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COALITION "EUROBLOCK"

PROJECT:
"STRENGHTENING THE CIVIL SOCIETY CAPACITY TO CONTRIBUTE TO EU INTEGRATION AND ACCESSION PROCESS"

Corruption and Public Procurement in Montenegro

June, 2012.

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Corruption and Public Procurement in Montenegro

Publisher
Institute Alternative
Đoka Miraševića („Kroling“) 3/3, Podgorica, Montenegro
Tel/Fax: (+382) 20 268 686
e-mail: info@institut-alternativa.org
web site: www.institut-alternativa.org

For Publisher
Stevo Muk, President of Managing Board

Editor
Stevo Muk

Authors
Stevo Muk, Jovana Marović MSc., Milica Popović MSc.,
Nemanja Tepavčević, Marko Sošić

Professional Assistant
Ivan Krkeljić

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Content:

Summary

Public procurement system in Montenegro has been significantly improved in the legal and institutional terms, as of its establishment in 2001 to date. The Law on Public Procurement adopted in 2011, has brought substantive changes and improvements, primarily referring to the increase in transparency of the process, enhanced control of the large - value contracts, as well as the inspection supervision over the execution of these contracts. As far as the institutional aspect is concerned, the Law is more precisely unbundling competences of state institutions managing the public procurement system. Competences of the State Commission for the Control of Public Procurement Procedure (hereinafter referred to as: the Commission) have been extended and specified, yet the manner of its appointment is still an open issue. The administrative and financial capacities of the Commission, as well as the Public Procurement Administration (hereinafter referred to as: the Administration) remain limited.

The new Law has neither adequately addressed the need of strengthening anti – corruption rules and mechanisms, nor is fully compliant with the relevant EU Directives, pertaining the harmonization of certain procedures. The absence of adequate anti - corruption measures is also one of the features of the Public Procurement Development Strategy for the period 2011 – 2015 (hereinafter referred to as: the Strategy), as well as of the Action Plan for its implementation.

Furthermore, the process is featured by imperceptible number of criminal charges brought by the Police Administration, or indictments of the State Prosecutor's Office, absence of final judgments on corruption in public procurement, as well as the misdemeanor charges and disciplinary liability of the public procurement officers.

In the light of the above, the problem of corruption in public procurement procedures is still significantly pronounced, encompassing limited control of procedure, and thus its improvement is pivotal. This opinion is commonly shared by the European Commission in its Progress Reports and the citizens of Montenegro.

With the objective of combating corruption in the public procurement procedures, it is necessary that public authorities undertake a number of measures and activities. The public procurement planning process should be conducted on the basis of a specific methodology

governing certain areas, whereas this stage should be integrated into the budget preparation process. The administrative and financial capacities of both the Commission and the Administration must be strengthened. Moreover, it is required to provide a corresponding financial compensation for the work of the public procurement officers, aimed at ensuring independence and autonomy in their work, and these persons should be covered by the Law on Prevention of Conflict of Interest. The appointment procedure of the Commission's members should be strengthened in light of the selection criteria, as well as the procedure itself that should be implemented in the Parliament.

The Law on Public Procurement should be harmonized with the EU Directives, whereas both the Law and the Strategy should be altered for the purpose of strengthening the anti – corruption mechanisms. The comparative practice has shown that the black and white lists are one of the possible ancillary methods for combating corruption in the public procurement.

There is a room for the improvement of the public procurement procedure and the provision of greater participation of non – state actors in all stages of the procedure - civil society, media and citizens.

1 INTRODUCTION

Analysis "Corruption and public procurement in Montenegro" was developed in the period from February 2011 to June 2012, representing the continuation of ongoing research activities of the Institute "Alternative" in the public procurement area. The idea of the authors was to pinpoint the reasons for classifying public procurement into six special risk areas of corruption in Montenegro, and to underline why the anti - corruption mechanisms strengthening is the top priority for improving the fight against corruption in this area. Bearing in mind the scope of the research, the analysis is focusing on elements of the legal and institutional establishment of the public procurement system, with the objective of reviewing the corruption risks in all stages of the procedure, supported by the recommendations for overcoming the risks.

The analysis starts with the explanation of the specifics of the term "corruption in public procurement", with a brief overview of the principles which should represent the anchor of a modern public procurement system. The introductory description of the corruption risks and principles is general, not addressing to any specific country, being accompanied by the review of public procurement system of Montenegro, providing as well the overview of statistical data explaining the trends in the key categories of the public procurement procedures in Montenegro, as of 2007 to date (GDP share, percent of applying certain procedures, largest contracting authorities, etc).

The new Law on Public Procurement (hereinafter referred to as: PPL), which entered into force in January 2012, has brought numerous new legal solutions. Therefore, the central part of this publication is devoted to the analysis of these solutions with the specific intention of clarifying the direction in which they are reforming this area, and identifying persisting or remaining weaknesses affecting the corruption risks. The risks overview is given against the stages of the procedure: planning, implementation of the public procurement procedure, as well as the stage after the decision adoption and contract award.

Opinions of direct actors in the procedure have helped us in considering the extent to which these new solutions represent the improvement in comparison to the previous legal framework. In the light of the above, during the research stage, conducted were a numerous interviews with the participants in the process (representatives of institutions in charge of public procurement procedures control, tenderers, public procurement officers, representatives of ministries coordinating activities in the fight against corruption ...). Furthermore, requests for free access to information were submitted to the Administration, Administrative Court, Supreme Court, Commercial Courts in Podgorica and Bijelo Polje, Commission, Police Administration, etc., that have significantly enabled us in providing

the overview of administrative capacities of authorities in charge of public procurement system management, as well as the activities of other state institutions in charge of combating corruption in public procurement.

In the period from 11 to 18 April 2012, the Institute "Alternative", in cooperation with the Ipsos Strategic Marketing, conducted a public opinion survey in Montenegro on the perception of corruption in the public procurement procedures. Collection of data was made on a sample (840 respondents) representative for the population of adult citizens of Montenegro (474 655). Three-stage stratified probability sample was applied in the following stages: territory of the polling station; households selected through random step method, starting from the given addresses (SRSWoR); household members selected without replacement – at same probability (SRSWoR) - Kish tables.

The analysis encompasses public opinion survey results in comparison to the opinion of citizens in reference to the implementation method of the public procurement procedures in Montenegro, to what extent they are satisfied with the control of the procedure, and in which areas the control should be strengthened, etc.

The presentation of the best practice in the fight against corruption in public procurement in the EU member states and the countries in the region is aimed at indicating the direction in which is possible to improve the anti – corruption mechanisms, and to which extent their implementation is possible within the Montenegrin context and the current legal solutions.

2

CORRUPTION FEATURES OF PUBLIC PROCUREMENT

Corruption is the abuse of position and violation of law for the purpose of obtaining a specific, often tangible, benefit. In addition to its obligation of providing adequate mechanisms to combat corruption, the State as the leading contracting authority, is an important economic actor in every country. The fact that developed countries are committing the amount of 10 - 15% of total GDP annually to public procurement is making this area extremely vulnerable to corruption. Concerning the fact that these are public funds, hence the money obtained from the taxpayers, civil servants are obliged to use the funds in a rational and cost – effective manner, with the maximum guarantee that the funds will not be misused. Public procurement encompass a set of all actions that the public sector is undertaking to procure several different types of procurement, from low to extremely large - values. When the procurement is placed into the context of the number of institutions that are financed from the budget, regardless of the central or local one, it is clear that there is a great room for corruption.

The key difference between the corruption in public procurement and the one in all other segments and areas of society is that this corruption is usually taking place at the "high level" and has the features of "political clientelism".[1] Corruption in public procurement must be directly approved by senior officials taking the greatest share of bribe, while the lower level officials are involved, almost exclusively, in technical operations. This fact is directly linking public procurement corruption to the political corruption. Budget management is grounded on, as it is the case with all other resources, the delegation of citizens' competences and responsibilities to elected representatives. The political mandate of high – rank officials obtained by the citizens may not be fully controlled, which leaves a plenty of room for abuse. It is possible to divide these abuses into the two directions. The first one is linked with the political party's interests, while the second one is directly linked to interests of an individual who has the right to make a discretionary decision on tenderer. [2] Political campaigns are, to the greatest extent, financed through private donations. Victory at the elections and winning the term of office implies a "possibility" of providing certain privileges for these so-called private donors. Enabling "access" to public procurement contracts and direct allocation of public funds to private ones, seems to be the prevailing factor or the most common type. Based on the aforementioned actions, the state institutions are trapped by the interests of large companies and private companies, thus the incurred losses are enormous.

The essence of corruption in public procurement is reduced to avoiding mechanisms enabling competition. The splitting of large – value procurements into the low – level ones,

1 Dyulgerov, Asen, Pashev, Konstantin, Kaschiev, Gergi, *Corruption in Public Procurement – Risks and Reform Policies*, Center for the Study of Democracy, Sofia, 2006, p. 10;

2 Ibid. p. 16;

in which the contracting authorities are selecting tenderers on their own motion, use of negotiated procedure without publication of a tender, absence of both the internal and the external quality control of works, goods and services, amendments to legislation in a manner that is opening an additional room for corruption, are just some of the types of abuse in the public procurement.

The absence of these principles represents the main indicator (not necessarily a guarantee) of corruption. The overview of indicative corruption actions includes: partial or complete avoidance of the public in public procurement procedures; establishment of the additional criteria within the tender procedure (other than price); invitation of certain (selected) tenderers to apply to the tender by contracting authority; "design" and "tailoring" the tenders to a tenderer.

One of the aspects of corruption in public procurement includes giving bribe by foreign tenderers for being first – ranked in the tender. From the aspect of a company that offers bribe, generated benefit may be the long – term one, being reflected in the provision of monopoly position in the market. The doubt in fixing tenders is usually discouraging other tenderers to apply to the tender. Private companies are not just lobbying for their interests during the tender procedure; this is a process conducted in a planned manner and involves continuous bribery. Bribery provides private companies to obtain confidential information during the tender procedure, putting them in a better position compared to other participants.

Clearly, private companies "enjoy" certain benefits until revealing their involvement in corruption, which can irreversibly, generate bad influence on their future business. Selection of a company that failed to offer a lowest price, is negatively affecting that a project expenses are far higher than its real values.

If there are a great number of companies participating in tender, an illusion in the existence of real competition among companies may be created. However, the implementation of the public procurement procedure can lead to the conclusion of cartel agreements with the objective of influencing the outcome of competition. Moreover, tenderers may submit fictitious tenders for awarding the tender to a certain tenderer, with the objective of obtaining alternate contracts (rotating) or a mutual distribution of the market.[3] In fact, it usually occurs, most often at the local level that several small – sized companies are "pooled" and strategically compete in a tender with specific, predetermined tenders. Following the completion of the procedure, these companies are jointly sharing the profit.

An efficient public procurement system must ensure the mechanisms to combat and sanction corruption, and in order to establish these mechanisms, the system should operate on certain principles. The principles on which the public procurement system should be grounded are as follows: [4]

- Cost - effective and efficient use of state/public funds;
- Competition – encouraging competition means the participation of a large number of tenderers and participants and procedures directly providing rationalization (reduction) of the cost of products/service, increase quality, etc;

3 Public procurement against corruption, IPA 2008 twinning light project "Strengthening capacities to remedy irregularities in public procurement procedures" Croatian Ministry of Economy, Labor and Entrepreneurship, p. 5;

4 These four principles in the Montenegrin PPL are defined by Articles 5-8. Basis: PPL "Official Gazette of MNE", No.: 42/11;

- Transparency - procedure must be clear and known and adhered to by all participants in the process. Tender documents, ultimately, must be standardized and include all relevant information;
- Equality – which in this context refers to the equal conditions to tenderers, thus the rule is to implement open tenders wherever possible. Strategies, laws and other rules regulating this area must be strictly and precisely determine the rules and procedures, as well as the fair decision making manner

Public procurement system strengthening requires ancillary measures to improve all stages of the procedure, and in particular the definition of specification, [5] which is vulnerable to political interference, as well as during management/execution of contracts and payment. These phases are particularly prone to corruption, in most of the cases; they are not regulated by statutory provisions. [6]

5 Technical characteristics;
6 Basis: OECD Principles for Integrity in Public Procurement, OECD, 2008, p. 10;

3 PUBLIC PROCUREMENTS IN MONTENEGRO

Based on 2011 Corruption Perception Index of the Transparency International, Montenegro is ranked 66th (out of the total of 183 countries covered by the research).[7] Although Montenegro has progressed by three positions compared to 2010, the problem of corruption is still pervasive. The corruption problem is overshadowing the results in fight against corruption and organized crime, thus the country's integration into the European Union is lagging behind. [8]

The roots of corruption may be associated to the consequences that the state was "suffering" due to the dissolution of the joint state, severe economic crisis, sanctions and the overall political issues engulfing both the country and the region in the nineties of last century. The persistence of corruption is caused by the weak mechanisms for its suppression. This problem has been also recognized by the European Commission, classifying the fight against corruption improvement into seven key prerequisites that require top priority resolution in order for the country to obtain the date negotiations commencement, estimating in 2010 that the "independence and capacity of supervisory authorities should be improved to ensure compliance with regulations on conflict of interest and financing of political parties and election campaigns, for the purpose of monitoring the application of the rule of law, transparency and accountability in areas such as the public procurement, privatization, spatial planning, construction permits and local government. "[9]

Acting upon these assessment, the Ministry of Finance in the "Corruption risks assessment of special risk areas" from 2011, has defined: local government, spatial planning, public procurement, privatization, education and health, as special risk areas for corruption. [10] The share of public procurement in the total GDP of Montenegro, which in 2011 amounted at 11, 43%, [11] "is contributing" to its ranking within the six special risks areas of corruption. Furthermore, although the institutional and legal framework for public procurement, during the last year, has improved to some extent, weak anti - corruption mechanisms continue to be a central issue in fight against corruption in this area.[12]

Citizens describe public procurement in Montenegro as a process that takes place under

7 Report available at: http://cpi.transparency.org/cpi2011/results/
8 EC has attached the obtaining of date for commencement of negotiations on the EU membership to the concrete progress in fight against corruption;
9 Analytical report accompanying communication from the Commission to the European Parliament and the Council, Commission Opinion on Montenegro; application for membership of the European in the EU, Brussels, 9 November 2010, p. 21.
10 Corruption risk assessment of special risk areas, Ministry of Finance, Podgorica, July 2011, p. 2;
11 Administration's 2011 Public Procurement Report, p. 39;
12 SIGMA Assessment Montenegro 2011, p. 6;

a political or party's influence. Almost every second citizen of Montenegro, believes that the public procurement process is implemented in a lesser fair or even unfair manner. Furthermore, only one of five respondents believes that public procurement in Montenegro is implemented in accordance with the public interest, law, objective criteria, transparent and impartial manner. [13] However, a very small percentage of citizens are reporting abuse in public procurement. [14] In addition, "number of final judgments, particularly in cases of high – level corruption is low." [15] The same situation is with the cases of corruption in public procurement.

3.1 Public Procurement System Legal Framework Development

The public procurement system of Montenegro was established in 2001. The first PPL was adopted in 2001, failing to provide a viable system, due to generality, impreciseness and ambiguity of legal norms. As a consequence and due to the lack of capacity of competent authorities for legislative enforcement, its application was extremely difficult, being featured by the vast shortfalls. PPL has failed in preventing corruption in public procurement, and due to the aforementioned reasons, there are poor or unavailable public data on implemented public procurement procedures, number, types of procedures, contacted values and execution of awarded contracts.

The system was strengthened in the legal terms by the adoption of the second 2006 PPL. However, during its implementation identified were the weaknesses of legal solutions, requiring amendments for the purpose of reducing the room for corruption. Provisions requiring improvement, inter alia, have also implied the improvement of restricted procedure and procedure for awarding the contract by applying the framework agreement; better and clearer definition of the shopping method; clearer definition of the technical characteristics and specifications; establishment of improved, prompter and more efficient control of public procurement system, consistent reporting of corruption activities and legal violations, as well as initiating proceedings and establishment of accountability for penalties and criminal offenses.

Therefore, 2011 PPL, has defined more complete segregation and positioning of competences and authorizations of institutions in charge of carrying out operations of state administration in the public procurement area, as well as clearer and more complete definition of specific procedures for the implementation of the public procurement procedures. The new PPL has introduced the option of integrating procurement [16], and the transparency of entire process has been significantly improved by introducing the obligation of contracting authorities to adopt and publish an elaborated Public Procurement Plan (hereinafter referred to as: PPP), as well as the obligation of publishing calls and requests, decisions on the selection of most advantageous tender on the public procurement web – portal, as well as all public procurement contracts.

Finally, the new PPL also improved the control of entire process by introducing a special

13 Public opinion survey in Montenegro - Ipsos Strategic Marketing and Institute Alternative, April 2012;
14 Public opinion survey in Montenegro - Ipsos Strategic Marketing and Institute Alternative, April 2012;
15 2011 Montenegro's Progress Report, p. 14;
16 Pursuant to the regulation of the Government of MNE, or competent local government authority, as well as other contracting authorities having the status of legal entity in determined administrative area (establishment of central public procurement authorities);

legal remedy – the Commission's mandatory control of public procurement procedures, the value of which is exceeding EUR 500, 000.

However, "while the new PPL has brought progress, full harmonization with the acquis has not yet been achieved. Related legislation for the implementation is pending completion," [17] whereas the control system requires further enhancement and strengthening. [18]

In late 2011, the Government of Montenegro has adopted the Strategy and Action Plan for its implementation. Out of the total fourteen measures outlined in the Action plan, eleven addressed the institutional framework development and administrative capacities enhancement, i.e. further strengthening of existing institutions responsible for the public procurement development and control, electronic public procurement, training in public procurement. Only two measures were dedicated to the prevention of corruption in public procurement system. The measures in Action Plan are broadly set, thus the manner of achieving specific objectives outlined in the Strategy is unclear, primarily in reference to the suppression of corruption and remedying irregularities in the public procurement system, harmonization process with the European standards in the long run, etc. The Strategy is not addressing concrete results achieved in the fight against corruption.

3.2 Public Procurement Institutional Framework

Compared to the old PPL, 2006 PPL has introduced a new institutional mechanism for the management public procurement system. Pursuant to PPL, the Public Procurement Directorate, i.e. current Administration, was in charge of public procurement system monitoring, the Commission was in charge of protecting the rights in public procurement procedures (appeals procedure), while the Ministry of Finance was in charge of carrying out legal and development activities in this area, as well monitoring of the legality and appropriateness of the work of Directorate. Judicial protection was provided in an administrative procedure before the Administrative Court of Montenegro.

