

Screening report

Montenegro

Chapter 5 – Public procurement

Date of screening meetings:

Explanatory meeting: 27 September 2012

Bilateral meeting: 19 November 2012

I. CHAPTER CONTENT

The *acquis* on public procurement is based on the **general principles** deriving from the Treaty on the Functioning of the European Union (TFEU), Part Three, Title IV und Title VII, and from the jurisprudence of the European Court of Justice (ECJ) such as transparency, equal treatment, free competition and non-discrimination. These principles apply to all procurement procedures including those falling outside the scope of the EU procurement directives for example in view of their value (procurement below the EU thresholds) or subject matter.

The **award of public contracts** (public works, public supply and public service contracts) is coordinated by two specific directives: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts regarding the so-called "traditional contracting authorities" (the "classical sector") and Directive 2004/17/EC concerning the coordination of procurement procedures of entities operating in the fields of water, energy, transport and postal services (the "utilities sector"). The respective scope of application of the directives is defined in terms of the contracting authorities or entities and contracts covered, application thresholds and specific exclusions. Within this framework, specific requirements are laid down to guarantee full respect of the general principles in the course of the procurement process. The directives also provide a framework for electronic procurement including electronic means of communication, dynamic purchasing systems and electronic auctions. Apart from the above two directives, Directive 2009/81/EC regulates the award of certain contracts in the fields of defence and security.

The proper implementation of the procurement directives requires an adequate implementation capacity. In particular, there is a need for appropriate administrative structures to ensure the key functions of policy-making, drafting of primary and secondary legislation, provision of operational tools, help-desk, monitoring and statistics as well as controls in a coherent manner for all areas related to public procurement. Moreover, main purchasers at all levels have to possess the necessary administrative capacities to allow for an effective implementation of the procurement rules.

Further to the award of public contracts, the procurement *acquis* entails three directives on **remedies**: Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts ("the classical sector"); Directive 92/13/EEC on coordinating the laws, regulations and administrative provisions relating to the application of EU rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications ("utilities sector") and Directive 2007/66/EC amending the other two directives to improve the effectiveness of review procedures concerning the award of public contracts. The remedies directives contain requirements for the establishment of effective and independent review procedures above the specific value thresholds against decisions taken by contracting authorities during the award of contracts. Review bodies have to be independent and equipped with the adequate capacity to guarantee the effectiveness and the rapidity of the system as a whole. Furthermore, in line with the principle of judicial protection deriving from the EU legal order, the availability of remedies is also required outside the scope of application of the directives.

II. COUNTRY ALIGNMENT AND IMPLEMENTATION CAPACITY

This section summarises the information provided by Montenegro and the discussion at the screening meeting.

Montenegro indicated that it can accept the *acquis* regarding public procurement. Montenegro indicated that it does not expect any difficulties to implement the *acquis* by accession.

II.a. General principles

Public contracts

As regards public contracts, Montenegro stated that the Law on Public Procurement of 2011 applies to all public contracts, including those below the procurement threshold as stipulated under Article 7 of the public procurement law. The public procurement law includes the principles of transparency, free competition, non-discrimination, equal treatment and the principle of cost effectiveness and efficiency in the use of public funds.

According to Montenegro, the law is implemented through Implementation Acts of 2011, including the Regulation on the Methodology of expressing sub-criteria in the appropriate number of points, the method evaluation and comparison of bids and the Rulebook on Forms in Public Procurement Procedures. Furthermore, Montenegro has established a Competition Protection Agency to enhance free competition.

Other laws covering the general principles are: the Law on Free Access to Information, the Budget Law, the Law on the State Audit Institution and the Law on Companies (Art. 7). The latter also ensures equal treatment of national and foreign companies as foreign investors can be established under the same terms as Montenegrin ones. Currently, approximately 20% of the participants in tenders are international bidders. On average, there are five bidders participating per tender and in the context of the current economic crisis the number is even higher.

