

A REGIONAL OVERVIEW: CRIMINAL LIABILITY FOR CORRUPTION IN PUBLIC PROCUREMENT



TITLE:

A Regional Overview: Criminal Liability for Corruption in Public Procurement
(overview of the legislative framework and practice in Serbia, BiH, North
Macedonia, Albania and Kosovo)

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INTRODUCTION

Public procurement refers to the procedure in which public sector entities - contracting authorities - procure goods, works and services. This procedure is also one of the most susceptible to corruption, and uneconomic methods of public spending in the countries of the Western Balkans.

Considering that corruption implies any situation in which one tries to use one's position while performing a public or private function, in order to achieve private profit greater than would normally be the case, it is clear why the field of public procurement is extremely fertile ground for fraud.

An increase in the share of public procurement in the national GDP was recorded in all countries of the Western Balkans. On average, it ranged from 9% to 11%, with yearly fluctuations only in the cases of Kosovo and North Macedonia. Given the above, as well as the fact that the value of public procurement is constantly increasing, we can conclude that this area merits active control mechanisms, thereby reducing the manoeuvring space for anyone inclined to commit abuse.

In December 2023, Montenegro introduced a special criminal offence of abuse concerning public procurement into the criminal legislation. Details on how this area is regulated in Montenegro and results in the area of fight against corruption in public procurement will be presented in a separate analysis.

The aim of this paper is to provide brief insight into how countries in the Western Balkans (Serbia, Bosnia and Herzegovina, North Macedonia, Albania and Kosovo) have legally regulated the issue of criminal liability for corruption in public procurement. This paper also presents a four-year overview of results in the area of fight against corruption for countries that have made data publicly available.

SERBIA

- **LEGISLATIVE FRAMEWORK**

The Criminal Code of the Republic of Serbia (CCRS) defines the criminal offence of “Abuse Concerning Public Procurement”, within the chapter “Offences Against Economic Interests”.¹

The CCRS stipulates that “whoever, concerning a public procurement, submits a bid based on false information, or makes unlawful arrangements with other bidders, or takes other unlawful actions with the intention of influencing the decision-making by the buyer in public procurement shall be punished with imprisonment of six months to five years”. The same punishment shall also be pronounced to a person “who, by abusing his/her position or powers, exceeding the limits of his/her powers or failing to perform his/her duty, violates the law or other regulations governing public procurements and thus damages public funds”. CCRS also stipulates that the offender will be punished with imprisonment from one to ten years, if the aforementioned criminal offence is committed “in relation to a public procurement worth more than 150 million dinars.” The offender may be remitted from punishment if he/she “voluntarily discloses that the bid is based on false data or on an unlawful agreement with other bidders, or that he/she had undertaken other unlawful actions with the intention of influencing the decision-making of the buyer prior to making their decision on contract awarding”.²

The criminal offence of abuse concerning public procurement is a novelty introduced by changes to the Criminal Code in December 2012 as a form of state response to the perception of corruption in the field of public procurement.³

The Law on Public Procurement regulates the scope of work and form of organisation of the Public Procurement Office; competence, regulation and other matters in relation to the scope of work of the Republic Commission for the Protection of Rights in Public Procurement Procedures; the procedure of protection

1 Criminal Code of the Republic of Serbia (Official Gazette of RS, No. 94/2016) available at: <https://pravno-informacioni-sistem.rs/eli/rep/sgrs/skupstina/zakon/2005/85/6/reg>

2 Article 228 (paragraphs 1-4), Off. Gazette of RS, No. 94/20, available at: <https://pravno-informacioni-sistem.rs/eli/rep/sgrs/skupstina/zakon/2005/85/6/reg>

3 Commercial Criminal Offences, Institute for Criminological and Sociological Research, I. Stevanović, V. Čolović, Belgrade, 2017, p. 11, available at: https://www.iksi.ac.rs/izdanja/privredna_krivicna_dela_2017.pdf



of rights in public procurement procedures and in other instances in accordance with the Law; and it governs other matters of relevance for public procurement.⁴

The legislative framework and institutional readiness in the field of public procurement implementation are also addressed European Commission progress reports. The 2023 progress report states that Serbia is partially ready in this field, and that it has made some progress by repealing the Law on Special Procedures for linear infrastructure projects of special importance for the Republic of Serbia. The report underlines that the capacities of competent institutions must be further strengthened.⁵

• INSTITUTIONAL RESPONSE

According to reports of public prosecutor's offices on tackling crime and protecting constitutionality and legality in 2020-2023, a total of 277 persons⁶ were reported on the territory of the Republic of Serbia on suspicion of having committed the criminal offence of abuse concerning public procurement. Unresolved reports were transferred from year to year,⁷ resulting in a total of 628 such criminal reports in the work of prosecutor's office in the period 2020-2023.⁸