Upon the effectiveness of the new PPL and the Decree on organization and the manner of work of public administration, [19] the Directorate obtained the status of independent administrative authority, thus, the Administration and Commission are currently in charge of public procurement area. The Administration carries out administrative and professional activities in the public procurement area, while the Commission considers appeals and issues decisions on appeals lodged by the tenderers against the public procurement procedures.

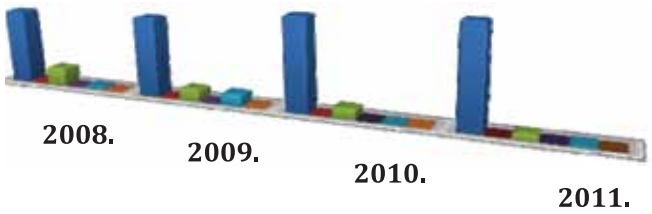
3.3 Key features of the Public Procurement System of Montenegro

Pursuant to data available, in last five years, the share of public procurement in GDP of Montenegro has had a downward trend. In 2011, the share of public procurement in total GDP amounted at 11, 43%, and 18.92% of GDP in 2007. [20] The highest value of public procurement was accounted for in 2008, amounting at 16, 11% of GDP. [21]

17 2011 Montenegro's Progress Report, 12 October 2011, SEC(2011) 1204, Brussels, 2011, p. 34-35;
18 Report from the Commission to the European Parliament and the Council on Montenegro's Progress in the implementation of Reforms, Brussels, 22 April 2012, COM (2012) 222 final, p. 6-7;
19 **Basis:** Decree on organization and the manner of work of state administration ("Official Gazette of the RoM", No. 38/03 and the "Official Gazette of MNE ", No. 22/08 and 42/11), Article 32;
20 Administration's 2011 Public Procurement Report, Podgorica, May 2012, p. 39;
21 Administration's 2008 Public Procurement Report, p. 19;

In the period 2007 – 2011, the conclusion of contract based on a call for competition has had an upward trend. In the same period, the application of the negotiated procedure without publication of a contract notice declined. [22]

Graph No. 1: Value of public procurement per type of public procurement



	2008.	2009.	2010.	2011.
Open procedure	71,99%	75,34%	87,08%	92,91%
Limited procedure	1,44%	0,35%	0,68%	0,12%
Negotiation procedure without published call	17,44%	11,51%	9,90%	5,29%
Negotiation procedure with published procedure	0,39%	0,42%	0,11%	0,12%
Framework agreement	3,01%	11,25%	0,28%	1,49%
Tender	0,71%	1,12%	0,68%	0,08%

UIn 2009 and 2010, the number of procedures contracted through negotiated procedure without publication of a contract notice has decreased compared to 2008, wherein its application resulted in contracting 18, 86% of the total public procurement value. In 2009, the application of negotiated procedure resulted in contracting 10.75%[23], and 9, 90% in 2010 of the total value of public procurement, while this percentage in 2011 amounted at 5.29. [24]

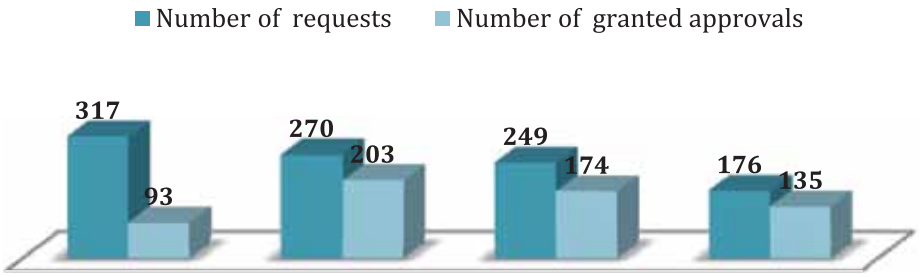
PPL stipulates the obligation of issuing prior approval by the competent state administration authority for conducting negotiated procedure, because this type of procedure is least transparent, and in which competitiveness and equality is limited to one or several tenderers. In the period 2008 – 2011, the number of the issued approvals for the application of negotiated procedure without publication of a contract notice has fluctuated. The largest number of requests was submitted in 2008, while in 2009, the Administration issued the greatest number of approvals for this type of public procurement procedure.

22 Negotiated procedure without publication of a contract notice represents a procedure in which the contracting authority is negotiating with one or several tenderers on contractual requirements, not subjected to a call for competition.

23 Administration's 2008 and 2009 Public Procurement Report;

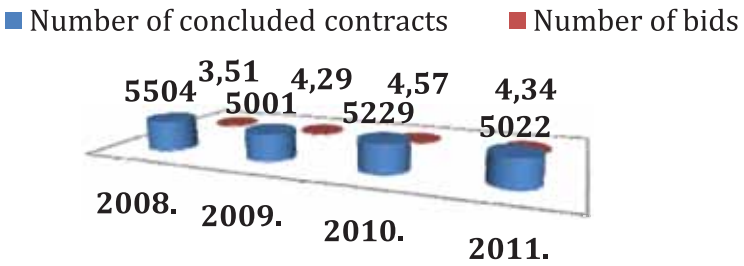
24 Administration's 2010 Public Procurement Report, p. 35 and Administration's 2011 Public Procurement Report, May 2012, p. 33;

Graph No. 2: Prior approval for the application of negotiated procedure without publication of a contract notice



In the observed period, public procurement procedures competitiveness, illustrated through the number of contracts concluded and submitted tenders in the public procurement procedure have had the upward trend. In 2011, the number of concluded contracts amounted at 5,022, whereas in 2007, the number of concluded contracts amounted at 3, 928 contracts. [25] In 2011, the number of tenders per tender amounted at 4, 34 while in 2007, it amounted at 3,03. [26]

Graph No. 3: Number of concluded contracts on public procurement and tenders submitted in the public procurement procedure



Procurement of works is predominant in the total value of public procurement by type of subject, amounting at around a half of the total value of public procurement annually. In the period 2007 – 2010, the share of works in the total public procurement value has, to some extent, reduced. In 2007, the procurement of works amounted at 57, 99%, while in 2010, the total amount of procurement of works amounted at 49, 74%. During 2011, the share of public works in the total value of public procurement amounted at 32, 69% and the highest share percentage was with goods amounting at 47, 65. [27]

The largest contracting authorities in 2011, were the Transportation Directorate (80 procurements in the total contracted value of EUR 27, 426, 585. 20) and PAI "Montefarm" (9 procurements in the total contracted value of EUR 20, 387,515. 96). [28] The largest tenderer per value of public procurement (EUR 11.779, 147. 51) during 2011, was Bemax DOO. [29]

The statistics by groups of contracting authorities is illustrating that state authorities, local public institutions and enterprises have increased their share, simultaneously significantly

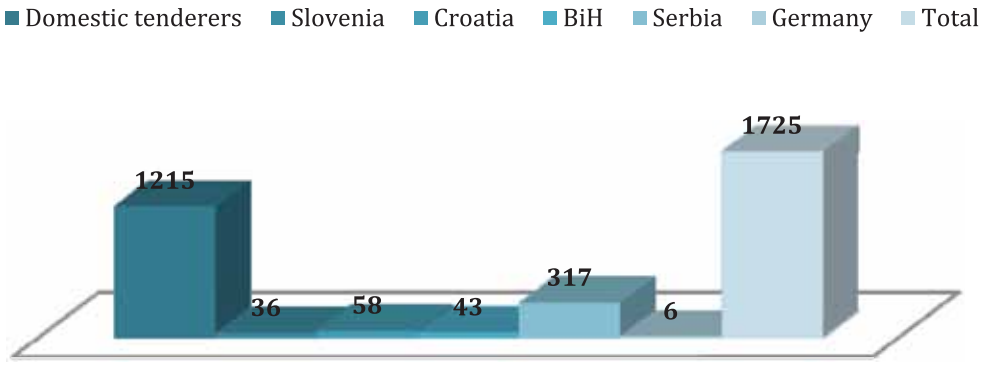
25 Administration's 2011 Public Procurement Report, p. 68;
26 Ibid., p. 47;
27 Ibid. p 41;
28 Ibid. p. 75;
29 Ibid. p. 80;

reducing their share in the f public procurement value structure. In 2007, 2008 and 2009, the largest number of contracts were entered by the public institutions and public enterprises, while in 2010, state authorities have the largest share in contracts concluded (56, 27%). In 2011, the greatest importance, expressed through the value of public procurement was with the state authorities (38, 02%), public institutions and public enterprises founded by the state (38, 02%), public institutions and public enterprises founded by the local government (15, 94%) and bodies of local government units (9, 95%). [30] The failure in submitting admissible tenders, offered price exceeding planned and allocated funds for a particular public procurement, as well as the cease of need for public procurement are the most common grounds for the annulment of public procurement proceedings.

PPL's obligors list (covered parties subject to the application of PPL) is published on the Administration's web - page. [31] In the observed period, identified were some fluctuations in the number of PPL obligors of Montenegro. The new list contains 747 obligors, while in 2010, updated number amounted at total of 974 obligors, as it was the case in 2009.

List of tenderers was updated upon the effectiveness of new PPL, encompassing 1, 725 national and foreign tenderers.

Graph No. 4: Number of tenderers in Montenegro



List of public procurement officers contains a list of persons responsible for public procurement activities in state authorities, organizations and services, public services founded by the state, local government authorities and public services. [32]

30 Ibid. p 48;

31 PPL prescribes that newly established contracting authority shall be obliged to submit the application to the competent authority, for the purpose of entering it into the List of Tenderers, within 30 days following the acquiring of the contracting authority status. The List is updated within three days following the submission of application, contrary to the old PPL ("Official Gazette of MNE", No. 46/06), prescribing that the List of obligors is updated at latest by 31 December annually. The contracting authority is obliged to apply the Law even in the absence of recording it on the List.

32 List available at: http://www.ujn.gov.me/lista-sluzbenika-za-javne-nabavke/

4 KEY RISKS OF CORRUPTION IN PUBLIC PROCUREMENTS OF MONTENEGRO AND COUNTER MEASURES IN LEGAL FRAMEWORK

4.1 Planning Stage

All public procurement procedure stages provide for the opportunities for various forms of corruption. Moreover, corruption in public procurement can be, and often is, present prior to launching a procedure.

The key risks in the planning stage encompass inadequately developed PPP – lacking with pre-prepared analysis based on market research, wrong and redundant investment failing in adding value to society, failure to adopt and publish PPP, overestimated required quantity of goods, contracting of unnecessary quantities. In addition, the risk of corruption is pronounced in actions such as incompliance with requirements for the implementation of public procurement procedure according to estimated values and subdivision of both the subject of procurement and the value aimed at avoiding application of prescribed procurement procedure, opting for negotiated procedure without publication of a contract notice contrary to legal requirements. There is a possibility to prescribe the tender documents in a discriminatory manner, providing for a preferential treatment to a tenderer, based on definition of subject specification and tender requirements (e.g. conditions and requirements that are not directly related to the public procurement subject), labeling (making references) type or types of goods bringing a tenderer or manufacturer in a more favorable position. It may be the case that the technical specifications are prepared by a potential tenderers, or that they envisage requirements that may be only met by a specific business undertaking.

The stage encompassing engagement of external experts is also prone to corruption. External experts have a task to provide project's feasibility assessment in terms of how a facility/service should look like. Expert's opinions are usually grounded on their subjective assessment, thus the cases in which requirements can be only met by a certain company/tenderer are not an exception. One of the solutions to this problem is to engage consulting firms on the basis of public call/announcement and pre - defined criteria that are publicly available. Additional credibility in selecting a consulting company should be provided by a competent commission in charge of selection. [33] Public opinion surveys may be used to make an impact on selection of tenderer. An agency conducting surveys may represent an "instrument" distributing pre-formulated questions based on pre – selected survey sample, aimed at obtaining desired results. In this way, the corruption is hidden behind the "will of the people." [34]

33 Jovanović Predrag, *Anatomy of Corruption*, Transparency International Serbia, Belgrade, 2001, p. 40;
34 Ibid. p. 41;

Pursuant to PPL, the contracting authority (head or the competent body of contracting authority) may initiate a public procurement procedure only if budget funds are foreseen for such procurement, or in any other manner prescribed by PPL and if such procurement is envisaged by PPP.[35] The contracting authority shall be obliged to develop PPP, by 31 January of the current fiscal or financial year, and to submit it to the competent authority for the purpose of its publication on the public procurement web - page. PPL defines the content of PPP (data on contracting authority, public procurement title and subject; estimated public procurement value for each individual public procurement item and budget item, or the financial plan envisaging funds for public procurement). PPP is endorsed by the head, or responsible person of the contracting authority, being developed on the public procurement form determined on the basis of subordinate legislation adopted by the ministry in charge of finance.[36]

Aforementioned solutions are identical to the solutions of 2006 PPL, being improved in a part providing for the option to amend PPL, as well as in a part of issuing approvals by the supervisory authorities, which simultaneously contributes to strengthening the anti – corruption activities through the application of these statutory provisions.

Thus, any alteration to PPL, with the exception of budget correction, can be made at latest 15 days prior to initiating public procurement procedure. Ministry is issuing approval to PPL's adopted by the users of the Budget of MNE, with the exception of the Parliament of MNE and judicial authorities, whereas the competent authority of local government unit is issuing approval to PPL's of local government authorities. If public procurement lasts for several years, funds for servicing liabilities maturing in subsequent years, must be contracted pursuant to budget regulations. Key change brought by the new PPL is that all contracting authorities, and not only those conducting procurement exceeding EUR 100,000, must adopt and publish PPL.

Exceptionally from the aforementioned, the contracting authority may initiate the public procurement procedure even if the funds for public procurement are not fully provided, if: funds for execution of public procurement are the subject of procurement procedure; is necessary to obtain consent, or approval in accordance with the budget regulations in the course of public procurement, requiring payment in subsequent years; public procurement procedure is completed based on concluding the framework agreement, not generating contractual obligation.[37]

The aforementioned provisions have improved the current legal solutions, because now the contracting authority is obliged to ensure that PPL also envisages this type of public procurement, its estimated value, manner or procurement procedure, which does not imply that the contracting authority cannot initiate the public procurement procedure. Moreover, competences of the competent authority have been extended to include this authority, which is of extreme importance, e.g. by applying framework agreement.

However, in the absence of determined parameters and methodology, the procedure suffers from the lack of clear mechanism that would prevent the public procurement planning based on objective market requirements research. In the absence of these parameters and methodologies, the process is lacking from mechanism that would prevent the planning and procurement of redundant services and goods or overestimated quantity of goods and services.

35 Article 37 of PPL, "Official Gazette of MNE", No. 42/11;
36 Ibid. Article 38;
37 Ibid. Article 39;

The Administration is reaffirming this shortfall by stating that "the current level of public procurement system development is clearly not providing an answer to the question.... what subjected to procurement, from the aspect of justified spending of funds, and even the justification of public consumption in general". [38]

4.1.1. Determining the Public Procurement Subject

There is a plenty of room for manipulations in determining the subject of public procurement, ultimately resulting in tailoring the tender requirements to suit exclusively to a tenderer, canceling the tender because of the failure of available tenderers to offer required goods, services or works, which would lead to less transparent procurement methods.

With the objective of limiting opportunities for manipulation and reducing the room for corruption activities, 2011 PPL has placed a major focus on elaboration of the procedure for determining the subject of public procurement, development of criteria and sub - criteria.

The subject of public procurement is determined by the contracting authority in accordance with the Common Procurement Vocabulary (hereinafter referred to as: CPV). [39] CPV was published on the Administration's web - page. As far as CPV is concerned, the legal solutions are harmonized with the European standards and they should contribute to the precise determining of the subject, and subsequently the setting of requirements (specifications), or conditions that must be met by the contracting authority in the procedure, criteria that must be met by the tender providing for the objectification of selecting the best most advantageous tenderer and tender in the public procurement procedure.

Thus, the subject of public procurement defines the type of goods, services or works against the technological and functional characteristics, purpose and characteristics. The subject must be clear, unambiguous and intelligible, enabling the submission of a corresponding tenders by type, quality, price, as well as other required features and requirements. The description of the public procurement subject encompasses the data on quantity, place of delivery and completion time limits or special requirements regarding the manner of execution subject of public procurement, which are important for developing the tender and contract execution, including data of importance for environmental protection, energy efficiency or social demands. [40]

If the subject of procurement is split in several lots, all lots must be indicated in a call for competition and tender documents, anticipating the option of submitting tenders for certain lots.

The contracting authority is obliged to express the estimated value of public procurement in PPP, decision on initiation of public procurement procedure, call for competition, tender documents and decision on selection of most advantageous. Estimated public procurement value is expressed in EUR, VAT inclusive. When determining public procurement estimated value, the contracting authority shall be obliged to calculate only the expenses required for the execution of contract on procurement of goods, services and works. Determining the estimated public procurement value in all the aforementioned cases is important both

38 Administration's 2011 Public Procurement Report, p. 59;
39 CPV - Common Procurement Vocabulary is a nomenclature of goods, services and works applied in public procurement procedure;
40 PPL, Article 41;

for the tenderer and the contracting authority, because the contracting authority must conduct a thorough market research, develop a comprehensive PPP resting upon the real needs and provided funds, on the other hand, enabling the tenderer to timely review the subject of public procurement, legal requirements and procedures, thereby resulting in developing the most acceptable tender.

As previously emphasized, pursuant to PPL, the contracting authority must adhere to the public procurement requirements and method determined at specified values, whereas during the fiscal or financial year, he cannot split the subject of public procurement representing a single whole, with the objective of avoiding the application of the Law and prescribed public procurement procedure. The aforementioned represents the anti - corruption provision preventing the contracting authority to split unique public procurement subject, representing a single whole, and to avoid the application of an open or other transparent public procurement procedure. PPL envisages a penalty for breaching this provision.

4.1.2. Technical Characteristics and Specifications

The new PPL has enhanced the technical characteristics and specifications, being now more complete, clear and precise. Depending on the subject of public procurement, the technical characteristics and specifications represent a mandatory part of the tender documentation.

In the tender documents, the contracting authority must not refer in the technical specifications to any particular trademarks, patents, types or a specific origin or production designating goods, services or works, with the effect of favouring certain tenderers or unfairly eliminating the others.

