Project “Advancing Accountability Mechanisms in Public Finances”

ANALYSIS OF DIFFERENT APPROACHES TO REGULATING PUBLIC PROCUREMENT IN THE FIELDS OF DEFENCE, SECURITY, UTILITY AND PROTECTION OF BIDDER’S RIGHTS

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# 1. Introduction

This document has been prepared within the framework of UNPD project – “Advancing Accountability Mechanisms in Public Finances”.

The purpose of this document is to provide an analysis of different approaches to regulating public procurement in the fields of defence and security, utility and protection of bidders’ rights. The analysis provides a list of, both, advantages and shortcomings related to each approach suggested. It also provides an explanation regarding the suggested method of transposition, especially related to the scope and structure of the relevant Directive. This analysis does not aim to recommend the best model but will provide stakeholders with sufficient information to reach the decision on the approach best suited for Serbia.

As a candidate country the Republic of Serbia is required to harmonise its public procurement legislation with the *acquis* and to ensure its full implementation. Pursuant to the Public Procurement Development Strategy of the Republic of Serbia for the period 2014 - 2018, the process of harmonisation of national legislation with the *acquis* will be carried out gradually. In this process the Republic of Serbia will pay special attention to the analysis of legislative mechanisms for transposition of provisions of the new Directives by the EU Member States. One of the conditions for the successful harmonization process is a decision of Serbian authorities on the method of transposition of EU law, in particular from an aspect of regulating public procurement in the fields of defence and security, utility and protection of bidders’ rights by separate laws.

This document is therefore intended to support the Public Procurement Office, in activities focused on further harmonization of national legislation with the *acquis* in the field of public procurement mainly with regard to the decision whether to regulate different fields of public procurement in one or more laws and possibly some of the aspects thereof in secondary legislation.

# 2. State of play

**Serbian legal framework**

The basic act regulating the issues of public procurement in Serbia is the Public Procurement Law (“Official Gazette of the RS”, No. 124/12) – henceforth “the PPL”. The PPL was adopted in 2012 and became applicable on 1 April 2013, with exception of Article 78 which became applicable on 1 September 2013. On 12 February 2015 the Law on Amendments to the PPL (“Official Gazette of the RS”, No. 14/15) came into force. In addition to the PPL, there are a number of implementing regulations adopted pursuant to the PPL.

In accordance with its Article 1 the PPL governs, among other issues:

* the planning of public procurement
* the requirements, manner and procedures of public procurement
* the public procurement in the areas of water management, energy, communication and postal services
* the public procurement in the area of defence and security
* the tasks, manner of work and organizational forms of the Public Procurement Office and the Republic Commission for the Protection of Rights in Public Procurement Procedures
* the manner of protecting the rights in public procurement procedures and in other cases in accordance with the PPL.

The PPL is based, as regards its procedures of awarding contracts, on three EU Public Procurement Directives:

* Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (henceforth: Public Sector Directive)
* Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (henceforth: Utilities Directive)
* Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (henceforth: Defence Directive).

As regards legal measures and procedures available to aggrieved economic operators (review and remedies) the PPL is based on provisions of two EU directives:

* Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts,
* Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

both amended by:

* Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (henceforth: Remedies Directives).

From the above mentioned scope of the PPL, it is apparent the Serbian legislator decided to regulate the public, utilities and defence procurement sectors as well as review and remedies procedures in a single act. In addition, further details of defence and security procurement is regulated by Regulation on public procurement procedure in the field of defence and security, “Official Gazette of the RS“, No. 82/2014.

**New Directives**

On 26 February 2014 the European Parliament and the Council adopted three new directives on public procurement and concession contracts:

* Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing directive 2004/18/EC (referred as “the new Public Sector Directive” or “new classical directive”)
* Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing directive 2004/17/EC (“the new Utilities Directive”)
* Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (“Concessions Directive”).

Those three new directives were published in the Official Journal of the European Union L 94 dated 28 March 2014. They entered into force on April 17, 2014.

The new Public Sector Directive repeals and replaces Public Sector Directive 2004/18/EC while the new Utilities Directive repeals and replaces Utilities Directive 2004/17/EC. Directives 2004/18 and 2004/17 cease to be applicable, however, only as of April 18, 2016. This means that until that date two sets of procurement directives, “old” and “new”, co–exist.

The Concessions Directive on the other hand, in addition to imposing new rules on award of concessions contracts, amends also Remedies Directives. Concessions Directive is entirely new. Until its adoption only award of works concessions was partly regulated by the Public Sector Directive. The Concessions Directive covers, for the first time in EU law, in comprehensive manner, both works and service concessions. It codifies relatively rich case law of the Court of Justice of the European Union on concessions offering, at the same time, some discretion as for the precise way how the procedures leading to award of concessions are to be designed by Member States. However, the Concessions Directive is not covered by this analysis.