In the same period, applications against 244 persons were dismissed, while 195 remained unresolved. Orders were issued to conduct investigations against ten persons, while 39 investigations initiated in the earlier period were carried out. Indictments were filed against 60 persons, and ten persons were charged following investigation. In the past four years, the courts reached a total of 55 verdicts. Of that number, three verdicts were acquittals, while the remaining 52 were convictions. Six people were

4 Law on Public Procurement (Official Gazette of RS, No. 91/2019 and 92/2023), available at: <https://pravno-informacioni-sistem.rs/eli/rep/sgrs/skupstina/zakon/2019/91/1/reg>

5 Report of the European Commission for Serbia, 08/11/2023, Brussels, p. 85, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/9198cd1a-c8c9-4973-90ac-b6ba6bd72b53_en?filename=SWD_2023_695_Serbia.pdf

6 Reports on the work of public prosecutor's offices on tackling crime and protecting constitutionality and legality in 2020/21/22/23, available at: <http://www.vrhovnojt.gov.rs/ci/Информације-о-раду/Годишњи-извештај-о-раду-јавних-тужилаштава>

7 In 2023, 65 persons were reported; adding to the 167 unsolved cases from the previous year. Therefore, in 2023, there were a total of 232 pending cases. The year before (2022), 67 persons were reported, and 186 unsolved cases were transferred from the previous year, totalling 253. In 2021, 56 persons were reported for suspected violations of the Law on Public Procurement, and 179 were carried over from the previous year, totalling 235. In 2020, 89 persons were reported, and 96 pending reports were carried over from the previous year, totalling 185, available at: <http://www.vrhovnojt.gov.rs/ci/Информације-о-раду/Годишњи-извештај-о-раду-јавних-тужилаштава>

8 Reports on the work of public prosecutor's offices on tackling crime and protecting constitutionality and legality in 2020/21/22/23, available at: <http://www.vrhovnojt.gov.rs/ci/Информације-о-раду/Годишњи-извештај-о-раду-јавних-тужилаштава>



sentenced to prison and 45 were given suspended sentences. Finally, there was only one instance of confiscation of assets, and security measures were taken in five cases.

- **PRACTICE**

The following key facts and figures contribute to an understanding of the general landscape of public procurement processes in Serbia. According to annual EU progress reports, the share of public procurement in GDP in the period 2020 - 2022 was continuously increasing. In 2020, the share of public procurement in GDP was at the level of 6.88%.⁹ In 2021, it increased to 8.9%,¹⁰ while in 2022, the share of public procurement in GDP was at the level of 9.3%.¹¹

With larger amounts of funding allocated to public procurement comes a greater susceptibility to corruption and uneconomic spending of public funds. Therefore, the legislative framework remains a critical institutional foundation for combating corruption in public procurement.

- **EXPENSIVE IRREGULARITIES?**

The media were active in attempts to expose dubious practices in public procurement. For instance, in 2022 Insajder alleged that the State Audit Institution had determined that as much as 97% of irregularities worth a staggering EUR 1.07 billion was linked to public procurement procedures in just three public companies. Elektroprivreda Srbije (power supply), Infrastruktura železnice (railway), and Putevi Srbije (road network) spent more than EUR 350 million contrary to the Law, by starting negotiation procedures without a call for bids. The Law was also being breached when companies sent invitations to only one bidder, although the conditions of the tender obliged the companies to ensure competition. The Toplica Center for Democracy and Human Rights analysed 100 largest public procurements in Serbia, valued at almost EUR 3 billion, and found that 72 procedures had only one bidder.¹²

9 Report of the European Commission for Serbia, 19/10/2021, Brussels, p. 69, available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/Serbia-Report-2021.pdf>

10 Report of the European Commission for Serbia, 12/10/2022, Brussels, p. 79, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/d87e4167-65fd-42b0-8ede-7fa05c3d9355_en?filename=Serbia%20Report%202022.pdf

11 Report of the European Commission for Serbia, 08/11/2023, Brussels, p. 86, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/9198cd1a-c8c9-4973-90ac-b6ba6bd72b53_en?filename=SWD_2023_695_Serbia.pdf

12 "Former police inspector: 99 percent of fraud in public procurement goes undetected", Insajder, 17/05/2022, available at: https://insajder.net teme/bivsi-policijski-inspektor-99-odsto-malverzacija-u-vezi-sa-javnim-nabavkama-ostane-neotkriveno?fbclid=IwAR1bWhhJvwkxS4qvr-oMMa06cynFM9eiVqEe_v4KvMHy2mnt_wh0qcS9xlo



- **LEX SPECIALIS**

One of the most bizarre examples of the circumvention of the Law on Public Procurement, as characterised by Serbian media, was the act adopted for the construction of the Moravian Corridor.

Why is it an example of problematic practice?

Firstly, because the Law is, by its very definition, a general legal act, enacted for an unrestricted number of current and future situations. A law regulating only one project, even when adopted by a majority vote in Parliament, can be a law only in name, but not in substance. It is not even a “lex specialis”, because the provisions of a “special law” also prescribe general rules, but in one part of the legal system, as is the case with the Law on Public Procurement in relation to the general provisions of the Law on the Budget System.¹³

Hence, it is not only illogical, but also dangerous for the Government, which after all proposed the regulations related to public procurement, to rule out the application of the Law or propose special rules that will only apply to one case.

