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ANALYSIS AND RECOMMENDATIONS FOR IMPROVEMENT OF THE PUBLIC PROCUREMENT OFFICE'S MONITORING FUNCTION

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Information about the project

This document was prepared within the project ''Support to Further Improvement of Public Procurement System in Serbia'' financed by the European Union and implemented by the consortium led by the organization Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

The main purpose of this project is to support the strengthening and development of a stable, transparent and competitive public procurement system in the Republic of Serbia in line with the European Union standards, including improved implementation of the strategic and policy framework aimed at achieving an efficient and accountable public procurement system.

The following results are required from the project:

- strengthened and further developed strategic, legal and institutional framework for public procurement aligned with EU legislation,
- improved implementation of regulations in the field of public procurement practice,
- e-procurement platform set up and developed and
- enhanced capacities and professional capabilities of the Republic of Serbia Public Procurement Office and other relevant target groups.

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INTRODUCTION

The key institutions of the public procurement system in the Republic of Serbia, whose activities, mode of operation and form of organisation are regulated by the Public Porcurement Law[1] (hereinafter: the PPL) are as follows: the Public Procurement Office (hereinafter: the PPO) and the Republic Commission for Protection of Rights in Public Procurement Procedures (hereinafter: the Republic Commission).

The PPO is a special organization that oversees the implementation of the PPL, adopts bylaws and performs expert activities in the field of public procurement, monitors conducting of public procurement procedures, controls the implementation of certain procedures, manages the Public Procurement Portal, prepares reports on public procurements, proposes measures for impoving public procurement system, provides expert assistance to contracting authorities and bidders, contributes to the creation of conditions for economical, efficient and transparent use of public funds in public procurement procedures. In addition, the PPO also gives opinions on the implementation of the provisions of the PPL, examines the fulfilment of conditions for applying the negotiation procedure under Article 26 of the PPL and of the competitive dialogue, prepares document models for contracting authorities, appoints a civil supervisor, prepares framework agreement models (templates). The PPO has the power to file requests for the protection of rights, requests for initiation of misedemeanor proceedings and lawsuits for determining nullity of a contract. When it identifies irregularities in public procurement procedures conducting and public procurement reports submission, the PPO notifies the State Audit Institution (hereinafter: the SAI) and the Budget Inspection. The PPO also carries out activities in relation to public procurement officer professional certification (i.e. taking the professional exam for public procurement officer) and maintains the register of public procurement officers. In addition to this, the PPO, with the approval of the Government of the Republic of Serbia, conducts accesion negotiations with the European Union (hereinafter: the EU) in the domain of public procurement and it also prepares plans and normative (regulatory) acts pertaining to public procurement.

The Republic Commission is an autonomous and independent body which ensures the protection of rights in public procurement procedures and is accountable for its work to the National Assembly. Within the stipulated competences it decides on requests for the protection of rights in all public procurement procedures. The Republic Commission monitors the execution of decisions it has made, annuls public procurement contracts, imposes fines on contracting authorities and responsible persons therein and submits proposals for removal from office the manager or responsible person within the contracting authority. It also imposes fines on claimants whom it finds to have abused the request for the protection of rights. In addition, the Republic Commission conducts misdemeanour proceedings in the first instance for misdemeanours stipulated in the PPL, initiates proceedings for determining the nullity of a public procurement contract, decides on costs of the proceedings for the protection of rights and costs of tender preparation. The Republic Commission has the authority to adopt principal legal positions in relation to implementation of regulations within its competences as well as to maintain the list of experts who, in line with conditions stipulated in the PPL, participate in its work. The Republic Commission has a president and eight members, elected and dismissed by the National Assembly, and works and decides in panels consisiting of three members.

In addition to this, the SAI, Ministry of Finance, Public-Private Partnership Commission, Anti-Corruption Agency, Commission for Protection of Competition and Administrative Court play importan roles in the field of public procurement. In addition, the PPL defines the Administration for Joint Services of the Republic Bodies as the body for centralized public procurements.

[1] "RS Official Gazette", No. 124/2012, 14/2015 and 68/2015.

The SAI is the highest authority for auditing of public funds in the Republic of Serbia which is accountable to the National Assembly of the Republic of Serbia for the conduct of activities stemming from its competence. Within its competences, the SAI conducts audits of financial statements, audits of regularity of operations which includes reviewing of financial transactions and decisions in the field of public procurement as well as audits which include reviewing the manner in which budget funds and other public funds are spent for the purposes of reporting whether the assets of the audited entity have been used in compliance with the principles of economy, efficiency and effectiveness, and in compliance with the planned goals. The SAI is competent for filing requests for initiatiation of midsemeanor proceedings. Pursuant to the provisions of the PPL, contracting authorities have certain obligations towards the SAI, such as: submission of public procurement plans, of contract modification reports, as well as of reports in the case awarding a contract to the tenderer whose tender contains the offered price which is higher than the estimated value of the public procurement.

In addition to the abovementioned institutions, the following institution are also important for functioning of the public procurement system in the Republic of Serbia.

The Ministry of Finance, pursuant to the Law on Ministries[2], carries out public administration activities related to, among other things, public procurement. **The Budget Inspection** carries out activities related to the control of implementation of laws and accompanying regulations in the field of financial and material operations and purposeful and lawful use of funds for all beneficiaries of funds specified in the law governing the budget system.

The Commission for Public-Private Partnership in line with the Law on Public-Private Partnership and Concessions[3], provides expert assistance in the implementation public-private partnership projects and concessions as an inter-ministerial public body operatively independent in its work.

The Anti-Corruption Agency is an autonomous and independent state authority which is accountable for its work to the National Assembly. Within its legal competences, the Agency oversees the implementation of the National Anti-Corruption Strategy and the Action Plan for Implementation of the National Strategy, the special part of which refers to public procurement.

The Commission for Protection of Competition is an autonomous and independent organisation which is accountable for its work to the National Assembly. It is competent to decide on the rights and obligations of the market participants. In line with this competence, the Commission's activity implies the detection of cases of competition infrigement, their sanctioning and elimination of consequences of competition infringement.

The Administration for Joint Services of the Republic Bodies is the body in charge of centralised public procurement for the needs of state bodies and organizations, including judicial bodies. The Government regulates more closely the conditions in which and manner how the Administration for Joint Services shall conduct centralized public procurement procedures as well as the list of contracting authorities for which the centralised procurement is conducted and the list of procurement subjects that are subject to centralisation.

2 "RS Official Gazette", No. 44/2014, 14/2015, 54/2015, 96/2015 – state law and 62/2017.

3 "RS Official Gazette", No. 88/2011, 15/2016 and 104/2016.

1. FUNCTIONS OF PUBLIC PROCUREMENT OFFICES/AUTHORITIES AND MONITORING FUNCTION, ACCORDING TO EU PRACTICE

We can present the functions of public procurement offices/authorities/administrations in EU countries, as well as description of tasks and activities pertaining to the monitoring function, by viewing the following publications published by OECD/SIGMA: Public Procurement Brief 26 – Organising Central Public Procurement Functions and Brief 27 – Monitoring of Public Procurement[4].