All three new directives have to be transposed to legal orders of EU Member States, in principle, within 24 months following their entry into force (i.e. until April 18, 2016). A longer time period is available for application of mandatory electronic communication in procurement procedures (electronic tendering) - 54 months counted from the entry into force of the directive, i. e. until October 18, 2018.

**General note on transposition of EU directives**

New 2014 public procurement rules were established, as it is also the case of older rules, by means of a directive. Article 288 of the Treaty on the functioning of the European Union (TFEU) lists legal tools which are available to European Union’s institutions for the purpose of performing European Union’s competences. This Article mentions regulations, directives and decisions.

The Directives are intended to co-ordinate national contract award procedures by introducing a minimum body of common procedural rules that reflect the basic Treaty principles rather than to achieve the harmonisation of all national rules on public procurement. The Directives thus limit their scope to those measures required for the co-ordination exercise and permit the Member States to maintain or adopt substantive and procedural rules to the extent that these are not in conflict with the Directives or with Treaty provisions.

Member states are bound to take all appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the EU institutions. The procurement directives, like all directives, are by definition not directly applicable, i.e. they do not apply automatically. In order to produce their effects within the Member States, they need to be implemented or “transposed” into national law. The Member States are, therefore, required to take the measures necessary to give full effect to the provisions of the Directives in national law and to ensure that no other national provisions undermine their applicability. This normally takes the form of a transposition of the Directives into national law and the abrogation of all contrary legislative provisions.

According to Article 288 of TFEU a directive “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. Thus, it is not necessary for EU Member States to produce an exact copy of the Directives in their national legislation, although some Member States have done precisely that, by reference to the Directives themselves. In other words, it is up to a Member State to decide on a form of legal acts used in order to transpose a directive provided its purposes are achieved. Similarly, specific methods and tools of transposition are left to the discretion of Member States, for example, transposition of all procurement relevant directives in one single act or adoption of separate legal instruments for some or all of them. Member States may also opt for using their own specific legal concepts or terminology suiting them best in the light of their legal and administrative traditions. However, one should bear in mind that the new procurement directives regulate procurement processes in very prescriptive, detailed way. Thus, EU Member States will most likely opt for repeating those provisions *verbatim* in their national provisions, minimising or even better, eliminating the risk of improper transposition.

In addition to directives, in the area of public procurement a number of regulations is adopted. According to Article 288 of TFEU a regulation “shall have general application. It shall be binding in its entirety and directly applicable in all Member States”.

Once Serbia becomes a EU Member State the regulations will be directly applicable. Practice, however, shows that candidate countries in pre accession period often adopt national legislation covering provisions (fully or partially) of EU regulations in order to establish national practices that would enable smooth functioning of the system. Examples on such practice are often related to Common Procurement Vocabulary or public procurement notices based on EU standard forms provided in the relevant Commission regulations. However, such national provisions transposing EU regulations, due to their direct application, should be put out of force as of date of accession to the EU.

# 3. Analysis

The starting point for this analysis is the assumption that the Public Sector Directive will continue to be transposed in the Serbian legal order by means of law as it is now. It does not mean that all the provisions of the Directive need to be placed in the law itself. Serbian authorities can transpose certain provisions in secondary legislation such as government regulations or ordinances. This is particularly useful for procedural issues which necessitate more detailed description, for example methods for calculating the estimated value of procurement, content of notices, form and manner of publication of notices, content of invitations and individual reports on procedures for the award of contracts, national reporting and statistical information etc.

Therefore, the issues that are analysed are related to the form of regulating the Utilities Directive, Defence Directive and Remedies Directives.

## 3.1 Utilities Directive

The procurement directives were originally intended to cover public procurement, that is, contracts awarded by public authorities or other public bodies. As a result, the new Public Sector Directive (as well as all of the previous directives that applied to the public sector) excludes from its scope all public contracts that, under the Utilities Directive, are awarded by contracting authorities exercising one or more of the relevant activities in the utilities sector (water, energy, transport and postal services) and that are awarded for the pursuit of those activities[[1]](#footnote-1).

The rules on utilities are adopted in a separate directive because the provisions for the utilities sector are more flexible than those in the public sector. It is recognised that the entities in these sectors are operating in a more commercial market so that, although the main principles of the public procurement rules need to be respected, it is also necessary to provide some flexibility in order to take account of the reality of the environment in which their activities take place.

The Utilities Directive 2014/25 is composed of a long preamble (142 recitals) followed by 110 articles (35 articles more than in 2004/17 directive) and 21 annexes (down from 26 annexes in 2004/17 directive). The preamble is very important for purposes of interpretation of the directive’s provisions. It explains not only the reasons behind the adoption of specific provisions but advises also on how to understand the new rules.

New utilities rules are practically modelled on new public sector rules. It has to be noted that, although new Utilities Directive has more flexible rules than the new Public Sector Directive, fewer differences remained between two set of rules as compared to 2004 Directives.