¹³ “Special laws for a special state“, N. Nenadić, Peščanik, 26/06/2019, available at: <https://pescanik.net/specijalni-zakoni-za-specijalnu-drzavu/>



BOSNIA AND HERZEGOVINA

• LEGISLATIVE FRAMEWORK

The Criminal Codes of the Federation of Bosnia and Herzegovina (BiH), Republika Srpska, and Brčko District do not explicitly stipulate a criminal offence committed within public procurement or concerning public procurement.

Generally speaking, all three laws contain groups of criminal offences which can include criminal offences committed within the framework of public procurement or concerning public procurement (Criminal Code of the Federation of BiH: Criminal Offences against the Economy, and Criminal Offences against Official and Other Responsible Duties;¹⁴ Criminal Code of the RS: Criminal Offences Against Official Duties;¹⁵ Criminal Code of the Brčko District: Criminal Offences Against the Economy and Safety of Payment Transactions, and Criminal Offences Against Official and Other Responsibilities¹⁶).

Procedures for conducting public procurement on the territory of Bosnia and Herzegovina are regulated by the Law on Public Procurement. This law regulates the system of public procurement in Bosnia and Herzegovina, establishes the rules of the public procurement procedure, by defining the rights, obligations, responsibilities, and legal protection of participants in public procurement procedures, as well as competencies of the Public Procurement Agency of Bosnia and Herzegovina and the Procurement Review Body of Bosnia and Herzegovina as two key institutions in this area.¹⁷

The European Commission also reports on the legislative framework and institutional readiness in the field of public procurement. The 2023 progress report states that Bosnia and Herzegovina is somewhat ready in this area, and that limited progress has been made in the form of passing by-laws that will facilitate greater efficiency in implementation of the Law on Public Procurement.¹⁸

14 Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette FBiH, no. 47/23), available at: <https://www.paragraf.ba/propisi/fbih/krivicni-zakon-federacije-bosne-i-hercegovine.html>

15 Criminal Code of the Republic of Srpska (Official Gazette of RS, no. 73/2023), available at: <https://www.paragraf.ba/propisi/republika-srpska/krivicni-zakon-republike-srpske.html>

16 Criminal Code of the Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko District of Bosnia and Herzegovina, no. 19/2020), available at: <https://www.paragraf.ba/propisi/brcko/krivicni-zakon-brcko-distrikta-bosne-i-hercegovine.html>

17 Law on Public Procurement (Official Gazette of BiH, No. 59/2022), available at: <https://www.paragraf.ba/propisi/bih/zakon-o-javnim-nabavkama.html>

18 Report of the European Commission for Bosnia and Herzegovina, 08/11/2023, Brussels, p. 74, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_691%20Bosnia%20and%20Herzegovina%20report.pdf



- **INSTITUTIONAL RESPONSE**

Reports on the work of the Prosecutor's Office of Bosnia and Herzegovina do not contain data related specifically to criminal offences in public procurement, but provide a general overview of results of the work of the Special Department for Organised Crime, Economic Crime and Corruption,¹⁹ as these offences fall under their jurisdiction. Therefore, there is no data in these reports to indicate how effective the Public Prosecution Service has been in addressing potential violations.

On the other hand, reports of the Public Procurement Agency contain results of monitoring individual public procurement procedures in the period 2020 - 2022. The Public Procurement Agency performed a total of 1832 individual monitoring missions of public procurement procedures. As a result of monitoring of individual public procurement procedures, 24 reports of potential violations of the Law were submitted, claiming existence of elements of a criminal offence. These reports do not contain information on the outcomes of applications for potential violation of the Public Procurement Act.²⁰

At the time of writing the analysis, data for 2023 was not publicly available.

- **PRACTICE**

Bosnia and Herzegovina has also seen an increase in the share of public procurement in the total nominal GDP. In 2022, this share was 10.65%, which is a 3.14% increase compared to 2021, when it was 7.51%.²¹

According to Bosnian media, public procurement drains money from public funding, otherwise indented for citizens. The case of "Ventilators" and the "Doboj Hospital" are among cases that received wide media coverage, in relation to abuse of public procurement in the territory of Bosnia and Herzegovina.

