

# Screening report

## Serbia

### Chapter 5 – Public procurement

**Date of screening meetings:**

Explanatory meeting: 21 March 2014

Bilateral meeting: 13 May 2014

## I. CHAPTER CONTENT

The *acquis* on public procurement is based on the **general principles** such as transparency, equal treatment, free competition and non-discrimination 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). 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) and concessions is governed by three specific directives: Directive 2014/24/EU on public procurement regarding the so-called "traditional contracting authorities" (the "classical sector"), and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (the "utilities sector"), as well as Directive 2014/23/EU on the award of concession contracts. The 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 the 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, e-submission, dynamic purchasing systems electronic auctions, and electronic catalogues. EU Member States have to transpose the above three Directives into their national legislation until April 2016, with the exception of certain provisions regarding electronic procurement, where the deadline is October 2018. During the transition period until these dates, the previous Directives 2004/18/EC (classical sector) and Directive 2004/17/EC (utilities sector) can still be applied. In addition to these 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, the main purchasers at all levels have to possess the necessary expertise and administrative capacity to allow for an effective implementation of the procurement rules.

Further to the award of public contracts, the procurement *acquis* entails two 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 (applicable to the "classical sector" and to concessions covered by Directive 2014/23/EU) and 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). 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 Serbia and the discussion at the screening meeting.

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

### II.a. General principles

#### Public contracts

The Serbian Law on Public Procurement (OG 124/12) entered into force on 6 January 2013. It governs the process of public procurement planning, sets out procurement requirements, methods and procedures, as well as the organisational structures of the Public Procurement Office. According to Serbia, the Law on Public Procurement is implemented through 16 by-laws, including the Regulation on Mandatory Elements of Tender Documents in Public Procurement Procedures and on the Manner of Proving Fulfilment of Requirements (OG 104/13<sup>1</sup>), the Regulation on Contents of Rulebook Regulating in Detail the Process of Public Procurement Procedure within Contracting Authorities (OG 106/13), the Regulation on the Content of the Report on Public Procurements and Manner of Keeping the Records on Public Procurements (OG 29/13), and the Regulation on Form and Contents of Procurement Plan and Report on Implementation of Procurement Plan (OG 29/13). Other laws covering general principles are: the Law on the Protection of Competition (OG 95/2013), the Law on Free Access to Information of Public Importance (OG 36/2010), the Law on State Audit Institution (OG 36/2010), and the Law on Budgetary System (OG 108/13).

Serbia stated that the public procurement law applies to all public contracts, i.e. including to those contracts below the EU procurement thresholds. The law also regulates public procurement in the areas of water management, energy, transport, and postal services, as well as the area of defence and security. The public procurement law includes the principles of transparency, free competition, non-discrimination, equality of bidders, and the principle of cost effectiveness and efficiency, as well as the principle of environmental protection and energy efficiency in the use of public funds (Articles 9-13).

As far as the principle of non-discrimination is concerned, Serbia declared that the public procurement law does not foresee any additional requirements concerning the eligibility of foreign bidders as compared to national bidders. However, under Article 86 of the Law on Public Procurement, it applies a preference system for domestic bidders and goods of domestic origin. The advantage given varies from 10 to 20% depending on the type of procurement and on whether it is evaluated based on lowest price or cost effectiveness. As regards EU bidders, Article 86 of the Law on Public Procurement refers directly to Article 76 of the Stabilisation and Association Agreement (SAA) with the EU. This foresees a phased elimination of these preferences vis-à-vis EU companies, ending after a five-year transition period in September 2018. Serbia furthermore declared that since May 2010 bidders established in members of the Central European Free Trade Agreement (CEFTA) as well as goods of CEFTA origin are treated the same way as domestic bidders and goods, in accordance with the relevant provision in the CEFTA Agreement. Serbia confirmed that this includes companies established in Kosovo\*.

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<sup>1</sup> OG references are always made to the last amendment only.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence.

The public procurement law limits the use of the negotiated procedure without invitation to bid to duly justified cases. For such cases, the prior opinion of the Public Procurement Office (PPO) needs to be obtained in line with Article 36 of the Law on Public Procurement. Article 52 of the public procurement law stipulates that the procurement procedure can only start if the budget is available and when it was envisaged by the annual procurement plan.