The said documents show us that EU Member States, in general, establish central organisational structures for the performance of functions related to the public procurement system as a whole. All stakeholders in public procurement systems rely to a great extent on the capacity of public procurement offices/authorities to support the development of national public procurement systems. These central institutions have been given the authority and have been entrusted with tasks of coordination, management and provision of support in the implementation of public procurement legislation. The practical experience of Member States that have recently joined the EU, as well as candidate countries (but also of some ''old'' EU Member States), proves the importance of central public procurement organisations in carrying out tasks and activities stated in the public procurement chapter for EU accession negotiations. In these countries, a key challenge in the public procurement reform process, along with the reform of the legal component, is the question how to best ogranise the central organisational structure for the coordination, implementation and monitoring of public procurement.

The functions performed by these bodies may be classified as either core functions or supplementary functions.

The core functions are:

- **Development of public pocurement primary policy**, whose aim is setting the overall legal framework for public procurement operations. The most important function in this context is to prepare and draft primary public procurement legislation. Under this function, the tasks commonly assigned are as follows: (1) to lead the working group in the drafting process; (2) to organise the consultation process with the main stakeholders in the procurement system; and (3) to take part in other legislative activity of relevance to public procurement;
- **Secondary policy and regulatory functions**, which relate to regulations that are formally adopted by the government in order to give effect to primary legislation in specific areas or to provide implementing tools in support of the application of primary legislation. A set of supplementary regulations may include implementing regulations – covering technical aspects of the procurement process, areas not covered by primary legislation, or areas where clarifying application instructions are needed; operational guidelines, standard formats for contract notices, model tender documents for goods, services and works, including instructions to tenderers, tender forms and technical specifications as well as model general conditions for goods, services, works and concessions;
- **International coordination function** (international cooperation);
- **Monitoring function (supervision)** - this monitoring includes any systematic observation of the public procurement system that is conducted in order to assess the way in which the development and functioning of the system as well as the desired (targeted) state of play, as defined by policy makers, has been achieved. The 2014 Directive requires Member States to assign a monitoring

[4] On functions in individual Member States of the European Union see Chapter 4 of the Analysis herein.

function to "one or more authorities, bodies or structures", which are empowered to report on the "specific violations or systemic problems" that have been identified (*more in the text below*).

Supplementary functions are as follows:

- **Advisory and operations support functions**. The aim of these functions is to enable contracting authorities/entities to act efficiently and in compliance with national legislation, the fundamental principles of the Treaty on the Functioning of the EU and good practices, while they encompass: organisation of a help-desk function to provide legal and professional support to contracting authorities and economic operators on a daily basis; development of guidance systems and operational tools for managing all phases of the public procurement process;
- **Publication and information functions** (may as well include the publication and distribution of information on public procurement legislation and policy, including sources of additional information, materials and advice). The tasks linked to this function may include the following: provision of contract notice models and instructions on how to use them; operation of internet-based publication systems for contract and award notices; quality and legality controls of received notices; publication of notices and submission of notices to the Official Journal of the EU; maintenance of public procurement registries or other public procurement databases; maintenance of lists of contracting entities of public procurement contracts; operation of an internet-based information and guidance system to support the procurement community, including guidance documentation, model tender and contract documents, and interpretative and commentary communications;
- **Professionalisation and capacity strengthening functions,** which include**:** initiation and co-ordination of national training programmes for contracting authorities/entities; facilitation of independent teaching and research in universities and training colleges and through private companies; organisation of a research programme on public procurement law, economics and policy; and participation in national and international academic and other events on public procurement law, economics and policy;
- **Development and procurement co-ordination functions**, such as introduction of systems for performance measurement of public procurement or development of electronic public procurements.

Speaking of **monitoring function**, monitoring is any systematic observation of the public procurement system that is conducted in a coherent way in order to assess how the system functions and develops over time and to establish whether the desired (targeted) state defined by policy makers has been achieved. A distinction should be made between the concept of monitoring, as defined above, and the methods and proceedings applied in order to detect and remedy infringements of public procurement rules (auditing, inspection, checking of compliance). Although detecting and combating infringements of public procurement rules (by means of a compliance assessment) is instrumental in achieving goals set for public procurement, monitoring is a much wider concept that is not limited to the assessment of legal compliance. Such monitoring of public procurement involves the activities such as: collection, analysis and dissemination of data (concerning various aspects of public procurement, e.g. its transparency, openness, competitiveness and efficiency) and the results of monitoring provide a basis for the preparation of regular reports on the functioning of the procurement system and in particular for the elaboration of recommendations and proposals for the future development of the procurement system. The practice of EU Member States shows that the central public procurement organisations conduct the abovementioned monitoring almost without exception, while monitoring in terms of detecting and

combating/remedying infringements of public procurement rules has been conducted in increasing number in recent years.

The Directive 2014/24/EU[5] introduces additional requirements concerning the monitoring of the operation of public procurement systems:

- **Monitoring authorities:** Article 83 of the Directive requires Member States to ensure that monitoring of the application of public procurement rules is performed by "one or more authorities, bodies or structures" (monitoring authorities). The monitoring authorities must be empowered to report on "specific violations or systemic problems" that have been identified;
- **Results of monitoring:** The results of monitoring activities conducted by monitoring authorities must be made available to the public. The results must also be made available to the European Commission. Article 83 sets out requirements concerning regular data collection and reporting to the European Commission every three years. The report provided to the European Commission must include information, where applicable, on the most frequent sources of wrong application or legal uncertainty including possible structural or recurring problems in the application of the rules; the level of SME participation; prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities.

The role of monitoring in public procurement is: to assess the way in which the public procurement system is developing as a whole and the direction in which it is moving – some trends can be identified only after years of observation – and thereby provide meaningful information that is essential for policy making; identify the need for any changes in the system; set short-term and long-term priorities and evaluate whether they have been achieved; analyse the potential effects of alternative solutions; provide guidance for procurement policy and implementation of decision making; provide information of relevance to decisions made by other policy makers.

2. ACTIVITIES CURRENTLY PERFORMED BY THE PUBLIC PROCUREMENT OFFICE

Pursuant to the provision under paragraph 1 of Article 135 of the PPL, the PPO is established as a special organization which monitors the application of the PPL, passes bylaws and performs professional activities in the area of public procurement, monitors the conducting of public procurement procedures, controls the application of certain procedures, manages the Public Procurement Portal, prepares reports on public procurement, proposes measures for improvement of public procurement system, provides professional assistance to contracting authorities and tenderers, contributes to the creation of conditions for cost-effective, efficient and transparent use of public funds in public procurement procedures.

In line with Article 136 of the PPL, the PPO performs the following activities:

1) monitors the application of the PPL;
2) adopts bylaws in the field of public procurement;
3) participates in drafting regulations in the field of public procurement;
4) issues opinions on interpretation and application of provisions under the PPL;
5) examines the fulfilement of requirements for conductiong a negotiated procedure under Article 36 of the PPL and for competitive dialogue;

5 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

6) proposes a list of contracting authorities to the Government, according to data from reports and records on public procurements in its possession;

7) appoints civil supervisor (in line with paragraph 5 of Article 28 of the PPL, it closely regulates the conditions and criteria for appointment of civil supervisors and their methods of work);

8) creates models of framework agreements (pursuant to paragraph 10 of Article 61 of the PPL, it determines as well the framework models of tender documents);

9) prescribes standard forms of public procurement notices;

10) prescribes the manner of keeping records of and compiling reports on public procurement;

11) compiles quarterly and annual reports on public procurement;

12) stipulates the mode and programme of professional training and mode of taking professional examination for public procurement officer and maintains the register of public procurement officers;

13) manages the Public Procurement Portal;

14) takes measures aimed at development and upgrading of the public procurement system;

15) files requests for the protection of rights;