19 Reports on the work of the Prosecutor's Office of BiH for 2020/21/22, available at:

<https://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=12&id=36&jezik=b>

20 Annual reports on concluded contracts in public procurement procedures in 2020/21/22, available at:

<https://www.javnenabavke.gov.ba/bs-Latn-BA/reports?page=2&rows=9&searchByTaxonomyValueIds=37>

21 Report of the European Commission for Bosnia and Herzegovina, 08/11/2023, Brussels, p. 74, available at:

https://neighbourhood-enlargement.ec.europa.eu/document/download/e3045ec9-f2fc-45c8-a97f-58a2d9b9945a_en?filename=SWD_2023_691%20Bosnia%20and%20Herzegovina%20report.pdf



- **THE CASE OF “VENTILATORS”**

One of the more media-covered cases related to the repressive response of some of the Western Balkan countries was the case of the Prime Minister of the Federation of Bosnia and Herzegovina, Fadil Novalić. Novalić was found guilty in the case dealing with the procurement of 100 Chinese medical ventilators, and was sentenced to four years in prison in the first instance. Additionally, Fikret Hodžić and the former director of the Federal Administration of Civil Protection, Fahrudin Solak, were sentenced in a first-instance verdict to five and six years, respectively. All those convicted were found guilty of the criminal offence of abuse of office, while they were acquitted of the offences of money laundering and accepting gifts. Solak was also found guilty of falsifying documents, while Novalić was charged with a couple of other crimes.²²

- **THE CASE OF “DOBOJ HOSPITAL”**

Mladen Gajić, director of the “Sveti Apostol Luka” hospital in Doboj, was convicted of negligence in the performance of official duties. As the director of the Doboj hospital, he entered into a contract with the travel agency “Travel for Fun” through a negotiation process, without publishing a notice. The contract was for procurement of protective medical equipment for the needs of the hospital, even though he must have known that the agency did not meet the requirements stipulated in the contract, as it was not registered to perform activities that were the subject of public procurement. According to the verdict, Gajić was also found guilty for failing to react when the said travel agency had delivered non-medical gowns and welding masks instead of medical protective equipment – medical gowns and masks.²³

22 Fadil Novalić sentenced to four years in prison, Fikret Hodžić to five years, and Fahrudin Solak to six years, Klix, 04/05/2023, available at:

<https://www.klix.ba/vijesti/bih/fadil-novalic-osudjen-na-cetiri-godine-zatvora-fikret-hodzic-na-pet-a-fahrudin-solak-na-sest-godina/230405028>

23 Director of the Doboj hospital sentenced to ten months in prison for procurement at the beginning of the pandemic, Detektor, 18/07/2022, available at:

<https://detektor.ba/2022/07/18/direktor-bolnice-u-doboju-osudjen-na-deset-mjeseci-zatvora-zbog-nabavki-na-pocetku-pandemije/>



NORTH MACEDONIA

- LEGISLATIVE FRAMEWORK

The Criminal Code of the Republic of North Macedonia (CCRNM) defines the criminal offence “Abuse in Public Procurement”, under chapter “Crimes against Public Finances, Payment Operations and the Economy”.²⁴

CCRNM stipulates that a person who “consciously violates the regulations for the open call procedure, awarding public procurement contract or public-private partnership by submitting false documentation, making arrangements with other possible participants for the purpose of misleading the procedure for awarding contracts for public procurement, not fulfilling the obligations arising from the contract with intention to mislead it or otherwise intentionally violates the rules of procedure and thus acquires for himself/herself or for another person greater property gain” shall be punished with a fine or imprisonment of up to three years.²⁵

The current Law on Public Procurement has been in force in North Macedonia since 1 April 2019, alongside a number by-laws. This Law regulates the manner and procedures for conducting public procurements, the competences of the Public Procurement Bureau, the competences of the State Appeals Commission on Public Procurement and the review procedures in awarding public contracts, but also the review procedures in awarding concessions and public private partnership contracts.²⁶

In its 2023 progress report, the European Commission stated that North Macedonia was partially ready in this area, and that limited progress had been achieved. Furthermore, the report stated that national authorities should introduce more effective anticorruption measures.²⁷

24 Criminal Code of North Macedonia, (Official Gazette of the Republic of North Macedonia), available at: <https://jorm.gov.mk/wp-content/uploads/2016/03/%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%B8%D0%BA-%D0%BF%D1%80%D0%B5%D1%87%D0%B8%D1%81%D1%82%D0%B5%D0%BD-%D1%82%D0%B5%D0%BA%D1%81%D1%82.pdf>

25 Criminal Code of North Macedonia, (Official Gazette of the Republic of North Macedonia), Article 275-v, p. 117, available at: <https://jorm.gov.mk/wp-content/uploads/2016/03/%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%B8%D0%BA-%D0%BF%D1%80%D0%B5%D1%87%D0%B8%D1%81%D1%82%D0%B5%D0%BD-%D1%82%D0%B5%D0%BA%D1%81%D1%82.pdf>

26 Law on Public Procurement (Official Gazette of the Republic of North Macedonia, No. 08 - 640/1), available at: https://www.bjn.gov.mk/wp-content/uploads/2019/05/ZJN_Sluzben-vesnik_24-2018-od-01.02.2019.pdf

27 Report of the European Commission for North Macedonia, 08/11/2023, Brussels, p. 67, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_693%20North%20Macedonia%20report.pdf



The share of public procurement in Macedonian GDP was at the level of 8.6% in 2022.²⁸ The year before, it was at 11%, while in 2020 it was 8.5%.²⁹

• INSTITUTIONAL RESPONSE

Reports on the work of the Public Prosecutor's Office of the Republic of North Macedonia for 2021 and 2022 contain information on the number of reported persons, indictments and verdicts pronounced on charges of abuse of public procurement,³⁰ which was not the case with reports for 2020.³¹ The 2023 report for this prosecutor's office is still not publicly available.