### Concessions

Concessions are not covered by the Public Procurement Law, but by the Law on Public-Private Partnership and Concessions (OG 88/11) and relevant by-laws. The law regulates the preparations and approval process for public-private partnership proposals, the rights and obligations, the scope, as well as the authorities responsible, and issues of legal protection. It foresees that service concessions are awarded through a concession granting procedure, based on the highest offered concession fee or the economically most favourable bid. Where the concession consists predominantly of characteristics of concession of public works, the law foresees the use of the tender procedures included in the Law on Public Procurement.

### International aspects

Serbia is not party to the WTO Government Procurement Agreement. Apart from the SAA with the EU, which foresees a gradual elimination of domestic preferences, Serbia has concluded free trade agreements that include public procurement provisions with CEFTA, the European Free Trade Association (EFTA), and with Turkey. While the EFTA and Turkey agreements foresee the possibility to open up public procurement markets, so far no measures have been agreed for that purpose. Under CEFTA, domestic treatment is granted to CEFTA members since May 2010.

## **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 law also covers the utilities as well as the defence and security sectors, with detailed provisions laid out respectively in Chapters IV and V. Contracting authorities and entities are defined in Article 2 of the Law on Public Procurement as (a) budget beneficiaries and organisations for compulsory social insurance, (b) a public enterprise, and (c) legal entities that perform activities of common interest, where (i) it is supervised by a contracting authority, or where (ii) 50% is financed through a contracting authority, or where (iii) the majority of the managing body is composed of representatives of a contracting authority. Article 117 provides for specific provisions for the utilities sector, which apply when a contracting authority performs economic activities in the areas of water management, energy, transport and postal services for the purpose of these activities and when a person performs such activities pursuant to exclusive or special rights. The list of contracting authorities, including as regards the utilities sector, is published on the Public Procurement Portal and the Official Journal. Contracting authorities, which fall under the provisions of Articles 2 and 117 of the law, are obliged to report to the PPO and abide by law, irrespective of whether or not they appear on the published list.

The *award of contracts* in Serbia is divided into three categories: (i) contracts with a value below Serbian Dinars (RSD)<sup>2</sup> 400,000 can be subject to direct agreement; (ii) low value procurement, which requires a contracting authority to invite at least three bidders to submit an offer, ranges from RSD 400,000 to RSD 3,000,000<sup>3</sup>; (iii) and several tender procedures may be used for contracts with a value equal to or above RSD 3,000,000. These different tender procedures are the open, restricted, and negotiated procedures with or without prior invitation to bid, as well as the qualification procedure, competitive dialogue, and design contest. The use of negotiated procedures and competitive dialogue needs to be approved by the PPO. The law also includes the use of framework agreements and centralized or joint procurement. The deadlines for submission of tenders are stipulated in Articles 95-100 of the procurement law.

Procurement in the *utilities sector* is covered by the Law on Public Procurement. Utilities procurement includes construction or operation of facilities and networks for the production, transport or transmission and distribution of potable water, electricity, gas and heating, including the supply of potable water, electricity, oil, coal, and gas; exploration for /or production of oil and gas (hydrocarbons), extraction of coal and other solid fuels; construction, maintenance and management of networks and facilities in the areas of air, river, railway transport, as well as regular urban and suburban passenger road transport performed by buses, trams, and trolleybuses.

Article 10 of the Law on Public-Private Partnership and Concessions defines a *concession* as a contractual public private partnership, which "regulates the commercial use of natural resources or assets in general use, [...] for a specific period of time, against the payment of a concession fee by the private or public partner, with the private partner bearing the risk associated with the commercial use of the subject of concession". The law covers both works and service concessions. Serbia stated that for service concessions, the law foresees a concession granting procedure that is based on the highest offered concession fee or the economically most favourable bid. Where the concession consists predominantly of characteristics of concession of public works, the law foresees the use of the tender procedures included in the Law on Public Procurement. The concession granting authority is the respective competent level of government, i.e. the Government, the autonomous province, or a local self-government unit, depending on the concession subject. The publication of the invitation notice in the EU's Official Journal is mandatory for concessions projects whose value exceeds EUR 5 million. Serbia stated that the duration of the public concession is limited from 5 to maximum 50 years in accordance with Article 18 of the law.

