

# RISKS OF FRAUD AND CORRUPTION

COMPARATIVE STUDY



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# CHAPTER 1: EUROPEAN FRAMEWORK FOR PUBLIC PROCUREMENT

In April 2018, two years elapsed from the deadline set for the Member States to transpose the EU package of modernised **public procurement directives**, consisting in particular of the following key regulations:

- 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 (**classical procurement directive**);<sup>1</sup>
- 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 (**utilities directive**);
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (**concession directive**).

The new rules of the EU aim to reduce bureaucracy in public procurement, both by simplifying and accelerating individual processes from a time perspective and by providing a more elaborate guidance on the use of the existing institutes, which are not new but which have been used very little in the past by the Member States. The reason why some instruments are not used has sometimes been an ambiguous or too general formulation of the rules for their use, assuming the existence of accompanying methodological guidelines, whether by the European Commission (Commission) or individual Member States. Therefore, in some areas, the modernised rules do not bring any revolutionary changes compared to the previous directives, but there are clear efforts to strengthen and refine the existing rules to ensure that they are used more effectively in practice.

One of the areas that are changing is the **streamlining of procedures to fight corruption and increase transparency** in public procurement.<sup>2</sup> An example is the **unification of the definition of the concept of conflict of interest**, which has been set for the first time at the EU level. The Member States can go beyond this EU standard and to further elaborate or, as the case may be, tighten it at the national level.

As early as 2011, the Commission viewed the existing legal framework in public procurement as insufficient, for example, given the absence of harmonised rules for conflict of interest.<sup>3</sup> Together with the plan to unify the definition of conflict of interest, it also considered other

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<sup>1</sup> The following part focuses on some procedures in public procurement used by contracting authorities under the classical procurement directive. With some exceptions (for example, relevant thresholds), this publication does not deal with nuances relating to specific aspects in utilities public procurement or concessions in detail.

<sup>2</sup> In 2016, the RAND Europe study estimated the costs of the risk of corruption related to public procurement at approximately EUR 5 billion a year. The main conclusions of the study carried out for the European Parliament which focused on assessing the direct and indirect impacts of corruption in Europe are available at [https://www.rand.org/pubs/research\\_reports/RR1483.html](https://www.rand.org/pubs/research_reports/RR1483.html).

<sup>3</sup> See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Fighting Corruption in the EU. COM(2011) 0308 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0308&from=EN>.

measures to increase transparency, such as the obligation to disclose concluded contracts or to tighten the obligation concerning the reasons for excluding tenderers from the procurement procedure and the so-called self-cleaning measures.<sup>4</sup>

Key changes introduced by the classical procurement directive:

#### **Simplifying and streamlining processes**

- Completion of the **digitalisation** of the procurement process using mandatory electronic communication of contracting authorities in October 2018.<sup>5</sup> One of the steps is to introduce a **European Single Procurement Document** (abbreviated as ESPD) – provided only in electronic form since October 2018 – as a preliminary document evidencing fulfilment of the conditions required for participation in a procurement procedure without the obligation to further evidence fulfilment of these conditions by means of other documents based on the requirements of a particular contracting authority. The **e-Certis** online database, which provides information on certificates required by contracting authorities within the individual Member States, also contributes to the reduction of administrative burden.
- **Shortening the minimum time limits** for individual types of procurement procedures.

#### **Enhancing the involvement of small and medium-sized enterprises**

- Possibility to suitably **divide a public contract into parts** in the case of a divisible subject of performance, defining the scope of the individual parts and laying down the rules for the participation of contracting authorities in the individual parts and for their award. However, it should be emphasised that the total estimated value of the public contract is decisive for the selection of the procurement procedure, otherwise it is an undesirable division in order to circumvent the legal rules.
- Establishing a ceiling in relation to the requirement for economic qualification of contractors, namely **by limiting the condition of the minimum amount of the annual turnover of the contractor to the maximum of twice the estimated value of the public contract**.
- Enabling **direct payments to subcontractors** at their request as a mean of protection against the contractor's adverse economic situation if the funds are only paid to the contractor, which redistributes them among its subcontractors.

#### **New types of procedures**

- Expanding the possibility to use the **negotiated procedure with publication**, regardless of the type of public contract or contracting authority. This type of procurement procedure can be used especially in cases where the special needs of the contracting authority cannot be satisfied, without modification, using the

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<sup>4</sup> Or a possibility for an excluded tenderer to reverse its exclusion by proving to the contracting authority during the procurement procedure that it has removed its faults and, therefore, there are no reasons for its exclusion (in the Czech Public Procurement Act, the rules for the use of this institute are enshrined in Section 76).

<sup>5</sup> I.e. mandatory electronic submission of tenders.

solutions already available in the market or if, given the complexity of the solution, it is necessary, prior to the award itself, to first negotiate on the subject of performance with the contractors or if, for example, the performance of the public contract includes a proposed solution.

- Introducing a new type of procurement procedure, namely an **innovation partnership**, the use of which is conditioned by the factual unavailability of supplies, services or works that would meet the specific needs of the contracting authority. Its greater use can be expected, in particular, for public contracts awarded in connection with research and development.
- A **simplified regime for procurement of social, cultural, health care and other specific services** (these are services exhaustively listed in Annex XIV to the classical procurement directive). The procurement of the above is subject to the harmonised regime if the estimated value of the public contract for a given service exceeds the (newly increased) threshold of EUR 750,000.

#### **Responsible procurement with regard to social and environmental aspects**

- Possibility to **exclude a participant in a procurement procedure** that breaches environmental law or labour law regulations (for example, if it turns out that the tender price is abnormally low due to a breach of labour law, such as compliance with the minimum wage, especially for contracts that do not require highly qualified employees, the contracting authority is obliged to exclude such a participant).
- Preference of **the criterion of the most economically advantageous tender** rather than the criterion of the lowest tender price, including the possibility of taking into account life-cycle costs or social, environmental and innovation aspects of the public contract (in particular within the qualitative criteria).
- In the case of so-called reserved contracts, the new rules allow the **integration of disabled or otherwise disadvantaged persons** if at least 30% of workers employed by the tenderer (sheltered workshop or economic operator whose aim is their integration) are disabled or otherwise disadvantaged persons.

#### **Strengthening the fight against corruption and increasing transparency**

- Definition of **conflicts of interest** as a **minimum standard** allowing the Member States to tighten these rules further at the national level.<sup>6</sup>
- Obligation to introduce sufficient measures to avoid any distortion of competition or breach of the prohibition of discrimination and the principle of transparency if a **preliminary market consultation** is conducted with an entity which may later be a participant in the procurement procedure before launching the procurement

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<sup>6</sup> Article 24 of the classical procurement directive defines the concept of conflict of interest as follows: *The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.*

procedure. These measures include, for example, the obligation to communicate information which was the subject of the preliminary market consultation to other tenderers.

- Possibility to exclude a participant in a procurement procedure in the event of a conflict of interest or unauthorised influence on the contracting authority's decision or an attempt to obtain an unjustified advantage over other participants.
- Specification of the conditions for **changes in the public contract obligation** if this is a **minor change** (i.e. such a change does not make a new public contract significantly different from the initially awarded public contract as regards the conditions, economic balance or the scope of the subject of the public contract) that does not change the overall nature of the public contract and that has been caused by objectively unpredictable circumstances where the **price increase does not exceed 50%** of the value of the original public contract.
- The aforementioned full transition to e-procurement should also contribute to increase the transparency of the public procurement process.

With regard to the setting of the threshold amounts which predetermine the application of the rules of the **classical procurement directive** (in the terminology of the Czech law, the above-threshold regime), the Commission retains the possibility of their regular updating for the future:

- a) **contracting authorities with national operation** (within the meaning of the Czech law, these are the Czech Republic as a contracting authority, including the organisational units of the state, the Czech National Bank and state contributory organisations)
  - EUR 144,000 for public supply and service contracts;
  - EUR 5,548,000 for public works contracts;
- b) **other contracting authorities** (within the meaning of the Czech law, these are territorial self-governing units or their contributory organisations and so-called other legal entities)
  - EUR 221,000 for public supply and service contracts;<sup>7</sup>
  - EUR 5,548,000 for public works contracts.

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<sup>7</sup> From the perspective of the Czech Public Procurement Act, this threshold is also relevant for the so-called subsidised contracting authority (contracting authority within the meaning of Section 4 (2) of the Act) and the so-called voluntary contracting authority (contracting authority within the meaning of Section 4 (5) of the Act). The thresholds for public defence or security contracts, concessions and public utilities contracts are set differently. Public contracts for exhaustively listed social and other specific services are also subject to the above threshold of EUR 750,000.