Increased transparency is ensured by publication of all laws on the Montenegrin web portal (www.ujn.gov.me). Also the procurement plans, evaluation process, implementation of the contracts as well as appeal decisions are published on the same web portal. Below threshold procurement as well as procurement with negotiated procedure is also published. The public procurement law is used for all public contracts in Montenegro. The law does not include any preferential treatment clauses of national bidders or other. The law strictly limits the use of the negotiated procedure to duly justified cases for which prior agreement of the Public Procurement Administration needs to be obtained (in line with Art. 6 paragraph 2 and Article 31 of the Law on Public Procurement). Article 37 of the public procurement law stipulates that the procurement procedure can only start if the budget is available and when all the necessary publications have been completed.

The Public Procurement Administration establishes and maintains the Public Procurement Portal for the purpose of ensuring the transparency of public procurement. Public procurement plans, invitations to public tenders, decisions on the qualification of candidates, decisions on the selection of the most favourable bid, decisions on the suspension of public procurement procedures, decisions on the annulment of public procurement procedures, public contracts, changes and amendments to the public procurement plans, invitations to public tenders, decisions and contracts, and other acts in accordance with this law are published on this website. Furthermore, the Public Procurement Administration prepares and publishes a list of contracting authorities on the Public Procurement Portal and submits to the Government annual reports on public procurement.

The review body, the State Commission for the Control of Public Procurement Procedures (the “State Commission”), reports to parliament in line with the public procurement law and also has its website. Furthermore, all the institutions are bound by the law on access to information which stipulates that information must be provided within 15 days after the request was made.

As far as the principle of non-discrimination is concerned, Montenegro declared that the public procurement law provides for free access to procurement procedures irrespective of residence or registered seat, national classification of activity, status as legal or natural person and origin of goods.

Montenegro indicated that it also plans to organise a public awareness-raising campaign and conduct training sessions to further inform the different stakeholders about the functioning of the public procurement system.

The Common Procurement Vocabulary (CPV)

The CPV is covered by the Law on Public Procurement under Article 43, and by the Rulebooks on Forms and Records in Public Procurement Procedures and is managed by the Public Procurement Administration. The current legislation is based on the *acquis* of 2006. Further alignment with the 2008 Regulation on the CVP is ongoing with the aim to have it implemented still in 2013.

Concessions

Concessions are not covered by the Public Procurement Law, but by other legislation. Concessions have been granted in Montenegro since 2003. Since then, 180 Concessions contracts have been concluded. The Law on Concessions was adopted in February 2009. It includes a definition of concessions as the right to use the state owned natural wealth, goods in general use and other goods of general interest, or to perform activities of public interest, subject to the payment of a concession fee by a concessionaire, or the delivery of a financial compensation or other support to a concessionaire for achieving relevant public interest. It also foresees the right to fund, explore, design, construct or reconstruct, use, maintain, recover or sell structures, facilities or plants owned by a grantor within a contracted period.

Montenegro recognised that the current definition and concept is not aligned with the relevant EU procurement *acquis* on concessions. Furthermore, Montenegro indicated that the area of public private partnerships is new to Montenegro.

Implementation capacity

The main bodies involved are the Ministry of Finance, the Public Procurement Administration and the State Commission for Control of Public Procurement Procedures, as well as the Concessions Commission.

The Ministry of Finance supervises the legality and purposefulness of administrative acts and is the coordinating body for steering the public procurement policy in Montenegro. In cooperation with other competent bodies in this field, it prepares draft laws, other regulations and general acts, proposes development strategies and other measures in the public procurement field to the Government, and supervises the implementation of the law. It ensures coordination of the different stakeholders and has a deputy chairman in a coordination body, which meets every three months.

The Public Procurement Administration is responsible for the implementation of the Public Procurement Law, monitoring and the implementation of the Public Procurement Strategy. It is an independent state body with current staffing of 15 and three additional recruitments planned.

The State Commission has four members and a president. The Concessions Commission consists of the chairperson and eight further members, who are appointed by the Government.

The Law on Public Procurement foresees a mandatory certification for officials working on public procurement by means of a public procurement exam. Furthermore, conflict of interest clauses and other anticorruption measures are an obligatory part of the public procurement procedures.

Montenegro stated that it needs to strengthen implementation capacities in the public procurement system. The institutional framework is subject to revision. Further changes are also envisaged following the upcoming legislative changes as regards the EU directives on Public Procurement and Concessions.