Procurement in the area of *defence and security* is also covered by the Law on Public Procurement, which foresees the award of contracts through a restricted or negotiated procedure in Article 129, with some exemptions regulated in Article 128.

Serbia stated that it is committed to the principles of *social, green, and innovation procurement*, some of which have been incorporated into the Serbian public procurement law. The PPO is responsible for the implementation of these principles together with a number of other Ministries. As regards the social aspects, the public procurement law foresees the possibility to conduct a reserved procurement procedure that is limited to certain institutions and economic operators dealing with vocational training, professional rehabilitation, and employment of persons with disabilities (accounting for at least 30% of employees). Serbia informed that in 2013, 19 large value contracts (above RSD 3,000,000) were concluded under this procedure. A number of measures stipulated by the law seek to facilitate the participation of *small and medium-sized enterprises* (SMEs). These include the Registry of Bidders as well as provisions

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<sup>2</sup> EUR 3,478, with an exchange rate of EUR 1 equals RSD 115.

<sup>3</sup> Approximately EUR 26,087

to structure centralised procurement in lots to enhance the possibility for SMEs to submit offers.

*Specific exclusions* are listed in Article 7 of the public procurement law, including procurement under international agreements, emergencies and natural disasters, procurement in the field of electronic communications, goods and services intended for resale, notary services, as well as the production of radio and television programmes, arbitration, various financial services, labour relations and employment. Article 122 of the law provides for further exemptions in the field of utilities, including the purchase of potable water, energy, and fuel for their business activities, as well as in-house procurement. Specific exclusions for the defence and security sectors are then enlisted in Article 128, covering inter alia intelligence activities, disclosure of vital security information, as well as the development of new products.

In relation to *advertising and transparency*, there are detailed rules on the way of communicating the invitations to submit a tender or to negotiate. The publication of procurement notices and tender documents on the Public Procurement Portal and the contracting authorities' website is mandatory for procurements above RSD 400,000. The Law on Public Procurement contains the following publication requirements: prior notices, invitations to public tenders, tender documents, clarifications upon request from interested persons, decisions on qualifications, decisions on the suspension or annulment of public procurement procedures, decisions on the use of negotiated procedure, award decisions and notices on concluded contracts and contract amendments when using negotiated procedure without prior notice, quarterly reports of the Contracting Authorities, and other acts foreseen in the law are published on this website. 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. Publication on the Public Procurement Portal and the website of the Contracting Authority is free of charge. Above certain thresholds, publication is also foreseen in the Official Gazette of Serbia against a fee. Procurement plans are not yet published by the contracting authorities but Serbia indicated that they may be published in the future. The opening of bids is public. Minutes of the opening session must be given to the bidders within a maximum of three days of the opening. The law also requires all contracting authorities and entities to keep a record of all procurement procedures conducted and concluded contracts, and report on them on a quarterly basis to the PPO. This information serves as a basis for the semi-annual report of the PPO, 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 contains rules on the preparation and content of the tender documentation including technical specifications, qualifications, and award criteria, and their relative weighting. Serbia stated that in 2013, 55% of contracts were awarded based on the lowest price offered and 45% on the economically most advantageous bid. The law also provides for the minimum number of participants in the restricted procedures. Regarding subcontracting, the Law on Public Procurement sets a maximum proportion of 50% of the value of the contract. The Law on Public Procurement also regulates the content, form and submission of the tender, public opening, and evaluation. It also 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. The Common Procurement Vocabulary (CPV) is covered by the Law on Public Procurement under Article 3 sub-item 38 and Article 56, which oblige contracting authorities to use the CPV and determine that the CPV corresponds to the vocabulary used in the EU. Serbia stated that the current version is based on the 2008 *acquis*, i.e. on the consolidated version of Regulation (EC) No 2195/2002, as amended by Regulation

(EC) No 213/2008. As regards the use of standard forms, Serbia indicated that they are partially aligned with the Commission Implementing Regulation (EU) No 842/2011 establishing a standard form for the publication of notices in the field of public procurement.