When the contracting authority cannot describe in the technical specifications the subject-matter of the contract in the manner that will make the specifications sufficiently intelligible to tenderers, any reference to the elements such as trademark, patent, type or producer must be accompanied by the words ''or equivalent''.

Technical characteristics and specifications are determining both the conditions and the requirements in reference to the quality, performances, safety and dimensions of goods or services, for quality assurance, terminology, code, testing and test methods, packaging, marking and labeling. In the case of construction works procurement, the technical characteristics and specifications may also include provisions on design and calculation of costs, trial period, professional supervision and acceptance requirements, as well as the technique or method of construction. In the tender documents, the contracting authority is obliged to specify all requirements of importance that are not envisaged by the technical norms and standards in force, pertaining to safety and other factors of public interest.

In limiting the corruption risk, determined substantial violation of the Law are pivotal: [41] 1) conducting a public procurement procedure without the adoption of a decision on the initiating and implementing the public procurement procedure; 2) tender documents and other public competition documents are not compliant with the Law, which resulted or might have resulted in discrimination of any tenderers of distorted competition; 3) tender documents and other public competition documents are not compliant with the Law in reference to the requirements for participating in the procedure.

41 PPL, Article 134;

Following actions and acts in the planning stage represent a basis for exercising legal protection of tenderers, i.e. lodging appeal before the Commission: a) content and manner of publishing a call for competition; b) content of a call for competition; c) content, explanation and availability of the tender documents to interested parties.

4.2 Public Procurement Procedure Stage – Tender Procedure

Entering agreements for the purpose of influencing the outcome of competition (so-called cartel agreements) represent the greatest risks of corruption activity related to the tenders. There are three main types of these agreements: agreement on price, agreement on delivery and the agreement on the tenderer that will provide the best tender. Tenders submitted by different tenderers having identical errors or template are the leading formal indicators based on which the contracting authority may identify the cases of cartel agreements. Based on these indicators, the contracting authority may determine that, during the implementation of tender procedure, the tenders were in contact. On the other hand, key material indicator represents a great difference in price between the lowest price and the one offered by other tenders, in which an unknown (new) tenderer is offering an extremely high price, while the other tenderers have "customized" their prices to this price. Furthermore, it may be the case with the tender documents purchased by several tenderers, resulting in submitting only one valid tender, even though the market situation is indicating that a greater number of tenderers – business undertakings are capable of meeting the conditions and requirements of public procurement competition; as far as the most economically advantageous tender is concerned, the selected tenderer is withdrawing from concluding the contract, regardless of losing the guarantee.

The tenders' evaluation stage may result in unequal appraisal of the parts of tender – exclusion of tenderers and tenders meeting competition requirements or acceptance of a tender that should be excluded (rejected or declined).

4.2.1 Negotiated procedure without publication of a contract notice

It should be noted that the greatest risks of corrupt rests with the implementation of a negotiated procedure without publication of a contract notice.[42] In particular, the possibility of corruption activities in this procedure is provided based on the implementation of the aforementioned public procurement procedure in case of:

Procurement of goods, services, or subcontracting of works:

- When in at least two open, or restricted public procurement procedure, a valid tender has not been submitted, provided that the subject of the public procurement and content of the tender documents have not been substantially altered, in which case the contracting authority shall be obliged to include in the negotiating procedure all tenderers who submitted tenders in an open or restricted procedure. In this case it is possible that the contracting authority is consciously setting requirements based on which procurement conditions may not be met by any of the tenderer.
- When due to the technical requirements of the subject of procurement, the procure-

42 2011 PPL, Article 25 and 2006 PPL, Article 23 prescribe almost identical solutions;

ment may be provided by only one tenderer. In this case it is possible, due to insufficient knowledge of technical regulations and standards and the inability to verify compliance with requirements, to make relatively easy the adjustments - setting of the legal situation for the implementation of this procurement procedure.

There is a room for improving the legal framework and the introduction of anti-corruption measures following the solutions of PPL in the Republic of Serbia. Specifically, the current Montenegrin PPL doesn't provide a practical possibility to a potential tenderer to lodge an appeal and to exercise the right to legal protection in case of awarding public procurement through direct negotiated procedure without publication of a contract notice. The current PPL of the Republic of Serbia stipulates that the contracting authority is not obliged to publish a contract notice, but prior to entering the contract, he is obliged to publish a special type of announcement in the Official Gazette and on the public procurement web - portal - information on selection of the most advantageous tender that may be disputed based on the request of protecting rights by the potential tenderers not invited to participate in negotiated procedure.

The introduction of such solution would significantly improve the level of legal protection and provide for additional guarantees of equality and competition protection.

4.2.2 Anti – Corruption Provisions and Prevention of the Conflict of Interest

The new PPL envisages so-called rules of anti-corruption and prevention of the conflict of interest with the contracting authority, or the tenderer. PPL envisages explicit provisions on recording the cases of conflict of interest and invalidity or nullity of public procurement procedures conducted with the existence of the conflict of interest Each contracting authority is exposed to a risk to be imposed a misdemeanor fine for the failure of recording the cases of conflict of interest, subsequently implying the annulment of the contract in the court's proceedings, not excluding the compensation of damages to the appellants, as well as possible criminal liability arising from any misuse of official position or corruption activities in the public procurement. These new provisions are to some degree clearer compared to the ones stipulated by the prior Law, and moreover, through additional application of subordinate legislation, to some extent, they may contribute to reducing corruption in public procurement. However, some provisions are hardly applicable, particularly for monitoring, yet others may generate other harmful effects.

4.2.2.1 Prevention of the Conflict of Interest with the Contracting Authority

Pursuant to so-called anticorruption rule, the contracting authority is required to annul, or reject the tender depending on the stage of procedure, if it finds or has grounds to believe that the tenderer directly or indirectly gave, offered or put into the appearance a gift or other benefit to the procurement officer, member of the Commission for opening and evaluation of tenders, a person who participated in the preparation of calls for public competition and tender documents, a person who participates in the planning of public procurement or other person, for the purpose of finding out confidential information or influencing the contracting authority's conduct.

Furthermore, pursuant to PPL, the contracting authority is obliged to annul, or reject the tender if he finds out or has grounds to believe that the tenderer directly or indirectly threatened the public procurement officer, member of the Commission for opening and evaluation of tenders, a person who participated in the preparation of calls for public competition and tender documents, a person who participates in the planning of public procurement or other person, in order to find out confidential information or influence the contracting authority's conduct.

However, these provisions prescribing the obligation of contracting authority to "determine" or to "reasonable suspects" in the existence of an action that is undermining the integrity of the procurement process, is opening up several important issues. Pursuant to Criminal Code, bearing in mind that threat or bribery is a criminal offense, the contracting authority is obliged to inform the State Prosecutor's Office, or to bring criminal charges. It is to expect that the State Prosecutor's Office will act parallel with the progress of the procurement procedure. What are the consequences if the contracting authority continues with the process and completes it, excluding from further procedure the tender of tenderer subjected to allegations that has used threats or other means of influence. If based on final judgment is proved that the tenderer is proven guilty, a legal and practical consequences of the overall case is undisputed and in favor of public interest. On the other hand, it is certain that the tenderer against whom the prosecution dismissed the charges, and in particular the tenderer who was not found guilty based on the final judgment, may rightly turn to the competent court for compensation of damage resulting from these actions of the contracting authority. There is also an open option for the contracting authority if in this case rejects the tender aimed at suspending the further course of the public procurement procedure, until the competent prosecutor's office dismisses the criminal charges, or until the final judgment of the competent court. Of course, this case is likely to lead to an imbalance to the detriment of the principles of efficiency, since the implementation of public procurement would be pending the court's decision. In short, although the described provision, at first glance, seems fair and in public interest, it may be become or be inverted into its opposite during its application. An alternative to this solution might be found in the application of the provision referred to in Article 32 of PPL, providing the possibility to the contracting authority to "parallel to the adoption of decisions on public procurement procedure initiation and implementation, the contracting authority shall authorize another contracting authority at his consent, to conduct the public procurement procedure or to take certain actions in the procedure in his name and on his account."[43]

Broader interpretation of this provision or its possible alteration may open up a room to reallocate the public procurement procedure with another contracting authority, resulting in both avoiding the elimination of suspicious tenderer and the conduct of efficient procedure. Of course, in case of proving the criminal liability of the tenderer to whom the contract was awarded, such legal entity and its responsible persons would be "blacklisted" in accordance with the public procurement regulations.

The contracting authority is obliged to record and to make minutes thereon, bring charges before the competent state authorities for the purpose of taking measures in accordance with the Law and to notify the Administration.

As far as the prevention of the conflict of interest with the contacting authority, the par-

43 PPL, Article 33;

ticipants [44]in the public procurement procedure are required to take necessary measures to prevent conflicts of interest, and that without delay, inform the contracting authority about the existence of actual or potential conflict of interest. Employees of the contracting authority, who participated in the public procurement procedure, within the period of two years upon completing the public procurement procedure, cannot enter employment with the tenderer or related persons to whom the contracted authority awarded the public procurement contract.

It is interesting to note that a similar provision is stipulated in the Law on Civil Servants and State Employees prescribing that "civil servant and/or state employee, within the period of two years upon termination of employment with state authority, cannot: enter employment in the capacity of director, manager or consultant in business organization or another legal entity where a state authority, which used to employ civil servant and/or state employee, carried out audit or control – related activities...."[45] Based on comparison of these two provisions, it may be concluded the stricter measure was rightfully stipulated by PPL. However, the application of this provision is hardly or impossible to control in the current situation. With the objective of implementing this provision, there should be a competent authority that would have a database of persons participating in specific public procurement procedures, enabled with automatic reference of persons and tenderers, having an insight into the data on employment and possibility to initiate appropriate proceedings thereof.

It is not a coincidence, in our opinion, that neither the Law on Civil Servants and State Employees has prescribed penalties for this offense.

An alternative could be that these persons are obligated by the Law, to sign contracts stipulating that, within two years after completion of the procedure, they will submit the statement on change of employer, or business, financial or other relationship with the selected tenderer to the contracting authority. For the failure to submit statements an appropriate contractual penalty should be imposed, and the prohibition of performing activities should be stipulated by the Law on Misdemeanors.

The conflict of interest occurs if such person (procurement officer, members of the Commission for opening and evaluation of tenders, persons participating in the preparation of call for competition, invitation to tender and tender documents, persons participating in the planning of public procurement and other persons, directly or indirectly, involved in the public procurement procedure): is the tenderer, subcontractor or sub - provider, or the tenderer's legal representative or attorney; is a relative in the straight line of kinship, or in the lateral line of kinship up to the fourth degree, or is a marital or extramarital partner or in – law up to the second degree, regardless of whether the marriage is terminated or not; is a guardian, adopter or adoptee of the tenderer, his legal representative or attorney; is a shareholder or member of management bodies of the tenderer, or the applicant; has direct or indirect interest in the public procurement procedure; directly or indirectly involved in other circumstances causing a doubt about such person's impartiality.

44 Procurement officer, members of the Commission for opening and evaluation of tenders, persons participating in the preparation of call for competition, invitation to tender and tender documents, persons participating in the planning of public procurement and other persons, directly or indirectly, involved in the public procurement procedure;

45 Article 77 of the Law on Civil Servants and State Employees, "Official Gazette of MNE", No. 39/*2011*", of 4 August *2011;*

A person preparing invitation to tender, calls for competition or the tender documents, or who may affect the implementation of public procurement in any other manner, should not act as the tenderer, sub - provider or subcontractor, and shall not cooperate with the tenderer when developing the tender. The head, or responsible person of the contracting authority and person who, on behalf of the contracting authority is carrying out certain public procurement activities, pursuant to PPL, is obliged to file a statement in writing of the existence or absence of conflict of interest. The statement represents an integral part of the public procurement documentation. If the conflict of interest occurs or if the person fails to submit a statement, he shall be exempted from the public procurement procedure. If during the public procurement procedure, the contracting authority receives a request or a tender subjected to the occurrence of the conflict of interest, he shall be obliged to take measures aimed at preventing the conflict of interest, in accordance with the Law, as well as special regulations governing the system of labor relations, employment and ethics.

4.2.2.2. Prevention of the Conflict of Interest with Tenderers

Conflict of interest with tenderers, sub - providers or subcontractors shall occur if tenderer's authorized person, sub - provider and subcontractors is: legal representative or attorney; blood relative of persons above listed with the contracting authority, is a relative in the straight line of kinship, or in the lateral line of kinship up to the fourth degree, or is a marital or extramarital partner or in – law up to the second degree, regardless of whether the marriage is terminated or not; is a guardian, adopter or adoptee of the tenderer, his legal representative or attorney; is a shareholder or member of management bodies of the tenderer, or the applicant; has direct or indirect interest in the public procurement procedure; directly or indirectly involved in other circumstances causing a doubt about such person's impartiality. Authorized person of the tenderer, subcontractor or sub provider shall also file a statement in writing of the existence or absence of indicated conflict of interest, representing an integral part of the public procurement documentation. It is explicitly determined that in case of the conflict of interest or the authorized person of the tenderer, subcontractor, or sub – provider fails to submit the statement, he shall be exempted from the public procurement procedure. [46]

Public procurement procedure conducted with the existence of the conflict of interest shall be null and void. The contracting authority shall be obliged to record all the aforementioned cases of conflicts of interest and to inform, without any delay, the competent authority in charge of public procurement operations, including the obligation of the competent authority to make this information available to the public. [47]

The Ministry of Finance, in cooperation with the Administration, has adopted the subordinate legislation [48] – regulating the manner of keeping and content of the records of violations of anti-corruption rules in public procurement procedures – anti - corruption records. Pursuant to the provisions of this regulation, the anti-corruption records are kept by the contracting authority and the tenderers whose tenders are rejected, or void for reasons set out in Article 15 of PPL, actions that constitute violations of anti-corruption rules, person against whom the action is directed, objectives and results of actions taken.

46 PPL, Article 17;
47 Ibid. Article 18;
48 Rulebook on the manner of keeping and content of records of violation of anti – corruption rules ("Official Gazette of MNE", No. 63/11), of 28 December 2011;

Once the contracting authority establishes, or has grounds to believe that the action constituting violation of anti-corruption rules has been taken, the contracting authority shall produce an official notice, stating all relevant information on violation of anti-corruption rules. Data from the official records are entered into the anti-corruption record. [49]

Pursuant to the anti-corruption records data, the contracting authority is obliged to prepare a report on violation of anti-corruption rules, which is submitted to the authority in charge of public procurement operations, semiannually, up to 31 June and 31 December of the current year. Pursuant to the report, the Administration is producing the Annual report to the Government of Montenegro up to 31 May of the current year for the previous year.

According to available data, a similar provisions prescribed by the previous Law has failed to generate particular results, and there aren't any information illustrating to what extent they were adhered to. It is obvious that a special focus has not been placed on its application, because the reports of the competent institutions are lacking with the relevant data thereof. On the contrary, the first and only data were published at the request of the European Commission within the response to the EC 2010 Questionnaire, yet in the response was stated that the records are neither kept nor their keeping was mandatory for the contracting authorities up until the adoption of the new Law. "Up to present, the Directorate has not received any written notification of violations of anti-corruption rules, although the Directorate has published the instruction on the manner of submitting this type of information." [50]

The most important legal definition in relation to the conflict of interest is the one prescribing that the "procurement procedure conducted based on a conflict of interest is void." Prescription of nullity is the strictest measures against corruption and conflict of interest in public procurement. This provision implies that the procedure for promulgating the contract null and void may and must be initiated, or that the tenderer or other person has the possibility to initiate this procedure, and that this is the obligation of the competent authority if it becomes aware that a conflict of interest was present.

4.2.3 Criteria and Sub – criteria for the Selection of Most Advantageous Tender

The provisions regulating the criteria and sub-criteria for the selection of the most advantageous tender are also more complete in normative sense in the new PPL, especially when it comes to determining the points for sub - criteria ranking the most economically advantageous offer. The contracting authority in a call for competition, invitation to tender and tender documentation is defining the criteria and sub - criteria for selecting the most advantageous tender. Criteria and sub - criteria must be stated in writing, indicating a maximum number of points that may be assigned based on individual criteria

49 Anti-corruption record contains: number of official notices submitted; number and types of proceedings in which the violation of anti-corruption rules has been determined; types of activities constituting violation of anti-corruption rules; types of evidence confirming violation of anti-corruption rules; manner of collecting the evidence/information; information on tenderers or persons employed with the tenderer who directly or indirectly gave, offered or put into the appearance a gift or other benefit or have threatened; data on officer/s or other employees with the contracting authority to whom the tenderer, directly or indirectly gave, offered or put into the appearance a gift or other benefit, or who were threatened; safeguarding measures; signature of the responsible person. These records shall be kept on a separate form, representing an integral part of this Rulebook;

50 Questionnaire, Information requested by the European Commission to the Government of MNE for the preparation of the Opinion on the application of Montenegro for membership of the EU – additional questions – Public Procurement, Ministry of Finance, 12 April 2010, p. 12.

and sub - criteria. Criteria and sub - criteria must not be discriminatory, pertaining to the content of the subject of public procurement, clear and intelligible. In assessing and evaluation of tenders, the contracting authority is obliged to apply only the criteria and sub - criteria that are identified in the invitation to tender and the tender documents. In the tender documents, the contracting authority is specifying the evaluation method and assignment of points for sub- criteria for selecting the most advantageous tender within the criteria of economically most advantageous tender. Criteria for selection of the most advantageous tender are the lowest offered price or the most economically advantageous tender, depending on the type of procedure and the subject of public procurement applied.

4.2.4 Selection of the Most Advantageous Tender and Contract Conclusion

The contracting authority is entering the public procurement contract with the tenderer whose tender was selected as the most advantageous one. The contract must devised in accordance with accepted tender and must contain a certificate of payment for the orderly execution of all outstanding liabilities. The contract cannot be concluded prior to the expiry of deadline for filing objections. If the tenderer fails to sign the draft contract (deadline of 16 days) after repeated contracting authority's requests, or if he fails to provide guarantee for executing the contract in good faith as required in the tender documents, the contracting authority may conclude a contract with the second ranked tenderer, if the price difference does not exceed 10 % compared to the originally selected render, or he may cancel the tender procedure and repeat the procurement procedure.

The tenderer who was awarded the contract, may not subcontract any contractual substantial part without the prior written approval of the contracting authority. Elements of the contract subject to subcontracting, as well as the identity of subcontractor must be timely conveyed to the contracting authority, prior to concluding the subcontract. The tenderer who was awarded the contract shall be held fully liable for the implementation of the contract, according to the laws governing the system of contractual relations and civil liability.