According to available information, in 2021 and 2022, 31 persons were reported for abuse of public procurement, and one indictment was filed. No final verdicts were reached in this period.³²

According to the Annual Reports of the Public Procurement Bureau, natural and legal persons in North Macedonia are active in filing criminal charges, while the State Commission for Prevention of Corruption, whose competences are equivalent to the Montenegrin Agency for Prevention of Corruption,³³ acts on its own initiative in cases where it suspects illegality in public procurement procedures.

The report on the work of the Public Prosecutor's Office of the Republic of North Macedonia for the year 2020 does not share specific figures, as is the case with the following two reporting cycles. In terms of the wider structure of criminal offences, chapter XXV - Crimes against Public Finances, Payment Operations and

28 Report of the European Commission for North Macedonia, 08/11/2023, Brussels, p. 68, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_693%20North%20Macedonia%20report.pdf

29 Report of the European Commission for North Macedonia, 08/11/2023, Brussels, p. 60, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_693%20North%20Macedonia%20report.pdf

30 Reports on the work of the Public Prosecutor's Office of the Republic of North Macedonia in 2021 and 2023, available at: <https://jorm.gov.mk/wp-content/uploads/2022/08/izveshtaj-finalen-2021-1.pdf> https://jorm.gov.mk/wp-content/uploads/2023/09/izveshtaj-za-rabotata-na-javnite-obvinitelsta_2022_2_mail-2-3.pdf

31 Report on the work of the Public Prosecutor's Office of the Republic of North Macedonia in 2020, available at: <https://jorm.gov.mk/wp-content/uploads/2022/08/izveshtaj-finalen-2021-1.pdf>

32 Report on the work of the Public Prosecutor's Office of the Republic of North Macedonia in 2022, p. 71, available at: https://jorm.gov.mk/wp-content/uploads/2023/09/izveshtaj-za-rabotata-na-javnite-obvinitelsta_2022_2_mail-2-3.pdf

33 Official website of the State Commission for the Prevention of Corruption, Status and Competencies, available at: <https://dksk.mk/mk/статус-и-надлежности-на-дкск/> compare with <https://www.antikorupcija.me/me/o-nama/o-agenciji/>

the Economy,³⁴ abuse of public procurement is absent as an area for which data is offered in the form of reported persons, indictments and verdicts.

On the other hand, available reports on the work of the Public Procurement Bureau refer to the years 2020 and 2021, during which the State Commission for Prevention of Corruption acted in 36 cases upon receiving applications by natural and legal persons, and in eight cases on its own initiative.³⁵ In one self-initiated case of suspicions of illegality in public procurement procedures in 2020, the alleged illegality was not established, and no one was held criminally liable.³⁶ The epilogue of the remaining seven cases, which it launched on its own initiative in 2021, is not listed in the aforementioned reports of the Public Procurement Bureau.³⁷

At the time of writing the analysis, data for 2023 was not publicly available.

- **PRACTICE**

The case of the Mining and Energy Combine Bitola is a good illustration of the space for potential abuse of public procurement, sometimes measured in millions of EUR.

- **THE CASE OF “REK BITOLA”**

The mining and energy combine “REK Bitola” has been awarding public tenders to the company Kompakt MSF for years. The owner of that company and her husband are also employees of REK Bitola and have connections with the ruling party, SDSM. Despite the possible conflict of interest, they did not end business transactions with REK Bitola. Thanks to the fruitful cooperation with the mining and energy combine, the company collected around EUR 1.9 million, according to contracts published on the electronic public procurement system.³⁸

34 Report on the work of the Public Prosecutor's Office of the Republic of North Macedonia in 2020, p. 52, available at: <https://jorm.gov.mk/wp-content/uploads/2022/08/izveshtaj-finalen-2021-1.pdf>

35 Annual reports of the Public Procurement Bureau for 2020 and 2021, available at: https://www.bjn.gov.mk/wp-content/uploads/2021/07/Godisen-izvestaj-2020_Final.pdf https://www.bjn.gov.mk/wp-content/uploads/2023/05/Godisen-izvestaj-2021_final.pdf

36 Annual Report of the Public Procurement Bureau for 2020, May 2021, p. 34, available at: https://www.bjn.gov.mk/wp-content/uploads/2021/07/Godisen-izvestaj-2020_Final.pdf

37 Report of the Public Procurement Bureau for 2021, August 2022, available at: https://www.bjn.gov.mk/wp-content/uploads/2023/05/Godisen-izvestaj-2021_final.pdf