Article 40 of the Law on Public Procurement introduces the possibility to use framework contracts. Serbia also conducts centralised procurement, as well as joint procurement by several contracting authorities, in accordance with Articles 48 to 50 of the law.<sup>4</sup> Moreover, the Law on Public Procurement introduced a Central Registry of Bidders. The registry is managed by the Serbian Business Registers Agency. Serbia stated that at the time of the screening 3,092 bidders were registered. In accordance with Article 79 of the law, bidders so registered in this Registry do not need to provide documentary evidence when participating in public procurement procedures.<sup>5</sup> The Law on Public Procurement foresees that a contracting authority must reject a bid whenever it has evidence that a bidder is contravening one of the listed eligibility requirements. The PPO is tasked to maintain a negative reference list that is accessible on its internet portal. An excluded bidder may appeal against the decision to the Republic Commission, as the review body. Serbia also emphasised that conflict of interest clauses and other anti-corruption measures are an obligatory part of the public procurement procedures; they are regulated in Articles 21 to 30 of the Law on Public Procurement. Serbia considers that the obligation to adopt a plan for combatting corruption in public procurement procedures, under Article 21, has been fulfilled by the Government's Action Plan for the Implementation of the National Anti-Corruption Strategy. The high-volume Contracting Authorities' obligation to adopt internal plans for combatting corruption however has not been followed up, according to information provided by Serbia.<sup>6</sup> The provisions also comprise the establishment of Civil Supervisors for high value procurement, and which is operational.<sup>7</sup> Furthermore, Serbia established an Anti-Corruption Agency as well as a Commission for the Protection of Competition to enhance free competition. All institutions are bound by the Law on Free Access to Information.

*Electronic procurement* is covered by the Law on Public Procurement and by the Laws on Electronic Signatures (OG 135/04), on Electronic Documents (OG 51/09), on Electronic Commerce (OG 95/2013), and the Law on Personal Data Protection (OG104/2009). E-procurement is managed by the PPO and the Ministry of Trade, Tourism 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 invitation notices and tender documents as well as other decisions and documents, as foreseen in the law. At the time of the screening the Public Procurement Portal had approx. 7,400 registered users, with an average daily number of visits of almost 5,000. Serbia informed that the English version of the Portal is under preparation. Furthermore, Article 41 of the Law on Public Procurement foresees the establishment of a dynamic purchasing system that uses electronic means only, while Article 42 concerns electronic auctions; the latter is compulsory

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<sup>4</sup> Since the entry into force of the Law on Public Procurement (1 April 2013), 787 contracts were concluded through framework agreements, with a total value of approx. EUR 165 million. 1245 contracts were concluded under centralised procurement, with a total value of approx. EUR 185 million.

<sup>5</sup> Serbia informed that an English website interface of the registry for bidders became available in November 2014. <http://www.apr.gov.rs/eng/Registers/Bidders.aspx>

<sup>6</sup> Following this, Contracting Authorities with an annual procurement volume of above 1 billion dinars must also develop such plans to combat corruption, for which the PPO prepared a Model Internal Plan available on its website. Such Contracting Authorities also need to establish special departments for control over public procurement planning, conducting and implementation. This includes the control of the appropriateness of planning public procurements, the criteria for drafting technical specifications and award criteria, as well as contracting implementation, including delivery of goods and services. Special departments exist in a few such Contracting Authorities.

<sup>7</sup> Serbia informed that at the outset relevant civil society organisations faced some capacity problems in taking up this role. However, in 2014, a total of 19 civil supervisors from five different non-governmental organisations were appointed in order to monitor procurement procedures with an estimated value of more than 1 billion dinars.

for contracting authorities whose total annual procurement exceeds RSD 700 million (approx. EUR 6.2 million). However, Serbia informed that, in practice, this is not applied. Serbia stated that the next steps in the area of e-procurement will be e-notification, e-submission, e-evaluation and e-awarding aimed to be achieved in the medium to long-term.