International aspects

Montenegro is not party to the WTO Government Procurement Agreement (GPA) but has observer status.

Montenegro has concluded three Free Trade Agreements (FTAs) with the European Free Trade Association (EFTA), the Central European Free Trade Agreement (CEFTA), and with Turkey. The CEFTA foresees the possibility for the parties to open up public procurement for CEFTA countries but so far no measures have been agreed for that purpose.

II.b. Award of public contracts

Public contracts

The *scope of application* of the Law on Public Procurement includes public supply contracts, public service contracts and public works contracts. Provisions regulate all aspects of the procurement process, from the definition of the subject matter to the award of the contract.

The award of contracts in Montenegro is divided into three categories. Contracts with a value equal or below EUR 5.000 are subject to direct agreement, the shopping method is applied for contracts worth between EUR 5.000 and EUR 25.000 for services and supplies, and EUR 5.000 to EUR 50.000 for works. For contracts where the value is equal or above EUR 25.000 for service and supply, or above EUR 50.000 for works, several procedures may be used.

The types of procedure used are open, restricted and negotiated procedures with or without prior publication of a contract notice. They also include framework agreements (which however are different from the ones stipulated in the EU directives for the classical and utilities sectors) and specific procedures for consultancy services. Deadlines are shorter than the ones foreseen by the EU directives.

The different types of *contracting authorities and entities* include the State, local authorities, bodies governed by public law, business organisations and legal entities performing tasks of public interest, and entities performing activities in the areas of water management, mining, telecommunications, postal services and transport.

The Law on Public Procurement requires the publication of a list of contracting authorities. The Public Procurement Administration determines the list and publishes it on the website of the public procurement portal. Contracting authorities, which fall under the stipulations of the Art 2 of the law are obliged to report and to abide by law, irrespective of whether or not they appear on the published list.

Montenegro's public procurement law contains anti-corruption rules in Article 15 and provisions on prevention of conflict of interest (Articles 16-18). Furthermore, a chapter of its

Public Procurement Strategy is devoted to preventing corruption in the public procurement system.

The Montenegrin legislative framework governing the award of concessions is composed of the 2009 Law on Concessions and is applied to: transport, maritime domain, tourism, education, mining, forestry and water supply. The providers of concessions are competent authorities (governing authority or a local government authority) and implement procedures under the concession through public announcement. Concessions are awarded on the basis of an annual plan adopted by the Government or municipality, which is published on their websites. The plan is adopted by areas, after a public hearing conducted by the competent authority. After the adoption of the plan a call is published locally and internationally. Montenegro has three ways of awarding concessions: public competition in open procedure, two level procedure, and in a shortened procedure. The Government can grant concessions for up to 30 years. If a concession is granted for more than 30 years and up to 60 years, then the decision is taken by the Parliament.

Montenegro has no specific law for public private partnerships. However, a new law on concessions and public private partnership is under way.

Specific exclusions are listed in Articles 3 and 113 of the Law on Public Procurement, such as confidential procurement, weapons, ammunitions, and other supplies for the defence of Montenegro. The Law on Data Confidentiality furthermore defines confidential data and is therefore also relevant in this area.

Furthermore, the Regulation on Foreign Trade for special purposes covers the area of defence. The Montenegrin legislation allows for further exemptions from the public procurement law on the basis of international rules; services of public interest, state of emergency; broadcasting material, arbitration, financial services, labour relations and employment; concession and privatisation of the economy, sale and renting, and election material. The Ministry of Finance is in the lead together with other relevant line Ministries for the implementation of these exclusions. Montenegro stated that its legislation is not in line with the EU directives and indicated its willingness to align its legislation with the EU *acquis*.