38 M. Mitevaska, “REK Bitola awards tenders to its employees close to SDSM”, RSE, August 17, 2022, available at: <https://www.slobodnaevropa.mk/a/%D1%80%D0%B5%D0%BA-%D0%B1%D0%B8%D1%82%D0%BE%D0%BB%D0%B0-%D0%B4%D0%BE%D0%B4%D0%B5%D0%BB%D1%83%D0%B2%D0%B0-%D1%82%D0%B5%D0%BD%D0%B4%D0%B5%D1%80%D0%B8-%D0%BD%D0%B0-%D1%81%D0%B2%D0%BE%D0%B8-%D0%B2%D1%80%D0%B0%D0%B1%D0%BE%D1%82%D0%B5%D0%BD%D0%B8-%D0%B1%D0%BB%D0%B8%D1%81%D0%BA%D0%B8-%D0%B4%D0%BE-%D1%81%D0%B4%D1%81%D0%BC/31991280.html>



KOSOVO

- **LEGISLATIVE FRAMEWORK**

The Criminal Code of the Republic of Kosovo (CCRK) defines the criminal offence “Abuse and Fraud in Public Procurement”, under the chapter “Corruption of Officials and Criminal Offences against Official Duty”.³⁹

The CCRK stipulates that a person who “intentionally violates public procurement rules during a bid for awarding a public procurement contract, by presenting false documentation, illegal secrecy agreement or undertakes any other illegal action for the purpose of fraud in public procurement procedures and for purpose of influencing the decision of a contracting authority in the public procurement procedure” shall be punished with imprisonment for up to five years. Additionally, a person who “deliberately and in breach of public procurement procedures and rules, does not apply the obligations arising out of the public procurement contract for purpose of benefits for themselves or causing budgetary damage, if the characteristics of other criminal offences are not met”, will be punished in the same way. The CCRK also stipulates that the offenders will be punished with imprisonment of one to eight years, if they “acquire or cause substantial property damage, in the value exceeding EUR 5,000”. Finally, the CCRK stipulates that in cases where the offender is found guilty, the court shall, in addition to the punishment, “impose on the offender the prohibition on taking part in the procedures for awarding public procurement contracts”, after which the offender would be punished with a fine and a prison sentence of one to eight years.⁴⁰

The Law on Public Procurement regulates the manner and procedure of conducting public procurement, as well as the competences of the Public Procurement Regulatory Commission and the Central Procurement Agency, as two umbrella institutions in this area.⁴¹

The legislative framework and institutional readiness in the field of public procurement are discussed in European Commission reports on Kosovo. The 2023 report states that Kosovo is partially ready in this area, having made limited

39 Criminal Code of the Republic of Kosovo (Code no. 06/L – 074), Article 415, available at: <https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf>

40 Criminal Code of the Republic of Kosovo (Code no. 06/L – 074), Article 415, available at: <https://md.rks-gov.net/desk/inc/media/A5713395-507E-4538-BED6-2FA2510F3FCD.pdf>

41 Law on Public Procurement in Republic of Kosovo (Law No. 04/L – 042), available at: <https://e-prokurimi.rks-gov.net/Home/Documents/Legislation/Ligjet/eng/PPL%20consolidated.pdf>



progress in the reporting period. The recommendation from 2022 for the adoption of a new Law on Public Procurement was repeated.⁴²

The 2022 report placed Kosovo alongside North Macedonia as one of five countries that recorded a decrease in the share of public procurement in GDP. In the period from 2019 to 2021, it decreased from 10.7% to 7.5%, and finally in 2021 it fell to 5.65%.⁴³ That trend was interrupted in 2022, when the share of public procurement in GDP increased from 5.65% to 6.5%.⁴⁴

• INSTITUTIONAL RESPONSE

The State Prosecutor's Office of Kosovo reports on its work proactively, through annual reports. These reports are not available in English or Montenegrin.⁴⁵

Data from the Public Procurement Regulatory Commission were used for the purpose of the analysis. In its reports on activities in the field of public procurement, this Commission publishes the list of institutions with which the Rules Department, which operates within the Commission, has cooperated in order to ensure adequate implementation of the Public Procurement Law. The Anticorruption Agency, the Central Procurement Agency, the Procurement Review Body, the Economic Crimes Investigation Unit and the State Audit Institution are notable examples.⁴⁶

Tackling corruption in public procurement falls under the jurisdiction of the Economic Crimes Investigation Unit, which operates as part of the Kosovo Police and aims to tackle economic and financial crimes, as well as corruption.⁴⁷

42 Report of the European Commission for Kosovo, 08/11/2023, Brussels, pp. 71, 72, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/760aacca-4e88-4667-8792-3ed08cdd65c3_en?filename=SWD_2023_692%20Kosovo%20report_0.pdf

43 European Commission reports for Kosovo for 2020 and 2022, available at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2020-10/kosovo_report_2020.pdf