Annex XXI to the new Utilities Directive contains a table presenting correlation between provisions of the new Utilities Directive and 2014/17 directive. This table lists 85 provisions of the new directive (paragraphs, subparagraphs and smaller units) out of the total number of 319 as not having their equivalents in the provisions of 2004/17 directive. That means that roughly one third of text of the new Directive consists of entirely new provisions. In addition, there are provisions which were retained in substance from the previous rules but changed in some elements (for example minimum time periods for receipt of requests and tenders were shortened).

The entities covered by the EU procurement rules fall within two broad categories. The first category consists of entities over which the state may exercise direct control. These are public authorities and bodies governed by public law. The second category consists of defined public undertakings and those private entities that operate in their relevant sectors on the basis of special or exclusive rights granted by a Member State.

It is important to remember that, unlike in the case of the Public Sector Directive, where contracting authorities once caught by the definition must carry out all of their procurement according to that directive, public authorities, bodies governed by public law and other entities covered by the Utilities Directive are covered only to the extent that they carry out a relevant activity defined in the Utilities Directive. To fall within the scope of application of the Utilities Directive, they must (i) fall within the definition of an entity operating in a utility sector, and (ii) carry out a relevant activity (only or as one among many relevant and/or non-relevant activities).

As stated above, the Public Sector Directive excludes from its scope of application all public contracts that are awarded by contracting authorities under the Utilities Directive. It also makes clear that contracts that are excluded from the Utilities Directive do not, at the same time, re-enter the scope of application of the Public Sector Directive. As a result, public authorities carrying out relevant activities in the utilities sector are covered by the Utilities Directive, not by the Public Sector Directive.

### Options for Serbia

Except for apparent differences between the Utilities and the Public Sector Directive, such as the definition of entities, thresholds, relevant activities, some exclusions, qualification systems, etc., other provisions seem identical or very similar. However, by detailed comparison of the provisions of the two directives it can be concluded that there are many more differences. For example:

* Provisions on conflict of interest do not apply to public and private undertakings,
* Contracting entities are free to choose whether to award several contracts (dividing procurement into lots) or award one single contract (no obligation to justify this decision),
* Obligation to exclude economic operator is applicable only with regard public purchasers,
* There are no specific conditions for the use of any of procedure needed, except for the use of negotiated procedure without prior publication,
* Conditions for the use of negotiated procedure without a prior call for competition are identical to conditions as in Public Sector Directive but:
	+ the scope of condition concerning research and experiments is wider – “contract” v ”the products”,
	+ “bargain purchases” is available for a very short time at a price considerably lower than normal market prices,
* Shorter time periods for receipt of requests to participate,
* For receipt of tenders in restricted and negotiated procedures all contracting entities may agree the deadline with candidates (in the Public Sector Directive it applies only to sub – central contracting authorities),
* Maximum duration of framework agreements is 8 years (4 years in the Public Sector Directive),
* Only basic principles of awarding contracts based on framework agreements are defined (no details of the procedure as in the Public Sector Directive).

All this leads to conclusion that specific rules, which will be applicable for utilities, are required in national legal order. In other words, the Utilities Directive needs to be transposed since the rules of the Public Sector Directive cannot replace the rules specifically designed for utilities.

There are at least four options with respect to possible method of transposition of the Utilities Directive.

#### Option I – One single law with specific chapter on utilities

Only those specific and different provisions applicable for utilities contracts are provided in a designated chapter of the law. This means that the main body of the law implements the provisions of the Public Sector Directive which would also apply to awarding of contracts in utilities sector, unless there are specific provisions regulating a given utility issue differently. In other words, in case of divergent regulation, provisions of specific utility chapter takes precedence over general rules from the main part of the law. This option is currently used in the Serbian PPL.

This method is challenging from the point of view of proper drafting because it requires a precise cross-referencing between the two sets of rules. It also requires a careful consideration with regard to certain provisions to avoid overlapping. For example, some exclusions from the scope of the both Directives are identical, but some are specific only for utilities. With this in mind, it is important to clearly regulate which exclusions are allowed for which contracts to avoid the application of exclusions which would not be available under the Public Sector Directive.

This option has the advantages from an administrative capacity point of view because it requires only one public consultation, drafting and adoption procedure. Therefore, there are less procedural steps to be undertaken for the adoption of the law. In case of amendments of the law, if required, it is easier to amend one law in one procedure as opposed to two laws. Furthermore, the smaller volume of the law in this case can be perceived as less daunting for users. Another advantage is that in case there is any secondary legislation, there will be one set of secondary legislation adopted pursuant to the law applicable to both public and utilities sector.

Negative aspects in this scenario may occur in implementing the law by contracting entities. Specific utilities issues could be “lost in the crowd of provisions”. This can lead to a situation that flexible options available to contracting entities will not be used by them. This may occur because the contracting entities need to follow two set of rules - those designed for public sector, and at the same time pay attention and implement those rules specifically designed for utilities which are applicable only in case they differ from public sector rules.