16) notifies the SAI and Budgetary Inspection on identified irregularities in the conduct of public procurement procedures and delivers public procurement reports;

17) initiates misdemeanour proceedings having learned in any way of a violation of this Law which may constitute the basis for misdemeanour liability;

18) initiates proceedings to determine the nullity of a public procurement contract;

19) prepares models (templates) of decisions and other acts that contracting authorities make in the public procurement procedure;

20) collects statistical and other data on conducted procedures, concluded public procurement contracts and on the overall efficiency of the public procurement system;

21) publishes and disseminates relevant expert literature;

22) collects information on public procurement in other states

23) prepares plans and normative (regulatory) acts and, with the Government's consent, undertakes other activities related to negotiations on accession to the European Union in the domain of public procurement;

24) cooperates with foreign institutions and experts in the field of public procurement;

25) cooperates with other state bodies and organizations, as well as with bodies of a territorial autonomy and local self-government;

26) performs other activities in line with the law (pursuant to paragraph 6 of Article 21 of the PPL, the PPO shall develop a model (template) of internal plan for preventing corruption in public procurement, while pursuant to Article 22 of the PPL, besides its obligation to closely regulate the contents of internal bylaws adopted by contracting authorities, it is also obliged, should it identify non-compliance of the internal bylaw with the provisions of the PPL, to notify the contracting authority of it, along with the proposal on how to comply and the deadline for doing it, and also, where a contracting authority fails to act in accordance with that instruction, to notify thereon the

body in charge of supervision of the contracting authority's operations and the SAI, as well as to initiate the relevant proceedings before the Constitutional Court).

3. ACTIVITIES OF PUBLIC PROCUREMENT OFFICES IN THE REGION AND IN EU MEMBER STATES

Analysing activities of the public procurement offices in the region, which encompasses Croatia, Bosnia and Herzegovina, Montenegro and Macedonia, we may conclude that the offices perform core functions described in the previous chapter of the analysis (participation in public procurement policy making and drafting of public procurement legislation, international coordination and monitoring function), as well as activities related to advisory support, education and certification in the field of public procurement, also, activities related to managing the Public Procurement Portal, while, generally, they do not perform certain activities that are within the competence of the PPO (issuing opinions on justifiability of applying certain type of procedure, filing requests for initiation of misdemeanour proceedings and initiation of proccedings for determining the nullity of a public procurement contract).

Table 1 – a comparative overview of activities of public procurement offices in the region

Power	Serbia	Croatia	B&H	Montenegro	Macedonia
Participation in public procurement policy making and drafting of public procurement legislation	+	+	+	+	+
International coordination/cooperation	+	+	+	+	+
Monitoring function	+	+	+	+	+
Advisory support and education	+	+	+	+	+
Activities related to e-procurement	+	+	+	+	+
Reporting	+	+	+	+	+
Issuing opinions on the justifiablity of applying certain type of procedure	+	-	-	+	-
Filing requets for initiation of misdemeanour proceedings	+	+	-	-	-
Initation of proceedings for determining the nullity of a public procurement contract	+	-	-	-	-
Filing requests for the protection of rights	+	+	-	-	-

Having analysed the activities performed by public procurement offices/authorities/administrations in EU Member States, in regard to the monitoring function, we can conclude that different member states apply different solutions for the same purpose - in terms of providing legallity of actions, detection of

irregularities in public procurement and implementation of actions aimed at strengthening the system (on the basis which was established by monitoring).

In that regard, some of the Member States, such as **Slovenia** (which, since the first Public Procurement Law in the Republic of Serbia, has represented a model for the implementation of solutions in the public procurement system of the Republic of Serbia, have a solution according to which the central public procurement institution (the Public Procurement Directorate) ensures monitoring of public procurement legislation. In this regard, when the Public Procurement Directorate identifies or receives information related to specific violations of legislation or systemic problems, it notifies of it the budget inspection, state audit authority, authority responsible for protection of competition or anti-corruption agency. The Public Procurement Directorate is obliged, in this regard, to act in accordance with the aforementioned Article 83 of the Directive 2014/24 and to notify the European Commission of the detected irregularities. Also, The Public Procurement Directorate is obliged to ensure that the information and instructions related to the application and interpretation of EU acquis pertaining to the public procurement are available to the participants in the system and to provide support to them in this regard. In adiition to this, the Public Procurement Directorate conducts monitoring of public procurement thorugh collection, analysis and dissemiination of data related to public procurement.

On the other hand, in addition to the aforementioned (systemic) monitoring, the central public procurement bodies in some Member States perform other activities related to this, including the so-called inspection activities, such as: checking of legal compliance in individual public procurement procedures or giving prior approval of tender documents in certain public procurement procedures (above a certain value, if they are financed from EU fnds etc.).

So, for example, in **Poland**, the public procurement office may, in addition to system monitoring, initiate *ad hoc* controls in individual public procurement procedures, in the case there is reasonable suspicion that the public procurement rules have been violated in the course of a public procurement procedure.

In **Romania**, within the public procurement office a special organisational unit has been established that conducts the so-called *ex-ante* control of certain parts of tender documents before their publication, while there is similar competence also in Slovakia, in cases when public procurements are financed or co-financed from EU funds.

Analysing the public procurement in EU Member States, we can also conclude that there are special bodies for controlling individual public procurement processes. Thus, in **Italy**, for example, an anti-corruption body controls public procurement procedures and execution of public procurement contracts. In **Portugal**, public procurement control is conducted by the Court of Auditors and Financial Inspection, while the Public Procurement Law dedicates special attention to monitoring of public procurement contract performance, specifying that a ''a contract manager'' shall be appointed to perform the tasks related to the supervision (monitoring) of the execution of a contract.

4. ANALYSIS OF THE ACTIVITIES CURRENTLY PERFORMED BY THE PUBLIC PROCUREMENT OFFICE WITH RECOMMENDATIONS FOR IMPROVEMENT

Certain number of activities currently performed by the PPO have undoubtedly proved to be a good practice, both in terms of their positive impact on the public procurement system in the Republic of Serbia and in terms of compliance with the previously described good practices in the EU[6], as well as with the

[6] Namely, in Chapter 2 of the Analysis, it is stated that, in the EU, central institutions were given authority and they were assigned with tasks of coordination, management and support provision in the application of legislation in the field of public procurement, so that their (usual) major and auxiliary functions are listed.

activities performed by public procurement offices in the countries of the region. These activities are as follows:

1) Adoption of by-laws in the field of public procurement, participation in the preparation of legislation in the field of public procurement and issuing opinions on the interpretation and implementation of the provisions of the PPL;

2) Preparation of framework agreement models (templates) (in line with paragraph 10 of Article 61 of the PPL determining the framework models of tender documents) and prescribing standard forms of public procurement notices as well as preparation of models of decisions and other regulations adopted by contracting authorities in the public procurement procedure;

3) Prescribing the manner of keeping records of and compiling reports on public procurement (compiling quarterly and annual reports on public procurement) and collecting, also, statistical and other data on conducted procedures, concluded public procurement contracts and on the overall efficiency of the public procurement system);

4) Stipulating the mode and program of professional training and the mode of taking professional examination for public procurement officer and maintains the register of public procurement officers, and it also publishes and diseminates relevant expert literature and collects information on public procurement in other states;

5) Management of the Public Procurement Portal;

6) Taking measures aimed at development and upgrading of the public procurement system;

7) Preparation of plans and normative (regulatory) acts and, with consent of the Government, undertaking of other activities related to negotiations on accession to the European Union in the domain of public procurement, cooperation with foreign institutions and experts in the field of public procurement and cooperation with other state bodies and organisations, as well as with bodies of territorial autonomy and local self-government.