44 Report of the European Commission for Kosovo, 08/11/2023, Brussels, p. 71, available at: https://neighbourhood-enlargement.ec.europa.eu/document/download/760aacca-4e88-4667-8792-3ed08cdd65c3_en?filename=SWD_2023_692%20Kosovo%20report_0.pdf

45 Reports of the State Prosecutor's Office, available at: <https://prokuroria-rks.org/sr/izvestaji/>

46 Reports of the Regulatory Commission on public procurement activities in Kosovo for 2020/21/22, available at: https://e-prokurimi.rks-gov.net/HOME/Documents/Legislation/Raportet%20Vjetore/ser/Godisnji%20Izvestaj%202020_RKJN.pdf
<https://e-prokurimi.rks-gov.net/HOME/Documents/Legislation/Raportet%20Vjetore/ser/Izve%C5%A1taj%20o%20aktivnostima%20javne%20nabavke%20za%202021.pdf>
<https://e-prokurimi.rks-gov.net/HOME/Documents/Legislation/Raportet%20Vjetore/ser/Godi%C5%A1nji%20izve%C5%A1taj%202022.pdf>

47 Kosovo Police website, available at: <https://www.kosovopolice.com/en/departments/investigation-department/>



Publicly available reports on the work of the Police show the total number of cases in which the Police acted due to suspicions of corruption, but no specific information regarding criminal offences in the field of public procurement.⁴⁸ For this reason, the text of the analysis includes data published by the Regulatory Commission, i.e. the results of their cooperation with the following two institutions: the Anticorruption Agency and the Economic Crimes Investigation Unit.

The Public Procurement Regulatory Commission cooperated with the aforementioned institutions in a total of 57 cases of criminal investigations in the field of public procurement in the period 2020 - 2023.⁴⁹ Available reports do not offer insight into the outcomes of these investigation.

In the period 2020 - 2022, the Rules Department, which operates as part of the Regulatory Commission, assisted the Anticorruption Agency in proper application of the provisions of the Law on Public Procurement and associated by-laws in 24 cases. It also worked with the Economic Crimes Investigation Unit in 60 instances of investigation of public procurement activities.⁵⁰ Data on the number of cases in which the Department cooperated with other institutions is not available in the report for 2023.⁵¹

• PRACTICE

Kosovo spends about 30% of its budget on public procurement; therefore, oversight in this area is vital for building a more stable economy.⁵²

According to data collected from the media, the public in Kosovo focuses on big businesses, particularly in the area of delay of court processes and failure to report corruption at the highest level. Some allegations suggest that as many as 56% of businesses said that corruption was present in the public sector.⁵³

48 Annual reports on the work of the Kosovo Police, available at:

<https://www.kosovopolice.com/en/documents/documents-for-strategy/>

49 Report of the European Commission for Kosovo, 08/11/2023, Brussels, p. 71, available at:

https://neighbourhood-enlargement.ec.europa.eu/document/download/760aacca-4e88-4667-8792-3ed08cdd65c3_en?filename=SWD_2023_692%20Kosovo%20report_0.pdf

50 Ibid.

51 Report of the Regulatory Commission on Public Procurement Activities in Kosovo for 2023, March 2024, Pristina, available at:

<https://e-prokurimi.rks-gov.net/HOME/Documents/Legislation/Raportet%20Vjetore/ser/Godisnji%20Izvestaj%202023.pdf>

52 Conference, Strengthening Public Procurement in Kosovo, Facebook, 8:45, available at:

https://www.facebook.com/UKinKosovo/videos/565375914927280/?_rdr

53 Over 50% of businesses in Kosovo say that there is corruption in public procurement, Koha, Decembar 2021, available at: <https://www.koha.net/en/arboretum/300578/over-50-of-the-businesses-in-Kosovo-say-that-there-is-corruption-in-public-procurement/>



ALBANIA

• LEGISLATIVE FRAMEWORK

The Criminal Code of the Republic of Albania does not explicitly refer to a criminal offence committed within public procurement or concerning public procurement.⁵⁴

This area is regulated by the Law on Public Procurement. The Law that was adopted on 27 July 2020 is currently in force, which addressed omissions of the previous version (from 2007), criticised as being too “business-oriented”.⁵⁵ The Agency for Public Procurement is recognised as the central public procurement authority. This body oversees the public procurement system, with the ultimate objective of ensuring efficiency and transparency in public procurement processes. Additionally, the Commission for Public Procurement, which reviews appeals and acts on them, is the highest administrative body in this area.⁵⁶

The latest report of the European Commission, from 2023, states that Albania is partially ready in this area, and that it made good progress, mainly due to increased use of the most economically favourable criteria for awarding tenders.⁵⁷

The share of public procurement in GDP also increased year by year in Albania. From 4.8% in 2019, it increased to 10.7% in 2021,⁵⁸ and fell slightly in 2022, to 9.4%.⁵⁹