PPL has failed in providing the answer to the question what if the contracting authority (head, competent authority of the contracting authority) doesn't accept the proposal of decision on selection of the most advantageous tender. This situation is possible to arise in practice, and may be highly risky for corruption. Furthermore, the question of whether members of the Commission, bearing in mind the complexity of their tasks, should be provided with some additional type of training in performing such a demanding operations. It is unclear whether the head, i.e. responsible person of the contracting authority, and procurement officer may be the members of the Commission for opening and evaluation of tenders. These issues should be specified and addressed by PPL.

Price determined by the public procurement contract may not exceed the price determined on the basis of the decision on selection of the most advantageous tender. A penalty is imposed for violation of this provision. Moreover, this represents absolutely substantial violation of the procedure. The contract entered contrary to this provision is null and void. Public procurement contract cannot be concluded prior to the expiration of the deadline for lodging appeals (rest period) and adoption of the decision on appeals lodged, unless otherwise stipulated by the Law (e.g. urgency). The tenderer is obliged to sign public procurement contract within eight days following the day of contract submission and to return

a copy of signed contract within the same deadline to the contracting authority enclosed with the guarantee for execution of the contract in good faith, and if the tenderer fails to sign the contract or fails to submit the guarantee for execution of the contract in good faith, the contracting authority may conclude a contract with the second ranked tenderer, if the price difference does not exceed 10% of the originally selected tender or he may cancel the public procurement procedure. The contracting authority is obliged to submit the public procurement contract to the competent authority within three days from the day of concluding the contract, for the purpose of publishing it on the public procurement web - portal. The aforementioned obligation represents a major step forward in public procurement procedure transparency.

It is worth mentioning that a number of activities were determined as substantive violation of the Law [51], such as follows: a) publication of a call for competition, decision on selection of the most advantageous tender and public procurement contracts are not in compliance with the Law; b) if the decision was passed by a body of the contracting authority which could not have rendered the decision due to the lack of subject matter jurisdiction; c) shortfalls in the process of opening of tenders, related to the lack of data on participants in the procedure, offered price and other data of importance for the validity of tenders; d) failures made in the process of review, assessment, comparison and evaluation of tenders; a) absence of special reasons and evidence upon which the decision was made; e) if provisions of this Law were breached referring to the use of language and script; f) selection of tenders, the price of which exceeds the estimated value of public procurement; g) selection of the tender not representing the most advantageous one. Determining these actions as substantive violation of the Law has created the obligation to the Commission to cancel the procurement procedure if it determined any of the above violations.

We are recalling that the tenderers have the option of lodging an appeal against a range of actions within the tender stage (tender opening and evaluation): public opening of tenders, content of the minutes of the public opening of tenders; conclusion on rejection the tender; decision on rejection of tenders; tenders evaluation process; decision on selection of the most advantageous tender; conclusion on suspension of public procurement procedure; decision on cancellation of the public procurement procedure.

Of course, having in mind the fact that the Commission is obliged to carry out the control over the public procurement procedure envisaging procurements, the value of which is exceeding EUR 500,000, although the number of these procurements is relatively small, it provides a stronger guarantee that the large – value will be carried out in accordance with the Law.

In the light of the above, it can be concluded that the system provides for relatively developed measures and legal protection in relation to corruption risks at this stage of the public procurement process. However, ultimately the implementation of these rights and obligations or competences depends, on the one hand, on the readiness of the tenderers to exercise their rights (right to appeal), and, on the other hand, on the independence and professionalism of the Commission.

51 PPL, Article 134;

4.3. Stage Following the Contract Award and Conclusion

4.3.1 Contract execution

The greatest risks of corruption are reflected in the possibility of the failure in fulfilling contractual provisions, particularly in terms of its quality, price and deadlines; alteration of essential contractual requirements that are contrary to implemented public procurement procedure (price, technical content, completion date, etc.). Furthermore, during the contract execution, the subject of procurement may be altered (in whole or partly), as well as the quantities or individual items. This stage is prone to corruption practice of concluding contracts for low - value quantities of goods, works or services, and then ordering additional supplies from the same tenderer without publication of a contract notice. Frequent are also the risks of concluding the contract for additional works or services without fulfilling prescribed requirements or in a manner contrary to the statutory provisions. It is also possible to conclude the public procurement contract and than to cancel a part of the contract (without publication) with the tenderer for cancelled part of the contract, with the explanation that the value of such contract does not exceed the estimated amount requiring the application of public procurement rules.

Measures aimed at increasing transparency and accountability include the publication of a contract notice on the web - page of the contracting authority; segregation of signing functions and control over the contract execution within the contracting authority; external control over the execution of the contract.

Particular controversy and the risk of corruption is with the negotiated procedure without a call for competition. In the phase of executing the main contract, this element is important because it occurs in three cases, such as follows: a) procurement of goods, envisaging additional deliveries during the execution of contractual obligations by the supplier with whom the main contract was entered with, indicating that the delivery should be "intended for the partial replacement of products, materials, or installation or extension of the volume of existing supplies of products, materials or installation, if a change of supplier, or goods would cause technical problems in the operation and maintenance"; b) procurement of services and conferral of works, not covered by the contract entered on the basis of conducted public procurement procedure as the result of unforeseen circumstances, [52] is important for the execution of public procurement contract which technically or economically can not be separated from the main contract without the incurring major difficulties to the contracting authority. Another case within the same type of procurement is when the procurement represents a repetition of similar services or works entrusted to the tenderer with whom the contracting authority concluded the main contract and when the procurement of these services or works is in accordance with the subject of procurement for which the contract was concluded, on the basis of implemented open or restricted procedure, specified in the invitation to tender.

The requirement in all the aforementioned cases is that the total value of additional supplies cannot exceed 15% of the total value of the contract. This is a step forward compared

52 Article 4 paragraph 12 of PPL defines that unforeseen events shall represent "natural disasters, fires, technical - technological accidents, damage to facilities and equipment, chemical, biological, nuclear and radiological contamination, epidemic, epizootics, epiphytotics and other accidents. "

to the previous requirement of 25% of the main contract. Moreover, in reference to the procurement of works execution, the requirement is that the procurement of additional works may not occur after three years from the conclusion of the contract.

It should be noted that the additional works or services, also without previous thorough reviews, are relatively easy adjustable and adaptable to this type of procedure, aimed at avoiding competition. For the purpose of avoiding corruption activities in the aforementioned cases, the documentation preceding the implementation procedure must reflect the real status of play of the requirements fulfillment for the implementation of the procedure, supported by the evidence, minutes and reports of the competent authorities, being objectively controlled and always verifiable. Due to limited professional and overall administrative capacities of the relevant administration authorities, as well as a possible limitation of autonomy of the contracting authority in independent selection of the procurement procedure, if at his own motion believes to have the evidence for the enforcement of appropriate procedure, the solution of having competent administration authority to provide approval for the implementation of certain public procurement procedures does not represent a feasible option in the long run, in the case of negotiated procedure without prior publication of a call for competition. In this case, it will be important to address more clearly the procedures and responsibilities of the contracting authority, or to enumerate the criteria and prerequisites for the selection of this procurement method.

However, it even now evident that the trend share of negotiated procedure without publication of a call for competition is significantly declining, amounting at only 5, 29% of the total value of public procurement in 2011, to the greatest extent, referring to the procurement of goods, works and services when due to technical or artistic requirements the subject of public procurement, or for reasons referring to the protection of exclusive rights, may be provided exclusively by a certain tenderer. [53]

For the implementation phase of the contract execution, the fact that every contract on public procurement is publicly available is of utmost importance. To that end, the additional room has been provided to the civil society organizations and investigative journalists, who using opportunities of the free access to information, may continue with the monitoring of the execution of contracts.

Overall, in comparison to the old PPL, provisions in the new PPL have in a similar, but more intelligible manner, prescribed the defining of the requirements for the initiation of the public procurement procedure, determining the subject of public procurement, technical characteristics and specification of items, their use, essential requirements and fees for use of patents, validity of evidence from other countries, determining the criteria and sub - criteria, methods of their evaluation, as well as the award of public procurement. These provisions should contribute to a clearer and more complete defining of the subject procurement, subject requirements (requirements to be met by the subject), evaluation criteria and sub - criteria and selection of the most advantageous tender, or the conclusion of the contract and its public disclosure.

53 Administration's 2011 Public Procurement Report, p. 44;

5 INSTITUTIONAL AND ADMINISTRATIVE CAPACITIES FOR PUBLIC PROCUREMENT

Although the administrative capacities of the key institutions in the public procurement system are to some extent strengthened, limited human and financial capacities still represent an impeding factor to the Law enforcement.

5.1 Decentralization/centralization or a hybrid?

Public procurement system of Montenegro is decentralized. Public procurement procedures are carried out by authorized officers in the state and local institutions and authorities and public services. The total number of the obligors is high, amounting at 974, [54]preventing the full enforcement of regulations governing public procurement area and tender procedures, and adequate contract execution monitoring. The Strategy envisages the centralization of public procurement system through the establishment of a central public procurement authority. However, the Strategy failed in providing clear instructions on the manner of the future public procurement system centralization. [55]

Thus, Montenegro has not yet opted for a model which will be used for public procurement system centralization, whereas one of the open options is to introduce a semi – decentralized a hybrid public procurement system. The hybrid system involves the integration of public procurement of several authorities under the auspices of a single authority that will, in its capacity carry out the public procurement procedure. This implies that the procurement for around 250 schools in Montenegro will be carried out by the Ministry of Education and Sports, Judicial Council for the prosecution and all courts, Misdemeanors Council for its branch offices, Health Insurance Fund for all health institutions, etc. The introduction of the hybrid system envisages the decrease in the number of contracting authorities, subsequently facilitating control of the public procurement procedure. According to the Administration's Director, complete centralization of public procurement system, and its concentration in one place, opens up a greater room for corruption, than the partial one. [56]

5.2 Administrative capacities of the key institutions

With the objective of reorganizing the Administration's structure, the Government of Montenegro has adopted the Rulebook on Internal Organization and Systematization of Job

54 Administration's 2011 Public Procurement Report, p. 18;
55 Public Procurement System Development Strategy 2011 – 2015, Government of MNE, 22 December 2011;
56 Interview with Mersad Mujević, Administration's Director, published on 20 March 2012;

Positions of the Administration, in November 2011. Pursuant to the Rulebook, the number of civil servants and state employees increased from 15 to 18 posts, including the Director. [57] The Administration is currently composed of the four organizational units: Sector for monitoring the implementation of regulations and inspection supervision which consists of the Department for monitoring the implementation of regulations and Department for inspection supervision, Department for monitoring the public procurement procedure and electronic public procurement management, Department for professional training, development and international cooperation in the public procurement area and the General affairs and finance service. [58]

The Administration employs 14 civil servants and state employees, including the Director. The position of assistant to the director is vacant. The greatest lack of administrative capacities rests with the Sector for inspection supervision and the Department for electronic public procurement.[59]

There is a discrepancy between the number of new job positions envisaged by the Action Plan for Strategy implementation and the adopted Rulebook. By the end of 2012, the Action Plan envisages the recruitment of eleven new officers in the Administration, while the Rulebook envisages only three new job positions. [60]

Public procurement inspector is controlling the regularity of public procurement procedures implementation, timely submission and publication of PPP's, calls for competition, adopted decisions and concluded contracts in the public procurement procedure, regularity and timely production and submission of the public procurement reports, fulfillment of conditions for the exercise of duties of the public procurement officers, public procurement records development regularity and keeping, keeping the documents created in the public procurement procedure.[61] Inspection service currently has two inspectors, not adequately addressing the extensive competences and the crucial role that this service may play when it comes to the fight against corruption.

Pursuant to 2006 PPL, the Commission was composed of the President and two members. [62] The Commission's professional service was composed of eight civil servants and state employees, including the Secretary of the Commission. The new PPL stipulates that the Commission shall consist of the President and four members performing their duties in a professional manner. [63] The new convocation of the Commission was established in March 2012. The appointment should be accompanied by the adoption of the Rulebook on Internal Organization and Systematization of the Commission's professional service, which will increase both the number of employees and the expertise structure, bearing in mind the new competencies and responsibilities the Commission, stipulated by the new PPL. [64]

57 Template of the report on Action Plan's implementation for the period 1 July 2011 – 31 December 2011;
58 Administration's Rulebook on Internal Organization and Systematization, determined at the Government's session of 21 November 2011;
59 Interview with Mersad Mujević, Administration's Director, published on 20 March 2012;
60 Action Plan for the implementation of the Public Procurement System Development Strategy 2011 – 2015, Government of MNE, December 2011;
61 PPL ("Official Gazette of MNE", No. 42/11), Article 148;
62 PPL ("Official Gazette of MNE", No. 46/06), Article 92;
63 Article 138 of PPL ("Official Gazette of MNE", No. 42/11). The Government shall appoint the president and members of the Commission, based on public announcement. President and members of the Commission shall be appointed for a period of five years and may be reappointed.
64 Response to the request for access to information of the Institute Alternative submitted to the Commission, No. (1093-3/2011), 24 January 2012;

It is also necessary to emphasize inadequate financial status of persons in charge of public procurement with the contracting authorities – public procurement officers, assuming preventive actions for the purpose of eliminating the corruption activity risks, following up the public procurement procedures, as well persons in charge of system monitoring (particularly in the Administration), providing professional assistance to support the control of public procurement procedures (administrative employees in the professional services of the Commission).

In 2012, the budget of Administration amounts at EUR 270, 537. 70 being reduced compared to 2011 and 2010, when it amounted at EUR 291, 018.66, or EUR 341, 382.69. [65] The planned budget of the Commission in 2012 amounts at EUR 182, 900.73, being higher compared to the budget for 2011, when it amounted at EUR 136, 318.85. [66]

5.3 Inter - Institutional Cooperation

With the objective of combating corruption in public procurement system, the increase in cooperation between the key anti-corruption institutions is pivotal. During 2010 and 2011, the Administration entered agreements with the Directorate for Anti-Corruption Initiative (hereinafter referred to as: DACI) and the Commission for the Prevention of Conflict of Interest (hereinafter referred to as: CPCI). However, concrete results of the protocol cooperation are pending evaluation by the signatories to the agreement. [67] The agreement with DACI aims at the data exchange for improvement of the reporting, detection and prosecution of criminal acts with the corruption elements. The agreement stipulates that the Administration shall submit semi annual information on reported cases of corruption to DACI. [68]

In 2011, the Administration has entered cooperation agreement with CPCI. The agreement envisages the data exchange with the objective of combating corruption activities of public functionaries, or cooperation and networking of institutions, aimed at facilitated detection of public functionaries' abuse, primarily in the public procurement procedures. The data submitted by the Administration to CPCI are confidential, whereas the final decisions are publicly available. Based on the agreement, CPCI obtains information on contracting authorities and tenderers through the electronic database. Pursuant to the agreement, the Administration and CPCI have organized a joint training for the public functionaries, contracting authorities and tenderers in the area of conflict of interest. Up to March 2012, the Administration and CPCI have organized six seminars, in which the Administration's employees held trainings in the area of conflict and potential conflict of interest in public procurement.

The networking of software solutions was planed, for the purpose of CPCI's verification of contracts published on the web – page of the Administration, the value of which is exceeding EUR 500, 000. A good solution, according to the Administration's director, would be to enter the agreement on cooperation with the Tax Administration, Chamber of Commerce and the Commercial Court. [69]

65 Budget Law of MNE for 2010, 2011 and 2012;
66 Budget Law of MNE for 2010, 2011 and 2012;
67 Interview with Mersad Mujević, Administration's Director, published on 20 March 2012;
68 2010 Public Procurement Report, p. 12;
69 Interview with Mersad Mujević, Administration's Director, published on 20 March 2012;

Participants in the public procurement procedure, particularly contracting authorities, are lacking from an organized and systematic mutual communication, thus the data exchange is at a low level, which will require the setting up of the public procurement network for the purpose of exchanging experiences and information, as well as the provision of funds for public procurement system improvement.

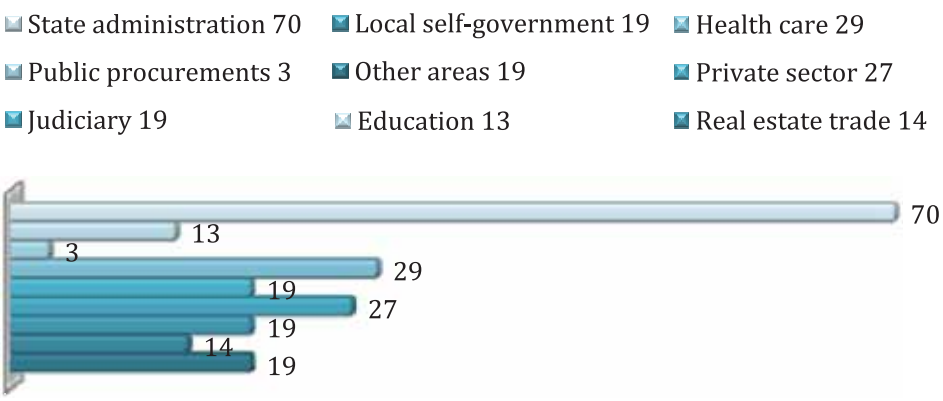
6 ACTIVITIES OF THE STATE AUTHORITIES IN FIGHT AGAINST CORRUPTION IN PUBLIC PROCUREMENT PROCEDURES

The fight against corruption in public procurement, as the fight against corruption in general, implies the involvement and actions of numerous actors: national, international, civil society, media and citizens. Taking into account the extent of the problem with which the State is currently confronted with, it may be concluded that the activity of all these actors must be strengthened, especially in reference to the awareness raising among the citizens about the necessity of active participation in the fight against corruption. Every fifth citizen of Montenegro is aware or has heard of some case of embezzlement and misuse of public procurement, which occurred in the previous 12 months, and only one out of ten that has faced with the corruption problem says that has reported this case, mostly to the police. The vast majority of those who have heard or are aware of the case of embezzlement and misuse of public procurement have failed to report the case to authorities, emphasizing, as the most common reason, the distrust in competent institutions (28%), and then the fear of creating problems to themselves (23%). [70]

A number of total criminal charges brought in 2011 are low, being partly the result of the aforementioned citizens' passivity. Out of 223 reports, only three related to public procurement procedures

Graph No. 5: Reported areas subjected to a reasonable doubt in the existence of corruption activities

Source: Report on the number of corruption reports for 2011, Podgorica, March 2012.