### Implementation capacity

The main bodies involved are the Ministry of Finance, the PPO, the Republic Commission, as well as the Commission on Public Private Partnership and Concessions (PPP Commission).

The Ministry of Finance is responsible for adopting certain implementing regulations and budget inspection. Its Budget Inspection Unit is responsible for checking compliance with laws and secondary legislation in the field of financial matters and the legal use of funds by all spending units listed in the Law on Budgetary System. At the time of the screening, five civil servants permanently worked on public procurement issues in the Ministry, while the budget inspection unit employed nine civil servants, who in the last three years had carried out inspections in 55 entities falling under the public procurement law, detecting irregularities in 32 of them. In addition to these irregularities found by the Ministry of Finance, the State Audit Institution detected 221 irregularities over the last three years (*see also Chapter 32*).

The PPO supervises the implementation of the Law on Public Procurement. Serbia stated that PPO is an autonomous and independent state body with current staffing of 23. The tasks and activities of the PPO are set out in Articles 135 and 136 of the Law on Public Procurement. The PPO is responsible for the implementation of the public procurement law, as well as the monitoring and development of the public procurement system. It also participates in the drafting of regulations and adopts by-laws in the area of public procurement, and controls certain tender procedures. Moreover, the PPO proposes a list of contracting authorities for adoption by the Government and submits to the Government annual reports on public procurement. This aside, the PPO establishes and maintains the Public Procurement Portal for the purpose of ensuring the transparency of public procurement (<http://portal.ujn.gov.rs>).

As regards Concessions, the PPP Commission is an inter-ministerial body that assists the preparation of public private partnership and concessions proposals, gives its opinion in the approval procedure for such projects, develops best practices and methodological materials, and submits an annual report on concession projects to the Government. The PPP Commission consists of nine members, appointed by the Government for a five-year term. Serbia informed that the PPP Commission has so far considered 12 proposals for concession projects, out of which eight were endorsed.

Serbia stated that the review body, the Republic Commission for the Protection of Rights in Public Procurement Procedures (Republic Commission) is an independent and autonomous body that reports to parliament in line with the public procurement law and also has its own website (<http://www.kjn.gov.rs/en.html>). The Republic Commission is headed by a president and currently employs 62 staff.

Serbia also pointed out that there are 3,430 contracting authorities with 1,810 certified public procurement officers at all levels. The Law on Public Procurement foresees a mandatory certification<sup>8</sup> for officials working on public procurement by means of a public procurement examination<sup>8</sup>. However, the certification programme was suspended in 2013, pending the preparation of the Regulation on the Method and Programme of Vocational Training and

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<sup>8</sup> According to Article 134 PPL, this is compulsory when the volume of procurement in a contracting authority exceeds 21,000,000 dinars (approx. EUR 182,609).



Procedure for Taking the Professional Examination for Public Procurement Officers.<sup>9</sup> The Administration of Joint Service for Republic Bodies is the centralised procurement body for national authorities. Joint procurement of certain medicines and medical supplies are conducted by the Republic Health Insurance Fund.

According to Serbia, the share of government procurement amounted to 7.3% of GDP in 2013 (approx. EUR 2.3 billion). Serbia stated that the average number of bidders per tender was 2.7 during the same year. The percentage of foreign bidders equals approx. 4%, with half of them coming from the EU.

Serbia stated that it needs to strengthen implementation capacities, improve monitoring and oversight, and raise awareness on the importance of implementation and enforcement as regards its public procurement system. Further changes are also envisaged in order to align to the recent legislative changes as regards the EU Directives on Public Procurement and Concessions. In October 2014, Serbia adopted a new public procurement development strategy 2014-2018, in which the Government lays out its development priorities and activities for the period to come. Through this strategy, Serbia seeks to further improve the regulatory, institutional, and administrative framework; increase the implementation capacity and effectiveness of the system; as well as to bring about full harmonisation with the EU *acquis*, including the recent EU public procurement package.