As it can be observed from the practices of countries (mostly in the region) which have opted for this method of transposition of the Utilities Directive, in most cases the utilities entities behave as public sector purchasers. In other words, they do not take advantage of more flexible rules available to them under Utilities Directive.

#### Option II – One single law transposing both the Public Sector and the Utilities Directive in a comprehensive manner

One part of the law is designated to transpose all provisions from the Public Sector Directive and the other part is designated to transpose all provisions from the Utilities Directive. This means that the law implements the provisions of the Public Sector Directive and the Utilities Directive in an equivalent manner. In this case it is not only those outstanding utilities provisions that are regulated differently in relation to classical sector but the whole Utilities Directive. In other words, all provisions dealing with utilities (not only those specific) are regulated in the law. Practically it would appear there are two laws in one. This option is currently used in Austrian PPL.

This method is less challenging from the point of view of proper drafting because it does not require cross-referencing between the two set of rules, as it is the case under Option I. In this scenario issues with regard to overlapping between the two sets of rules are avoided. This is because each chapter of the law deals exclusively and comprehensively with rules applicable to the each of the two regimes.

As in the case of Option I, this option has the advantages from the administrative capacity point of view because it requires only one consultation, drafting and adoption procedure. Therefore, there are less procedural steps to be undertaken for the adoption of the law. In case of amendments of the law, if required, it is easier to amend one law in one procedure as opposed to two laws. Another advantage is that in case there is any secondary legislation, there is possibility to envisage one set of secondary legislation adopted pursuant to the law applicable to both public and utilities sector.

Positive aspects of this option may be envisaged in implementing the law by contracting entities. From their point of view there will be only one comprehensive set of rules to be followed and not, as in the case of Option I, only those specific utilities issues. It can also be expected that contracting entities would be in a position that better enables them to use the advantages of all flexible options available to them under the Utilities Directive.

However, a volume of the law in this case can be perceived as deterrent, especially in public consultation and adoption process. Inevitably, because many provisions of the two Directives are very similar or identical, an exact repetition of the provisions in this scenario cannot be avoided. It also remains to be answered whether such method would be in line with legal and administrative tradition customary in Serbia.

#### Option III – Special law for utilities sector

A special law transposing the Utilities Directive is adopted. This means that one law on public procurement in classical sector implements the provisions of the Public Sector Directive and the other law on public procurement in utilities sector implements the provisions of the Utilities Directive. This option is similar to Option II but there are two different laws. All provisions dealing with utilities would be regulated in the special law. This option is currently used in Slovenia and United Kingdom.

This method is least challenging from the point of view of drafting because it does not require much cross-referencing between the laws, except for cases where there is cross-referencing between the two Directives, for example in cases of mixed procurement[[2]](#footnote-2). In this scenario issues with regard to overlapping between the two set of rules are completely avoided. This is because each law deals exclusively and comprehensively with rules applicable to the each of the two regimes.

Unlike in case of Options I and II, this option has the disadvantages from the administrative capacity point of view because it requires two public consultations, drafting and adoption procedures. Therefore, there are more procedural steps to be undertaken for the adoption of the law which can be demanding. In case of amendments of the law, if required for example due to a systematic problem, there will be need to amend two laws at the same time. Another disadvantage is that in case there is any secondary legislation pursuant to the laws, it is questionable from the legal tradition point of view whether there is possibility to envisage one set of secondary legislation adopted pursuant to the both laws.

Positive aspects of this option may be envisaged in implementing level of the legislation by contracting authorities and entities. They will apply only one law, either for public sector or utilities sector, as the case may be. This option may therefore be beneficial for contracting entities as they will be in clear position with regard to possibility to use take advantage of all flexible options available to them under the Utilities Directive. There will be clear understanding what rules are applicable because they will be clearly regulated in a special law on utilities procurement.

Inevitably, because many provisions from the two Directives are very similar or identical, the exact repetition of many provisions in two laws cannot be avoided. This might be negatively perceived in public consultation and adoption process in the sense that the rules from either of the two laws are redundant, where in reality they are not.

It also remains to be answered whether such method would be in line with legal and administrative tradition customary in Serbia.

#### Option IV – Consolidated/merged public and utilities provisions in one law

The Public Procurement Law transposes provisions from the Public Sector Directive and Utilities Directive in a manner which consolidates or merges all provisions applicable to the each of the two regimes. There is no separate chapter or part of the law applicable for utilities like in Options I and II. Public and Utilities Directive share many provisions. At the same time, there is a number of provisions which are regulated differently. In this scenario, these differences are presented in a natural order of the procedure. For example, a provision on thresholds which differ between the two regimes would be regulated at one place (same Article or Section) and would take account of different thresholds in public contracts and utilities contracts procedures. This option has been used by Slovenian legislator in the new draft of Public Procurement Law[[3]](#footnote-3) which is in the public consultation phase.