## CHAPTER 2: EXPERIENCE FROM SELECTED MEMBER STATES

### SLOVAK REPUBLIC

Public procurement as percentage of GDP in Slovakia is roughly at the level of the Czech Republic; there was a minor increase to 17% of GDP in 2015.<sup>8</sup> An attempt to define a longer-term framework for further development of public procurement was presented in the **Concept of Public Procurement in the Slovak Republic** in 2015.<sup>9</sup> Based on an analysis of the situation in public procurement, the Concept introduced the proposed measures aimed, for example, at lowering the administrative burden or non-effectiveness of spending public funds, enhancing the competitive environment, increasing transparency, strengthening supervision in public procurement also from the general public, and increasing the use of electronic public procurement.

Despite the formal modernisation of the legislative framework following the example of EU regulations, Slovakia has been criticised for years by the Commission for insufficiently effective or missing measures aimed at increasing transparency, enhancing competition, and fighting corruption and illegal practices in public procurement. As with the Czech Republic, the volume of public contracts awarded in the Slovak Republic in a non-competitive environment was above the EU average in the past years.

As stated by the Commission in its findings published in connection with the latest evaluation of the European Semester,<sup>10</sup> the share of public contracts awarded in the negotiated procedure without publication fell sharply compared to 2015 (18%) to 5% in 2017, but Slovakia is still unable to eliminate the occurrence of collusive practices in connection with public procurement,<sup>11</sup> “tailored” contracts and unclear criteria for meeting the conditions of participation in the procurement procedure or for evaluating tenders.

According to the conclusions published in 2017 in Flash Eurobarometer 457, specifically focused on the occurrence of corruption and its perception by the business environment, corruption is generally perceived as a barrier to business in the Slovak Republic, namely by 55% of respondents from the business environment. Up to 86% of respondents perceive corruption as a widespread problem across the Slovak Republic, and many respondents also point to the widespread occurrence of corruption in public procurement by contracting authorities (50–58%). Approximately 40% of respondents ascribe their failure in a procurement procedure to the occurrence of corruption.

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<sup>8</sup> Data from OECD Government at a Glance – 2017 edition: Public procurement, available at <http://stats.oecd.org/Index.aspx?QueryId=78413#>.

<sup>9</sup> The text of the Concept is available at <https://www.uvo.gov.sk/informacny-servis/koncepcia-rozvoja-verejneho-obstaravania-v-sr-426.html>.

<sup>10</sup> Country Report Slovakia 2018, available at <https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-slovakia-en.pdf>.

<sup>11</sup> According to the findings published in Flash Eurobarometer 2017, this practice is also considered by the business environment to be relatively widespread (62% of respondents).

In the area of drawing EU funds, it is also possible to point to the conclusions of the audit activity carried out by the Supreme Audit Office (SAO), which considers, in particular, the lack of transparency of processes and, in some cases, time pressure to be the main obstacles to the efficient drawing of EU funds, with consequent negative impact on the quality of preparation, evaluation and implementation of individual projects.<sup>12</sup>

### ***Characteristics of the legislative framework with regard to some reform elements***

When transposing the new procurement directives, Slovakia chose a similar procedure as the Czech Republic, incorporating the new rules in completely new **Act No. 343/2015 Coll., on public procurement**,<sup>13</sup> which came into effect on 18 April 2016. Most of the changes were due to the need for a correct and complete transposition of the requirements of the procurement directives. The main benefits of the new legal regulation are summarised by the Office for Public Procurement as follows:<sup>14</sup>

- accelerating and streamlining the public procurement process, including reduction in administrative burden, for example, through digitalisation of individual procedures and process stages, with greater emphasis on the use of qualitative criteria in tender evaluation (the most economically advantageous tender);
- strengthening transparency and fight against corruption;
- supporting the drawing of EU funds;
- supporting the business environment, especially the greater integration of small and medium-sized entrepreneurs or regional contractors;
- the need to deal with the application problems faced by contracting authorities, participants in procurement procedures and other stakeholders during the effective period of the old law.

Unlike the old legislation, the law did not bring any revolutionary changes. Public contracts are categorised using the above amount as above-threshold, below- threshold and low-value contracts.

Rules for awarding **above-threshold public contracts** the estimated value of which is equal to or exceeds the threshold set at the EU level are based on the harmonised requirements of EU directives.

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<sup>12</sup> The SAO focused on the implementation of the calls within the programming period 2014–2020 by selected ministries and state contributory organisations. Other risk factors presented by the SAO include an insufficient or only formal internal control system, a lack of qualified evaluators with regard to highly specialised areas of evaluation, failure to meet deadlines, etc. Details of the audit findings are available at <https://www.nku.gov.sk/documents/10157/749295/Transparentnos%C5%A5+procesov+a+%C4%8Dasov%C3%A1+tiese%C5%88+s%C3%BA+naiv%C3%A1%C5%BEnej%C5%A1ie+probl%C3%A9my+pri+%C4%8Derpan%C3%AD+eurofondov/1615991e-954f-48ac-beba-85b092f60ccc>.

<sup>13</sup> The current version of the law in the Slovak language is available at <https://www.slov-lex.sk/domov>.

<sup>14</sup> See the document Main Benefits of the New Public Procurement Act of the Office for Public Procurement available at <https://www.uvo.gov.sk/uvod/aktualne-temy-2a8.html?id=42>.

**Below-threshold public contracts**<sup>15</sup> are defined by the law using the upper limit, which is a threshold set at the EU level, and the lower limit, which is a threshold the amount of which varies depending on the subject of the public contract (delivery of goods, provision of a service or execution of works) and the fact whether or not they are commonly available goods, services and works. The law also provides certain guidance for determining the *common availability on the market*. These are goods, works or services of a consumer nature or those satisfying the normal operating needs of the contracting authority which are not subject to specific or unique requirements of the contracting authority and further modifications and are therefore also available in this form to ordinary consumers or other market participants.

The lower limit of the threshold for below-threshold public contracts is as follows:

- EUR 15,000 for a public contract for commonly available goods, services (other than social, cultural, medical and other specific services) or works;
- EUR 50,000 for a public contract for goods or services other than commonly available goods (except for food supply contracts as set out below) or services (except for social and other specific services specially listed by the law);
- EUR 200,000 for a food supply contract for school facilities, facilities for the elderly, social service homes or other similar establishments if they provide meals, or for a public contract for social and other services specially listed by the law;<sup>16</sup>
- EUR 150,000 for a public contract for works other than those commonly available on the market.

Another, purely national category, consists of **low-value contracts** whose estimated value during the calendar year or during the valid period of the contract (concluded for a period longer than one year) does not reach the above thresholds for the contract to be qualified as a below-threshold contract. In the case of low-value contracts **with a value exceeding EUR 5,000**, contracting authorities are **obliged to publish on a quarterly basis a summary report on such contracts** for the previous calendar quarter, specifying in particular the value of the public contract, its subject and identification data of the selected contractor. Even in the case of low-value contracts, contracting authorities should proceed in such a way to ensure that the incurred costs of the subject of the contract are proportionate to its quality and price.

In addition to the requirements laid down in the classical procurement directive, the law also applies the statutory regime to public contracts subsidised by contracting authorities by more than 50%, even if the estimated value of the subsidised public contract does not reach

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<sup>15</sup> The law distinguishes whether it is a civilian public contract or a defence and security public contract; the thresholds for this area are different.

<sup>16</sup> The original threshold of EUR 40,000 was increased by an amendment that came into force in November 2017. The amendment also removed the obligation to award below-threshold public contracts for commonly available goods, services or works only through the so-called electronic marketplace, i.e. using the auction procedure through the public administration's information system managed by the Ministry of the Interior. An overview of the major changes is available at <http://www.voportal.sk/navrh-novely-z-dielne-most-hid/>.

the thresholds specified in the directive or, as the case may be, such contracts are not public contracts for works and services related thereto, which the directive explicitly mentions in this case. Depending on the specific amount of the estimated value of the public contract<sup>17</sup> and its subject, the subsidised entity is obliged to award the public contract under the below-threshold regime or, as the case may be, to adhere to the rules laid down for awarding low-value contracts. For the sake of completeness, the law also applies to public contracts that are subsidised by a contracting authority by less than 50% and, simultaneously, reach the thresholds laid down by the law.<sup>18</sup>

The Act does not fundamentally change the conditions for using the existing types of procurement procedures. Following the example of European procurement directives, the list of procedures is complemented by the use of competitive dialogue and innovation partnership.