The aforementioned activities stipulated in the PPL are in accordance with the good practice in the EU and represent the aforementioned key and supplementary functions of the central organisational structure for performing functions related to the public procurement system as a whole.

The aforementioned activities of the PPO significantly affect the efficiency of the public procurement system in the Republic of Serbia and, as a central institution in the public procurement system, it signifantly influences the public procurement policy making and efficiency as well as the legality of actions of all participants in the system (by creating a transparent public procurement system through the management of the Public Procurement Portal, as well as by improving the professionalisation and regularity/correctness of actions through designing vocational education programs and preparation of adequate models, guidelines etc., but also through the creation of preconditions for public procurement policy making and development by means of data collection and reporting).

Further in this chapter, we will analyse the activities currently performed by the PPO which seem to be unnecessary and inexpedient for this body, with the exeption of supervising function (monitoring)which will be specifically addressed in Chapter 6 of this analysis.

A) The PPO shall draft a model (template) of internal plan for combating corruption in public procurement – Article 21 of the PPL.

The provision of Article 21 of the PPL stipulates general measures for corruption prevention and the duty of contracting authorities to take all necessary measures to prevent the occurrence of corruption at any stage of the public procurement (in the course of planning stage, conducting of a public procurement procedure and public procurement contract performance). The obligation was set up for contracting authorities to adopt internal plans, which should contain preventive measures for combatting corruption as well as measures of internal monitoring and control for preventing corruption in public procurement in cases where total estimated annual value of public procurement exceeds one billion dinars.

The PPO drafts a model of internal plan for combatting corruption in public procurement, which contracting authorities should follow when composing their internal plans.

Purusant to Article 59 of the Anti-Corruption Agency Law[7], state bodies, territorial autonomy bodies and local self-government bodies, public services and public companies are obliged to adopt an integrity plan in line with the guideliness for the development and implementation of the integrity plan of the Anti-Corruption Agency.

Having this in mind, it seems unnecessary and unporpesful to set the obligation for contracting authorities having total estimated annual value of public procurement exceeding one billion dinars to adopt a special anti-corruption plan, and therefore, also, the PPO's obligation to compose a model of internal plan for combatting corruption in public procurement seems unnecessary and inexpedient. On the other hand, it seems appropriate that the competent state bodies, and in particular the PPO, provide expert assistance to the Agency in the implementation of these activities, in the part regarding the drafting of an integrity plan related to the public procurement processes, instead of prescribing an obligation for contracting authorities to prepare another act, in addition to the act prescribed by special piece of legilslation.

B) Determining inconsistencies of the contracting authority's internal bylaw with the provisions of the PPL – Article 22 of the PPL

The PPL envisages the obligation of each contracting authority to adopt an internal bylaw that will more closely regulate all stages of the public procurement (planing, conducting public procurement procedure, contract performance). The internal bylaw must contain a more detailed and clearer presentation of internal procedures within contracting authority at all stages of public procurement. The PPO, in accordance with the competence stipulated in this provision of the PPL, adopted the Rulebook on the contents of the internal act regulaing in detail the public procurement process of the contracting authority[8].

This Article of the PPL also stipulates the PPO's responsibility to notify the contracting authority should it identify inconsistencies between the contracting authority's internal act and the provisions of the PPL and to send the proposition suggesting how to make the internal act compliant with the PPL and the deadline for doing it. Where the contracting authority fails to act in line with the proposition, the PPO is empowered to notify of it the body in charge of supervising the contracting authority's operations and the SAI as well as to initiate the adequate proceedings before the Constitutional Court.

It is quite clear that it is impossible for the PPO to control and determine inconsistencies between each internal act of each contracting authority and the PPL, since the PPO's capacities should be much greater and/or there should be an entire organisational unit within it tasked with such operation (or

7 "RS Official Gazette", No. 97/2008, 53/2010, 66/2011 - decision of the CC, 67/2013 – decision of the CC, 112/2013 – authentic interpretation and 8/2015 – decision of the Const Court.

8 "RS Official Gazette", No. 83/2015.

with such job decription). On the other hand, the power to initiate proceedings before the Constitutional Court in cases where the contracting authority fails to rectify the identified inconsistences seems ambiguous and unenforceable. It cannot be assessed which type of proceedings before the Constitutional Court would that imply, which lawsuit should be filed and along with which statement of claim. It seems appropriate to delete this function or to find a solution acoording to which the PPO, upon receipt of notifications from interested parties in the public procurement system of possible inconsistencies between the contracting authority's internal bylaw and the provisions of the PPL, would be empowered to order the contracting authority to rectify the identified inconsistencies within a certain time limit, and also to prescribe sanctions for failing to comply with the PPO's orders.

C) Protection of the integrity of the procedure - Article 23 of the PPL

In addition to rejecting the tender as described in paragraph one of Article 23 of the PPL, the contracting authority is obliged to notify the competent state bodies of the cases where a person who participated in the public procurement planning or in the preparation of tender documents (or separate parts thereof), as well as a person related to him/her, acts as a tenderer or tenderer's subcontractor and also of the cases where a tenderer or an applicant has, directly or indirectly given, offered or hinted about some benefit or tried to find out any confidential information or to influence in any way the contracting authority's actions during the public procurement procedure.

Since the mentioned provision does not stipulate which competent bodies should be notified by the contracting authority, it is presumed that one of those bodies is the PPO, whose competence is to monitor the implementation of the PPL. However, there arises a question regarding the PPO's acting upon received notification, having in mind its competence as set out by the PPL. Should the PPO process and examine the facts from a specific case based on such information or simply forward it to the prosecution's office to determine the reasonableness of suspicion that a criminal offence has been committed? It seems that such notifying can be possibly prescribed in terms of notifying the competent prosecutor's office or budget inspection, which, in accordance with the legislation regulating their operation, have adequate power to determine the facts in concrete cases as well as to pronounce adequate sanctions and/or initiate adequate proceeding with respect to this.

D) Reporting corruption to the PPO – Article 24 of the PPL

The obligation to report corruption to the PPO, Anti-Corruption Agency and the competent procecutor's office refers to all persons engaged in public procurement activities and to any other persons employed by the contracting authority as well as to any interested party possessing information on the occurence of corruption in public procurement.

It seems illogical that information on the presence of corruption should be delivered to the PPO. This is because the PPO has no established competence to act upon such information that can be classified under the concept of monitoring of the PPL implementation because the existence of corruptive actions in itself contains elements of certain criminal offences and is classified as the competence of the prosecutor's office. Namely, it is indisputable that the PPO as a central institution in the public procurement system has knowledge with which it can contribute, through its activities, to reducing corruption, but it seems advisable that the PPO should direct the said activities towards the influence on the public procurement system, through, for example (and based on the information collected in the performance of its activities) proposing measures for combating corruption in public procurement.

E) The PPO scrutinizes the fulfilment of conditions for applying negotiated procedure under Article 36 of the PPL

The contracting authority is obliged, prior to the initiation of a negotiated procedure without publication of a contract notice, to request the PPO's oppinion on the justification of application of this type of procedure (certain reasons for its initiation). The PPO is obliged, within ten days from the date of receiving the contracting authority's request, to scrutinize the basis for applying the negotiated procedure and to deliver its opinion to the contracting authority and it may also request the contracting authority to provide additional information and data necessary for determination of the facts which are relevant for giving its opinion.