A volume of the law in this case can be perceived as user-friendly, especially in public consultation and adoption process. Since many provisions from the two Directives mirror each other, an exact repetition of the provisions in this scenario is avoided. In this scenario issues with regard to overlapping between the two sets of rules are completely avoided. This is because the law consolidates the rules applicable to the each of the two regimes. However, at the same time it will take some additional effort to identify, draft and properly transpose all of the specific rules and details in the manner which will clearly present mixed provisions of the two regimes to enable smooth implementation.

As in the case of Option I, this option has the advantages from the administrative capacity point of view because it requires only one consultation, drafting and adoption procedure. Therefore, there are less procedural steps to be undertaken for the adoption of one law. In case of amendments of the law, if required, it is easier to amend one law in one procedure as compared to multiple procedures. Another advantage is that in case there is any subordinate legislation, there is possibility to envisage one set of secondary legislation adopted pursuant to the law applicable to both public and utilities sector.

Negative aspects of this option may be envisaged in implementing the law by contracting entities. From their point of view the specific utilities issues could be perceived as “lost in the crowd of provisions” together with classic procurement regime since there is not only one comprehensive set of rules to be followed for utilities. They will still have to carefully search for applicable specific utilities provisions which could cause some misinterpretations or longer period of adaptation.

## 3.2 Defence and Security Directive

Since they were introduced, public sector directives have always provided for a partial exemption for defence procurement. The exemption from the procurement rules was not given because of the identity of the contracting authority, for example, the Ministry of Defence. The exemption applied because of the subject matter of the procurement, i.e. the products that are of a military nature.

Since 2009, however, those previously exempt products are covered by Directive 2009/81, which applies an alternative, more flexible and confidential regime to the procurement of military supplies and related works and services. The procurement of such products is no longer excluded from the scope of EU procurement rules.

The Defence Directive (as are other two directives) is also subject to the exceptions provided for by the Treaty. In the context of defence, Article 346 TFEU is the most relevant Treaty-based derogation.

Article 346 TFEU allows a Member States to exempt defence and security contracts if the application of European law would undermine their essential security interests:

* Article 346 (1)(a) allows EU Member States to keep secret any information the disclosure of which they consider contrary to the essential interests of their security.
* Article 346 (1)(b) allows EU Member States to take measures they consider necessary for the protection of their essential security interests in connection with the production of or trade in arms, munitions and war material (specified in the Council Decision 255/58 of 15 April 1958[[4]](#footnote-4)). Measures taken under Article 346 (1)(b) may not adversely affect competition on the common market for products not specifically intended for military purposes.

The Treaty contains strict conditions for the use of derogation under Article 346, balancing Member States’ security interests with EU principles and objectives. According to the European Court of Justice (ECJ), the use of the derogation must be limited to clearly defined and exceptional cases and interpreted in a restrictive way. Exemption must be necessary for the protection of a Member State’s essential security interests (i.e. interests vital to the country's military capabilities, not economic interests).

If a Member State intends to rely on Article 346 TFEU to award a contract covered by the Defence Directive (or by the Public Sector or the Utilities Directive) without observing the procedural requirements laid down by those Directives, it must ensure that the measure chosen (for example the direct award of the contract to a specific economic operator) is necessary in order to protect its essential security interest.

In this context, the Defence Directive is a legal instrument that has been specifically created to meet the specific needs and requirements of defence and security procurement. However, there may still be contracts which, for example, necessitate such extremely demanding requirements in terms of security of supply, or which are so confidential and/or important for national sovereignty, that even the specific provisions of the Defence Directive would not be sufficient to safeguard a Member State's essential security interests.

It follows that the contract award procedures provided for in the Defence Directive should be considered as the standard procedures for defence and sensitive security procurement, and that recourse to Article 346 TFEU should be limited to clearly exceptional cases.

### Options for Serbia

The Defence Directive establishes procurement rules specifically adapted to meet the concerns of Member States about the sensitive nature of procurements in the defence and security sectors. It is intended to address concerns that the Public Sector and the Utilities Directives do not always permit the acquisition of military or sensitive security supplies, works or services as effectively as they could, or deal explicitly with key requirements for acquisitions such as security of information.

Therefore, the Defence Directive provides Member States with common defence and sensitive security procurement rules, such as security of information and security of supply, which take account of the special features of those markets.

The Defence Directive is largely based on the Public Sector Directive and the provisions of the Remedies Directives are largely replicated in the articles of the Defence Directive. Its scope also extends to contracting entities to which the Utilities Directive applies if they procure equipment, works or services which are for security purposes and involve, require or contain classified information.