In line with the requirements of the directives, the law prefers to use **the criterion of the most economically advantageous tender**. In this area, contracting authorities had the opportunity in 2017 to complete a number of training sessions in order to better integrate the use of this evaluation criterion in public procurement in construction and health care. However, in other sectors, the lowest tender price remains the most widely used evaluation criterion (according to the Commission's data published within the European Semester, this criterion was used in 92% of the contracts awarded).

The law also assumes **full e-procurement**, which was to be originally carried out in two steps, namely by 18 April 2016, in connection with centralised public procurement, dynamic purchasing systems, electronic auctions and catalogues, and by 1 April 2017, i.e. the deadline for full digitalisation of all processes and processes. Following this, the Office for Public Procurement prepared the **Electronic Public Procurement Strategy**,<sup>19</sup> presenting a proposal for the functioning of electronic procurement also with regard to the need to integrate individual public procurement systems. However, in 2017, the use of the central system for electronic public procurement (EVO), managed by the Office for Public Procurement, only reached 4%.<sup>20</sup> A more used portal was the public administration's information system or, more precisely, an electronic tool for automated public procurement of commonly available goods, services and works (in particular due to the mandatory use of the electronic marketplace by contracting authorities), i.e. the EKS electronic contracting system managed

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<sup>17</sup> The thresholds differ depending on the subject of the public contract (goods, services or works), and their amounts range from EUR 40,000 to EUR 400,000.

<sup>18</sup> However, the forthcoming comprehensive amendment to the law should also regulate this area and narrow the legislation only to entities subsidised by more than 50%, as laid down by the EU regulation. Further information on the planned amendment is available at <http://www.vo-portal.sk/navrhovane-zmeny-velkej-novely-zakona/>.

<sup>19</sup> The text of the Electronic Public Procurement Strategy is available at <https://www.uvo.gov.sk/informacny-servis/strategia-elektronickeho-verejneho-obstaravania-54c.html>.

<sup>20</sup> According to the Commission's conclusions relating to the Slovak Republic within the European Semester for 2017, available at [https://ec.europa.eu/info/sites/info/files/2017-european-semester-country-report-slovakia-en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/2017-european-semester-country-report-slovakia-en_0.pdf). The EVO portal is available at [https://evo.gov.sk/evo/ethics.nsf/public\\_tenders2!OpenView](https://evo.gov.sk/evo/ethics.nsf/public_tenders2!OpenView).

by the Ministry of the Interior. In connection with the EKS, the Commission questioned the nature of this system and its mandatory use by contracting authorities even in the case of below-threshold contracts (already cancelled), given the missing mechanism for detecting collusive practices<sup>21</sup> and dumping tenders or other problems of technical nature. In addition, in awarding below-threshold public contracts, the EKS only allows awarding based on the lowest tender price. In addition, within the audit focus on the economic aspects of using the EKS system, the SAO negatively evaluated the fragmentation of electronic procurement methods, where the EKS is not managed by a specialised public administration body in public procurement (Office for Public Procurement) but by the Ministry of the Interior and, for the future, it recommended that the management of the EKS (as a subsystem for public procurement of commonly available goods, services and works) be transferred to the Office for Public Procurement.<sup>22</sup> Therefore, in the coming years, Slovakia will have to improve the interconnection of the individual systems in line with the “once only” principle in order to eliminate the administrative complexity and the need to publish relevant information manually in multiple information systems.

Although **joint** or **centralised public procurement** is not new from the point of view of procurement directives, it is not a frequently used tool for some Member States, including the Czech Republic. However, the Commission relies on this instrument as one of the possible measures to reduce the scope or administrative complexity of the procurement process.<sup>23</sup>

***Example: Centralised public procurement in health care***

In the field of health care, the Ministry of Health has in recent years sought to increase the share of centralised public procurement in connection with purchasing medical supplies for hospitals set up by the Ministry, where the Ministry also tries to make greater use of qualitative criteria in evaluating tenders. At the end of 2015, the Ministry introduced new rules for purchasing medical devices based on benchmarking of their prices. The commencement of a public procurement process in individual hospitals is subject to the prior approval of the Ministry and the obligation to compare the prices of medical devices

<sup>21</sup> In addition to the persistent problem related to the space for the occurrence of collusive practices (for example, in the case of “tailored” contracts where multiple affiliated contractors submit their tenders), other problems such those related to flexible end auctions for public service or works contracts (“turning off” the auction by the contracting authority at a predetermined time even if there is room for further price reduction) or fictitious overestimation of savings in relation to the EKS towards the public can be pointed out. More information on the EKS is available at <https://dennikn.sk/blog/772459/elektronicke-trhovisko-milacik-ministra-r-kalinaka-preslo-pozitivnymi-zmenami/>.

<sup>22</sup> The report on the results of the audit activity conducted by the SAO of the Slovak Republic is available at <https://www.nku.gov.sk/documents/10157/166625/Spr%C3%A1va+o+v%C3%BDsledkoch+kontrolnej+%C4%8Dinnosti+N%C3%A1zor+SR+za+rok+2017/231e9dfe-2189-46fd-8ee3-6a2ed10b80b5?version=1.0>. In addition, the SAO recommended, for example, that the possibility of awarding works using this form be cancelled, that its transparency be increased and that this method of public procurement be formalised, including better methodological support.

<sup>23</sup> Conclusions from an interview with Jaroslav Kračún from the Commission (DG GROW). In Veřejné zakázky v praxi. 2017, 1/V, pp. 8–13. ISSN 1805-8523.

with the average prices contained in the Ministry's database. Initially, the pilot project focused on purchases of devices the value of which exceeded EUR 50,000. Gradually, this threshold was reduced to EUR 20,000, and the Czech market was also included in the price comparison. Although the results of the project were evaluated positively, successful implementation in practice is conditioned by improvement in the financial situation of individual hospitals. According to the Commission's latest evaluation, however, the share of joint public procurement in Slovakia is only 5%.

The law now explicitly regulates the possibility to use a **preparatory market consultation** involving independent experts or market participants. These may provide advice or assistance in preparing a public contract, but the contracting authority is then obliged to take the necessary measures to avoid any potential distortion of competition. The law in this case does not go beyond the directive, only demonstrating the necessary provision of information to other candidates or tenderers.

In connection with **awarding above-threshold public contracts co-financed from EU funds**, the law regulates the **possibility of ex ante assessment of the documentation** and, simultaneously, introduces the **mandatory inspection of such contracts by the Office for Public Procurement before concluding a contract** on the initiative of the contracting authority. The subject of the ex ante assessment, which is a preventive measure aimed at detecting potential shortcomings, may include, in particular, notices used to initiate the procurement procedure, procurement materials or calls for tenders, except for technical conditions. In addition, the Office for Public Procurement publishes a notice on the compliance or non-compliance of the documents thus assessed on its website. However, in connection with the mandatory inspection, the Commission has pointed to the time-consuming nature of the entire process, which could affect the effective drawing and absorption of EU funds. Instead, it recommends creating a checklist of individual steps and further training of responsible staff.

Furthermore, contracting authorities are **obliged** by the law **to make references** according to the model form which are then collectively registered in electronic form in the publicly accessible **register of references**, i.e. the public administration's information system managed by the Office for Public Procurement. These contain, inter alia, an evaluation of the quality of the performance under the statutory criteria (for example, early termination of a contract, total time of delay by the contractor, number of complaints reasonably filed) and the final evaluation score from 0 to 100. In evaluating the fulfilment of the conditions of participation in the procurement procedure, contracting authorities are obliged to take account of the contractor's reference entered in the register of references.

Originally, the law also imposed on contracting authorities the obligation to uncover contractors' ownership structure to the last natural person. Legal entities or natural persons with an unclear ownership structure were not allowed to participate in procurement procedures. In practice, however, this institute caused application problems.