## **II.c. Remedies**

The right for legal remedy is stipulated in the Serbian Constitution and in the Law on Public Procurement. The Serbian remedies system includes both administrative and judicial review. Based on the provisions of the Law on Public Procurement, the General Administrative Procedures Law (OG 111/09), and the Law on Administrative Disputes (OG 111/09), the Republic Commission is responsible for administrative review at second instance. Serbia has set up one single system for classical and utilities procurement, as well as concessions and public private partnerships. Accordingly, the Republic Commission decides on requests for protection of rights in all public procurement procedures. Serbia stated that its remedies system is in line with the provisions of Directive 2007/66/EC.

In accordance with Article 148 of the Law on Public Procurement, the protection of rights procedure is initiated through the submission of such a request to the contracting authority against any action of this contracting authority in a public procurement procedure. According to the law, the persons entitled to request reviews are bidders, applicants, candidates, or any interested person. Business associations may also submit protection requests on behalf of the aforementioned persons as well as the PPO, the State Audit Institution, Public Attorney and Civil Supervisor. A complaint can be submitted to the contracting authority within ten days from the day the decision was received (award, cancellation, recognition of qualifications, conclusion of framework contract). The deadline is the same for all types of procurement used, but it is reduced to five days for low-value contract procedures. The deadline for protection requests regarding invitations to bid or tender documents is seven days before the expiry of the deadline for submission of bids (reduced to three days for low-value and qualification procedure).

Within five days from the day the contracting authority receives a (timely) submitted request for protection, the contracting authority must either (i) accept the request, or (ii) submit its response as well as all documents to the Republic Commission for it to decide upon the request.

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<sup>9</sup> Serbia informed, post-screening, that the Regulation was adopted in July 2014 and that the certification procedure resumed towards the end of the year.

Article 150 of the public procurement law stipulates that the submission of a protection request automatically suspends the procurement procedure until a decision is made on the file, except if the Republic Commission approves the continuation in cases of negotiated procedure used for extreme urgencies brought by extraordinary circumstances.

The Republic Commission either annuls a procurement procedure, fully or partially, or refuses the request for rights protection. The Republic Commission makes a decision at the latest within 30 days from the complete submission of the request to the contracting authority. The decisions of the Republic Commission are published on the Public Procurement Portal and its website. A complaint fee ranging between RSD 15,000 and RSD 80,000<sup>10</sup> is levied for tenders of an estimated value of up to RSD 80 million<sup>11</sup>; above that 0.1% of the value. Serbia explained that, in view of preventing the abuse of the remedies system, Article 164 of the Law on Public Procurement stipulates that the Republic Commission will impose a fine on a claimant, whose three requests for the protection of rights have been refused within six consecutive months. Serbia informed that, since its entry into force in 2013, this provision has not yet been used by the Republic Commission.

As part of its mandate, the Republic Commission may also on its own initiative or upon request by a claimant or interested party annul a public procurement contract when the legal basis for annulment is met. Such a request for annulment may be filed within 30 days from the date of learning the reason for annulment and no later than one year from the day the contract was concluded. The law also foresees that the Republic Commission monitors and controls the implementation of its decisions. The contracting authorities must comply with the orders from the Republic Commission within the specified deadlines. The Republic Commission may require reporting on the implementation of its decision and inspect the contracting authority at question. In accordance with Article 162 of the law, it may also impose a fine in case of failure to comply with its orders, ranging from RSD 80,000 to RSD 1,000,000<sup>12</sup> for a contracting authority and up to RSD 80,000 for a responsible officer.

The decisions of the Republic Commission are final, but can be challenged before the Administrative Court of Serbia, which then examines the legality of the decision of the Republic Commission, and decides on a possible reopening of the tender procedure. The deadline for launching an administrative procedure is 30 days from the receipt of the decision of the Republic Commission.

The Republic Commission also conducts minor offence proceedings in first instance in relation to 23 minor offences of a contracting authority and five minor offences of bidders, with possible fines ranging from RSD 80,000 to RSD 1,500,000<sup>13</sup>. Minor offence proceedings are initiated upon request of the PPO, the State Audit Institution, and other authorised bodies. Such first instance decisions may be challenged by an appeal lodged to the Higher Misdemeanour Court.