The Defence Directive also introduces a number of provisions concerning the award of public contracts in the defence and security fields which are either new, or are adaptations of the provisions which exist in the Public Sector Directive, in particular:

1. financial thresholds triggering application of the Regulations are higher (they are aligned with those under the Utilities Directive)
2. default procedures are the negotiated with prior publication of contract notice and the restricted procedure. The competitive dialogue procedure can be used for particularly complex contracts where the default procedures are not sufficient
3. specific provisions on security of information are included which ensure that sensitive information will remain protected against unauthorised access
4. special clauses on security of supply will provide contracting authorities/entities with greater certainty that equipment, works or services can be delivered, in particular in times of crisis or armed conflict
5. contracting authorities/entities can exclude bidders who have been found not to be sufficiently reliable to be entrusted with security-sensitive information
6. contracting authorities/entities can use stringent criteria to ensure continuity of supply
7. special rules on sub-contracting make it possible for contracting authorities/entities to require competitive procurements for sub-contractors on an EU-wide basis, potentially improving market access for small and medium-sized enterprises (SMEs)
8. framework agreements can be last for 7 years as compared with a 4 year maximum under the Public Sector Directive.

The Defence Directive includes a comprehensive set of provisions aimed at making effective means of remedies available to aggrieved bidders. These provisions are based on the Remedies Directives. However, the Defence Directive foresees some adaptations to the general review system to take the special characteristics of defence into account. For example, Article 56 (10) and Article 60 (3).

All this leads to conclusion that specific rules applicable for defence and security procurement is required in national legal order. In other words, the Defence Directive needs to be transposed since the rules of either the Public Sector Directive or the Utilities Directive cannot replace the rules specifically designed for defence and security procurement.

Taking into account all mentioned above, it is suggested that the way forward for the transposition of the Defence Directive into national legal order is to apply a special set of rules for the defence procurement based, in principle, on one of the options (I-IV) described above for the Utilities Directive.

There is also option V for transposition of the Defence Directive which could be considered. This option is currently used in Serbia.

Only some defence and security provisions, usually the basic ones, are provided in the law and the rest is regulated through the secondary legislation. This means that the law which covers either the public sector or the utilities contracts, or both would, in addition, contain a specific chapter or part with the basic defence provisions. This part would normally include the material and personal scope of the Defence Directive, the main terms used, exclusions from the scope of the Directive, the main procedural requirements, etc. Most importantly, the law needs to provide clear legal basis for further regulation of the award of defence and security contracts in the secondary legislation.

The advantages of this option are mainly related with the user-friendliness of the law which is already overloaded with public sector, utilities and possibly review and remedies provisions. By providing a specific defence and security regulation in the form of, for example government regulation, the main structure of the law would seem to be intact. This option is especially worth considering in a case when there is already a public procurement law adopted and there is a decision to transpose the Defence Directive by amending already existing law.

Another advantage of this option is related to the fact that in reality there is only a limited number of contracting authorities in the field of defence and security that will actually apply the specific defence provisions. This seems to be a valid reason to have the defence and security procurement regulated in the secondary legislation and not in the law.

From this point of view, the option to regulate a majority of defence related provisions in secondary legislation appears to make sense.

The disadvantages of this option are the mainly related to the fact that both the Defence and the Public Sector Directive (as well as the Utilities Directive) share the similar structure. This structure is usually followed in national legislation, although variations are possible.

In that respect, by having a major part of the Defence Directive regulated in the secondary legislation the legislator is in a situation that forces him to take a different approach with regard to transposition of the Public Sector Directive as compared with approach taken with regard to Defence Directive. Basically, the problem lays in the fact that on one hand – when transposing the Public Sector Directive the relevant provisions, for example on procedures are in the law, and on the other – when transposing the Defence Directive the equivalent but adapted defence provisions are placed in the secondary legislation. Therefore, two similar sets of provisions would be provided in two different levels of national legislation, one in a basic law and one in a secondary legislation. In addition, as it was explained above, the Defence Directive provides for some adapted provisions related to review and remedies to take the special characteristics of defence into account. In this respect, if general review mechanism is regulated in public procurement law or specific law on review in public procurement, it is not appropriate to have those specific defence review provisions in a bylaw. To put it simpler, when it comes to classical and utilities sector the provision of the same legal strength are placed in the law, and when it comes to defence sector the same type of provisions are in the bylaw. Legally it is hard to find an argument for such an approach in the legal context.

## 3.3 Remedies Directives

Public Procurement legislation in the EU is aimed at creating a common market by ensuring that public contracts are awarded in an open, fair and transparent manner. The different systems and procedures envisaged in the Public Procurement Directives have been introduced to facilitate domestic and non-domestic economic operators to compete for business on an equal basis, while at the same time allowing contracting authorities and entities to obtain the best quality and price for their purchases. To complement the Public Procurement Directives, specific review and remedy procedures were introduced to coordinate national provisions. Remedies are legal actions available to economic operators participating in contract award procedures, which allow them to request the enforcement of public procurement regulations and their rights under those regulations in cases where contracting authorities, either intentionally or unintentionally, fail to comply with the legal framework for public procurement.