Subsequently, the law was amended and the mechanism for proving the ownership structure was simplified by creating a publicly accessible register of end users of benefits, containing data on natural persons or, as the case may be, partners or shareholders with a share in the registered capital or voting rights or other persons with significant control in the companies involved in the public contract, which was managed by the Office for Public Procurement until the end of January 2017. A new, publicly accessible **public sector partner register** was established in 2017 as the public administration's information system managed and operated by the Ministry of Justice. Its purpose is to uncover the ownership and management structures of persons who enter into contractual relations with the public sector. The register also contains the information of whether or not the end user is a public official. When awarding a public contract, contracting authorities are prohibited by the law to conclude a contract with a person who is not entered in the register although he/she is obliged to do so. Breach of this prohibition is sanctioned by a fine of up to 5% of the contractual price.

As an example of good practice, the Commission positively evaluated the establishment of the **central register of contracts**, keeping records of not only contracts concluded as part of public procurement but of all contracts concluded in writing since 2011 if one of their contracting parties is one of the obliged entities within the meaning of the Act on Free Access to Information and, simultaneously, if it is a contract related to the handling of public funds, including EU funds. Any contracts concluded by a municipality or a higher territorial unit and their budgetary or contributory organisations or other obliged entities in which they have a share of more than 50% are published directly on the website of the entity concerned or, as the case may be, its founder or in the Commercial Journal.

### ***Conclusion***

In public procurement, Slovakia has started to modernise the legislative framework and its implementation in practice in recent years. Compared to the Czech Republic, Slovakia has longer experience with the application of certain measures aimed at increasing transparency and fighting corruption within public procurement, such as the mandatory publication of contracts on the Internet as an anti-corruption measure introduced as early as 2011 and the gradual digitalisation of public procurement. In addition, the thresholds laid down at the national level for the below-threshold regime allow the application of a procedure at least partially formalised by the law at lower public contract values than in the Czech Republic.

From the point of view of public contracts financed from EU funds, specific institutes such as a control mechanism before the actual conclusion of the contract which aim at minimising or eliminating potential discrepancies subsequently identified by the national audit authority (SAO) or by the Commission can be mentioned as a good practice.

It is also possible to highlight the gradual introduction of aggregated public procurement with the application of the criterion of the most economically advantageous tender at least in some sectors (for example, in health care).

However, in connection with health care, it can be pointed out that, given the long-term unsatisfactory financial health of individual hospitals and the specific subsidy conditions set for drawing EU funds by the Ministry of Health for the submission of applications for irrecoverable financial contribution, for example, for infrastructure modernisation, reconstruction or improvement of care or equipment and technology, the real possibility for indebted hospitals to draw finance from these funds is limited or completely excluded.<sup>24</sup>

Slovakia continues to face relatively frequent occurrence of non-transparent procedures in public procurement, increased risk of corruption and violation of the principle of non-discrimination. The process of public procurement and drawing of EU funds is associated with higher administrative demands and not always effective set-up of individual processes. With regard to the drawing of EU funds, the existing ex ante control mechanism is a time-consuming process where simplification can be considered in the future.<sup>25</sup> Certain gaps can also be seen in connection with e-procurement, offering space for further reduction of administrative burden and better integration of data from the existing systems in line with the “once only” principle and allowing more efficient work with open data.

The currently discussed amendment to the Public Procurement Act brings the recommended simplification of public procurement, making it more efficient, but it also increases by a third the value of public contracts for which it will not be necessary to initiate a procurement procedure and to comply with the minimum statutory time limits or standard statutory procedures for public procurement. According to Transparency International Slovakia, up to three quarters of the value of public contracts awarded by towns or cities and municipalities will not need to be subjected to tendering within a procurement procedure.<sup>26</sup> Therefore, a further reduction in the transparency of public procurement and control can be expected.

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<sup>24</sup> This approach has also been criticised by trade unions. More detailed information on this issue can be found at <https://vzdravotnictve.sk/loz-uchadzat-sa-eurofondy-moze-iba-niekolko-nemocnic/>.

<sup>25</sup> The intention to simplify the process of controlling public procurement in drawing finance from EU funds was presented by representatives of the Office for Public Procurement to the Commission in April 2018, see <https://www.uvo.gov.sk/uvod/aktualne-temy-2a8.html?id=315>.

<sup>26</sup> The risks associated with the amendment to the Public Procurement Act were pointed out by Transparency International Slovakia in May 2018, more detailed information can be found at <http://transparency.sk/sk/obmedzenie-verejnej-sutaze-obecnych-nakupov/>.

## **ROMANIA**

According to OECD's data, the volume of funds spent in Romania for public procurement is 11% of GDP.<sup>27</sup> Since joining the EU, Romania has been among the EU best performers in terms of investment as percentage of GDP (22.7% in 2016), but in recent years it has experienced a slight decline in public investment due to its poor quality as a result of deficiencies in the economy, frequent changes in priorities and a slow start in the use of EU funds for the programming period 2014–2020.<sup>28</sup>

Romania has faced corruption, which, according to recent findings regarding the perception of corruption by the business environment, is considered to be the main obstacle to business (85%). A relatively large percentage of participants in procurement procedures mention corruption as the reason for their failure in the procurement procedure they participated in (62%) or as the reason for the restriction of competition (93%).<sup>29</sup> With regard to public procurement, corruption is perceived by up to 80–83% of respondents as common among public authorities at the regional or local level. In connection with corruption, a large percentage of respondents particularly point to the expansion of clientelism and nepotism (82%) and bribery (54%). What is also criticised is the existence of a close link between the business sector and politics, which creates the prerequisites for the emergence of a potentially corrupt environment or excludes entities without such links from competition.

Based on the findings published in Flash Barometer 457 in December 2017 in connection with public procurement, the business environment points to the following widespread illegal practices in public procurement:

- ambiguous criteria for selecting contractors or unclear evaluation criteria (70% of respondents);
- existence of conflict of interest in tender evaluation (67% of respondents);
- influencing tenders or fraudulent manipulation of tenders (collusive bidding, 69% of respondents);
- misuse of procurement procedures with a negotiation element or extreme urgency for the use of procurement procedures with limited competition or accelerated procedure (64–69% of respondents);
- change in a contractual obligation after the contract has been concluded (52% of respondents).

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<sup>27</sup> The Commission's study published in 2017 on improving the quality of public procurement financed from the ESIF – Romania's profile is available at [http://ec.europa.eu/regional\\_policy/sources/policy/how/improving-investment/public-procurement/study/country\\_profile/ro.pdf](http://ec.europa.eu/regional_policy/sources/policy/how/improving-investment/public-procurement/study/country_profile/ro.pdf).

<sup>28</sup> These are the conclusions resulting from the last evaluation of Romania within the European Semester in 2018, available at <https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-romania-en.pdf>.

<sup>29</sup> The Corruption Perceptions Index (CPI) for 2017 is 48/100 for Romania, with no year-on-year improvement compared to 2016 (for comparison: the EU average is 65/100), see: [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017](https://www.transparency.org/news/feature/corruption_perceptions_index_2017).

Furthermore, Romania is among the Member States with the highest occurrence of discrepancies in connection with the drawing of finance from EU funds and is therefore repeatedly a frequent addressee of OLAF's recommendations. The most frequently occurring discrepancies are restrictively set criteria for selecting contractors.

In 2014, within specific recommendations for the individual Member States, the Council of the EU criticised Romania for the low level of drawing of EU funds due to long-term shortcomings in the system of management, control and method of awarding public contracts. In addition to the above shortcomings in public procurement, the Council of the EU pointed to the instability and incoherence of the national legislative framework for this area, insufficient strategic planning and ambiguous definition (or even overlapping) of the political priorities and powers of the state authorities concerned, as well as insufficient methodical support provided to contracting authorities. For the period 2014–2015, Romania was recommended to accelerate the drawing of EU funds, to strengthen the management and control system, to remove persistent shortcomings in public procurement, to streamline and improve the judicial system and to strengthen the fight against corruption.<sup>30</sup>

Regarding the percentage of public contracts awarded in a non-competitive environment, Romania was above the critical threshold of 10% in 2014–2016. According to the Commission's current data published within the European Semester, this share rose to 17% in 2017.

### ***Characteristics of the legislative framework with regard to some reform elements***

Following the above recommendations of the Council of the EU, an action plan was prepared, identifying the various steps leading, *inter alia*, to the approval of the **National Strategy for Public Procurement** for 2015–2020 in 2015, covering the gradual reform of the public procurement system. The strategy also includes a list of specific measures.