70 Public opinion survey in Montenegro, Ipsos Strategic Marketing and Institute Alternative, April 2012;

Bearing in mind the fact that the state authorities are ultimately held liable for the establishment of efficient mechanisms for combating corruption, as well as that the networking of activities of these institutions is required, this paper will address the current efforts undertaken by the Administration, Commission, Administrative Court, Police Administration and State Audit Institution focusing on combating corruption in public procurement.

6.1 Administration

The Administration took part in the training programme titled "Receiving and processing reports and protection of persons reporting corruption (whistleblowers). [71]Within the information campaigns conducted during 2011, the Administration took part in the development of DACI's Bulletin. However, generated effects of campaigns conducted in this period are not listed. Moreover, in this period public opinion surveys had not been conducted. [72]

Contracting authorities and tenderers have the right to address to the Administration for the purpose of reporting irregularities and corruption. An open phone line is a measure introduced for strengthening the fight against corruption, enabling greater availability of the Administration to the citizens, thorough which they can address authorized officer for the purpose of reporting corruption, obtaining information and legal advices. [73] During 2010, 2011 and 2012, the Administration has not received any report on irregularities and corruption over the open line. [74]

In 2010, the total of 25 reports were filled, while in 2009, around 40 filled reports related to around 300 cases of irregularities in public procurement procedure, mostly the shopping method in which as the conflict of interest, inter alia, was indicated as a violation. [75]

Within the activities related to the fight against corruption, the Administration submits quarterly reports to the National Commission for monitoring the Action Plan for implementation of the Programme for the fight against corruption and organized crime with recommendations for its fulfillment. [76] The Administration has, almost at full extent, fulfilled the measures outlined in the aforementioned Action Plan, thus for the period from 1 July – 31 December 2011, the Administration has implemented nine out of the total eleven measures. [77] The annual training plan has neither been passed, nor the manner of taking examination. [78]

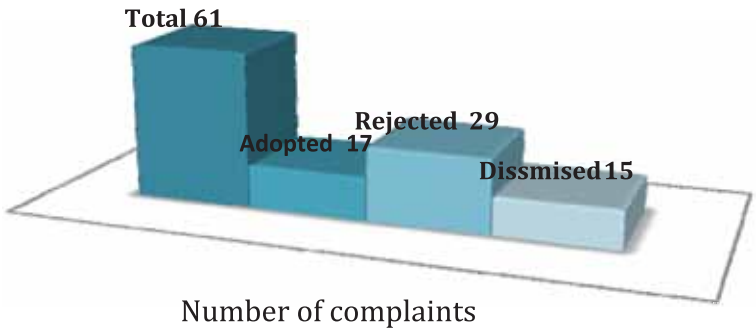
71 Administration has published a brochure "How the corruption corrupts the public procurement procedure " and "Practical guide to the manner of reporting irregularities in public procurement procedure ";
72 Reporting template on the number of information campaigns and public opinion surveys, January - June 2011;
73 2010 Public Procurement Report, p. 32;
74 Commission's response to the request for access to information of the Institute Alternative, No. 01-1487/12-1;
75 As stated above;
76 Ibid. p. 19;
77 Updating the internet page of authorities and institutions, electronic system establishment for the provision of services to the citizens and businesses undertakings, adoption of subordinate legislation, determining a new Administration's Rulebook on Systematization and Internal Organization, new list of public procurement officers, promoting and improvement of a help desk for the provision of advisory and consulting services, improved is the procedure for the reporting corruption to DACI by the third parties, established is an efficient system of control of implementation of the negotiated procedure representing a special risk area for the occurrence of corruption, ensuring the application of disciplinary measures for members of the tender Commission subjected to the existence of a conflict of interest, imposing obligation on the contracting authority to report on the implementation of public contracts exceeding EUR 100.000, providing access to all relevant documents placed on the Administration's internet page, adoption of subordinate legislation for teh establishment of electronic public procurement system;
78 Reporting template on Action Plan's implementation for the period from 1 July 2011 to 31 December 2011;

In the reporting period from 1 January – 30 June 2011, fulfilled was the obligation of officers in reference to the solutions for free access to information, submission of quarterly reports on the reasons for rejecting request for access to information, reporting of corruption, establishment and initial operation of a help desk for advisory and consultancy services, establishing a special group or reports for reporting irregularities, establishment of a system of mandatory submission of statistical data on reports on corruption and further proceedings by DACI, review of the current agreements on cooperation between institutions, submission of semiannual reports by the obligors on the basis of the Action Plan. Measures listed in the Action Plan, which in this period have not been implemented encompass: legally established mandatory adoption of integrity plans in the public sector, adoption of subordinate legislation for the establishment of the public procurement electronic system, regulation on Curriculum and the manner of taking examination in the public procurement area, establishment of the Commission for taking professional examination in the public procurement area. [79]

6.2 Commission

As mentioned earlier, the Commission is considering appeals lodged by the tenderers in reference to identified irregularities in the public procurement procedure. However, the statistical data on the number of appeals submitted to the Commission have not been consolidated individually by years. The data is incomplete, being found in various documents and reports. [80]Up to March 2012, the Commission has issued a total of 61 decisions out of which 29 appeals were rejected and 17 were accepted, while 15 appeals were refused. [81]

Graph No. 6: Commission's Decisions in the first quarter of 2012.



Number of complaints

In the period from 1 October to 31 December 2011, the Commission has issued 111 decisions on appeals lodged, out of which 32 appeals were accepted, 57 rejected, 18 annulled, while in 4 cases the procedure was suspended because the appeal was withdrawn. In the reporting period, by type of procurement subject, the greatest number of appeals was lodged against: 58 works, 27 goods and 26 services, while by the type of procedure, 108 appeals were lodged against the open public procurement procedure and 3 against the shopping method.

79 Reporting template on monitoring of the Action plan for implementation of the programme for the fight against corruption and organized crime for the period 1 January 2011 – 30 June 2011;

80 Based on previous PPL, the Commission was not obligated to develop annual reports. The new PPL stipulates that the Commission shall submit the annual report to the Parliament for adoption, at latest by 30 June of the current year for the previous year;

81 Data on final decisions/appeals available at: http://www.kontrola-nabavki.me/index.php?meni=20&podmeni=1

As of its establishment in 2006 to October 2011, the Commission adopted 1,053 decisions, out of which 330 decisions were published in 2010, and 140 in early 2011. [82]

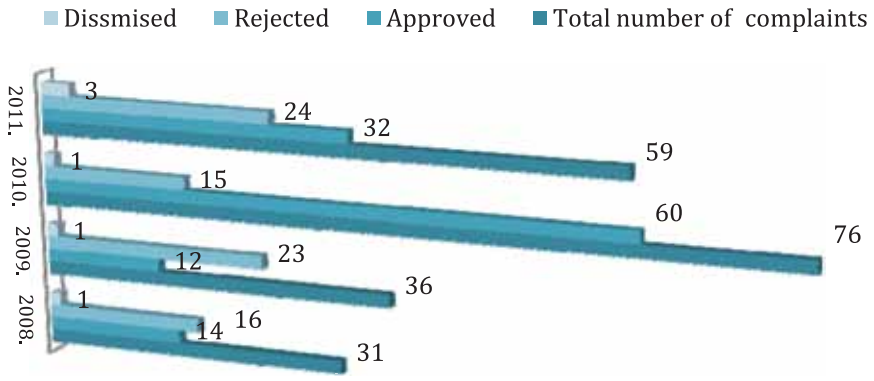
In the period from 1 January to 11 May 2010, the Commission held 19 sessions and adopted 120 decisions, out of which 41 appeals were accepted, 65 rejected, and 14 were annulled. In 2009, the Commission adopted 278 decisions, out of which 88 appeals were accepted resulting in complete cancellation of public procurement procedure conducted by the contracting authorities in 43 cases, instructing them to repeat the procurement procedure. In 35 cases, the contracting authorities were instructed to repeat the review, evaluation and comparison of tenders, while in 10 cases, the contracting authorities were instructed to readopt the decision on objections submitted. 164 appeals were rejected, 26 were refused as: 4 untimely submitted, in 4 cases the procedure was suspended because the appeal was withdrawn, in 7 cases the Commission has determined that the appeal was invalid, and in 8 cases that the appeal was inadmissible and in 3 cases that the Commission was not competent to decide on appeals lodged.

79% of appeals were lodged by the national tenderers, while 21% of appeals were lodged by the foreign tenderers. Appeals were lodged against all procurement process stages, as follows: public competition, content of tender documents, explanation to the tender documents, public opening of tenders, decision on awarding the contract and the decision on annulment of the procurement process. Furthermore, complaints were lodged against procurement procedures conducted by applying the restricted procedure and shopping method.

6.3 Administrative Court

In the period 2010 and 2011, the Administrative Court of MNE, annulled the significant number of Commission's decisions. In 2011, 59 appeals against the Commission's decision were lodged, out of which 32 were accepted. [83] In 2010, the Administrative Court annulled the majority of Commission's decisions (60 out of 76). Half of the negative final judgments of the Administrative Court were adopted due to the existence of formal and procedural issues not relating to the quality of the procurement process. [84]

Graph No. 7: Administrative Court's Decisions



82 EC's 2011 Progress Report, 12 October 2011, SEC(2011) 1204, Brussels, p. 35;
83 http://sudovi.me/uscg/zbirke-odluka/
84 Montenegro's 2011 Progress Report, 12 October 2011, SEC(2011) 1204, Brussels, p. 35;

6.4 Police Administration

The Rulebook on Internal Organization and Systematization of the Police Administration does not envisage a special organizational unit for combating corruption in public procurement, but the problem of corruption in public procurement represents an integral part of operations of the Department for combating organized crime and corruption. Cooperation of officers of the Department is carried out through local contact persons responsible for the corruption issues, and these persons should be appointed in each regional unit of the Police Administration, although this is still not the case. [85] Employees of the Department emphasize that the training of personnel is an ongoing activity, outlining as an example say a seminar on "Receiving and acting upon repots of corruption". [86]

Department officers are indicating the two approaches used in the fight against corruption in public procurement: conventional method of collecting the evidence from physical persons or legal entities suspected of corruption and the method of covert investigation encompassing the application of the secret surveillance measures aimed at gathering adequate proofs. With regard to the initiating an investigation, the Police Administration is relying on its own sources of information obtained on the basis of intelligence analysis, as well as on the basis of the reports of citizens, NGO's and tenderers.

In the period from April 2010 to April 2012, the Police Administration received four criminal charges pertaining to public procurement for the crime act - misuse of the official position referred to in Article 416 of the Criminal Code. [87]

6.5 State Audit Institution

State Audit Institution (SAI) is auditing the legality and effectiveness of management of state assets and liabilities, budgets and all financial operations of entities, the resources of which are public or generated using state property. Entities subject to SAI's audit are obliged to carry out the procurement of goods and services, and subcontracting of works in accordance with the provisions of PPL. [88] Up to present[89,] SAI has conducted 61 audits, out of which 6 audits of the Year-end account of the budget, 9 audits of municipalities, 29 audits of the spending units (ministries, administrations, etc.), 6 audits of funds, 5 audits of public enterprises, 2 audits of other entities (regulatory agencies, National Security Agency, etc.), and 3 special reports.

From the very beginning of SAI's work, public procurement was the focus of all performed audits, as evidenced by the significant parts of the audit reports devoted to identify irregu-

85 Interview of the Institute Alternative researcher with Luka Gogić, Vesko Zindović and Maja Pavićević, officers in the Department for the fight against organized crime and corruption held in the Police Administration, 24 April 2012;

86 Seminar was held in December 2011, focusing on issues for prevention of corruption; reporting, informing and proceedings on reports on corruption; measures and actions taken in the preliminary investigation of corruption criminal acts. (http://www.policijskaakademija.me/obuka);

87 Two criminal charges brought against the director of PUC Nikšić, former assistant to the director and acting director of PHI "Dom zdravlja" Nika Labovića, MD from Berane and executive director of PUC Žabljak. Basis: Answer of the Criminal Police Department of the Police Administration issues at the request for free access to information of the Institute Alternative, of 29 May 2012;

88 SAI's role in public procurement procedure, member of SAI's senate, Branislav Radulović, MSc., official and published presentation at the conference organized by the EU, devoted to the public procurement system of Montenegro, October 2010;

89 As of its establishment in 2004 to early 2012;

larities in this area. In the current period, SAI was mainly focusing on, as it is the case in other areas subjected to its control, verifying the legality of the procurement procedure, without checking the efficiency and effectiveness and economical scope. In addition to focusing its audits on public procurement and the Year-end accounts, in 2011 SAI has published a report on specific audit focusing on the public procurement of IT in 2008. The specific audit involves the control of one aspect of operation with several entities, in this case the public procurement and the IT sector with six entities. [90]

After reading SAI's reports, it could be noted that SAI is gradually taking a systematic approach to public procurement, using relatively the same form for all auditing entities. The reason behind this approach is the adoption of the Guidelines on the conduct of audit of public procurement[91] in 2010, up to when the state auditors were dealing with the public procurement without a specific methodological instruction.

The review of all audit reports is drawing to the pronounced conclusion that the problems encountered in the public procurement area relate, almost exclusively, to the stages of planning and contracting. Pursuant to the Guidelines, in the course of public procurement auditing, SAI is exclusively focusing its control on the contract award procedure, as well as the implementation of awarded contracts. Although the Guidelines define that the most serious and most expensive forms of irregularities may arise during the implementation of awarded contracts, they fail in providing a detailed explanation on the manner in which the state auditor may carry out the verification of these aspects in the aforementioned stage. The conclusion is that SAI thus far, has not seriously addressed this area of contract implementation, which is even more concerning if we have in mind that the internal control systems are still not a reality of the public sector in Montenegro.

After examining up to date reports on control audits, a high degree of fulfillment of the recommendations imposed in the area of public procurement is pronounced, i.e. remedying irregularities and illegalities. [92] Eight out of ten auditees subject to control audits have fully fulfilled issued recommendations relating to public procurement, whereas two auditees have partially fulfilled recommendations. [93] In the light of the above, it may be concluded that the audits have provided for an incentive for the public procurement system improvement with audited entities.

There are legal grounds enabling SAI to issue recommendation for amending the laws in force that are generating or may generate adverse effects or that fail in achieving planned results. Up to present, SAI has used this option for the purpose of altering the public procurement system.

As a result of the audit of the Ministry of Defense and identified problems in the area of so - called "classified/confidential procurement", the Government adopted the Decree on classified procurement of items and services of particular importance for the defense[94],

90 Entities subjected to the specific audit were the Ministry of Information Society, Customs Administration, Real Estate Administration, Health Insurance Fund, Pension Insurance Fund and the Administration;

91 In 2010, SAI has prepared Instructions on conduct of audit in public procurement. Pursuant to the new PPL, Instructions will be amended by the end of 2012. SAI's answer issues at the request for free access to information of the Institute Alternative, No. 4016-06-570/2;

92 Statement from the Report on control audit of the National Tourist Organization: "Based on the estimate of the state auditor, in comparison to the period in which irregularities in reference to the application of PPL were identified, and having in mind the specific activity that the auditee is carrying out, the auditee has significantly improved its operations in light of regulatory compliance governing the public procurement system."

93 Ministry of Tourism and Employment Bureau;

94 "Official Gazette of MNE", No. 28/08;

resulting in the fulfillment of SAI's recommendation and making distinction between what can be subsumed under a confidential procurement.

Another example is the Decree on requirements and manner of use of means of transport owned by Montenegro and its amendments, being the results of the Government's fulfillment of SAI's recommendation that is necessary to adopt a regulation "that would regulate the rights and obligations of the users of budget funds in reference to the procurement of vehicles used in official purposes, with obligation of applying it at the level of state administration authorities providing for required procurement procedure transparency". [95]

However, SAI's representatives were neither a part of the working group for development of 2011 PPL, nor they officially issued comments and suggestions. [96]

There remains the question of responsibility for identified irregularities and illegalities, which in certain cases represent a very uneconomical and inefficient management of public funds. The most common recommendation with which SAI is finalizing the enumeration of irregularities and violation of the public procurement regulations is: "PPL provisions should be applied consistently." The question is whether the imposition of this and similar recommendations is the best way of addressing identified problems in the public procurement area with auditees and whether certain findings require the application of stricter measures that are at SAI's disposal. The scope of illegalities and irregularities, being identifies so far, based on performed audits there were neither sufficient reason for bringing criminal charges on the basis of audit findings, nor the requests for compensation of damages.

A significant problem also represents the inactivity of other relevant authorities and institutions on the basis of SAI's findings and reports. In 2010, SAI has entered the agreement on cooperation with the Commission. [97] The results of this agreement are questionable due to the absence of data on fulfillment of a concrete objective for which the agreement was signed, which raises the question of the efficiency of solving inter-institutional relations and responsibilities on the grounds of this document. In 2009, SAI and the State Prosecutor's Office, in cooperation with the OSCE Mission to Montenegro and DACI, prepared a draft document on guidelines, concerning the criminal charges in the audit process. The document did not result in bringing criminal charges by SAI, while the Public Prosecutor's Office has only in few cases initiated activities based on SAI's findings, the epilogue of which is unknown.

95 SAI's Annual Report on audits performed for the period October 2008 – October 2009;

96 Data from the interview with the member of SAI's senate, Branislav Radulović, MSc., 6 April 2012;

97 "The objective of the Agreement is to ensure the public interest through a transparent and regular application of PPL and the use of appropriate legal remedy in the public procurement procedures; improving and developing inter-institutional cooperation and activities in the prevention of corruption and other forms of illegal behavior; achievement of a high level of awareness for the prevention and timely detection of possible cases of abuse through false or incomplete implementation of PPL; organizing conferences and trainings of civil servants and state employees and development of professional publications; development of both the SAI's and the Commission's capacities, as well as the provision of greater support for the implementation of PPL, aimed at achieving good results in the area of control and audit of the public procurement, and timely mutual information on performed audits with auditees in the public procurement area and decisions adopted on appeals lodged in the public procurement procedures, in the context of the Law on SAI and PPL." http://www.kontrola-nabavki.org/index.php?vijesti_id=90

6.6. Public Internal Financial Control (PIFC)

The corruption in the public sector and poor financial management in the former communist countries were the main impetus for the European Commission to develop the concept of Public Internal Financial Control (PIFC) in 90's of the last century, which became an integral part of the accession negotiations with candidate countries for the EU membership.