The PPO has achieved significant results as regards reduction of frequency of application of the negotiated procedure without publication of a contract notice (the share of this procedure fell to 2% in 2017, compared with 28% in 2012[9]). Nevertheless, the question arises regarding the method according to which the PPO acts and which it can apply when giving opinion on the justification of applicationof the negotiated procedure, bearing in mind that it has only certain information avalilable, often delivered solely by contracting authorities and sometimes insufficient for issuing a precise and unequivocal opinion.

On the other hand, if it comes to the proceedings for the protection of rights, that opinion represents only one of the pieces of evidence in the decision-making procedure before the Republic Commission, so, it is possible, and it happens in practice when such procedures are conducted, that the Republic Commission ex officio annuls them in their entirety. Also, in the procedure under point 3 of paragraph 1 of Article 36 of the PPL it is required only to file a request to the PPO for issuing an opinion but not to obtain a positive opinion within a specified time limit for contracting authorities to be able to initiate and conduct a negotiated procedure due to ''extreme urgency''.

In addition to the abovementioned cases, it should be taken into account that the responsibility for implementation of each individual procurement procedure is on the contracting authority which is conducting it, and in that regard it should be noted that when the PPO's issues its opinion, the responsibility is actually shifted from the contracting authority that is conducting the procedure onto the PPO, which does not de facto participate in the concrete public procurement procedure.

Also, the data from the PPO's Report on Public Procurement in the Republic of Serbia for 2017, indicate that during that period the PPO issued almost 2,000 opnions on negotiated procedures without publication of a contract notice, which represents the time spent by the PPO's employees that they could have spent performing other tasks necessary for the functioning and improvement of the public procurement system. In addition, these data show that only 8% of opinions were negative, which is significantly less than in the previous years, which indicates that contracting authorities gained knowledge, through multiannual practice of the PPO, ofthe situations in which the application of this type of procedure would be justified and in line with the PPL.

Taking into account the abovementioned facts, it is justified to consider the abolition of this competence of the PPO, and possible establishment of an obligation for the PPO to develop gudieliness regarding this for the needs of contracting authorities, a well as to envisage an obligation or a possibility for the PPO to indicate to the contracting authority, on the basis of the collected data, its assessment that the conditions prescribed by the law for applying this type of procedure are not met, if this is the case.

9 Report on Public Procurement in the Republic of Serbia for the period 01/01/2017 – 31/12/2017.

Also, it seems justified (even if transparency of this type of procedure is currently envisaged in accordance with the existing PPL) to prescribe an obligation for contracting authorities, in case of applying this type of procedure, to publish a special notice (adivertisement) with necessary information (possibly also evidence) that would justify the grounds for conducting a negotiated procedure and simultaneously enable interested parties to potentially challenge that by filing a request for the protection of rights.

With regard to this PPO's competence, it should be noted that the analysis of competence and powers of the offices in the region shows that the PPO (in addition to the Public Procurement Office of Montenegro) is the only one with such established competence and that in Member States this practice is not (anymore) significantly present.

The same is shown by the GAP analysis conducted within an earlier EU-funded project (analysis of PPL compliance with the Directives 2014/24 and 2004/18), wherein it is stated that the requesting of PPO's opinion transfers responsibility from the contracting authority onto the PPO and that such requests are not mentioned in the Directive.

F) Submission of the contract modification decision to the PPO – Article 115 of the PPL

If the contracting authority is in a situation when it has to modify certain costituent parts of a public procurement contract after the conclusion of a contract, then it is obliged to adopt the decision on contract modification and to publish that decision on the Public Procurement Portal, and to submit a report to the PPO and the SAI thereupon.

The PPO is thus included in the control of a certain stage of contract performance but its competence is not entirely clear in the case when it establishes that the contract has been modified contrary to the provisions of the PPO, especially taking into account the fact that the stated reports are submitted to the SAI as well, which then, within the process of a business audit, determines whether there has been a violation of the law in that part as well.

With regard to modifications of a contract, it is important to pay special attention not only to the aforementioned ''official'' modifications, but also to factual modifications when a contracting authority allows that certain contractual obligation of the selected tenderer is performed in a different maner from what has been agreed, but that has not been formally implemented through the written modification of the contract referred to in Article 115 of the PPL (whether the subject of the public procurement has been delivered in accordance with the contracted quality etc.).

In the light of the abovementioned facts, we can potentially consider the necessity to envisage the advertisment which will be published on the Public Procurement Portal and which will refer to the contract performance and contain all relevant information regarding the contract conclusion, submission of the requested instruments of security (collateral) and fulfilment of contracting parties' obligations.

Namely, it is expected that the tenderers that participated in the concrete public procurement procedure are primarily interested in the outcome of each individual contract execution and that they could be the ones that can significantly control the actions with regard to contract execution and, , in cases of possible deviations and suspicion that such deviations exist, notify the competent bodies, and above all the SAI and Budget inspection.

G) The PPO initiates misdemeanour proceedings – point 20) of paragraph 1 of Article 136 of the PPL

The PPO initiates misdemeanour proceedings when it finds out in any way that there has been a violation of the provisions of the PPL. In addition to the PPO, the request for the initiation of misdemeanour proceedings can be also filed by the SAI, another competent body or it can be initiated ex officio by the Republic Commission immediately upon finding out about the offence.

It is unclear what it means ‘‘finds out in any way‘‘ because that can, in essence, mean that the PPO can be overburdened with a huge amount of information about alleged illicit actions which someone considers to have been classified as offences in the domain of public procurement. Such uncontrollable delivery of information, in both oral and written form may, and in reality it does, lead to a situation when the employees have to record and pay attention to all those information and also to officially register them as cases upon which they are supposed to react, while, in reality, neither according to their competence nor according to their capacities can they process them in order to determine whether they are offences indeed, and, accordingly and if necessary, file requests for the initiation of misdemeanour proceedings. Therefore, it is not realistic (nor advisable, taking into account other responsibilities of the PPO) for the PPO to receive information on all alleged offences, regardless of the stage in the public procurement cycle those information refer to, and it is especially not realistic taking into account the fact that more than 100 thousand public procurement contracts are annually concluded in the Republic of Serbia.

The power to file a request for the initiation of misdemeanour proceedings must stem from clear control and inspection powers which have been given to a state body, therefore, if the PPO kept its power to file requests for the initiation of misdemeanour proceedings, that power would have to stem from its new powers which will be clearly and more specifically defined. In this regard, it would be particularly justified to give power to the PPO to file requests for the initiation of misdemeanour proceedings when, in the course of monitoring in line with the law, it notices irregulatiries that may be the grounds for penalties for misdemeanour.

In regard to this power of the PPO, it is important to point out the overlapping of competences with other bodies (as it was emphasised earlier, the power to file requests for the initiation of misdemeanour proceedings has to stem from clear and inspection-related powers that have been given to a state body). So, for instance, the PPO has the authority to file requests for the initiation of misdemeanour proceedings in relation to the misdemeanours stipulated in the PPL, while the Budget Inspection and/or the SAI, in accordance with the Budget System Law[10] have a broad provision according to which any irregularity in the conduct of a public procurement procedure may be the basis for potential initiation of misdemeanour proceedings.