### Implementation capacity

Serbia stated that the Republic Commission is an autonomous and independent legal entity. The President and six members are appointed for five years by the National Assembly after a public competition, in line with the stipulations of the Law on Public Procurement. The President and four of the members must meet the requirements for appointment as a Primary Court Judge. Moreover, the members of the Republic Commission may not exercise any other public duty,

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<sup>10</sup> Approx. EUR 130 and EUR 696.

<sup>11</sup> Approx. EUR 696,000.

<sup>12</sup> See Article 162, approx. EUR 696 to EUR 8,696.

<sup>13</sup> Approx. EUR 696 to EUR 13,043.

have a function in a political party, or perform any other function, service, duty, work, activity that may impact on his/her performance during their mandate. At the time of the screening, the Republic Commission had 62 staff members.

In 2013, the Republic Commission received 1,595 rights protection requests and adopted 1,522 decisions, out of which 351 requests were dismissed, 81 requests were rejected, 540 procedures were partially annulled and 369 requests were accepted with full annulment. 51 procedures were cancelled because of the withdrawal of the requests. This aside, the Republic Commission adopted another 444 decisions in 2013 in the context of other proceedings outlined above. Against the decisions upon appeals, 89 complaints were submitted to the Administrative Court in 2013, representing less than 5% of the overall number of decisions adopted. The Administrative Court took 112 decisions on such relating proceedings in 2013, confirming the decisions of the Republic Commission in 98 cases.

### **III. ASSESSMENT OF THE DEGREE OF ALIGNMENT AND IMPLEMENTATION CAPACITY**

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

A key challenge for Serbia will be to strengthen the implementation and enforcement capacities at all levels. When completing the legal alignment, Serbia needs to closely follow and take into account the latest legislative changes as regards the EU Directives on Concessions and Public Procurement, adopted in April 2014.

In October 2014, the Serbian Government adopted its public procurement development strategy 2014-2018 which sets out its plans for further strengthening the regulatory, institutional, and administrative framework, as well as pursuing full harmonisation with the EU *acquis*.

#### **III.a. General principles**

In the field of public contracts, the Serbian legislation is harmonised to a large extent as regards the general principles of transparency, free competition, and equal treatment. Serbia needs to ensure that these principles are adhered to by all contracting authorities on all levels. As concerns the principle of non-discrimination, the Law on Public Procurement foresees equal access for all economic operators in terms of eligibility. However, Serbia maintains a system of domestic price preferences. As regards the EU, domestic preferences are gradually reduced in line with the SAA provisions on public procurement.

In the area of concessions, the law foresees that service concessions are awarded based on the highest offer or economically most favourable bid. However, alignment of the thresholds with the *acquis* is necessary. This aside, Serbia still needs to plan the alignment with the new EU Directive on Concessions.

Regarding international aspects, Serbia will accede to the WTO Government Procurement Agreement at the latest when joining the EU, in which case it will automatically be covered by the agreement by way of EU membership. Other agreements may need to be brought in line with the *acquis*, including through renouncement. International agreements which exempt certain works and projects from public procurement rules will have to be re-assessed before accession as EU law allows the conclusion of such agreements only exceptionally and under narrowly defined conditions.

### III.b. Award of public contracts

Regarding public contracts, the Serbian Law on Public Procurement provides for an adequate level of alignment with the *acquis*.

As regards the *scope of application* and *award of contracts*, the definition of contracting authorities is yet to be fully aligned with the *acquis*. The use of those procedures that derive from the EU procurement directives is largely harmonised, but the restricted procedure and qualification procedure foreseen in Articles 33 and 34 of the public procurement law are not in line with the *acquis*. The deadlines foreseen under the different types of procedure are longer than the minimum required by the *acquis*. Provisions for framework agreements are not completely aligned with the ones stipulated in the EU directives for the classical and utilities sectors. Concerning additional information or requests for clarification, the guarantees required by the procurement directives are incorporated. All the information needs to be published.

Serbia introduced the scope of *utilities* in the public procurement law. However, the law does not take full advantage of the possibility to provide for more flexible procedures for utilities such as the option to use a periodic indicative notice as the sole means of publication and to foresee higher thresholds for supply and service contracts as well as for certain social services.