Procurement in the utilities sector is covered by the Montenegrin legislation on public procurement, but the law does not permit using the more flexible procurement allowed for utilities procurement under the EU directive for this sector. Furthermore, Montenegro stated that definitions such as the "bodies governed by public law" need to be aligned to the EU definition. Utilities procurement includes construction, maintenance, supply and exploitation of facilities for the production, transport or transmission and distribution of potable water, electricity, gas and heat, including procurement of electricity, oil and gas; exploration for /or production of oil and gas (hydrocarbons), extraction of coal and other solid fuels; construction, maintenance and utilisation of telecommunications networks and facilities and provision of telecommunication services and postal services, transport and construction, maintenance and utilisation of facilities used in air, sea, lake, river and railway transport, as well as regular urban and suburban passenger road transport that is performed by buses. The general *value threshold* is lower than the thresholds of the EU procurement directives. Montenegro indicated that this is due to the size of its economy and the specific economic situation.

Concerning *specifications and contract documents*, the Law on Public Procurement contains rules on the preparation and content of the tender documentation including the award criteria and their relative weighting. Regarding subcontracting, the Law on Public Procurement sets a maximum proportion of 30% of the value of the contract.

Montenegro stated that it is committed to the principles of social, green, and innovation procurement, some of which have been incorporated into the Montenegrin public procurement law. The Public Procurement Administration is responsible for the implementation of these principles together with a number of other line Ministries. Montenegro indicated its willingness to further develop this area and its intention to introduce it in its Sustainable Development Strategy.

Regarding the different *types of procurement procedures*, the public procurement law includes open, restricted and negotiated procedures, framework agreements, contest, shopping method, consulting services, and direct contracts. The use of those procedures that derive from the EU procurement directives is largely harmonised. As regards the utilities sector, contracting authorities and entities operating in the relevant sectors cannot freely choose between the open, restricted and negotiated procedure with prior call for competition, as provided for by the EU procurement directive for the utilities sector.

In relation to *advertising and transparency*, the Law on Public Procurement contains publication requirements on the contract notices and invitation to tender for certain procedures. Minutes of the opening session must be given to the bidders within a maximum of three days of the opening.

Regarding the provision of the tender documentation, the Law on Public Procurement provides for the basic rules. Concerning additional information or requests for clarification, the guarantees required by the procurement directives are incorporated. All the information needs to be published.

There are detailed rules on the way of communicating the invitations to submit a tender or to negotiate. The contracting authority or entity is obliged to communicate its decision on the cancellation of the procedure or on the award of the contract, including the reasons for such a decision and there are requirements for providing reasons individually to the unsuccessful tenderers. The public procurement law lays down a general obligation for all communication to be made in writing and published.

The law also requires all contracting authorities and entities to keep record of all procurement procedures on conducted procedures and concluded contracts, on which they shall each year report to the Public Procurement Administration. This information serves as a basis for the annual report of the Public Procurement Administration, which it submits to the Government and which is published on the Public Procurement Portal.

Regarding the *conduct of the procedure*, the Law on Public Procurement differentiates between qualification requirements and award criteria. It provides for the minimum number of participants in the restricted procedures. With regard to contract award criteria, the public procurement law includes the criterion of the most economically advantageous tender and lowest price.

The Law on Public Procurement also regulates the content, form and submission of the tender, public opening, and evaluation, as well as it lays down strict rules for "acceptable" and "unacceptable" tenders and for the mandatory cancellation of the procedure. Besides the clarification of tenders, it contains certain provisions regarding abnormally low tenders.

Electronic procurement

Montenegro stated that it has taken first steps towards e-procurement. It requires a mandatory registration of the contracting authorities and economic operators. It currently has more than 2.200 users and posts more than 11.000 notices.

Electronic procurement is covered by the Law on Public Procurement and by the Regulation on detailed content and method of conducting public procurement in electronic form; by the Laws on Electronic Signatures, on Electronic Documents, on Electronic Commerce, on Information Security, on Electronic Communications, and by the Regulations on the protection of electronic signatures and advanced electronic signatures. E-procurement is managed by the Public Procurement Administration and the Ministry for Information Society and Telecommunications.

A part of the procurement is already done electronically, whereby contracting authorities are obliged by law to publish on the Public Procurement Portal the following notices: the Public Procurement Plan; invitations for open, restricted and negotiated procedures; framework agreements; contest and shopping method; decisions for the selection of the bid, cancellation of the public procurement procedure and public procurement contracts.

Montenegro stated that the next steps in the area of e-procurement will be e-notification, e-access, e-submission, e-evaluation and e-awarding aimed to be achieved in the medium to long-term.