H) The PPO initiates proceedings for determining nullity of a public procurement contract – point 21) of paragraph 1 of Article 136 of the PPL

The PPO has the power to file a lawsuit in court to determine nullity of a concluded public procurement contract in the case trere is any reason for nullity as stipulated in the PPL. This power, of the PPO as well as of the Republic Commission, is prescribed by the PPL itself, while paragraph 1 of Article 109 of the Law on Contracts and Torts stipulates that the court is in charge of nullity ex officio and any interested party may rely on it and invoke it and that the public procesutor as well has the right to request determining nullity.

10 “RS Official Gazette”, No. 54/2009, 73/2010, 101/2010, 101/2011, 93/2012, 62/2013, 63/2013 – corr. 108/2013, 142/2014, 68/2015 – state law, 103/2015, 99/2016 i 113/2017.

When it comes to the lawsuit for determining nullity of a public procurement contract, it must be noted that this right has been given to all interested parties under the Law on Contracts and Torts, hence, no need can be seen why this right, and/or authority, would be given specifically to the PPO.

I) The PPO appoints a civil supervisor– Article 28 of the PPL

Where the contracting authority conducts a public procurement procedure whose estimated value exceeds one billion dinars, the procedure shall be monitored by a civil supervisor. The PPO appoints a civil supervisor for each of the aforementioned public procurement procedures.

Civil supervisor is an institution introduced in the public procurement system in the Republic of Serbia in 2012, with the purpose and goal to introduce an additional control of high-value public procurement procedures performed by independent experts. However, the analysis of the PPO's reports and practice of actions shows that this institution has not yielded the exepected results (there is a significant decline in the number of reports submitted by civil supervisors), therefore, it can be expected that the retention of this institution will be reviewed when the new law is being passed and that the PPO's function in this regard will be deleted in the case this institution is deleted as well.

Also, having analysed public procurement legislation in the region and EU Member States, we can conclude that this institution is not widespread and not recognised as an institution that effectively ''helps'' in monitoring conducting of public procurement procedures.

5. RECOMMENDATIONS FOR IMPROVEMENT OF THE PUBLIC PROCUREMENT OFFICE'S MONITORING FUNCTION

In the EU, as stated earlier in this analysis, public procurement monitoring is understood as any systematic observation of the public procurement system that is conducted in a coherent way in order to assess how the system functions and develops over time and to establish whether the desired (targeted) state of play defined by policy makers has been achieved. In this regard, a distinction should be drawn between the concept of systemic monitoring and the methods and proceedings applied in order to detect and remedy infringements of public procurement rules (auditing, inspection, checking of compliance). Although detecting and combating infringements of public procurement rules (by means of a compliance assessment) is instrumental in achieving goals set for public procurement, monitoring is a much wider concept.

On the other hand, according to the current PPL, the PPO is given a wide range of powers related to monitoring while the boundaries within which the it should operate remain unclear, which certainly affects the efficiency of the PPO's monitoring function. Namely, pursuant to paragraph 1 of Article 135 of the PPL, the PPO was established as a special organisation which (among other things) monitors the implementation of the PPL, monitors the conductiong of public procurement procedures and controls the application of certain procedures. So, the PPL indicates only that the PPO monitors the implementation of the PPL and controls the application of certain procedures, thereby making the role of the PPO close to the role of bodies such as the budget inspection, but at the same time it does not indicate what this control should encompass, which powers (competences) the PPO should have in this respect etc. , which leaves room for different interpreations in this regard.

Certainly, it is indisputable that different types of public-procurement monitoring and controls are necessary and that the system cannot be efficient without any of them, but it is necessary to ensure that each institution in the system has clear competences and related powers.

It seems that the PPO, as an expert body, shoud primarily perform the so-called systemic monitoring of the conducting of public procurement procedures and public procurement contracts execution. This monitoring implies a number of activities aimed at preventing the ocuurence of irregularities and at facilitating their easy detection and effective sanctioning in a systematic and continuous manner. With respect to sanctioning of irregularites, not only in the field of public procurement, but in other fields as well, it must be noted that there are two circumstances which are very important but sometimes easily neglected. First, the rules must be clear and it must be ensured that these rules are available to those who are going to apply them, and that those who apply them can easily obtain clarifications of these rules so that they could have as few dilemmas as possible regarding their application. On the other hand, efficient and effective sanctioning of irregularites must be ensured, where the courts (misdemeanour courts and courts of general jurisdiction adjudicating in criminal cases and in cases wherein contractual disputes are resolved) have the most important role, and in the public procurement system also the Republic Commission (as well as the SAI and the Budget Inspection). Therefore, on the functioning of the judicial system depends as well the functioning of all areas of private and social life regulated by norms of a legal system, as each legal norm must be based, first, on the disposition – a rule that must be applied and then also on a sanction – a threat that some measures will be taken against those who do not comply with the rule. If the sanction did not exist, then the disposition as well would not make sense and it would remain, as it is usually said, ''a dead letter''.

The PPO can and must play a very important role in achieving both of the abovementioned goals regarding public procurement. On the one hand, the PPO can make all the rules readily available to all users, through several different activites that will be discussed in more detail below, and, on the other hand, it can, with its expert knowledge and experience, help the bodies that sanction irregularities become more efficient and perform their tasks at a high level of expertise, leaving as few dilemmas as possible as to why and how something was sanctioned. With respect to this, we must start from the fact that experts with all the necessary knowledge and experience in the prevention of irregularities are engaged by the PPO, and that they can also help the bodies that have repressive mechanisms and authority to undertake field activities (visiting the contracting authorities) such as inspection bodies, state audit, police and public prosecution. These bodies would then use their powers in a qaulity and effecient manner in order to achieve the basic goal of sanctioning of irregularities, which is a certainty in detection and sanctioning (punishing). The PPO would perform such a role at all stages of a public procurement process, thorugh various activities. All these activities could, in general be summarised as follows:

- ensuring fulfilment of the precondition that all relevant information on public procurement are published and publicly available, first of all, on the Public Procurement Portal;
- monitoring (supervision) of public procurement notices/advertisments published on the Public Procurement Portal;
- education of all stakehleders in public procurement, not only those who directly conduct and participate in public procurement procedures, but also of employees of state bodies and institutions who perform certain tasks in relation to control and combating of irregularities in public procurement, as well as of persons employed in the media and civil society representatives who can play an important role in detection of irregularities;
- systemic monitoring of the practices of competent bodies, such as the Republic Commission and the SAI, in order to detect the most frequent irregularities identified by those bodies, and to take preventive actions (thorugh presentation to the public and special education techniques) and to prevent repetition of those irregularities;

- preparation of models of acts/bylaws and documents which will make it easier for contracting authorities and tenderers, as well as control bodies, to participate in public procurement procedures or to control those procedures, by creating model documents that are clear, transparent and easy to view and that contain all necesaary notes and explanations so that those who apply them can understand their content and reasons for their application;
- undertaking initiatives aimed at closer cooperation among competent bodies and institutions in public procurement in order to ensure exchange of the necessary knowledge and experience and to ensure a uniform practice in the PPL provision application.

In the light of the abovementioned activities, it is important to reiterate that Article 84 of Directive 2014/24 provides that Member States shall ensure that the application of public procurement rules is monitored and where monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations or systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof. Further on, the results of the monitoring activities shall be made available to the public through appropriate means of information and these results shall also be made available to the European Commission and they may, for instance, be integrated in special monitoring reports. Thus, by 18 April 2017 and every three years thereafter, Member States shall submit to the European Commission a monitoring report covering, where applicable, information on the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules, on the level of SME participation in public procurement and about prevention, detection and adequate reporting of cases of procurement fraud, corruption, conflict of interest and other serious irregularities. On the basis of the data received according to those reports, the European Commission shall regularly issue a report on the implementation and best practices of national procurement policies in the internal market.