One of them envisages completion of the transposition of European public procurement rules, with **Public Procurement Act No. 98/2016**<sup>31</sup> and a set of other secondary regulations forming the transposition regulation of the classical procurement directive. Contrary to previous legislation, European directives were transposed by adopting a wider package of legislation – in addition to the law transposing the requirements of the classical procurement directive, by a separate law for utilities public contracts, concessions, defence and security public contracts, and the law for remedies and the review of public

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<sup>30</sup> See the Council Recommendation on the National Reform Programme 2014 of Romania and delivering a Council opinion on the Convergence Programme of Romania, 2014, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014H0729%2821%29>.

<sup>31</sup> The English version of the law is partly available through the Public Procurement Guide, prepared by the Ministry of Public Finance and the National Agency for Public Procurement, available at <https://www.achiziitiipublice.gov.ro/home>.

procurement.<sup>32</sup> The special law for awarding public contracts financed from EU funds is complemented by tertiary legislation issued through extraordinary government decrees.<sup>33</sup>

The general regulation provides for the obligation to award a public contract within a procurement procedure with the mandatory publication of a notice in the Official Journal of the EU if the estimated value reaches the values set at the EU level by the Commission. The law is also applicable to the procedure in awarding public contracts whose estimated value does not reach the harmonised limits set by the Commission but exceeds the following **national thresholds** (exclusive of VAT) whose approximate value in EUR is:

- EUR 29,000 (RON 132,519) for public goods and services contracts;
- EUR 97,000 (RON 441,730) for public works contracts.

In this case, a **simplified procurement procedure** is applied, where the contracting authority is obliged to comply with the **basic principles** of public procurement, i.e. prohibition of discrimination, equal treatment, mutual recognition (in particular for different certificates issued in another Member State), transparency, proportionality and accountability, and may shorten the time limits for individual procedural steps or utterly reduce formal procedures within procurement. The law lays down the obligation to publish a notice of the initiation of a procurement procedure in the national electronic system for public procurement (SEAP).

If the estimated value of a public contract does not reach the above limits, the contracting authorities may award the public contract directly. Even in such a case, contracting authorities may implement the award of a public contract electronically, using the SEAP.

The law allows contracting authorities to award a public contract through one of the following **types of procurement procedures**: an open or restricted procedure, a competitive dialogue if the conditions laid down by the law have been met, a negotiated procedure without publication or with publication, a design contest or, as the case may be, a special procedure in the case of public procurement for social and other specific services. It is now possible to use an innovation partnership. In the case of public contracts which do not reach the European thresholds, contracting authorities use a simplified procedure or direct award provided that the estimated value is below the thresholds set at the national level.

In line with the requirements of the EU regulations, the **criterion of the most economically advantageous tender** has been introduced as the preferred criterion for tender evaluation, because it makes it possible to better take into account, for example, the quality/price ratio. Paradoxically, however, in practice it is possible to encounter cases where the Romanian Court of Accounts, in inspecting the management of public funds, imposed fines on

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<sup>32</sup> For an overview of relevant legislation, see [https://www.juridice.ro/540534/the-reform-of-the-european-legislation-in-the-field-of-public-procurement-and-its-recent-transposition-in-the-romanian-law.html#\\_ftn31](https://www.juridice.ro/540534/the-reform-of-the-european-legislation-in-the-field-of-public-procurement-and-its-recent-transposition-in-the-romanian-law.html#_ftn31).

<sup>33</sup> It is worth mentioning that Romania was criticised by the Commission for adopting some EU rules in the form of extraordinary government decrees, the approval of which is not subject to the standard legislative process with the participation of the parliament.

contracting authorities in some cases for using a criterion that also takes into account the qualitative aspects of the public contract, pointing to inefficient use of public funds.<sup>34</sup>

Romania is among the Member States with relatively many years of experience using **electronic public procurement** although the system does not allow the full use of all features envisaged by full digitalisation. Since 2010, contracting authorities have been obliged to award public contracts electronically up to 40% of the total volume of public contracts awarded (including direct awards). Full digitalisation of public procurement (e-Submission) is expected in 2018.<sup>35</sup> Support for the use of electronic public procurement was also declared by the National Strategy on Digital Agenda for Romania by 2020 as one of its goals in implementing e-Government.<sup>36</sup> In 2014, Romania launched a modernised national electronic portal for public procurement (SEAP), which is gradually complemented with new features, currently in connection with the introduction of a single procurement document (ESPD) and an online procurement documents database (e-Certis). The extent of using the electronic form in public procurement was also positively perceived by the Commission in the latest comprehensive review of the public procurement quality. However, criticism from the general public points to the technical problems and incompleteness or inconsistency of data in individual systems, which prevents effective control not only by supervisory state authorities but also by the general public.

### ***Conclusion***

Romania formally transposed the requirements of the procurement directives and, in line with the Commission's recommendations, strengthened the area of longer-term strategic planning for the coming years in public procurement, identifying specific measures for improvement. In the coming years, modernisation of the public procurement system should be accompanied by the further professionalisation of the staff. In this regard, the web-based Public Procurement Guide can be mentioned as an example of good practice; it was prepared by the Ministry of Public Finance and the National Agency for Public Procurement, and should facilitate the process of planning, preparation and implementation of public procurement in individual stages for contracting authorities. Positive is also the advanced stage of e-procurement, despite persistent shortcomings, in particular related to the insufficient integrity of individual systems, data quality and the possibility of further use of data by the general public.

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<sup>34</sup> This fact is pointed out by the study carried out in 2017 for the OLAF (*Money and politics: the links between public procurement and political parties*); in the future, this approach could have a negative impact, for example, in implementing innovative public procurement. The study is available at <http://expertforum.ro/en/files/2017/09/EFOR-PB-61.pdf>.

<sup>35</sup> See PwC's e-Procurement Uptake study carried out in 2015 for the Commission, p. 18, available at <https://ec.europa.eu/docsroom/documents/10050/attachments/1/translations>.

<sup>36</sup> See the National Strategy on Digital Agenda for Romania (2014 version), available at <https://www.trusted.ro/wp-content/uploads/2014/09/Digital-Agenda-Strategy-for-Romania-8-september-2014.pdf>. The strategy envisaged the use of the electronic form of public procurement up to 60% in 2014.

Unlike the Czech Republic, Romania envisages lower thresholds in applying the statutory regime; however, as some experts have pointed out, the automatic extension of the rules for both the above-threshold regime to the below-threshold regime (in particular for EU-funded public contracts) increases, in some cases, the administrative complexity of the entire process, causing delays in drawing EU funds. On the other hand, in the case of Romania, also in view of the persistent occurrence of corruption risks in public procurement, this approach is understandable, because it minimises the space for discretion on the part of individual contracting authorities and, thus, the space for the occurrence of corrupt practices.

## SLOVENIA

According to the OECD'S data, the proportion of public contracts awarded by contracting authorities is around 13% of GDP.<sup>37</sup> Slovenia presented a rather ambitious plan for the modernisation of the public administration in 2015, following the evaluation and recommendations within the European Semester, when the **Public Administration Development Strategy 2015–2020** was approved by the Slovenian government.<sup>38</sup> In addition to the need to transpose the new procurement directives, the Strategy set the following key objectives:

- simplification and streamlining of processes with emphasis on greater flexibility;
- gradual transition to full e-procurement at all its stages.

Slovenia has been criticised for the high level of corruption risk in connection with public procurement. The risk associated with the occurrence of certain practices, such as the deliberate division of public contracts to avoid legal requirements, the existence of conflicts of interest, breaches of competition rules, the occurrence of tailored contracts, collusive practices, nepotism and insufficient inspection of the performance of public contracts, are not uncommon. Modernisation of public administration should therefore also focus on the implementation and strengthening of anti-corruption measures in the coming years. These include, in particular, measures to increase transparency of processes, more extended standardisation of certain operations and forms, and emphasis on greater use of centralised procurement.

The gradual implementation of individual measures and their practical benefits have been positively evaluated by the Commission for several years now. As part of the European

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<sup>37</sup> This is also the average level in the OECD countries. See OECD Government at a Glance – 2017 edition: Public procurement, available at <http://stats.oecd.org/Index.aspx?QueryId=78413#>.

<sup>38</sup> The English version of the Public Administration Development Strategy 2015–2020 is available at [http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/JAVNA\\_UPRAVA/Kakovost/Strategija\\_razvoja\\_JU\\_2015-2020/Strategija\\_razvoja\\_ANG\\_final\\_web.pdf](http://www.mju.gov.si/fileadmin/mju.gov.si/pageuploads/JAVNA_UPRAVA/Kakovost/Strategija_razvoja_JU_2015-2020/Strategija_razvoja_ANG_final_web.pdf).