The legal framework on remedies is found in the following directives:

* Directive 89/665/EEC[[5]](#footnote-5) which regulates remedies available to economic operators related to public sector contracts.
* Directive 92/13/EEC[[6]](#footnote-6) which regulates remedies available to economic operators related to utilities contracts.

Both directives were amended by the Directive 2007/66/EC[[7]](#footnote-7) with effect from the end of 2009. The revision of the Directives introduced a standstill provision which gave bidders time to ask for a review before a contract is signed. National review bodies were given the power to render contracts “ineffective” under certain conditions, or were also allowed to impose alternative penalties, such as fines or cutting short the duration of a contract. A new VEAT notice[[8]](#footnote-8) was drawn up in order to allow contracting authorities to advertise the justified direct award of a contract and limit the scope for subsequent challenge.

In January 2014 the Concessions Directive[[9]](#footnote-9) was passed by the European Parliament and adopted by the Council in February 2014. This directive aims to reduce current market distortion and inefficiencies resulting from the lack of legal certainty around concession contracts. It should be noted that concession contracts did not previously fall within the full remit of public procurement legislation as they were only partially covered by the Public Sector Directive. However, following the introduction of the Concessions Directive, the Remedies Directives now also applies to concession contracts. The Concessions Directive therefore amended the Remedies Directives 89/665/EEC and 92/13/EEC mainly with regard to the extension of remedies and review measures to services concession covered by the new Concessions Directive.

In addition, it has to be noted that the Defence Directive includes a comprehensive set of provisions related to remedies available to aggrieved bidders in the context of defence contracts. These provisions mostly repeat the Remedies Directives. However, the Defence Directive does not amend the Remedies Directives (as it is the case with the new Concessions Directive). It regulates comprehensively the available remedies in a separate chapter.

### Options for Serbia

It has to be underlined that Member States enjoy a wide discretion when it comes to implementing the review systems contained in the Directive, which ‘*lays down only the minimum conditions to be satisfied by the review procedures established in domestic law to ensure compliance with the requirements of Community law concerning public contracts’.*

The Remedies Directives intended the final review of legality in the field of public procurement to rest with a judicial body. Either directly, where the first review body is a court, or indirectly, where the courts have the power to hear and determine an action brought against the decision of any administrative review body which may have been created, such as the Republic Commission for the Protection of Rights in Public Procurement Procedures in Serbia.

The remedies process therefore varies from Member State to Member State according to how the Directives has been implemented and enforced in national law, and how effective the judicial systems are. Some countries have also developed informal procedures for solving issues of this nature. As such, the effectiveness of remedies in the public procurement area varies considerably across different Member States.

Options for Serbia regarding the form of transposition of the Remedies Directives much depend on the approach taken with regard to transposition of the Public Sector Directive, the Utilities Directive and the Defence Directive, as well as the Concessions Directive (although the concessions are outside of the remit of this analysis).

#### Option I – Single law on review and remedies

Whatever the approach regarding the transposition of the other parts of public procurement *acquis* (public sector, defence, utility, concessions) may be, this option presupposes one single law dealing exclusively with review and remedies mechanisms related to all contracts, including concessions.

It means that one law on review and remedies in public procurement would implement the Remedies Directives as amended, including the specific defence related provisions. Therefore all provisions dealing with review and remedies would be regulated in one single law. This option is currently used in Slovenia and Luxembourg.

This method is the least challenging from the point of view of drafting because one single law can easily accommodate all provisions regarding review in one place. Since many provisions in the Remedies Directives are identical, the exact repetition of many provisions in different laws is avoided. This might be positively perceived in public consultation and adoption process.

Positive aspects of this option may also be envisaged in implementing level by both the economic operators and contracting authorities / entities. There is a clear set of rules in a single law to apply. This option may therefore be beneficial for users as they will be in clear position with regard to what rules to apply in review procedures.

This option has the disadvantages from the administrative capacity point of view because more law requires more procedural steps to be undertaken for the adoption which can be demanding.

#### Option II - Each law regulating different procurement regime contains a chapter related to review and remedies

This option is based on the presumption that there are different laws transposing the Public Sector Directive, the Utilities Directive and the Defence Directive. In such an approach the Remedies Directives would be incorporated in a specific chapter designated for review and remedies regarding the contracts covered by each of the different laws. This option is currently used in United Kingdom.

This means that each of the laws dealing with different procurement regime implements the related provisions of the Remedies Directives in a specific chapter of the law, i.e.:

* Law on Public procurement → Directive 89/665/EEC as amended,
* Law on Utilities Procurement → Directive 92/13/EEC as amended,
* Law on Defence Procurement → Title IV (rules to be applied to reviews) of the Directive 2009/81/EC,
* Law on Concessions → Directives 89/665/EEC and 92/13/EEC as amended.