II.c. Remedies

The right for legal remedy is stipulated in the Montenegrin Constitution and in the Law on Public Procurement. The Montenegrin remedies system includes both administrative and judicial review. Based on the provisions of the Law on Public Procurement, the General Administrative Procedures Law, and the Law on Administrative Disputes, the State Commission is responsible for administrative review. Montenegro has one single system for classical and utilities procurement.

According to the law, the persons entitled to request a review are those having participated in the procurement procedure as a candidate or tenderer, or as an interested party. An interested party is defined as a person having an interest in the review of procurement procedures or who has brought tender documents or a person who claims having suffered damage due to an omission by a contracting authority.

A complaint can be submitted to the State Commission and to the contracting authority within ten days from the publication of the tender, of the purchase of the tender documentation, from the date of opening the tender, the receipt of the written decision, or from the date when the contracting authority has omitted to submit a decision inscribed by law. The deadline is the same for all types of procurement used. The submission of an objection automatically suspends the procurement procedure, except if the State Commission approves the continuation of the procedure, upon request of the contracting authority or entity and because of a risk of disproportionate damages, or where it may impact on the safety and security of Montenegro. Montenegro imposes a complaint fee of 1% of the estimated value of the public procurement, with a maximum limit of EUR 8.000. If the complaint is accepted, the fee is paid back to the complainant. In the event of refusal or absence of reply, the complainant may submit a complaint to the State Commission within eight days. The State Commission has to provide a reply within 15 days of the receipt of the complaint. If additional expert analysis is required, the deadline may be extended by 10 days.

According to Article 149 of the Law on Public Procurement, the State Commission performs controls on public procurement procedures exceeding EUR 500.000. For contracts from EUR 3.000 to EUR 500.000, the Administration for Inspection Affairs ensures the control. For contracts above EUR 500.000, the Contracting Authorities have to submit all the necessary documentation to the State Commission within five days of the publication of the winning bid. In the context of the review procedure, the State Commission examines the legality of the procurement procedure as a whole and takes a decision in line with its rules of procedure. The contract may not be signed before the State Commission has reached its decision. All contracts concluded before the decision or contrary to the decisions of the State Commission are null and void. All the decisions of the State Commission are published on its website.

In accordance with the 2009 Law on Concessions, the Concessions Commission is responsible for remedies for the award of concessions. Its mandate is for 5 years. It is an independent body with its own budget, separate from the State Commission.

The decisions of the State Commission and the Concessions Commission are final, but can be challenged before the Administrative Court of Montenegro, which then examines the legality of the decision of the State Commission and Concessions Commission, and decides on a possible reopening of the tender procedures. The deadline for launching an administrative procedure is 30 days from the decision of the State Commission. The decisions of the Administrative Court can be challenged within 30 days at the Supreme Court of the Montenegro, which can decide on the extraordinary legal remedies.

Implementation capacity

The State Commission is an independent legal entity. Its five members, including the President, are appointed for five years by the Government in line with the stipulations of the Law on Public Procurement. To ensure the independence of the State Commission, the Law on Public Procurement prohibits any form of influence practised on the State Commission. The members of the State Commission may not exercise any other profession during their mandate. Furthermore, the Law on Conflict of Interest and the Rulebook on the Work of the State Commission stipulate that any member of the State Commission should be exempted from cases with a possible risk of conflict of interest.

From January to November 2012, the State Commission adopted 398 decisions upon submitted appeals, out of which 155 were accepted, 124 dismissed and 103 rejected. 16 appeals were withdrawn by the complainants. In addition, the State Commission has conducted 40 control procedures for procurement procedures where the estimated value was above EUR 500.000. In almost half of the cases the procedure followed was legally correct. In three cases, the contested procedure was deemed not to be subject of the control. In the remaining cases, the procedure was either totally or partially annulled. Against the decisions upon appeals, 44 complaints were submitted to the Administrative Court, which represents a percentage of 9% in relation to the decisions adopted by the State Commission in 2012.

The Concessions Commission with its present functions was established in 2009. Its chairman and eight members are not professionally engaged by the Commission and pursue their regular professional activities.