Semester for 2018, the Commission recommended Slovenia to focus on the following areas in public procurement:<sup>39</sup>

- **Strengthening competition:** The Commission repeatedly points to the higher percentage of procurement procedures with only one tender and the use of closed procedures, notably the negotiated procedure without publication. However, as can be inferred from the data available for 2016, the percentage of contracts awarded in this type of procurement procedure displays a decreasing trend. Insufficient competition in connection with public procurement reduces the overall quality of tenders and performance, which results in a negative impact on innovative public procurement and, in some sectors (particularly ICT), leads to the vendor lock-in effect.
- **Professionalisation of public procurement staff:** This shortcoming is also pointed out by the Slovenian Court of Audit, which also focuses on auditing the management of public funds in inspection audits. In its report, the Court of Audit points to the most common cases of misconduct in public procurement, including breach of the principle of equal treatment or distortion of competition between contractors, failure to exclude a tender which does not meet the conditions laid down by the contracting authority, only a general evaluation of tenders, substantial changes to the contract compared to its original draft and changes in the procurement documents after the deadline for submitting tenders.<sup>40</sup>
- **Reducing the risk of corruption and strengthening the independence of supervision:** Generally, the degree of perception of corruption as the main obstacle to business has decreased in the business sphere, but the perception of the risk of corruption in connection with public procurement remains at a level higher than the EU average. According to the findings published in Flash Barometer 457 in December 2017, corruption is perceived as a barrier to business by 35% of respondents in the business environment; compared to 2015, there was a decrease by 22%. Up to 77% of respondents perceive corruption as a widespread problem across countries, and 44% of respondents point to corruption in connection with their failure in a procurement procedure. Examples of the most frequently used corrupt practices include tailored contracts, the existence of conflicts of interest in evaluating tenders and influencing or manipulating tenders (collusive bidding). The probability of sanction in the event of corrupt practices is low, according to the business environment. In connection with the supervision of the public procurement process, the Commission criticises the absence of sufficient safeguards for the supervisory body to be perceived as truly independent.

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<sup>39</sup> The Commission's conclusions addressed to Slovenia in relation to public procurement published within the European Semester 2018 are available at <https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-slovenia-en.pdf>.

<sup>40</sup> See the Court of Audit's report for 2015, available at [http://www.rss.si/rsrs/rsseng.nsf/V/K145E333A26EC8194C12580AD004F97B0/\\$file/Letno\\_2015\\_ang.pdf](http://www.rss.si/rsrs/rsseng.nsf/V/K145E333A26EC8194C12580AD004F97B0/$file/Letno_2015_ang.pdf).

### ***Characteristics of the legislative framework with regard to some reform elements***

As with other Member States, Slovenia decided to adopt a completely new law to transpose the procurement directives. When adopting a new law, a public debate took place among interested professionals, criticising, *inter alia*, a higher degree of flexibility introduced by the law in public procurement (for example, in connection with the implementation of new types of procurement procedures or procedures including the element of negotiation with contractors) based on the trend set by the new directives.<sup>41</sup> This flexibility entails higher demands on the expertise of individual contracting authorities, and Slovenia has faced a low level of professionalisation of contracting authorities, which is accompanied by a higher rate of misconduct in the implementation of individual procedures. The criticism by the professional public concerned the practical application of the law rather than the text itself, which formally reflects the requirements of the directives.

The transposition of the EU procurement directives took place in Slovenia with the adoption of new **Public Procurement Act No. 91/2015** (hereinafter referred to as "ZJN-3" or the "Act"),<sup>42</sup> which came into effect on 1 April 2016. Furthermore, the Act is implemented by a set of secondary regulations that detail the various aspects of procurement, such as a set of information to be published for below-threshold public contracts, public procurement with regard to the environment, as well as procedures in using the electronic auction. What was also new was the chosen method of transposing both procurement directives (except for the concession directive) into a single law, because the rules relating to utilities procurement were laid down in a separate law in the past.

From a formal point of view, the Act is based on the requirements of the directives, introducing a higher degree of flexibility and simplification of procedures for awarding public contracts or shortening time limits for individual procedural acts into practice. Compared to the previous law, the **criterion of the most economically advantageous tender** is set as the basis for the evaluation of tenders, but without a more detailed methodology for practical application.

In addition to public contracts the estimated value of which exceeds the thresholds set at the EU level, ZJN-3 also applies to the awarding of public contracts with an estimated value below the EU thresholds, with a value exceeding the statutory **national thresholds** the amount of which for contracting authorities is as follows:

- EUR 20,000 (exclusive of VAT) for public supply and service contracts<sup>43</sup> or for design contests;

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<sup>41</sup> See Peter Ferk's article The New Slovenian Public Procurement Act (ZJN-3). *Procurement & Pub. Private Partnership L.* Rev. 142 (2016), p. 142.

<sup>42</sup> The English version is available at [http://www.djn.mju.gov.si/resources/files/Predpisi/ZJN-3\\_ang\\_prevod.pdf](http://www.djn.mju.gov.si/resources/files/Predpisi/ZJN-3_ang_prevod.pdf). The above does not apply to the concession directive, because in Slovenia's case the EU law infringement procedure (non-communication procedure) entered the stage of submission of the matter to the EU Court of Justice in December 2017.

<sup>43</sup> Except for some social or other specific services for which the EU threshold of EUR 750,000 is relevant.

- EUR 40,000 (exclusive of VAT) for public works contracts.

If the estimated value of a public contract exceeds the above national thresholds, the contracting authority is obliged to publish a notice of the commencement of a procurement procedure on the national portal for public procurement; however, public works contracts with an estimated value exceeding EUR 500,000 are subject to the obligation to publish a notice also in the Official Journal of the EU. Contracting authorities may use a **simplified procedure**, including the possibility of negotiating with contractors, when awarding such public contracts. The simplified procurement procedure also allows the use of a single procurement document (ESPD) or other similar certificate to demonstrate compliance with the conditions for participation in the procurement procedure. In addition, the Act provides contracting authorities with more flexibility regarding time limits.

With regard to **awarding public contracts whose value does not reach the above national thresholds**, the Act requires contracting authorities to **comply with the principles of economy, efficiency and effectiveness and the principle of transparency**. This is reflected in the setting of other specific obligations applicable to public contracts below national thresholds, such as the obligation to proceed in accordance with the criterion of the most economically advantageous tender in evaluating tenders and the obligation to keep records and to publish information on the public contracts awarded. With regard to these contracts, in order to increase transparency, ZJN-3 also imposes on contracting authorities **the obligation to publish on their websites or on the national portal a list of all public contracts awarded in the previous year if their estimated value exceeds the threshold of EUR 10,000**. Such publication should include information on the subject of the public contract, the value of the contractual performance and the name of the contractor.

The Act also envisages the gradual introduction of the electronic form of the public procurement process using the e-JN electronic tool, with the assumption of **complete digitalisation of the procurement process** from 1 April 2018. In the case of centralised procurement through the central contracting authority, this obligation has been laid down since 1 January 2017. Although in 2016 the Commission still called on Slovenia to be more active in commencing e-procurement, the extent of progress in this area was assessed positively by the Commission in the latest evaluation, particularly in connection with the preparedness for using a single procurement document (ESPD). According to the reform programme prepared by the Slovenian government for 2017–2018,<sup>44</sup> intensive digitalisation of public procurement should continue to be conducted by supplementing new modules (including by extending the products offered in the electronic catalogue for the purposes of the electronic auction, the use of which is mandatory for contracting authorities, or joint procurement) and by completing the Statist project, aimed at enhancing transparency in connection with the collection of public procurement data, as one of the e-JN features. In operation since 2016, this tool enables the general public to collect data on public contracts

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<sup>44</sup> National Reform Programme 2017–2018, available at <https://ec.europa.eu/info/sites/info/files/2017-european-semester-national-reform-programme-slovenia-en.pdf>.

(with an estimated value exceeding the above national thresholds) implemented through the national portal of public contracts awarded since January 2013, including extensive search with different filtering capabilities and the possibility to export data in different formats.

***Example: Transparent ERAR platform***

One of the internationally successful measures implemented in Slovenia to increase transparency not only in public procurement but in public sector spending in general is the ERAR web application (formerly known as SUPERVIZOR, allowing data search back to 2003), launched in 2016 as an enhanced version. The application is managed by the Commission for the Prevention of Corruption, which serves to detect conflicts of interest and links between different entities involved in public procurement. In a user-friendly environment, it allows the general public to retrieve, download and analyse data in a machine-readable form regardless of the particular data owner (the data is retrieved from various sources, including the public administration's information systems operated by different government bodies such as the Ministry of Finance). Except for some exceptions, most data is also automatically updated. The public procurement data is retrieved from the national public procurement portal (eNaročanje).