As regards *concessions and public private partnership*, Serbia's law distinguishes between public private partnership type of contracts for works and services and more traditional 'grant of a concession' being the right of exploitation of natural resources or assets in general use. The award procedure and the definitions for works and service concessions follow the basic rules and provisions of the *acquis* in this area. However, alignment of the thresholds with the *acquis* is necessary. Furthermore, alignment with the new Directive on Concessions is yet to be foreseen. Serbia's legislation is broadly aligned with Directive 2009/81/EC on *defence and security procurement*. However, further efforts are needed, in particular with regard to the scope of the legislation which contains additional exemptions as compared to the EU Directive.

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

As regards *specific exclusions*, there are exemptions which are not in line with the *acquis*, such as the exemption of procurement conducted pursuant to international agreements, which under EU law are only permitted exceptionally and in case these agreements have been concluded in conformity with the Treaties.

Regarding the *conduct of the procedure*, the Common Procurement Vocabulary in Serbia is partially aligned with the *acquis*. It is based on Regulation (EC) No 2195/2002 as amended in 2008, but does not fully take into account the Commission Implementing Regulation (EU) No 842/2011 for standard forms. A number of measures introduced with the adoption of the latest Law on Public Procurement aim at enhancing transparency and help reduce malpractices. For instance, the prior approval by the PPO of non-competitive procedures, publication of notices for contract amendments, measures for sanctioning irregularities, and the Central Registry of Bidders led to a noticeable improvement. Provisions regarding negative references need to be brought in line with the jurisprudence of the European Court of Justice.

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

As regards the implementation capacity, Serbia needs to improve the planning, as well as monitoring and oversight of all phases of the public procurement process. The purpose and role of the establishment of annual public procurement plans by the contracting authorities need to be refined and streamlined. The mandatory publication of contract notices for low-value contracts and negotiated procedures led to improved transparency, entailing a reduction in the use of these procurement procedures, since the entry into force of the current law.

The staffing levels of the PPO as well as the Republic Commission have increased steadily over the last three years, in parallel with an expanded area of responsibilities, but remain insufficient, especially as regards the Procurement Office. The public procurement strategy acknowledges these limitations and foresees that the PPO will be allowed to employ a sufficient number of staff to exercise its responsibilities, including the required technical support and facilities. However, the respective Action Plan for 2014/15 does not foresee any provisions relating to staff increases. Furthermore, whilst the PPO takes a central coordination role in the public procurement system, its involvement in and responsibility for certain regulatory matters, such as initiating legal amendments, is not sufficiently defined by law.

Professional and well-trained procurement officers, including at local level, are critical for the successful implementation of the public procurement rules, highlighting the importance of a well-functioning training and certification programme. While legal provisions are foreseen, e-auctions and dynamic purchasing systems have so far not been used. The role out of e-procurement needs to be planned. Framework contracts are only used rarely.

Overall, Serbia needs to strengthen capacity at all levels to ensure enforcement of the legislation. This includes the need to reinforce early in the process the PPO's capacity, including through significant staff increases, and clarify its role within the public procurement system also as regards aforementioned regulatory aspects.

The new public procurement development strategy seeks to respond to these weaknesses through the identification of development priorities based on a time-bound action plan. The strategy comprises a capacity-building programme that broadly responds to the identified challenges and also includes Serbia's initial planning for moving towards full alignment with the new EU Directives on Public Procurement.

In this context, special attention needs to be given to the fight against corruption and the handling of conflict of interest through increased transparency and sound planning, clarity of the procedures, and a well-functioning remedies system. The PPO is the main actor in this field, but more effective cross-agency action is needed. For this purpose, a memorandum of cooperation was signed in April 2014, bringing together the main institutions responsible for anti-corruption activities. The action plans to combat corruption at the level of Contracting Authorities remain to be adopted. Suppression measures and the work of law enforcement agencies in the fight against corruption, including in the area of public procurement, are dealt with in the context of chapter 23: judiciary and fundamental rights.

### **III.c. Remedies**

The Serbian 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 by the Republic Commission and subsequent judicial review by the Administrative Court, is a solid basis for reaching compliance with and implementing the *acquis*. 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 Republic Commission is also responsible for the administrative review in the area of concessions and public private partnerships.

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