In addition to the abovementioned paragraphs, Article 84 of the Directive stipulates that Member States shall ensure that (a) information and guidance on the interpretation and application of the Union public procurement law is available free of charge to assist contracting authorities and economic operators, in particular SMEs, in correctly applying the Union public procurement rules and (b) support is available to contracting authorities with regard to planning and carrying out procurement procedures.

On the other hand, it seems that full monitoring of the PPL application is not an adequate solution (especially taking into account the competences of other institutions) because it is not specified on the basis of which information the PPO shall conduct monitoring; whether the PPO is obliged to react upon any information that is communicated or delivered to it, which creates a confusing situation wherein it is not known when it is required to react. Such undefined and general powers which overlap with powers of other competent bodies certainly do not lead to effective sanctioning of irregularities.

Nevertheless, given the practice in EU Member States described above, the criteria for closing Chapter 5 and the need to ensure effective control of activities in public procurement procedures, there remains the need to review the role of the PPO in conducting monitoring in individual public procurement procedures. This role of the PPO will have to be more clearly regulated in terms of situations in which the PPO would conduct this type of monitoring, as well as in terms of powers which would be then available to it (see conclusions regarding monitoring).

With regard to conducting control in individual public procurement procedures and performance of individual public procurement contracts, we must list the powers that other institutions have in this regard, namely The Republic Commission, Budget Inspection and the SAI.

The Republic Commission

Within the prescribed competences, the Republic Commission decides on requests for the protection of rights in public procurement procedures and monitors the implementation of the decisions it has issued. Through the aforementioned clearly defined powers which have been granted to it, the Republic Commission conducts a kind of direct monitoring during public procurement procedures. Any person interested in a specific public procurement procedure, in accordance with the provisions of the PPL, can initiate proceedings for the protection of rights and thereby practically initiate proceedings within which the legality of the application of a specific public procurement procedure will be examined.

So, we can conclude that the Republic Commission has a role in conducting control that is mainly related to public procurement procedures that are in progress.

The Budget Inspection

The Budget Inspection and the SAI primarily perform the so-called ex-post control i.e. the control of completed public procurement procedures (and of executed public procurement contracts).

The mode of operation and powers of the Budget Inspection are regulated by the Budget System Law. The activities of the Budget Inspection are performed by the Ministry of Finance with the aim of conducting inspection control of: 1) direct and indirect budget beneficiaries; 2) organisations for mandatory social insurance; 2) organisations for mandatory social insurance; 3) public enterprises founded by the Republic of Serbia, legal entities over which the Republic of Serbia has direct control or it has indirect control over more than 50% of equity or more than 50% of votes in the Management Board, as well as over other legal entities where public funds comprise more than 50% of total revenues; 4) autonomous provinces and local self-government units, public enterprises founded by local self-government, legal entities founded by such public enterpirses, legal entities over which a local-self government has direct control or indirect control over more than 50% of equity, or more than 50% of votes in the Management Board, as well as over other legal entities where public funds comprise more than 50% of total revenues; 5) legal entites and other entities to whom budget funds have been remitted directly or indirectly for certain purposes, legal entities and other entitles that participate in the operation that is the subject of control and entities that use budget funds on the basis of borrowing, subsidies, any other form of state aid, grants, financial assistance etc.

Budget inspection activities are organised also at the leves of autonomous provinces and local self-government units.

Budget inspection has access to all data, documents, reports and information required for the performance of functions within entities that are the subjects of inspection, hence it has at ist disposal appropriate resources (staff, space and equipment), which enable performance of their functions.

The activites of budget inspection are also regulated by the Law on Inspection Oversight[11]. Inspection oversight is a competence of public administration, the scope and concept of which are governed by legislation regulating public administration, performed by national, sub-national, and local authorities, which aims, through preventive action or imposition of corrective measures, at ensuring compliance and safety of operations performed by entities subject to oversight and the prevention or remediation of negative consequences and hazard to goods, rights, and interests protected by law or other regulation.

The Decree on Work, Competences and Insignia of Budget Inspection[12] stipulates that the budget inspection conducts inspection control of the application of legislation in the field of material and financial operation and lawful and purposeful use of budget funds by the entities that are subjects of inspection. The budget inspection performs activities of inspection control according to the schedule of activities but

11 "RS Official Gazette", No. 36/2015.

12 "RS Official Gazette", No. 93/2017.

a possibility of conducting extraordinary inspection controls is also envisaged (it must be taken into account that the official website of the Ministry of Finance published information on the possibility of submitting reports on irregularities and illegal use of public funds). The inspection control is carried out by inspecting business books, statements, records and other documents that are the subject of inspection control and of other entities participating in that operation. After the completed control, a control report (record) is compiled wherein, should the inspection control detect unlawful actions or irregularities, the following items shall be stated: 1) the legal basis; 2) the pieces of evidence on the basis of which the unlawful actions and irregularities were established; 3) the measures for their remedying; 4) the dealines for remediation.

Article 57 of the Budget System Law stipulates that contracts on the procurement of goods, financial assets, provision of services or contstruction works, contracted by direct and indirect budget beneficiaries and beneficiaries of funds of organisations for mandatory social insurance must be concluded in line with the legislation regulating public procurement, and this law stipulates that failing to act in accordance with the stated provision represents a misdemeanour (thereby it is practically enabled for the budget inspection to file a request for the initiation of misdemeanour proceedings with regard to any infringement of the PPL provisions, in line with the power provided by Article 104 of the Budget System Law).

Taking into account the powers of the budget inspection related to the control of public funds spending, and in relation to public procurement, it is clear the budget inspection is the body which, in line with positive legal regulations, is empowered with concrete powers related to conducting ex-post control and in relation to public procurement and related resources. In this regard, the need should be pointed out to possibly ‘’expand’’ the circle of entities to which the aforementioned misdemeanour from the Budget System Law refers, having in mind that the circle of entities set out by Article 57 is narrower than the circle of entities representing subjects of budget inspection control, and also that concrete and individual misdemeanours should be stipulated in that regard, in order to clearly and unambiguously state which actions of contracting authorities constitute the basis for misdemeanour liablity.

The SAI

The SAI conducts the audit of financial statements, audit of regularity of operations which includes the review of financial transactions and decisions in the field of public procurement, as well as the audit of performance which includes the review of the budget and other public funds spending in order to report whether the funds of the auditee were used in accordance with the principles of economy, efficiency and effectiveness, as well as in accordance with the planned objectives.

Ths institution, therefore, the same as the budget inspection, conducts ex-post control with relation to public procurement (primarily regarding the regularity of conducting public procurement procedures and execution of concluded contracts). The circle of audit subjects and auditees, in accordance with the Law on State Audit Institution[13] has been set up in such a way that it is even significantly broader than the circle of entities that are contracting authorities in accordance with the PPL. Upon the conducted audit, the SAI compiles an audit report and in the case of violation of the obligation of good business practice, it may request the udertaking of measures. The SAI has the power to file requests for the initiation of misdemeanour proceedings (as well as to file criminal charges) in relation to the conducted audit.

6. CONCLUSIONS WITH REGARD TO THE MONITORING

13 “RS Official Gazette”, No. 101/2005, 54/2007 and 36/2010.