III. ASSESSMENT OF THE DEGREE OF ALIGNMENT AND IMPLEMENTATION CAPACITY

Montenegro's public procurement system is broadly aligned with the *acquis* on public procurement.

A key challenge for Montenegro will be to strengthen the implementation and enforcement capacities at all levels. When completing the legal alignment, Montenegro needs to closely follow and take into account the upcoming legislative changes as regards the EU Directives on Concessions and Public Procurement, expected to be adopted in 2013.

III.a. General principles

In the field of public contracts, the Montenegrin legislation is harmonised to a large extent as regards the general principles of transparency, free competition, and equal treatment. As concerns the principle of non-discrimination, the Law on Public Procurement foresees equal access for all economic operators, irrespective of their residence, registered seat, or the origin of the goods. Montenegro needs to ensure that these principles are adhered to by all contracting authorities on all levels.

In the area of concessions alignment is needed with the *acquis*, including on remedies. The drafting of a new law on concession and public private partnerships is under way, with a view to aligning this area with the EU *acquis*.

The Common Procurement Vocabulary (CPV) in Montenegro is partially aligned with the *acquis*. It is currently based on the earlier *acquis* and does not yet take into account the CPV regulation of 2008. Further alignment is needed.

III.b. Award of public contracts

Regarding public contracts, the Montenegrin Law on Public Procurement provides for an adequate level of alignment with the *acquis*. However, as the EU legislation will undergo substantial changes, it is recommended to wait with further legislative modifications until the new EU directives are adopted. Defence procurement is not aligned with the *acquis* and Montenegro envisages the harmonisation in the long-term. As regards specific exclusions, there are exemptions which are not in line with the *acquis*, such as the one for the election material.

Regarding electronic procurement, substantial efforts are required to ensure full e-procurement, combined with trainings and provision of the required technical equipment.

Montenegro has recently introduced the scope of utilities in the public procurement law. Montenegro is recommended to reflect on the possibility to make use of the flexibility provided in the Directive in order to increase the efficiency of the system. The award procedures and the definitions for works and service concessions are not in line with the *acquis*. For remedies on concessions, Montenegro has established the Concessions Commission, albeit with very limited capacity. Its chairman and eight members are not professionally engaged by the Commission and pursue their regular professional activities. Montenegro envisages further improvements in the area of remedies in line with the EU *acquis*.

Montenegro has no specific law for public-private partnerships. It foresees further alignment with the *acquis* in this area through a new law on concessions and public private partnerships that is under preparations.

As regards social, green, SME and innovation related procurement, Montenegro is relatively advanced in this area, but further work is needed to ensure the implementation in line with EU best practices.

The implementation capacity needs to be strengthened at all levels to ensure enforcement of the legislation. As regards the award criteria, Montenegro indicated that despite an adequate

definition of cost effectiveness, it is at times difficult to ensure its consistent implementation in relation to the assessment of the most economically advantageous offer. In this context, special attention needs to be given to the fight against corruption and handling of conflict of interest through such measures as increased transparency, clarity of the procedures to be followed, and a well-functioning remedies system. The Public Procurement Administration is the main actor in this field, but more effective cross-agency action is needed. Suppression measures and the work of law enforcement agencies in the fight against corruption, including in the area of public procurement, is dealt with in the context of chapter 23: judiciary and fundamental rights.

Montenegro is following its 2011-2015 strategy on implementation of the public procurement policy and the current system seems to be well set up for continuing further work in this area. The Ministry of Finance is the central policy-making body and coordinates the different policy initiatives in the field of public procurement.

III.c. Remedies

The Montenegrin legislation on review procedures is broadly in line with the directives and relevant general EU Treaty principles.

The remedies system based on the administrative review of the State Commission and the judicial review by the Administrative Court seems a solid basis for reaching compliance. The review procedures under the Law on Public Procurement are the same for all types of procurement which provides for increased transparency and simplified processes.

The implementation capacity needs to be strengthened, in particular at the State Commission and the Concessions Commission. Attention should be paid to training, awareness-raising, as well as to the capacity of the administrative courts in terms of training and technical support.