This method is less challenging from the point of view of proper drafting because each of the different law can easily accommodate related review and remedies provisions with regard to covered contracts. In this way, a “natural” cycle of each of the procurement regime is presented in a comprehensive manner.

However, since many provisions in the Remedies Directives and the Defence Directive are identical, the exact repetition of many provisions in different laws cannot be avoided. This might be negatively perceived in public consultation and adoption process in the sense that the rules from different laws may seem redundant, where in reality they are not.

This option has the disadvantages from the administrative capacity point of view because more law requires more procedural steps to be undertaken for the adoption which can be demanding. In case of amendments of the law there will be need to amend many laws at the same time.

It also remains to be answered whether such method would be in line with legal and administrative tradition customary in Serbia.

The advantages of this option are mainly related with the user-friendliness of the legislation. Positive aspects of this option may therefore be envisaged in implementing level by users. There is a clear set of rules in each of the laws which are applicable to review and remedies. This option may therefore be beneficial for users as they will be in clear position with regard to what rules to apply in review procedures regarding contracts covered by each of the law.

#### Option III – Review and remedies procedures are included in the Public Procurement Law while other laws refer to those provisions

This option lays on the presumption that the Public Procurement Law implements the provisions of the Public Sector Directive while there are other laws dealing with the Utilities Directive, the Defence Directive and the Concessions Directive. This option also works in a scenario where the Public Procurement Law transposes the Public Sector Directive and includes a chapter(s) with specific utilities, defence and / or concessions provisions which may be further regulated in subordinate legislation. Therefore, there are many variations of the legal set-up, including subordinate legislation. The latter option is currently used in Serbia and Croatia.

This option means that the Public Procurement Law contains a chapter transposing the Remedies Directive(s). This chapter would apply to reviews in public, utilities, defence and concessions sectors. If utilities, defence and concessions sectors are transposed in different laws or regulations, then those legal acts need to have reference to review provisions contained in the Public Procurement Law.

This method is challenging from the point of view of proper drafting because it inevitably requires a precise cross-referencing between the laws or chapters regulating different procurement regimes and the Public Procurement Law. It also requires a careful consideration with regard to certain provisions in the Remedies Directives which differ depending on the procurement regime. The majority of provisions in the Remedies Directives and the Defence Directive (Title IV) are identical but some are specific only for utilities, defence and concessions.

This option has the advantages from an administrative capacity point of view because it requires only one drafting, public consultation and adoption procedure. Therefore, there are less procedural steps to be undertaken for the adoption of such law. In case of amendments of the law, if required, it is easier to amend one law in one procedure as opposed to more as compared to Option II.

Negative aspects in this scenario may occur in implementing the law by users. If review procedure is regulated in detailed manner in the Public Procurement Law it may occur that some of the detailed procedures are not at the same time adequate for utilities, defence and concession contracts. This much depends on how specific utilities, defence and concessions issues are regulated in designated laws or chapters. Therefore, this needs to be taken into consideration while drafting a chapter on review and remedies.

# 4. Conclusion

Above provided analysis shows that national authorities when deciding on the best approach for transposition of public procurement directives into national legislation, have to take into account a few factors. One factor is national administrative and legislative tradition in order to ensure that adopted law(s) and subordinate legislation are fully functioning within overall national legislative system. In addition, key factor is assessment of the type and number of stakeholders in specific sectors (for example, small number of contracting authorities applies the Defence Directive compared to the Public Sector Directive). This kind of assessment is required because one of the basic goals of the public procurement system should be establishing of sound and efficient public procurement procedures without unnecessary administrative burdens. Therefore, when deciding which of the options presented should be applied, Serbian authorities should take into consideration the option that will result in the best overall structure of the national system.

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1. Article 7 of the new Public Sector Directive [↑](#footnote-ref-1)
2. Article 3 of the new Public Sector Directive and Article 6 of the new Utilities Directive [↑](#footnote-ref-2)
3. <http://www.mju.gov.si/si/novinarsko_sredisce/novica/article/1328/6043/d070f5ff31456e0a0c67dd689ff28be4/> [↑](#footnote-ref-3)
4. The 1958 list was translated in November 2008 into all languages of the EU and is publicly available since then (<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014538%202008%20REV%204>). Defence Directive makes explicit reference to this list, but it does not reproduce the list. [↑](#footnote-ref-4)
5. Directive 89/665/EEC, on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, O.J. 1989 L395/33. [↑](#footnote-ref-5)
6. Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, O.J. 1992 L76/14. [↑](#footnote-ref-6)
7. Directive 2007/66/EC of 11 December 2007, amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts O.J. L335, 20/12/07. [↑](#footnote-ref-7)
8. Voluntary ex ante transparency notice [↑](#footnote-ref-8)
9. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94/1, 28.03.2014. [↑](#footnote-ref-9)