Slovenia has been using **central or joint public procurement** in health care for several years. One of the reasons for supporting its greater use was the discovery of significant differences in the price levels of purchases of drugs and medical supplies by individual hospitals. The Ministry of Health, as the central contracting authority, organises centralised or joint procurement of medical supplies. Joint procurement of drugs, medical devices and tools is also conducted or will be gradually introduced at the level of state-owned hospitals. Based on past experience with aggregated public procurement in health care, a price database has been created where the lowest price in the catalogue is the reference maximum price for the following public contract for similar performance. From the Commission's point of view, however, the share of joint procurement in Slovenia is considered low compared to other EU countries. Yet recent experience has shown that a well-prepared procurement procedure, in particular for purchases of medical devices, may increase the number of tenders submitted by contractors and significantly reduce the tender price. However, given the specific nature of these purchases, the Commission stresses the need for greater involvement of health care experts in the entire process of awarding these specialised public contracts. In connection with the size of the Slovenian market, the Commission also points to the risk of creating the monopolistic position of some contractors or the occurrence of collusive practices on their part, which are not yet successfully and conclusively detected and subsequently sanctioned.<sup>45</sup> The wider use of aggregated public procurement, including its extension to other goods, also remains one of the priorities of the Public Administration Development Strategy 2015–2020.

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<sup>45</sup> For more detail, see the Commission's conclusions addressed to Slovenia concerning public procurement published within the European Semester 2018.

Despite the numerous reform steps, the fight against corruption in procurement procedures is still one of the weaknesses of public procurement, as the Commission has also pointed out. As early as 2011, based on the **Act on Integrity and Prevention of Corruption**,<sup>46</sup> Slovenia stipulated the **so-called anti-corruption clause** as a mandatory part of the contracts concluded within public procurement, making it possible in the event of proving the existence of corrupt behaviour during the term of the contract to declare such a contract invalid from the beginning. In 2015, a two-year anti-corruption programme (Zero Tolerance of Corruption) was introduced within the Public Administration Development Strategy. The programme was evaluated as successful and, in 2017, replaced by a new programme to **ensure integrity and transparency in the public sector**.<sup>47</sup> With regard to public procurement, the following key measures that should be implemented by the end of 2019 can also be mentioned:

- simplification of the review of procurement procedures through digitalisation of the review procedure (possibility to submit an application electronically);
- supplementation of new features on the national public procurement portal (eNaročanje), where all public procurement documentation is kept and which is managed by the Ministry of Public Administration;
- continuing methodological support, training, standardisation, preparation of sample documentation and exchange of good practice (focusing on supporting innovative public procurement in 2018) within the system of preventive measures in order to strengthen the professionalisation of public procurement staff;
- with regard to structural funds, the Arachne tool should also be used by the end of 2018 to identify the risks of fraud, conflict of interest and discrepancies, because Slovenia is one of the Member States which have not yet used this instrument.<sup>48</sup>

### **Conclusion**

In public procurement, Slovenia has been constantly working on the modernisation and innovation of individual processes for many years, particularly aimed at increasing transparency. Compared to the Czech Republic, an active approach to data access for the general public may be highlighted, including measures beyond the requirements of EU regulations, in line with the clearly defined objectives set by the Slovenian government for public procurement. In this context, many years of Slovenia's experience with the operation of transparent platforms (SUPERVIZOR or ERAR in the updated version) which enable the general public to effectively check the management of public funds can be mentioned as an

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<sup>46</sup> The original text of the Act in English is available at <https://www.kpk-rs.si/upload/datoteke/ZintPK-ENG.pdf>. This Act also obliges contracting authorities to prepare integrity plans in order to assess corruption risks in the activities of the authority concerned and to establish measures for the timely detection of such risks, including measures to prevent or eliminate risks.

<sup>47</sup> The Programme of the Government of the Republic of Slovenia to Enhance Integrity and Transparency 2017–2019, available at [http://www.mju.gov.si/en/media\\_room/news/8592/](http://www.mju.gov.si/en/media_room/news/8592/).

<sup>48</sup> See the press release of July 2017, available at [http://www.svrk.gov.si/en/media\\_room/news/6704/](http://www.svrk.gov.si/en/media_room/news/6704/).

example of good practice. It is also worth mentioning the amount of national thresholds from which contracting authorities are obliged to use a formalised procedure in awarding a public contract, in accordance with the requirements of the Act (ZJN-3), or the publication obligation for public contracts with the estimated value from EUR 10,000.

On the other hand, the size of the Slovenian market and the focus of the individual measures only on the national market are a risk factor in public procurement, especially in view of the potentially frequent occurrence of conflicts of interest<sup>49</sup> or collusive practices by interested contractors. In spite of the implementation of a number of measures (such as helpdesk and regular training organised for contracting authorities), Slovenia still displays weaknesses related to the insufficient competitive environment, independent supervision and lower professionalisation of the staff involved in public procurement and the missing fully-fledged professionalisation strategy for the future.

## **ESTONIA**

According to business environment's opinion, Estonia is one of the few Central and Eastern European countries with a lower risk of the occurrence of some of the unfair practices such as tailored contracts, unclear rating criteria and collusive practices in public procurement. According to the conclusions released within Flash Barometer 457 in December 2017, corruption is perceived as a barrier to business only by 16% of respondents from the business environment, despite the fact that up to 52% of respondents generally perceive corruption as a widespread problem in the country. The occurrence of corrupt practices and perception of corruption as a barrier to participation in the procurement procedure are also relatively low. On the other hand, entrepreneurs point to too close links between politicians and entrepreneurs (78%). On average, public procurement as percentage of GDP in Estonia has exceeded 13% in recent years.<sup>50</sup> In addition, the percentage of public contracts awarded in the closed procedure is in an acceptable range, below 10%.

### ***Characteristics of the legislative framework with regard to some reform elements***

After the adoption and approval process lasting more than two years, the new **Public Procurement Act**<sup>51</sup> came into effect on 1 September 2017, transposing the EU procurement directives. The law is further implemented by other secondary legislation. Due to more than one year of delay in transposing the EU public procurement rules, the EU law infringement

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<sup>49</sup> Some problems are also a consequence of a relatively narrow definition of conflict of interest under the Act on Integrity and Prevention of Corruption, which can also be applied as support in public procurement. However, the reform of the anti-corruption measures has not been completed, also given the forthcoming amendment to the Act on Integrity and Prevention of Corruption approved by the government at the beginning of 2018.

<sup>50</sup> Data from OECD Government at a Glance – 2017 edition: Public procurement, available at <http://stats.oecd.org/Index.aspx?QueryId=78413#>.

<sup>51</sup> The English version of the Act is available at <https://www.riigiteataja.ee/en/eli/505092017003/consolidate>.

procedure (non-communication procedure) entered the stage of the Commission's reasoned opinion at the beginning of 2017.

The new law reflects the rules laid down by the EU directives and, in addition to awarding public contracts with an estimated value above the EU thresholds, it also applies to public procurement where the estimated value reaches national thresholds, at least the thresholds for using the simplified procedure (see below). In this respect, the law reduces the administrative burden, because the **national thresholds** have been reduced to the values specified below.

The law lays down a **dual regime for public contracts with an estimated value below the EU thresholds**. If the estimated value of a public contract (exclusive of VAT) reaches the following thresholds, the regime applicable to above-threshold public contracts applies:

- EUR 60,000 for public goods and service contracts, for public contracts for selected social and other specific services<sup>52</sup> or for design contests;
- EUR 150,000 for public works contracts;
- EUR 300,000 for public contracts for selected social and other specific services.<sup>53</sup>

If the estimated value does not reach the above limits, contracting authorities are obliged to award the public contract in a **simplified procedure**, provided that the estimated value of the public contract reaches the following thresholds:

- EUR 30,000 (exclusive of VAT) for public supply or service contracts;
- EUR 60,000 (exclusive of VAT) for public works contracts.<sup>54</sup>

If a public contract is awarded in a simplified procedure, the obligation to publish a notice of its commencement in the national public procurement register (with the exception of the negotiated procedure without publication which may be used if the reasons assumed by the law have been met) also applies. The law permits the possibility of negotiating with contractors if the contracting authority reserves this possibility in the procurement documents. The law lays down certain minimum time limits (for example, for submitting tenders) and the obligation to comply with general principles, or implies similar or appropriate use of the provisions for the above-threshold regime (for example, mandatory verification of the existence of reasons for exclusion of contractors, procedures for concluding or changing a contract), or assumes the obligation to publish information on the cancellation of a simplified procedure in the public procurement register.