Internal audit is one of the three pillars that constituting PIFC, representing an independent, objective assurance and consulting activity, which aims at adding value and improving the entity's operations and assisting in achieving its objectives by providing a systematic, disciplinary approach to assessing and improving the effectiveness of risk management, controls and management processes. [98]

It seems that the internal audit is in the best manner confirming its role and importance on the example of public procurement. Internal audit should play a significant role and enable that the public procurement procedure is monitored, controlled and that audit reports produced thereof represent the basis for the management for taking measures to eliminate adverse events. Pursuant to the Internal Audit Manual of the Ministry of Finance and the methodology of risk index, procurement (contract award) is marked as a system with the highest like hood of occurrence of corruption and fraud risks, recommending them for becoming the integral part of the annual audit plans of all internal audit units. [99]

Up to present, when conducting audits, SAI was also providing the evaluation of the status of play in reference to the internal controls system functioning. Due to the fact that PIFC system development is in the early stage, SAI mostly addressed the absence of established internal audit units[100], noncompliance of obligation of functional independence of internal auditors, [101] as well as the failure of the users of the budget/spending units to adhere to issued recommendations by the internal audit. [102]

We can currently only address the possible role that the internal audit could play in the fight against corruption in public procurement, because the overall PIFC system of Montenegro is in its early stage of development. Five years following the adoption of PIFC Development Strategy, and four years following the adoption of PIFC Law, we currently have a total 56 users of the budget, both at the central and local level, that have fulfilled and provided the initial requirements for carrying out the internal audit [103] Considering the fact that PIFC Law is requiring all users of the budget to establish the internal audit system, this figure is illustrating a relatively modest penetration of the internal audit in the public sector, underlying also the problems in the implementation of adopted legislation in this area.

Another important aspect of PIFC, financial management and control encompasses activities

98 Definition of the International Institute of Auditors, given pursuant to the Internal Audit Manual, 3rd Edition, Ministry of Finance, October 2011, p.8;

99 Internal Audit Manual, 3rd Edition, Ministry of Finance, October 2011, p. 24, 38;

100 As it is the case with the National Tourist Organization, failing to establish IAU even after the first 2010 Audit Report and conducted control audit in 2011 - http://www.DRI.co.me/index.php?option=com_docman&task=doc_view&gid=99 p. 9;

101 E.g. the functional independence obligation is not adhered to, since the Rulebooks on systematization and organization that are not compliant to PIFC Law are in force, and persons assigned for internal audit work are envisaged to perform other operations and competences. Example is the case with the RTV of Montenegro, where appointed auditor was requested by the general director to perform operations not related to the internal audit, e.g. involvement as the president of the commission for estimating the value of equipment;

102 Case with the University of MNE, SAI's Report for the period October 2009 – October 2010, p. 109;

103 Data taken over from the Registry of internal auditors kept by the Sector for central harmonization of public internal financial control and internal audit of the Ministry of Finance;

which, inter alia, especially related to budget planning and execution, public procurement procedure implementation, payment of contractual and other liabilities, protection of assets against losses, improper use and fraud and other non-financial activities in entity's operation. [104] We here also have concerns with regard to the current implementation: person responsible for financial management and control development are appointed in the total of 71 users of the budget, 64 at the central and 7 at the local level. All these FMS officers are just starting with the activities and training for the challenging tasks that lie ahead of them.

The eventual impact of the existing internal audit units in the public procurement area is impossible to evaluate, because the Annual consolidated report on internal financial control system is unavailable to the public. The Ministry of Finance or the Central Harmonization Unit (CHU), has prohibited the insight into this document, explaining that the report was compiled from information owned by other authorities and institutions (users of the budget reporting to CHU), and that the report may not be published without their. This interpretation is controversial, representing an exception to comparative practice. For example, the same report that was prepared in Bosnia and Herzegovina is available to the public. It is interesting to note that this report is clearly indicating that the public procurement are a top priority in the work of the internal audit units, also stating the key issues identified by the internal auditors during auditing. [105]

104 Article 2 of the Rulebook on the manner and procedure for FMC establishment and implementation, "Official Gazette of MNE", No. 37/10 of 9 July 2010;

105 Report available at: http://www.fmf.gov.ba/pdf/Konsolidirani%20izvjestaj%20interne%20revizije.pdf

7 PROTECTION OF TENDERERS RIGHTS

Right to appeal of tenderers against different decisions passed in the course of public procurement procedure is of key importance. This right is providing for a timely access to legal protection ensuring equal treatment of all participants in the procedure. Some form of extrajudicial control of procedure exists since the introduction of the public procurement system in Montenegro.

The procedure of protection of rights is initiated by lodging an appeal before the Commission. On the day of appeal submission, an appellant is submitting a copy of the appeal to the contracting authority, providing the proof to the Commission, within three days from the say of submitting the copy of the appeal to the contracting authority.

An appeal may be lodged against: 1) content and manner of call for competition publication; 2) content of call for competition; 3) content, explanation, and the availability of tender documents to interested parties; 4) public opening of tenders, content of the minutes of the public opening of tenders; 5) conclusion of tender annulment; 6) decision to reject tenders; 7) tenders evaluation process; and 8) decision on selection of the most advantageous tender; 9) conclusion on suspension of public procurement procedure; 10) decision on procurement procedure cancellation.

The Commission is deciding on appeal, while ex officio, it decides on substantial violation of the Law, [106] independently from the part of public procurement against which the appeal was lodged.

The new PPL has introduced the fee covered by the appellant in the amount of 1% of the evaluated public procurement value, whereas the amount of the fee may not exceed EUR 8,000. The fee for the implementation of procedure represents revenue of the budget of MNE. If the appeals procedure results in favor of the appellant, the fee is returned to the

106 Substantial violation of the Law in the public procurement procedure are as follows: 1) implementation of the public procurement procedure without adopting the decision on initiating and implementing public procurement procedure; 2) tender documents are not compliant with the law, which resulted or might have resulted in discrimination of any tenderers or distorted competition; 3) tender documents and call for competition, or invitation to tender are not compliant in reference to the requirements for participating in the procedure; 4) publication of a call for competition, decision on selection of the most advantageous tender and public procurement contract are not compliant with this Law; 5) if the decision was passed by a body of the contracting authority which could not have rendered the decision due to the lack of subject matter jurisdiction; 6) shortfalls in the process of opening of tenders, related to the lack of data on participants in the procedure, offered price and other data of importance for the validity of tenders; 7) failures made in the process of review, assessment, comparison and evaluation of tenders; 8) if provisions of this Law were breached referring to the use of language and script; 9) selection of tender, the price of which exceeds the estimated value of public procurement; 10) selection of the tender not representing the most advantageous one; 11) selection of the tender which is not the most advantageous one; 11) selection of inadmissible tender as the most advantageous one;

appellant. Practice will show whether the introduction of the fee and setting its amount is a factor that discourages the submission of appeals, limiting to certain extent, the availability of appeal and ultimately the legal protection of participants in the procedure. It is still early to draw conclusions in reference to this issue due to the absence of relevant indicators, comparative data and qualitative study of tenderers opinions.

The Commission's decisions are final, against which an administrative proceeding can not be instituted. The change brought by the new PPL, stipulated the urgency in adopting the decision in administrative proceeding. This solution is necessary, representing a step forward in securing a stronger balance between the need carry out the procedure in an efficient manner, and on the other hand, to fully ensure legality, envisaging the appeals procedure before the Commission and court's procedure before the Administrative Court.

The change brought by 2011 PPL, is envisaged in the obligation of the Commission to submit the Annual Report to the Parliament of Montenegro. However, the type of information included in the report has neither been stipulated by the Law, nor the subordinate legislation. Practice will show whether the Annual Report will contain adequate information for an objective assessment of the Commission's work, the quality and limitations of appeals procedure.

Finally, it is important mentioning the problematic constitutionality of PPL provisions in a part that the Commission established by the Government of Montenegro, i.e. executive power, is deciding in the second - instance on issues that are the prerogative competence of individual and independent bodies such as local government authorities, independent, autonomous legal entities or other state authorities and institutions that are outside the executive power system. An independent and autonomous state-level Commission established by the virtue of the law, is the sole institution that can provide independence in the aforementioned cases, which would ultimately be in compliance with the EU regulations.

8 FINANCING OF POLITICAL PARTIES AND PUBLIC PROCUREMENT

A direct connection between public procurement and the financing of political parties has been emphasized earlier. Previous Law on financing of political parties contained provisions prohibiting the financing of political parties by legal persons who gave donations to political parties in the period of two years prior and after the conclusion of public procurement contract. In reference to these provisions, GREKO [107] for the assessment made in 2010, during the third evaluation round for Montenegro, has noted that the previous legal framework has failed in prescribing penalties for companies that have public contracts based on which they are providing donations to a political party, which is contrary to the current prohibitions. In this context, the GET [108] recommends (i) to better adjust the existing sanctions relating to infringements of political financing rules in order to ensure that they are effective, proportionate and dissuasive, including by broadening the scale and range of penalties available; (ii) to cover all possible infringements of the law, as appropriate. [109]

The new Law on financing of political parties is applied as of 1 January 2012. The Law sets forth that "political parties and other nominators of election lists shall be prohibited to accept donations from legal entities, business organizations and entrepreneurs and related legal entities and physical persons, that carried out operations in the public interest pursuant to a contract entered with authorized bodies in accordance with the law or that have concluded a contract on the basis of the public procurement procedure in the period of two years preceding the contract conclusion, during the effectiveness of such business relationship, as well as two years upon the expiry of such business relationship. "[110] Unlike previous Law, the current one has extended the definition encompassing not only the legal entities and entrepreneurs, but also "related legal entities and physical persons." Our understanding of this formulation, by analogy, encompasses persons defined by PPL. However, it may be the case that only the judiciary practice will provide an answer this question. In any case, this formulation is limiting opportunities to manipulate with the transfer of donations.

The penalty provisions of the aforementioned Law envisage a fine from EUR 10, 000 to EUR 20.000 to be imposed for an offense on a political party if "accepts donations from legal entities, business organizations and entrepreneurs that carried out operations in the public interest pursuant to a contract entered with authorized bodies in accordance with

107 GRECO – Group of States Against Corruption;
108 The *GRECO Evaluation Team;*
109 GRECO, 3rd Round Evaluation Report on Montenegro, Transparency in financing of political parties, Adopted by GRECO at its 49th Plenary Meeting (Strasbourg, 29 November – 3 December 2010), p.20;
110 Article 16 paragraph 3 of the Law on Financing of Political Parties, "Official Gazette of MNE", No. 42/2011;

the law or that have concluded a contract on the basis of the public procurement procedure in the period of two years preceding the contract conclusion, during the effectiveness of such business relationship, as well as two years upon the expiry of such business relationship"[111]. The Law has failed in imposing fines on a legal entity and physical person making unacceptable donations.

Furthermore, it would be pivotal that a similar provision, with a different orientation, is prescribed by PPL. At least because that a part of a norm set forth by the Law on financing of political parties prohibiting donations to a political party two years prior to entering the public procurement contract is illogical and inapplicable. It is therefore desirable to amend PPL by provision based on which the tender of a legal entity, that made donations to a political party in the period of two years prior to the commencement of pubic procurement procedure, shall be rejected. Moreover, the same prohibition should be imposed on less transparent procurement procedures.

However, despite clear anti-corruption intent of these provisions, it is necessary to consider whether a legal entity, which supported a political party of candidate that failed to gain the parliamentary status, not participating in the work of the Government or local government or a party that has no direct or indirect connection with a political oversight or management with the contracting authority, should suffer the consequences of prohibition to participate in competition for public affairs. In out opinion the Law should address certain exemptions in accordance with the aforementioned.

Furthermore, if the intention is to prevent the possibility of thanking to a party's donors, the period of two years is limited to the one half of the regular Government's term of office. In other words, in the second half of the term of office, the Government will be able to freely "thank" the donor company.

A provision stipulating that "funds collected contrary to this Law" shall be confiscated pursuant to the Law on Misdemeanors" [112] represents a deterring tool.

SAI shall audit the financial statements of political parties and reports on financing of election campaigns. A political party is submitting final account to administrative authority responsible for keeping a unified taxpayers registry and SAI, at latest by 31 March of the current year for the previous year. Pursuant to the report, SAI is obliged to carry out the audit of political party's final account and to produce audit report being published on its web - page, at least within seven days upon adopting the final audit report.

Proper professional conduct of SAI requires that the Administration provides timely updating of the tenderers list, or legal entities that entered public procurement contracts based on the date of announcing a call for competition. This is not currently the case, because the Administration is keeping and publishing the list of tenderers, [113] which contains only the name of the company, country of business and in some cases, the address of the principal place of business. However, in reference to related parties, SAI will be limited in determining the violation of this norm, bearing in mind that a complete control requires full access to other databases and registers, provided that they updated and consistent.

111 Ibid. Article 35;
112 Ibid. Article 30;
113 http://www.ujn.gov.me/wp-content/uploads/2011/12/Lista-ponudjaca.pdf

9 BEST PRACTICE IN FIGHT AGAINST CORRUPTION IN PUBLIC PROCUREMENT

It was repeatedly emphasized that the weak anti – corruption mechanisms represent the reason of continual existence of corruption in Montenegro's public procurement system. Thus the question to which direction the existing mechanisms can be improved, as well as what are the mechanisms used in the comparative practice that have proved successful in combating corruption. Transparent "black" lists of tenderers that were involved in corrupt activities, or who, in turn, failed to fulfill their contractual obligations, greater involvement of non-state actors in control of procedure, are just some of the mechanisms that have been applied successfully in the European Union and neighboring countries. Therefore, this section will address the experiences of these countries in the implementation of mechanisms to combat corruption in public procurement, not known by the national legislation. Furthermore, the paper is explaining in details the establishment of public procurement system in Croatia, as an illustrative example of a centralized system, but also as an example of the best practice in the fight against corruption in public procurement.

9.1 "White" and "Black" lists as anticorruption mechanisms in public procurement

The principle of 'white list' is one of the mechanisms facilitating the selection of tenderers for public procurement. As an instrument for the prevention of corruption in public procurement, this approach implies that companies that meet stringent anti-corruption criteria can be ranked on the white list of tenderers. In order for a company to be listed on the white list, it is necessary to prove that its previous operations were not subjected to corruption scandals, to comply with ethical values and the anti-corruption principles. In order to combat corruption, the white list system is often reinforced by adding criteria related to the integrity of the tenderer that must prove to the contracting authorities that it had not been convicted or involved in crimes related to corruption and to operate with adequate instruments for internal control of work which prevents the corruption phenomena. In order to avoid abuse of this system, the white list must be made in a transparent manner and must be available to the public.

The introduction of "blacklists" or a list of tenderers with negative references might be considered. It is about creating a registry of companies that have not fulfilled their contractual obligations, or have violated the law by participating in corruption activities. Based on this registry, the contracting authorities are prohibiting the companies listed on the blacklist to participate in the tender procedures. Most countries that are using this system rely on initiation of an investigation if there is a suspicion about unethical or

illegal business activities of tenderers, because the final judgments, which are also rare, take a long time. [114] If the competent authorities confirm this suspicion, although the final judgment is pending, the tenderer may be excluded from further procedure and placed on a blacklist.

Best practise examples:

a) Hungary

Hungarian legislation prohibits participation in the public procurement procedures to the tenderers who are lawfully convicted with a violation of law (especially in the area of organized crime, money laundering, bribery, fraud, budget frauds), which were previously subjected to prohibition to participate in tenders, which have not settled their tax, customs and other liabilities to the state, who provided false information in the previous tender procedures (three year period) or who failed to adhere to contractual provisions that have entered earlier.[115]

According to these findings, the contracting authorities are informing the Hungarian authority in charge of public procurement on the exclusion of certain tenderers from the tender, as well as on the grounds for this decision, based on which the company is blacklisted. In the subsequent tender procedures, tenderers who are blacklisted are being automatically eliminated - those who have received final judgment for violating the law for a period of five years from the date of publication of tenders, or judgment for the breach of contract previously concluded for a period of two years from the date of tender publication.[116] Moreover, when applying to the tender, the tenderers must submit a certificate regarding the absence of conditions for their exclusion. Statements from this document must be verified by the competent authorities with the appropriate institutions, while the certification system is pending its introduction by the Government of Hungary. [117]

b) Slovenia

Based on the provisions of the Slovenian PPL, participation in the tender procedure of public procurement may be prohibited to the tenderers subjected to a final judgment because of: involvement in criminal activities, bribery, various forms of fraud, damage made to the financial interests of the EU, and money laundering. Moreover, companies that have not settled their tax liabilities, failed to regularly service social contributions, or have given false information when applying to the tender, may be excluded from the procedure.[118]

The contracting authorities may require the tenderers to submit a statement attesting that they did not commit any criminal offense which would led to exclusion from the tender procedure. In the absence of the final judgment, Slovenian legislation envisages the possibility of an investigation. i.e. seeking information from the relevant authorities if there is reasonable doubt that a tenderer has submitted false information about his involvement in a criminal activity. [119] Moreover, companies that failed to settle their tax liabilities, or have failed in regularly servicing social contributions, or have given false information when applying to the tender may be excluded from the procedure. [120]

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114 Using Blacklisting Against Corrupt Companies, Anti-Corruption Resource Centre, Transparency International 2006 (http://www.u4.no/publications/using-blacklisting-against-corrupt-companies/)

115 Article 56 of the Hungarian PPA, (Act CVIII of 2011 on Public Procurement), http://www.kozbeszerzes.hu/static/uploaded/document/PPA%202012_011.pdf)

116 Ibid. Article 57;

117 Ibid. Article 58;

118 Article 42 of the Skivenian PPL (Public Procurement Act); http://www.oecd.org/dataoecd/6/33/39647089.pdf)

119 "The contracting authority may require the tenderer to submit a statement confirming that he did not commit any offense mentioned in the preceding paragraph ... If there is reasonable doubt about the ability of the tenderer, related to the preceding paragraph, the contracting authority may require the competent authorities for information, if deemed necessary. " (Article 42 of the Slovenian PPA); http://www.oecd.org/dataoecd/6/33/39647089.pdf).