As stated in Chapter 2 of the analysis herein, during the performance of certain tasks regarding monitoring (supervision) function, it is necessary to differentiate among systemic monitoring which, as a rule, is conducted by public procurement offices/authorities as central bodies in public procurement systems and the monitoring conducted by the body in charge of protection of rights in individual public procurement, and the monitoring perfomed by auditing institutions and inspection bodies in accordance with their powers/competences.

In the expert's opinion, taking into account the existing system of controls in the Republic of Serbia, in order to achieve in the best way, adequate results in monitoring through the coordination of different powers of competent bodies, it is recommended that the PPO conduct systemic monitoring as described earlier in the anlysis, but when the conduct of monitoring in individual public procurement procedures is concerned, it is necessary to clearly define and regulate the PPO's powers and situations in which it should conduct such monitoring. Namely, the significance of the PPO in the conduct of monitoring in individual public procurement procedures is indisputable (primarily in order to prevent irregulaties, but also to remedy them in a timely manner), but it is necessary, then, to clearly (more clearly) regulate in which situations, for what purpose and how such monitoring is conducted.

Namely, it seems suitable that the PPO conducts such monitoring primarily acccording to the monitoring plan which would be prepared by the PPO. In this way, the PPO would be able to determine, on the basis of the data collected in the course of systemic monitoring, in which areas and over which contracting authorities such monitoring should be conducted for the purpose of preventing (but also detecting) irregular actions in conducting public procurement procedures. In this regard, the PPO could give priority to cases in which monitoring could affect a larger group of contracting authorities or economic operators etc.

In addition to that, in order to strengthen integrity of the public procurement system, it is recommended that conducting of monitoring on the basis of information provided by participants in the public procurement system such as relevant economic operators or certain competent bodies that during the performance of activities within their competences learn about possible irregular actions committed by contracting authorities in the course of conducting public procurement procedures. In this way, the PPO would be able to timely react and influence the lawfulness of conducting public procurement procedures.

However, in that regard, it is necessary to take into account that the monitoring process should not ''replace'' the possibility of initiating protection of rights proceedings or of otherwise combating ineffeciency in conducting public procurement procedures. Also, when creating a legal solution, it is recommended to clealry regulate the powers of the PPO as regards conducting this type of monitoring.

Finally, if we analyse different stages of a public procurement process, taking into account the aforementioned proposed powers of the institutions, we are of the opinion that in the public procurement planning phase, it would be justified to assign the most important role in monitoring to the PPO, since the PPO ensures the availability of data from public procurement plans published on the Public Procurement Portal. Conducting systemic monitoring in this area, the PPO would, on the basis of analysis of published public procurement plans, be in a position to prepare recommendations and guideliness that can be relevant for the preparation of public procurement.

In the phase of conducting public procurement procedure and contract performance, as previously stated, the systemic monitoring would be conducted by the PPO and thereby it would retain significant powers in these phases of the process, while direct monitoring would be conducted by the PPO in accordance with clearly regulated rules in this regard, as well as through filing requests for the protection or rights by all interested parties and the Republic Commission's decision-making and also

through inspections and controls conducted by the SAI and Budget Inspection. In addition to this, we are of the opinion that in the phase of monitoring of public procurement contract performance, significant results would be acchieved by increased transparency of the Public Procurement Portal, as described earlier in this analysis.

Table 2 – proposal for monitoring roles assigning

PPO	Republic Commission	SAI and Budget Inspection	Contract performance
- collection of statistical and other data on conducted procurement procedures, concluded public procurement contracts and on the effectiveness of the public procurement system as a whole; - ensuring all preconditions enabling that relevant information on public procurement can be published and publicly available, primarily on the Public Procurement Portal; - monitoring of public procurement notices and advertisements published on the Public Procurement Portal, in the manner described earlier in the analysis herein; - education of all stakeholders in public procurement, not only of those who directly conduct or participate in public procurement procedures but also of employees of state bodies and institutions who have certain tasks in relation to control of and combating irregularities in public procurement, media employees and representatives of civil society who can play an important role in detecting irregularities; - systemic monitoring of practice of competent bodies such as the Republic Commission and SAI, in	The Republic Commission has a role in conducting control that is mainly related to ongoing public procurement procedures.	Taking into account the previously described powers of the budget inspection and SAI in relation to public funds spending and also to public procurement, one may say that the budget isnpection and the SAI are ''specialised'' bodies that, in accordance with positive legal regulations, are provided with concrete powers in relation to conducting ex-post control and in relation to public procurement.	In the phase of monitoring of public procurement contract performance, increased transparency of contracting authorities's activities is of crucial importance and it would be acchieved throgh the use of the Public Procurement Portal (in a manner described earlier in this analysis), while it would advisable that the Budget Inspection and SAI continue with their activity of ex-post (directi) monitoring as they have been provided with clear powers in relation to conducting direct monitoring in these stages of public procurement procedures.

order to detect most frequent irregularities identified by these bodies and in order to take preventive actions (by means of presentation to the public and special education for contracting authorities in the areas where irregularities were identified in a great number of procedures) and prevent the repeat of these irregularities; - preparation of model of acts (bylaws) and documents that will help contracting authorities and tenderers, as well as control bodies, to participate more easily in the public procurement procedures, or to more easily conduct control of those procedures, by creating models that will be clear, transparent and that will contain all necessary notes and explanations so that those who apply them can understand their content and reasons for their application; - undertaking an initiative aimed at closer coopertion among competent bodies and institutions in public procurement in order to exchange necessary knowlegde, experience and to ensure that the practice regarding the application of the PPL provisions is uniform; - conducting monitoring in indvidual public procurement procedures in a manner described in the text herein.			

We can conclude, from the foregoing analysis, that the regulation of monitoring as described herein would be in line with solutions implemented in EU Member States.

The PPO would be the central institution in the system which conducts systemic monitoring of the public procurement system and which, on the basis of information received from competent institutions, proposes necessary changes in the system, conducts trainings and prepares guidelines, etc.

In addition to the said activities, the PPO would monitor individual public procurement procedures, in accordance with rules which would be clearly regulated in the law, in order to eliminate irregulaties in the application of the law.

It is also important to point out that cooperation among and coordination of all competent institutions in the public procurement system, when monitoring is concerned, as well as cooperation with competent prosecutor's offices and the police, is of great importance for effective remedying of irregularities in the the public procurement system. In that regard, the PPO could play a significant role, primarily having in mind that the PPO is the central institution in the system and that it has the greatest number of information at its disposal (having in mind its function with regard to the management of the Public Procurement Portal and reporting function).

We are of the opinion is that such clearly regulated monitoring conducted by all institutions, would significantly contribute to the fulfilment of requirements from criterion 2 for the closing of Chapter 5 – Public Procurement [14].

[14] Criterion 2 reads: Serbia puts in place adequate administrative and institutional capacity at all levels and takes appropriate measures to ensure the proper implementation and enforcement of national legislation in this area in good time before accession. This includes, in particular:

a) the implementation of Serbia's PP Development Strategy 2014-2018 to improve its administrative capacity, in particular by reinforcing the PP Office's staff and by ensuring proper training at all levels for all stakeholders;

b) the preparation of practical implementing and monitoring tools (including administrative rules, instruction manuals and standard contract documents);

c) the strengthening of control mechanisms, including close monitoring and enhanced transparency of the execution phase of public contracts and systematic risk assessments with prioritization of controls in vulnerable sectors and procedures;

d) the effective functioning of the remedies system;

e) Measures related to the prevention of and fight against corruption and conflicts of interests in the area of PP at both central and local level.