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<sup>52</sup> These are the services listed in Annex XIV (Description 6–15) of the classical procurement directive. This threshold also applies to concessions and utilities public contracts for these selected social or other specific services.

<sup>53</sup> These are the services listed in Annex XIV (Description 1–5) of the classical procurement directive. This threshold also applies to concessions and utilities public contracts for these selected social or other specific services, as well as to defence and security services where simplified procurement rules can be used.

<sup>54</sup> This threshold also applies to service concessions and public contracts for the supply of goods or services in the area of defence and security, with the exception of services awarded in this area under simplified rules, as well as to public supply or service contracts awarded by utilities contracting authorities. With regard to public works contracts in the area of defence and security or utilities public works contracts, the statutory regulation is only applied if the threshold of EUR 300,000 has been reached.

As in the Czech Public Procurement Act, the contracting authority is obliged to comply with the statutory procedures if it initiates the procurement procedure with a notice published in the national public procurement register although it was not obliged to do so.

In addition to the general principles for public procurement assumed by the EU directives, the law also includes in the **general principles** the obligation of contracting authorities to avoid conflicts of interest distorting competition, the economic and efficient use of the funds to finance the contract, the obligation to evaluate the contract based on the best tender price/quality ratio, and the obligation to implement a procurement procedure within a reasonable period of time.

Pursuant to the law, contracting authorities are **obliged to prepare internal rules for public procurement** if the total estimated value of their public procurement in the budget year exceeds EUR 80,000 (goods and services cumulatively) or EUR 500,000 (works).<sup>55</sup> Such internal rules should, inter alia, lay down procedures for the procurement of goods, services or works not covered by the statutory regime, or measures concerning the prevention and identification of conflicts of interest and appropriate remedial measures. In addition, the law foresees the possibility of preparing an **annual public procurement plan**. Contracting authorities are also obliged to publish the internal rules and plans on their websites, including the related changes, and to provide a link to them in the public procurement register. If the contracting authority does not reach the above volumes and is therefore not subject to the obligation to prepare internal rules, the law imposes on the contracting authority the obligation to adopt an internal regulation for the prevention and identification of conflicts of interest, as well as appropriate remedial measures. Such a document must be subsequently published.

Estonia relatively successfully implemented **e-procurement** in practice using the electronic public procurement register. The requirement for full digitalisation of the procurement process since October 2018, as required by the EU directives, has therefore been almost completed in Estonia. Estonia is also ready to integrate and use the single procurement document (ESPD) in public procurement.

#### ***Example: Supporting innovative public procurement***

In 2015, within the State as a Smart Customer programme, Estonia introduced an initiative co-financed from EU structural funds, aimed at introducing innovative solutions in public procurement.<sup>56</sup> The initiative was preceded by a sustainability study supplemented by case studies including experience with innovative public procurement from other Member States and recommendations specifically focused on Estonian conditions. Specialised areas such as digitisation of public administration (e-government), health care and construction

<sup>55</sup> For utilities contracting authorities, the total volume of public procurement irrespective of the subject of the public contract is relevant, namely EUR 500,000.

<sup>56</sup> A more detailed description of the initiative, including the sustainability studies and case studies, is available at <https://www.mkm.ee/en/objectives-activities/economic-development-and-entrepreneurship/innovation#state-as-a-smart-customer10>.

were identified as suitable areas for implementing innovative solutions. The initiative is designed as a demand-oriented tool to support both private and public sector activities and was accompanied by initial training sessions and conferences at the beginning to raise awareness among the general public and government about the possibility to request support in implementing innovative solutions. In Estonia, most innovative solutions are implemented in IT or in directly related areas.<sup>57</sup>

In spite of the above-average progress in digitalisation of public procurement, the Commission has for many years been critical of the insufficient consideration of qualitative aspects in the evaluation of tenders, because the **criterion of the lowest tender price** remains the main evaluation criterion for most public contracts.<sup>58</sup> This is probably one of the reasons for the slow integration of the use of innovative solutions in public procurement.

The new law also assumes the use of **central or joint procurement**, and Estonia is above the EU average in aggregated public procurement.<sup>59</sup> As early as 2012, it entered into a partnership agreement with the neighbouring countries on the possibility of **cross-border joint public procurement** of drugs and medical supplies. The first successful joint purchase was made in 2017, followed by another purchase in 2018.<sup>60</sup>

### **Conclusion**

What can be highlighted is Estonia's sophisticated system of public procurement where the emphasis is placed, in particular by contracting authorities, on the existence of transparently published internal rules for public procurement and its preliminary planning. Even in the case of lower volumes of public contracts awarded, contracting authorities are obliged to adopt internal rules at least to address conflicts of interest, including appropriate remedial measures. Compared to the Czech Republic, lower thresholds for applying the obligation to use a formalised procedure in public procurement, in accordance with the law, are again worth mentioning.

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<sup>57</sup> See the assessment of the state of innovative public procurement in Estonia for 2015, with data available at [https://www.mkm.ee/sites/default/files/inno\\_26\\_eng.pdf](https://www.mkm.ee/sites/default/files/inno_26_eng.pdf). An overview of currently implemented smart solutions (*e-Estonia*) is available at <https://e-estonia.com/solutions/>.

<sup>58</sup> The use of this criterion has been at a level above 70% for several years. See the Commission's conclusions related to Estonia within the European Semester 2018, available at <https://ec.europa.eu/info/sites/info/files/2018-european-semester-country-report-estonia-en.pdf>.

<sup>59</sup> According to the Commission's conclusions published within the European Semester in 2017, the share of public contracts thus awarded was 9%. See the conclusions for 2017 related to Estonia, available at <https://ec.europa.eu/info/sites/info/files/2017-european-semester-country-report-estonia-en.pdf>.

<sup>60</sup> As the Baltic Times informed, it was a joint purchase of vaccines, and according to the Ministry of Social Affairs, the vaccines were purchased 25% cheaper compared to "standard" public procurement, available at [https://www.baltictimes.com/latvia\\_to\\_purchase\\_vaccines\\_jointly\\_with\\_baltic\\_neighbors/](https://www.baltictimes.com/latvia_to_purchase_vaccines_jointly_with_baltic_neighbors/).

As an example of good practice in Estonia, many years of experience with electronic public procurement, active support for innovative solutions for public procurement and cross-border public procurement can be mentioned.

As with the Czech Republic, Estonia still has to improve integration and the use of qualitative criteria in public procurement and their preferential application instead of the criterion of the lowest tender price, which is a barrier to procuring innovative solutions in many cases.

## CHAPTER 3: CONCLUSIONS AND RECOMMENDATIONS

- Strengthening preventive measures, for example, through the mandatory existence of sufficiently unambiguous and transparently identifiable internal rules for public procurement, including conflict resolution procedures and appropriate remedial measures, and their proper practical application and checks. A sound planning of the public procurement process and ex ante and continuous checks focused on the areas of the most frequently occurring discrepancies, with the aim of minimising their occurrence in the following stages of project implementation.
- Reduction of using closed procedures in public procurement. If they are used, a greater emphasis should be placed on the unambiguity, objectivity and transparency of justification and the strengthening of random checks.
- Strengthening the transparency of the public procurement process, including more consistent checks and more effective enforcement of compliance with the existing legal obligations. Emphasis on data completeness and openness for use by the general public. Extending mandatory formal procedures and increasing transparency, especially in small-scale public contracts.
- Full e-procurement with an emphasis on a user-friendly environment, more consistent integration and interoperability of data from the existing systems.
- Emphasis on increasing the professionalization of staff involved in public procurement using educational activities focused in particular on some of its specific aspects, such as wider use of qualitative criteria, innovative public procurement and an increase in the share of centralised or joint public procurement. Greater use of interactive forms of education with a potentially broader scope, including e-learning, webinars and a web-based guide to the public procurement process (including the preparatory stage and after awarding a public contract). More active integration and sharing of good practice or, on the contrary, examples of the most frequent breaches and discrepancies, including their solutions.