120 Article 42 paragraph 3 of the Slovenian PPA - http://www.oecd.org/dataoecd/6/33/39647089.pdf)

In addition to the exclusion, Article 77 imposes an obligation on a SAI to propose the initiation of criminal proceedings against a tenderer for whom is determined that has submitted false statements or documents.[121] Pursuant to the new Article 77a, the authority in charge of misdemeanors shall be obliged to inform the Ministry of Finance on the final judgment, placing the tenderer on the blacklist, or entering him into the register of tenderers with negative references, against which it is impossible to lodge an appeal. [122]

c) Serbia

PPL of Serbia is explicitly making a reference to the institute of negative references in its Article 47 enabling the contracting authorities to refuse the tenders of companies that have in the past violated the Law or have failed in adhering to previously entered contracts. Profs for non adherence to contractual obligations blacklisting companies in Serbia, may be of judicial nature (e.g. final court's ruling) or of more informal character (such as a statement or report confirming the violation of previously reached agreements). [123]

9.1.1 Incentive from the EU

In the explanatory memorandum to the latest Proposal for directive on public procurement [124], the principle of establishing a black list is one of the most important aspects. The proposal of the European Parliament and EU Council suggests that public contracts should not be granted to economic operators who participated in a criminal organization or who have been convicted of corruption, fraud to the detriment of the financial interests of the Union, money laundering or terrorist activity. Furthermore, failure to pay taxes and social contributions, and disrespect the rules on environmental protection, prohibit discrimination against persons with disabilities, competitiveness, protection of intellectual property rights, etc., constitute the basis for excluding the tenderers from the tender procedure. [125] It introduces the possibility of delivery of certificates or written statement of tenderers on the absence of a basis for their exclusion. [126] Among the evidence that confirms the grounds for exclusion from the tender, or lack of grounds for exclusion, are listed the excerpts from the court or other certificates of relevant institutions. [127]

9.1.2 Problems od black and white lists system and possible solutions

Although the blacklist system is recommended as an effective mechanism to combat corruption, the problematic nature of this approach is numerous, especially in the Montenegrin context that is vulnerable in terms of professionalism of state authorities.

Earlier PPL of Montenegro, among mandatory requirements that had to be met by the tenderers, envisaged the non-conviction in criminal and other proceedings. The tenderers

121 Amended Article 77 of the Slovenian PPA;
122 New Article 77a of the Slovenian PPA;
123 PPL of Serbia; (http://www.zurbnis.rs/zakoni/Zakon%20o%20javnim%20nabavkama.pdf)
124 Proposal for directive of the European Parliament and of the Council on public procurement, 20 December 2011, COM(2011)896 final;
125 Article 55 of the Proposal for directive of the European Parliament and of the Council on public procurement, 20 December 2011, COM(2011)896 final;
126 Article 57 of the Proposal for directive of the European Parliament and of the Council on public procurement, 20 December 2011, COM(2011)896 final;
127 Article 60 of the Proposal for directive of the European Parliament and of the Council on public procurement, 20 December 2011, COM(2011)896 final;

were required to prove that they have not been the subject of a conviction by final judgment, in the period of 2 years prior to the submission of the tender, for the committed criminal offences of participation in criminal organization, corruption, fraud, money laundering or criminal offences related to the professional conduct of their business. [128] Moreover, the earlier PPL contained in its Article 50 an explicit provision enumerating the reasons for the exclusion of tenderers. Final judgment for any criminal offense listed in Article 46, as well as the failure to fulfill prior contractual obligations to the contracting authority, representing the grounds for exclusion from the tender procedure. [129] In this manner, indirectly, was left a possibility to form a blacklist of tenderers, based on networking and data exchange, which would be eliminated from the public procurement procedure. However, these cases have not been recorded by at that time competent Directorate of Public Procurement. Since this solution never became a customary practice, the current Law is not event addressing this issue in this form but in a form of mandatory requirements. Specifically, Article 65 of the new PPL of Montenegro sets forth, inter alia, that the tenderers must meet the requirement relating to the orderly execution of tax liabilities and non – conviction in criminal offenses. [130]

According Mersad Mujević, Director of the Administration, the current framework provides a room for introducing the negative references institute in Montenegro. The Administration is planning to oblige the tenderers to submit reports on fulfillment of contractual obligations by the contracting authority, and vice versa. Based on this information, the Administration would publish the negative list of both the contracting authorities and tenderers. [131] However, if the current Law is to be amended, the violation of contractual obligations should not be the sole reason for entering the tenderer or contracting authority with the register of negative references. What should be additionally considered is, through closer cooperation with police and prosecutors, the obtaining of information on suspicious activities of companies associated with the corrupt affairs, which should also be blacklisted.

The problematic aspect of this approach, however, is reflected in the competence for blacklisting. In other words, which state authority would be in charge of determining the blacklists of tenderers and based on which information or proves? Moreover, the political will issue becomes a focus, to prohibit companies the participation to the tenders for public procurement, which often with tacit support and complicity of the state authorities are bribing the contracting authorities.

The question of validity, or integrity, doesn't exclusively rest on tenderers, but also the contracting authorities, because the possibility that bribery occurs at the initiative of the state authorities that are the contracting authorities in public procurement should not be excluded. It is therefore useful to consider the introduction of a type of hybrid system encompassing both the black and the white lists, by a body cooperating with the prosecution and police aimed at efficiently collecting necessary evidence. With the objective of avoiding the abuse of the white list based on which the tenderers would have a preferential treatment and be placed in a foreground, it is possible to devise a specific forms to be filled by the interested tenderers for the purpose of submitting information on their business (such as a type of confirmation that they were not the subject of corruption investigations, having adequate and efficient internal control mechanisms in place, adhering to the ethical values, implementing anti-discriminatory policy, respect the rights of their employees, as

128 Articles 45 and 46 of the old PPL of MNE ("Official Gazette of the RoM, No. 46/06);
129 Article 50 of the old PPL of MNE ("Official Gazette of the RoM, No. 46/06);
130 Article 65 of the PPL of MNE ("Official Gazette of MNE, No. 42/11);
131 Response of Mersad Mujević, Administration's Director, to IA's questionnaire, April 2012;

well as that they are ensuring the protection of the environment, for example). Based on these forms, a register of tenderers with positive references could be devised.

9.2 Conflict of Interest and Public Procurment Officers

Bearing in mind the corruption vulnerability of certain categories of civil servant, the World Bank recommends two models to fight against this phenomenon: policy of preventing conflicts of interest and establishing a system of assets reporting. The first model is more a preventive one and may be considered as one aspect of the ex - ante control, while the latter is used as a mechanism for sanctioning illegal actions of public officials or as a form of ex - post control. In its latest study of public office and private interests[132], the World Bank is emphasizing that the systems in which public officials are forced to report their income and assets, is assisting in identifying the misuse of public office, thus strengthening public confidence in state administration.

Countries with a longer tradition of professional state administration are generally less reliant on other models, or the commitment of public officials to report information about their income and assets. This is predominantly the case with the old member states of the EU using the system for prevention of conflict of interest, because they already have sufficiently institutionalized code of ethics and well-developed instruments for supervision of functions of public officials. [133] On the other hand, countries that joined the EU in 2004, or 2007, are using so-called Income and Asset disclosure (IAD) system for the reporting of income and assets, being recognized as an important instrument for the identification of illegal enrichment, particularly in countries with a high degree of perception of corruption and impunity of the perpetrators of this criminal offense. [134]

As far as the IAD system application modality is concerned, specialized agencies or civil sector organizations (if the reports on income and assets are publicly available) could monitor the reporting of income and assets with the objective of identifying possible changes in the income of officers involved in public procurement. It can also be considered the possibility of crosschecking submitted data with the information held by banks, as well as authorities dealing with tax returns and records of movable and immovable property. Furthermore, investigative journalism and NGO's activities can contribute to so-called lifestyle checks in order to identify any indications suggesting to the occurrence of corruption. [135]

IAD can be applied based on two principles: position or rank, or by function or role played by the public servants (e.g. those working in the tax administration, monitoring procurement, issuing licenses). [136]

In 2006 Handbook on Curbing Corruption, OSCE emphasizes that "the rules on disclosure of assets, liabilities and income of senior officers should be introduced, and in case of unexplained wealth an investigation should be carried out." [137] SIGMA, a joint initiative of the OECD and the EU, also recommends the introduction of public disclosure of personal

132 The World Bank (2012), "Public Office, Private Interest: Accountability through Income and Asset Disclosure";
133 Ibid. p.9;
134 Ibid. p.14;
135 Ibid. p.15;
136 Ibid. p. 36;
137 OEBS 2004, "best pactices in combating corruption", p.113;

and family property records and information on income in order to prevent conflicts of interest and combating corruption..[138] In its recommendations, SIGMA is stating that these provisions are particularly relating to public officials entering the categories exposed to corruption risks..[139] Having in mind that public procurement represents one of the most important items of the Budget of MNE, the consumption of which is subject to the decision of procurement officers and members of tender Commission for opening and evaluating the tenders, these persons can be considered as a category of special risk for corruption.

Pursuant to Article 3 of the Montenegrin Law on Prevention of the Conflict of Interest, public officials covered by the obligation of submitting reports on income and assets are as follows: person directly elected on elections; an elected, nominated and appointed person whose election is confirmed by the Parliament of Montenegro; person appointed by the President of Montenegro; an elected, nominated or appointed person or on whose election the consent is issued by the Government of Montenegro; president and a member of the Judicial Council and President of the Court and the judge, elected by the Judicial Council; president and member of the Prosecution council, deputy public prosecutor and the Director of Broadcasting Agency; person appointed or on whose appointment the consent is issued by the municipal assembly or the Mayor of the Capital City, Royal Capital or the municipality; and any other person elected, nominated or appointed by bodies referred to in paragraph 1 of this Article, who makes decisions on the rights, obligations or interests of physical persons or legal entities or on the public interest. [140] Pursuant to the aforementioned definition of the term "public official", there are currently more than three thousand persons who are legally required to submit information on their income and assets.

The importance of the role of public procurement officers is illustrated in Article 58 of PPL pursuant to which all these persons are authorized to prepare the public procurement plan, as well as the text of the decision on initiating a procedure, keeping records and perform other tasks related to the implementation public procurement procedure. **[141]** Members of the tender Commission play equally important role because they are preparing necessary documentation and carrying out review, evaluation and comparison of tenders, and most importantly – propose the selection to of the most advantageous tenderer to the contracting authority. **[142]**

In reference to committing public procurement officers and members of the tender commissions to submit information on their income and assets, new EU member states have not explicitly covered these persons with their laws on prevention of conflict of interest. In Latvia, for example, only the members of commission for public procurement are covered by the Law on prevention of the conflict of interest, while the broader category of public procurement officers is not mentioned. [143] Czech example is specific, because

138 OECD (2005), "Conflict of Interest Policies and Practices in Nine EU Member States: A Comparative Review", Sigma Papers, No. 36, OECD Publishing; (http://www.oecd-ilibrary.org/governance/conflict-of-interest-policies-and-practices-in-nine-eu-member-states_5kml60r7g5zq-en);

139 "...obliging all civil servants to declare assets may not be necessary and may be too costly; it would be sufficient to oblige senior executives and civil servants who are in categories and sectors at risk." OECD (2005), "Conflict of Interest Policies and Practices in Nine EU Member States: A Comparative Review", Sigma Papers, No. 36, OECD Publishing (http://www.oecd-ilibrary.org/governance/conflict-of-interest-policies-and-practices-in-nine-eu-member-states_5kml60r7g5zq-en), p.30;

140 Article 3 of the Law on prevention of the conflict of interest of MNE ("Official Gazette of MNE, No. 1/09);

141 Article 58 of PPL of MNE, "Official Gazette of MNE", No. 42/11;

142 Ibid. Article 59;

143 Law on prevention of conflict of interest in activities of public officials of Latvia; (http://www.knab.gov.lv/uploads/eng/on_prevention_of_conflict_of_interest_in_activities_of_public_officials.pdf)

pursuant to Article 2 of the Law on conflict of interest, persons directly participating in the preparation and execution of public tenders are required to submit information on their income. [144] In other countries such as Bulgaria, Slovenia and Hungary, there are no explicit provisions requiring the public procurement officers or the members of tender commission to submit the information on their income, nor PPL in these countries is making a reference to the Law on prevention of the conflict of interest. However, since the area of public procurement of Montenegro is recognized as one of the focal points of corruption activity, the introduction of a form of control of persons responsible for implementing these procedures, such as the commitment to submit information on income and assets, should be seriously considered. [145]

Considering the fact that Montenegro is featured by the enormously high number of public functionaries, [146] as well as the procurement officer,[147] when addressing this issue, it is required to make strategically cost – efficient step - to limit the obligation of reporting income to those persons who are the key link in the public procurement procedure, and thus most susceptible to corruption and illicit acquisition of wealth. [148] It may be an option to integrate in sets of contracting authorities, through a form of centralization that would be responsible for appropriate ministries, which would also appoint persons responsible for monitoring the implementation of PPL, especially the items pertaining to the conflict of interest. In this way it would be more feasible to apply the IAD mechanism.

Sanctions for reporting false information or concealment of income can range from minor administrative ones that would be published in the Official Gazette, to more serious penalties such as suspension from work, employment termination or temporary nonpayment of wages, up to criminal prosecution. [149]

9.2.1. Integrity plan

The Law on Civil Servants and State Employees sets forth the rules relating to the integrity of civil servant and state employee. It stipulates that "for the purpose of creating and maintaining trust of citizens in good-faith and responsible performance of tasks in a state authority", civil servant and state employee must conduct "in a manner not to diminish their reputation and reputation of a state authority, and not to compromise their impartiality in their work, as well as to eliminate suspicion regarding the occurrence and development of corruption". [150]

A state authority shall adopt an integrity plan on the basis of assessment of susceptibility of certain job positions for occurrence and development of corruption and other forms of

144 Law on conflict of interest of Czech Republic (http://www.psp.cz/cgi-bin/eng/docs/laws/2006/159.html)

145 "As far as the corruption is concern, it so far has been an endemic phenomena in the market, but on the other hand, a faithful companion in procurement circles. There is no point cursorily passing over this issue. This is a reality and there are no solutions in overcoming this problem, primarily in reference to bribing persons involved in the procurement procedure, and it will not be roothed out. " Statement of Mersad Mujević, Admiistration's Deirector, at a conference on Corruption Risk Analysis held in Podgorica in February 2012; (http://www.ujn.gov.me/2012/01/konferencija-„analiza-rizika-korupcije-u-crnoj-gori-u-oblastima-javnih-nabavki-urbanizma-prostornog-planiranja-katastra-upisa-i-prometa-nekretnina-podgorica-29-februar-2012-go/);

146 "The number of public functionaries in 2011, has increased by 6,3% amounting at 3,075 at the end of the year, out of which 40% are public, and 60% local functionaries", Basis: 2012 CPCI Report, 25 May 2012, p. 18.

147 Estimated number of public procurement officers is at around 750, however, the number of tender commission members should be taken into account who can be the members without having the status of civil servants;

148 The World Bank (2012), "Public Office, Private Interest: Accountability through Income and Asset Disclosure", p.17

149 Ibid. p.20;

150 Article 67, Law on Civil Servants and State Employees;

partial actions of civil servants and state employees regarding certain job positions, which shall include measures preventing and eliminating the possibilities for corruption occurrence and development, in accordance with the guidelines of administration authority in charge of anti-corruption activities. [151]

Integrity plan may have certain significance in the fight against corruption in public procurement, having in mind that job positions of civil servants and state employees involved in the public procurement process are extremely susceptible to the occurrence and development of corruption. In the light of the above, it is necessary that all civil servants and state employees are involved in the planning of public procurement, establishment of the tender conditions, particularly the criteria and sub - criteria, the members of tender commission or Commission for opening and evaluation of tenders, officers preparing the public procurement contract, officials involved in the public procurement contract execution, officers in charge of verification, payment and other actions of contract execution, officers in charge of monitoring the execution of public procurement contracts. Based on the aforementioned reasons it is necessary to pay a special attention to integrity plan for these job positions, and a significant part of guidelines of administration authority in charge of anti-corruption activities should be devoted to the public procurement. One of the key measures to this end may be the obligation to report assets and income of these officers to the heads or another authority in charge of supervising the implementation of integrity plans, similar to public functionaries.

In addition to the aforementioned persons, pursuant to the contractual basis, it is required to apply measures equivalent to the persons who are not civil servants and state employees, and who participate in public procurement procedure, such as external experts, consultants, etc.

The Law on Civil Servants has confirmed the leading commitment that " in performance of tasks, civil servant and state employee shall be obliged to avoid situations wherein their private interest affects or may affect their impartial and objective performance of tasks of their job positions. [152] The Law has defined the private interest as "ownership and other material or non-material interest of a civil servant and state employee. [153]

9.3 Participation of non – state actors in implementation of public procurement procedures and control of the overall process

Concluded public procurement contracts, as well as the reports of institutions monitoring their execution, should be available to civil society organizations (CSOs), media and public with the objective of ensuring adequate control. This also applies to the financial statements in order to present to the public the manner of spending public funds.

CSO's and the public can be involved also in the capacity of observers in the monitoring of large - value procurement, if they are extremely risky for corruption. This form of direct control of non-state actors over the public procurement procedures implementation is triggering the risks reduction and opportunities for irregularities.

Finally, non-state actors could monitor and control all stages of public procurement proce-

151 Ibid. Article 68;
152 Ibid. Article 69;
153 Ibid. Article 69;

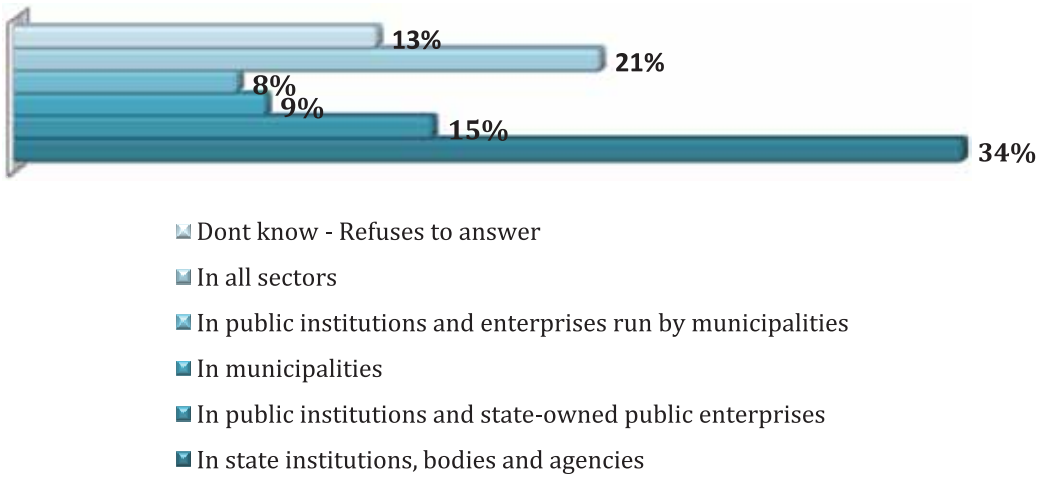
dure, including the stage subjected to the decision on selection of first – ranked tenderer, i.e. in the tender procedure (Commissions).

