subsidized by a contracting body with more than 50%. Further, the PPL in Macedonia doesn't foresee any sanctions in cases when a public procurement procedure is launched without previously being specified in a public procurement plan which puts a risk for corruption. Finally, in this regards, there are legally prescribed exceptions to the application of the PPL and when work, services and goods may be contracted without a previously implemented procedure like in the field of defence, diplomatic and consular offices, when contract is classified as state secret, when public procurement contracts for which funds have been provided from international organizations (donors and lenders).

### **Public procurement and public private partnership**

The authority responsible for monitoring and control of PP law is the Ministry of finance and the authority responsible for monitoring and control of PPP law is the Ministry of economy. There is no distinguishing between procurement of PPP projects and general public procurement because the PPP law refers to the PP law.

There is no explicit provision in the PPP Law prescribing the prior consent from the PPC for using the economically most favourable bid as the criterion for awarding the PPP contract, but in practice there is an understanding that such consent is required. This comes from the fact that PPP law prescribes that provisions from the PPL concerning the award procedures for PPP public work contracts and PPP public service contracts will adequately apply to the award procedures for PPP procurement contracts. Thus, in practice, this understanding works contrary to the value for money principle at PPP and it ends in adverse bureaucratic approach.

Since 2014, the PPP law obliged the contracting authorities to use e-auctions, positive and negative auctions, in the evaluation bid process. According to the PPP Law "electronic auction" means a positive or negative auction realized after an initial full evaluation of bids, in which the bidders have a possibility, exclusively by electronic means, to revise the offered prices so that the ranking is done automatically by electronic means. On the other side the awarding procedure of the PPL (Articles 47/48), related to the exclusion from the procedure to the award of public contract for economic operators and potential bidders, is not in line with the EU Public Sector Directive (Directive 2015/24/EU replacing Directive 2004/18/EC which has similar provisions) as argued by RESPA 2016 study.

According to the PPP Law the total amount of funds to which the public partner may assume financial commitments in a given year related to PPP contracts, should be determined by the budget of the public partner. In PPP Law in Macedonia there are neither specific provisions of the procurement value for PPP nor requirements for assessment of the fiscal impact of the PPP contract. The procurement value of PPP should be assessed within the PPP feasibility study. The by-law adopted by the government on the preparation of the PPP feasibility study gives the structure where the economic and finance analyses for the PPP is required as well as value for money calculation. In Macedonia there are no particular provisions regarding high-value PPP procurements.

The Ministry of economy, as the authority to monitor and control the PPP Law, and the PPP Unit there do not approve the PPP tender documents. For the competencies of the central government, the government on the proposal of the proper ministry approves the tender PPP documents. At the local level the Mayor approves the tender PPP documents. There is also no need to consult the PPP Unit in the Ministry of economy on these tender documents. However, it is obligatory for all procuring authorities to follow the tender documents approval procedure.

## Conclusions and recommendations

From the legislative and institutional point of view there are significant studies done by SIGMA, SAO, CSO and EU for the national authorities to assess thoroughly the PP efficiency. What is missing is an overall strategic PP document because we can see that there were frequent changes in the legislation reflecting the importance and the interest of the nation for the PP still, the changes were ad-hoc and not rooted in wider strategic document. Such a document might trigger also a more efficient cooperation and coordination of the different PP actors in Macedonia.

Further, it is indicative that a thorough training plan should be developed not only for the technical part of the PP but for strategic planning for efficient PP in Macedonia. In that regards the strategies, manuals and guidelines should be more detailed and useful. Improvement can be made by putting attention to the further development of the Public Internal Financial Control (PIFC) in Macedonia and more precisely related to the PPPs and concessions to enhance the capacity of the Ministry of economy (a good start could be improving the PPP registry and start of work of the PPP Council).

Further, the mandatory lowest price criteria should be abolished because it is against the value for money principle in the public sector. The lowest price and the economically most favourable choice should be left as a discretion to the PP certified experts at the contracting authority to assess the best price-quality ratio.

Also, Macedonia should assess the possibility for introducing measures for monitoring the implementation of the contracts for public procurement. Even though the PPL doesn't foresees any still, the contracting authority in its internal policy can assign a person responsible for monitoring the implementation of the public procurement contracts. In that regards the PPB should consider encouraging the contracting authorities with training and procedures.

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