54 Criminal code of the Republic of Albania, available at:

https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA_Criminal%20Code.pdf

55 E. Jorgoni, Albania: The new law on public procurement paves the way for the procuring and contracting of social care services, August 2020, available at:

<https://ec.europa.eu/social/BlobServlet?docId=23023&langId=en>

56 Criminal code of the Republic of Albania, available at:

https://adsdatabase.ohchr.org/IssueLibrary/ALBANIA_Criminal%20Code.pdf

57 Report of the European Commission for Albania 2023, 08/11/2023, Brussels, p. 68, available at:

https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_690%20Albania%20report.pdf

58 Report of the European Commission for Albania, 12/10/2022, Brussels, p. 63, available at:

<https://tinyurl.com/ybr2h9tb>

59 Report of the European Commission for Albania 2023, 08/11/2023, Brussels, p. 68, available at:

https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-11/SWD_2023_690%20Albania%20report.pdf



- **INSTITUTIONAL RESPONSE**

Following a detailed analysis of available websites (Agency, Commission, Police), we have concluded that the available reports on the work of the Public Procurement Agency are outdated, and that the latest available report dates back to 2015.⁶⁰ On the other hand, the website of the Commission for Public Procurement contains current work reports that do address the question of institutional response to violations in the field of public procurement. These reports mainly discuss administrative reviews of complaints received by the institution.⁶¹ Finally, the language barrier rendered the reports on the work of the Police incomprehensible.⁶²

In addition to the abovementioned institutions, SPAK (Special Anti-Corruption Structure), which is considered an independent judicial entity with the task of investigating corruption and organised crime at the highest level, also operates on the territory of Albania. It consists of three units: the National Investigation Bureau, the Special Prosecutor's Office and the Special Courts.⁶³ A review of the translated versions of annual reports for the last three years, leads to the conclusion that even SPAK reports do not directly respond to how many proceedings were initiated due to suspicions of violation of the Law. On the contrary, the reports offer an analysis of general indicators of criminality, without specifically addressing cases in the area of public procurement.⁶⁴

- **PRACTICE**

Albania does not deviate from neighbouring countries when it comes to public procurement practices. Exchange of experiences between clients and bidders is a key contribution to efficiency and leaving the so-called grey zone of public procurement. Institutions, legislation, capacities and responsible persons were identified as the main causes of the problem.⁶⁵

60 Official website of the Public Procurement Agency, available at:

<https://www.app.gov.al/legislation/public-procurement/reports-and-monitorings/>

61 Official website of the Commission for Public Procurement, available at: <https://kpp.al/en/Raporte>

62 Official website of the Police, available at: <https://asp.gov.al/category/njofitime/>

63 About SPAK, available at: <https://dbpedia.org/page/SPAK>

64 SPAK's official website, Annual Reports, available at: <https://spak.gov.al/raporti-vjetor/>

65 Conference, Challenges of the public procurement system in the Republic of Albania, YouTube, 2:43:40, available at: <https://www.youtube.com/watch?v=5JFNWasd710>



• CONCLUSION

The criminal codes of Serbia, North Macedonia and Kosovo identify abuses in the field of public procurement as a criminal offence. This is not the case with the criminal codes of Bosnia and Herzegovina and Albania, which do not define an explicit criminal offence related to abuse in public procurement. Simultaneously, each country included in this analysis has a Law on Public Procurement as an umbrella act that regulates procedures, competences, regulation and other issues related to the scope of work of institutions responsible for protection of rights in public procurement procedures, and other issues of relevance for public procurement.

The European Commission also assesses the legislative framework and institutional readiness to respond to challenges in the field of public procurement. According to available reports, all the countries included in the analysis are partially ready (for accession) in the field of public procurement implementation. All countries have achieved limited progress except Serbia and Albania, which were rated better than others in the latest report, i.e. they were the only ones not rated as having achieved limited progress.

Serbia stood out in terms of the number of reported offenders, among neighbouring countries whose criminal codes recognise abuses in public procurement as a criminal offence.

Punishment for a committed criminal offence in the field of public procurement is in the following range:

Serbia: The longest sentence that can be imposed for a criminal offence related to public procurement is ten years (when the amount of the procurement exceeds RSD 150 million). For bids submitted on the basis of false data and similar violations, punishment ranges between six months and five years.

North Macedonia: Bids submitted on the basis of false data and similar offences aimed at obtaining an unjustified benefit are punishable by a fine or a prison sentence of up to three years. A prison sentence of at least four years is imposed on those who act in violation of the Law, thus obtaining personal benefit.

Kosovo: Submitting false documents or failing to comply with obligations is punishable by up to five years in prison. In addition, if on the basis of a public procurement procedure significant property damage is caused, in the value exceeding EUR 5,000 the offender will be punished with a fine and a prison sentence of one to eight years.



About Institute Alternative

Institute Alternative was founded in 2007 in Podgorica with the mission of strengthening democratic processes and good governance in Montenegro, through research and analysis of public policy options, as well as monitoring the work of public administration.

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