Officers directly involved in the public procurement, have conflicting opinions on whether the NGO representatives and other non-state actors should be involved in the work of the tender commissions. For example, the procurement officer in the Municipality of Bar believes that NGO's can contribute to the work of the tender committeessions since it must be composed of "experts in a particular area with experience, and not of parapolitical organizations for which there is no evidence of expertise," [154] while his colleague from the Helth Center believes that with the consent of the contracting authority, it is desirable to enable CSOs representatives to attend the complete public procurement process, along with members of the Commission, without voting rights. In this way, in her opinion, the transparency of the procedure is ensured. [155]

Citizens of Montenegro are expressing great dissatisfaction with the public procurement control. Thus, 59% of respondents are not satisfied with the control (23% is completely unsatisfied and 36% is mostly unsatisfied) and 29% are satisfied with the control of public procurement (25% are mostly satisfied and only 4% are completely satisfied). Every fifth citizen believes that the control of public procurement should be strengthened in all sectors, while every third respondent believes that it should be strengthened in state authorities, organizations and services.

Graph No. 8: Sectors requiring strengthening of public procurement control

Source: Public opinion survey in Montenegro, Ipsos Strategic Marketing and Institute Alternative, April 2012.



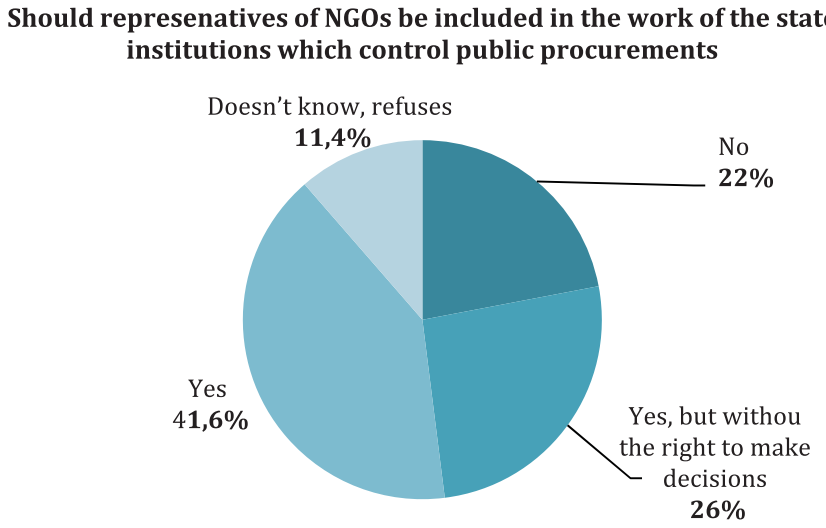
The presence of NGO's representatives in authorities in charge of control of public procurement is acceptable for more than 40% of the citizens of Montenegro. An additional 26% believes that NGO's representatives should be allowed to attend all sessions of these authorities, but without voting rights.

154 Response to IA's questionnaire of Emir Brkanović, public procurement officer in the Municipality of Bar, 27 April 2012;

155 Response to IA's questionnaire of Snežana Popović, public procurement officer in the Clinical – Health Center of MNE, 30 April 2012;

Graph No. 9 : NGO's and control of public procurement in Montenegro

Source: Public opinion survey in Montenegro, Ipsos Strategic Marketing and Institute Alternative, April 2012.



With regard to the media impact on corruption in public procurement, 52% of citizens believe that this topic has not been sufficiently covered by the media, while 39% believes that this topic is sufficiently covered. [156] The citizens of Montenegro believe that the media may improve the fight against corruption in public procurement.

9.4 Croatia and fight against corruption in public procurement

The area of public procurement in Croatia is regulated by the Law on Public Procurement. [157] The institutional framework for public procurement system encompasses: Administration for Public Procurement System of the Ministry of Economy supervising the implementation of laws and subordinate legislation in public procurement area through the conduct of preventive – instructive activities. Legal protection is guaranteed by the State Commission for the Control of Public Procurement.

The Croatian public procurement system is centralized. Centralized public procurement is conducted by the Central Procurement Office determining overall requirements for the procurement of goods and services, coordinating activities of the centralized public procurement obligors; market reasearch, development of the plans for the implementation of the procurement procedure, etc. "Based on consolidation of the procurement neeeds through one authority, established was a kind of an ancilary mechanism for controlling the actual needs at the level of the individual contracting authoritties for which the Office is procuring, or the state administration bodies. In this way the work of the Office has contributed to reducing the risk of corruption in public procurement. "[158]

All institutions responsible for public procurement system participate in activities that are determined and coordinated by the Commission for monitoring the implementation

156 Source: Public opinion survey in Montenegro, Ipsos Strategic Marketing and Institute Alternative, April 2012;
157 Croatian PPL (NN 90/11);
158 Response to IA's questionnaire of Teja Kolar, Deputy Minister of Economy for public procurement, 16 April 2012;

of measures for combating corruption, and they cooperate with state bodies responsible for combating corruption. In 2009, one of the important activities was the adoption of the "Anti-corruption programme for companies in majority state ownership for the period 2010-2012 encompassing, inter alia, measures for the implementation of public procurement procedure (e.g. publication of all information relating to public procurement on the Internet websites, trainings on prevention of corruption, improving supervision and audit system). [159]

Data on the activities of the State Commission for Control of Public Procurement, are published on the official web - site which contains a register of cases against which an appeal was lodged, being updated on a daily basis.

Ministry of Economy, Labor and Entrepreneurship in Croatia has developed a brief Instruction on conflict of interests and combating corruption in public procurement system. As of April 2010, this Ministry is collecting data on the enforcement of rules on conflict of interest. Particular emphasis in the part related to the prevention of conflict of interest and corruption has been placed on training that was attended by more than 1,600 people. Furthermore, the training is conducted for representatives of all institutions responsible for public procurement system, thus in April 2010, all institutions in the area of public procurement have appointed additional trainers for the training curriculum in reference to the prevention of corruption, being implemented by the Ministry. [160]

A number of manipulations in the Croatian public procurement system occurred by "spliting" of larger amounts into several low level amounts, aimed at avoiding the limits (low values or international procurement), yet another were were taking part at the level of negotiated procedure, the use of which was abolished by the new Law on Public Procurement, which entered into force on 1 Januray 2012.

Croatia has just begun the consolidation of procurement, whereas specifications and criteria are often wrong. Cartelization is also pronounced with the construction of highways in which the common case that occurs is that a tenderer applies for a particular road section, and if several of them would apply to the tender, then even the competitors would be the subcontractor of the cheapest tenderer. [161]

159 Croatian PPL;
160 Report on fulfillment of obligations set forth in the Chapter 5 "Public Procurement ", 29 April 2010, p. 16;
161 Response to IA's questionnaire of Marko Rakar, president of the association "Vjetrenjača", 24 March 2012;

10 CONCLUSIONS

Past decade was featured by the change of the three PPL's. The legal framework for the implementation of public procurement has improved significantly, especially after the adoption of 2011 PPL, which is substantially harmonized with the EU law. In the last four years, above EUR 1,67 billion was spent on public procurement in Montenegro. Above 5,000 public procurement contracts are entered annually. The average number of tenderers in public tenders has had the upward trend at average of 3.5 to 4.5 in the period 2007 -2011.

However, the enforcement of legislation on public procurement failed in convincing the public in the integrity of the process. The procurement procedure, in the opinion of citizens of Montenegro, to a large extent, may be described as a process that takes place under political or political party's influence. Almost every other citizen of Montenegro believes that the public procurement procedure is, to the lesser extent or not at all, implemented in a fair manner. In addition, every fifth citizens believes that public procurement in Montenegro is implemented pursuant to the public interest, law, objective criteria, transparently and impartially.

This opinion of the public is contributed by the fact that in the past ten years a negligible number of criminal charges was brought by the Police Administration, or appropriate criminal charges brought by the State Prosecutors Office, as well as the absence of final judgments for the corruption in public procurement. Furthermore, in the same period, there were no penalties imposed for violations of the law, and it is unknown whether a civil servant involved in procurement was subjected to a disciplinary liablity.

Advantages of the new Law include an increased level of transparency, especially based on obligation of all public procurement contracts publication. The Law is, in a more precise manner, segregating competences and authorizations of state institutions "responsible" for the public procurement. Moreover, the Law provides a basis for the consolidation of public procurement in accordance with the regulation of the Government of Montenegro, or competent local government authority. The new Law has also improved the control of the procedure, imposing the obligation on the Commission to control the procedure, the value of which is exceeding EUR 500,000. The implementation of contract of this value (above EUR 500,000 euros) is now being controlled by the competent inspection authority.

The shortfalls of the Law include inadequate provisions on anti-corruption rules and conflict of interest. In the first place, this is a provision prohibiting employment of persons involved in public procurement procedure (procurement officer and members of the Commission for opening and evaluation of tenders) in a period of two years with a legal

entity – tenderer with whom the contract on public procurement was entered. However, this provision is difficult to follow up due to the absence of neither the institutional mechanism for monitoring nor the legal system envisaging the sanctions for misconduct. The new Law has unclearly defined the procurement procedure through the shopping method. This remark applies especially to the part of determining whether the conditions for participation in this process have been fulfilled.

With regard to financing of political parties and public procurement, it is important to emphasize that the State Election Commission and SAI have limited capacity in carrying out the monitoring of application of provisions on financing of political parties. The Law provides for the prohibition of political parties and other nominators of election lists to receive donations from legal entities, business organizations and entrepreneurs and related legal entities and physical persons, who, under contract with the competent authorities, in accordance with the Law, have carried out the tasks of public interest or have concluded a contract in the public procurement procedures, in a period of two years preceding the contract conclusion, during the business relationship, as well as two years after the termination of such business relationship. This is primarily because there is no networking or unified database that would identify violations of these provisions.

Disputable is the constitutionality of PPL provisions in a part that the Commission established by the Government of Montenegro, i.e. executive power, is deciding in the second - instance on issues that are the prerogative competence of individual and independent bodies such as local government authorities, independent, autonomous legal entities or other state authorities and institutions that are outside the executive power system. An independent and autonomous state-level Commission established by the virtue of the law, is the sole institution that can provide independence in the aforementioned cases, which would ultimately be in compliance with the EU regulations.

Procurement officers and other persons involved in the procurement procedure, particularly members of the Commission for opening and evaluation of tenders are not covered by the provisions of the Law on prevention of conflict of interest, and have no obligation to file reports on income and assets.

Capacities of both the Administration and the Commission are limited. The National Programme for Integration of Montenegro into the EU (NPI), envisaged the employment of ten officers in the Commission in 2012, and 21 officers in the Administration. In April 2012, the Administration was employing 14 civil servants and state employees, including the director of Administration. The deficit of 7 employees is particularly troubling based on significantly introducing new responsibilities of the Administration. NPI has also envisaged that the budget of the Administration is at EUR 550, 000 and EUR 310, 000 of the Commission in 2012. The Budget Law for 2012 envisaged EUR 270, 000 for Administration and EUR 182, 000 for the Commission.

The Strategy, adopted in December 2011, failed in adequately prescribing the manner of meeting the objectives, especially those related to combating corruption and remedying irregularities in public procurement system, the process of harmonization with European standards in the long run, etc.

The Administration is not keeping records on withdrawal of first – ranked tenderers from entering the contract, terminated contracts and the reasons for termination, data on the number of tenders to which only one tenderer applies, trend of the number of participants

in tenders in total, by sectors, by largest supplier, data on terminated contracts, data on court's proceedings conducted by public procurement contracts.

The Law has failed in specifying an answer to the question what if the contracting authority does not accept the proposed decision on the selection of the most advantageous tender. This situation is practically possible, and it can be very prone to corruption. Furthermore, the question of whether members of the Commission, bearing in mind the complexity of the tasks they perform, should have some form of additional training to perform such a demanding task. It is unclear whether the head, i.e. responsible person of the contracting authority, the procurement officer may be members of the Commission for opening and evaluation of tenders.

Recommendations

- Methodologies development for of planning public procurement in certain areas of characteristic, and the integration of the planning process into the budget preparation process.
- Shopping procedure defining in accordance with the EU regulations.
- Institutionalization of trainings for public procurement officers, representing one of the important prerequisites for the application of the Law and its establishing at earliest.
- Necessity to improve the financial status of the public procurement officers.
- The Commission should be established as an independent and autonomous authority in line with the EU regulations, requiring that the Commission's members are appointed by the Parliament of MNE.
- Necessity to establish certain strengthened requirements for the appointment of the Commission's members.
- The Commission should inform the public in details on the results of audited public procurement procedures exceeding EUR 500, 000.
- Improvements in records kept and reports produced by the contracting authorities submitted to the Administration, or the Administration's Annual Report on public procurement submitted to the Government for approval (including data on the number of tenders to which only one tenderer applies, trend of the number of participants in tenders in total, by sectors, by largest supplier, data on terminated contracts, selected tenderers that are withdrawn from the contract; subcontracts and sub - providers; contractors that were subject to penalty charges based on public procurement contract; data on court's proceedings conducted per public procurement contracts.
- The Law should addressed the procedure of submitting the annual consolidated report on internal financial controls system to the Parliament of MNE and SAI, and it should be made available to the public.
- The Law on prevention of the conflict of interest should be amended to expand the scope of persons covered by the public procurement procedure.
- The Integrity plan that should be adopted in state authorities pursuant to the Law on Civil Servants and State Employees, identifying all persons involved in public procurement planning, tender procedure, entering, execution and control of contracts.

- Black and white list system, i.e. positive and negative references, should be determined as an ancillary anti – corruption mechanism.

- Amendments to the Organic Budget Law should prescribe that the reports on fulfillment of public procurement contracts are available on the Internet page of the contracting authorities.

- Both the Public Procurement System Development Strategy and the Action plan should be amended in a part referring to the anti - corruption measures.

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Appendices

Appendix 1: 10 OECD Principles in fight against corruption in public procurement procedures

Source: OECD Principles for Integrity in Public Procurement, OECD, 2009.

The initial basis used in the fight against corruption in the public procurement procedures, are the Guidelines developed by the member countries of the Organization for Economic Cooperation and Development (OECD) issued in 2008 in the form of 10 principles. These principles are designed to represent the baseline and the "milestone" for the implementation of international instruments to combat abuses and irregularities in the public procurement. OECD principles are placing the focus on good governance, being considered essential for the suppression of acts of corruption and protection of state interests.

10 OECD Principles:

1. To provide an adequate degree of transparency throughout the entire procurement cycle to promote fair and equitable treatment for potential suppliers
2. Maximize transparency in competitive tendering, in particular for exceptions to competitive tendering.
3. To ensure that public funds for procurement are used according to the purposes intended
4. To ensure that procurement officials meet high professional standards of knowledge, skills and integrity.
5. To put mechanisms in place to prevent risks to integrity in public procurement
6. To encourage cooperation between government and the private sector to maintain high standards of integrity
7. To provide specific mechanisms for the monitoring of public procurement and the detection and sanctioning of misconduct
8. To establish a clear chain of responsibility;
9. To handle complaints from potential suppliers in a fair and timely manner;
10. To empower civil society actors to scrutinize public procurement.

Institute Alternative

The Institute Alternative is a non-governmental association established in September 2007, by a group of citizens experienced in the civil society, public administration and business sector.

The Mission Statement of the Institute Alternative is the strengthening of democratic processes in Montenegro through the identification and analysis of public policies options.

The Strategic objectives of the Institute Alternative: increasing in quality of development of public policies, contributing to the development of democracy and rule of law and contributing to the protection of human rights in Montenegro.

Values that we follow in our work are the commitment to the mission, independence, continuous learning, networking and cooperation and the team work.

The Institute Alternative acts as an alternative think - tank, i.e., the research center, dealing with areas of a good governance, transparency and accountability. The scope of the topics of the Institute that are subject to its research, generating an impact through the representation of its own recommendations, include the following: parliamentary oversight of the security and defense sector, parliamentary oversight function and its role in the European integration process, public administration reforms, public procurements, public-private partnerships, state audit and budgetary control at the local government level.

Up to present, following publications/research papers have been released:

- Secret Surveillance Measures in the Criminal Proceedings – *Neglected Control;*
- National Security Agency and Secret Surveillance Measures – *Is there any control*?
- Parliament of MNE in the EU integration process – *Observer or active participant*?
- Law on Parliamentary Oversight of the Security and Defense Sector – first year of implementation – 2011 Monitoring Report;
- Parliamentary Inquiry – Oversight tool lacking political support;
- Montenegro under the Đukanović's and EU's watchful eyes;
- Regulatory Impact Assessment (RIA) in Montenegro – Towards "good legislation";
- Budget control at the local government level;
- State audit in Montenegro - proposals for strengthening its impact;
- Report on democratic oversight of security services;
- Think Tank – The role of independent research centers in the public policies development;
- Public-private partnerships in Montenegro - accountability, transparency and efficiency;
- Public procurement in Montenegro - Transparency and accountability;
- Evaluation of legal framework and practice in the application of certain oversight tools of the Montenegrin Parliament: consultative hearing, control hearing and parliamentary inquiry;
- Parliamentary oversight of the security and defense sector – What next?
- Case Lipci 2008 – Ways of routing it out;
- Case "Prva Banka" – Experience for supervisors and other decision makers;

- Public administration of Montenegro: Salary schemes, remuneration tools and professional capacity building options;
- Political criteria for the EU accession.

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The Institute has established cooperation with a great number of national organizations, and the cooperation was established with a number of institutions and administration bodies, such as the State Audit Institution, Public Procurement Directorate, Parliament of Montenegro (particularly its working bodies, Committee for Economy, Finance and Budget and Committee for Security and Defense), Ministry of Finance, Concessions Commission, etc.

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Jačanje kapaciteta civilnog društva za doprinos
EU integracijama i procesu pristupanja

Strengthening the civil society capacity to contribute
to EU integration and the accession process

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