

**BALKAN  
TENDER  
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## PUBLIC PROCUREMENT IN BOSNIA AND HERZEGOVINA, MONTENEGRO, MACEDONIA AND SERBIA

### COMPARATIVE ANALYSIS OF LEGAL AND INSTITUTIONAL FRAMEWORK



The conference is a part of the project Towards Efficient Public Procurement Mechanisms in the EU (potential) Candidate Countries. The project is funded by the European Union Instrument for Pre-accession Assistance (IPA) Civil Society Facility

## **PUBLIC PROCUREMENT: STATE OF AFFAIRS**

In the analyses of legislative and institutional framework of public procurement systems in Bosnia and Herzegovina, Montenegro, Macedonia and Serbia, two topics definitely assume the greatest prominence. The first topic is the pronounced anti-corruption dimension in shaping legislative and institutional framework. In analyzed regulations, this dimension is practically more pronounced than the basic purpose of a public procurement law – to ensure goods, works and services of an optimal quality and within an optimal deadline at the most favorable price. Numerous risks for the appearance of corruption in the system of public procurements have largely influenced the shaping of regulations pertaining to this area in Bosnia and Herzegovina, Montenegro, Macedonia and Serbia

The establishment of integrity of a public procurement system largely depends on state institutions specialized for prevention and fight against corruption in the area of public procurement. These institutions are relatively new in all observed states, established in the past dozen years and often having insufficient jurisdiction, insufficient guarantees of an independent work and insufficient physical and technical capacities. The lack of a clear political will for full establishment of these institutions as regulators and controllers in the field of public procurement is also a characteristic of the observed systems. However, such conditions are not the specificity of Western Balkan states exclusively. For example, in the Slovak Republic, whose experience was used in conducting this research, legislation which regulates public procurement has been amended 25 times in the past year. Moreover, in Slovakia the debate is held on independence of a body which carries out regulative and control functions in public procurement procedures.

The second pronounced topic in all observed countries concerning public procurement is the process of European integration. It is quite understandable given that all four states find themselves in this process. Bosnia and Herzegovina has a status of a potential candidate, while other three countries are candidates for membership in the European Union. The integration process places before these four states the requirement to align their national legislation and institutional arrangements with standards valid for EU member states.

Furthermore, the process of European integration implies effective implementation of these regulations and clear indicators of success.

The Slovak experience makes it clear that the process of European integration will not in itself resolve the problem of inefficiency of public procurement systems, high level of corruption and attaining the system integrity, although in developing basic elements of the system it can prove to provide a strong support. The integrity of a public procurement system must be attained in the context of building the entire legal and institutional framework. It relies on the publicity in the work of public authorities and free access to information, on anti-corruption regulations and policies in the field of prevention of the conflict of interests and money laundering, on legislation regulating market competition, on criminal and misdemeanor legislation, on standards of good governance upheld in all public administration bodies in all four branches of government – namely legislative, executive, judicial and the independent branch. The integrity of a public procurement system cannot be reduced only to procedure of selection of the most favorable or the cheapest bid within the selected procedure. Modest results of isolated attempts to advance integrity of separate elements of the system in observed countries, which have been made in the previous period, are telling in this regard. The advancement of integrity of a public procurement system makes sense only if public procurement is perceived as a process which starts with planning needs and ends with enforcement and review of the concluded contract.

The transparency in the work and the right to access to information of public importance lie at the root of the system integrity. The observed countries have contemporary regulations and appropriate institutions that ought to ensure the highest level of the publicity of work and access to information. The Law on Free Access to Information of Public Importance of the Republic of Serbia has been assessed as the best in the world.<sup>1</sup> Greater transparency of the system is also ensured by public procurement portals which enable monitoring the key stages in public procurement procedures and gaining an insight into the most important documents. However, when it comes to proactive publishing of information concerning public procurement procedures there is much room for improvement. The potential of public procurement portals established in the observed countries have not been used to the extent to which it would be the case if all information concerning public procurement procedures regardless of the value or the type of procedure were to be published on those portals. The smallest number of proactively published information in the observed countries concerns stages of enforcement of the contract and its review. This type of information should be made more available to the interested public considering that

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<sup>1</sup> [http://www.rti-rating.org/country\\_data.php](http://www.rti-rating.org/country_data.php), accessed on November 20, 2013.

possibilities for appearance of corruption at that stage are equal or bigger than at the stage of planning and conducting a public procurement procedure.

In terms of values of public procurements according to the selected type of procedure in 2011 and 2012 it can be seen that there is still a large share of negotiated procedures with or without an invitation to bid in Serbia and Bosnia and Herzegovina. In Bosnia and Herzegovina the negotiated procedure even prevails in terms of procurement values over the open procedure that ought to be the standard procedure. The exclusion of the open competition to such an extent can hardly be justified if we take into account the result achieved by Macedonia and Montenegro. Apart from the selection of the procurement procedure, competition is also reduced in numerous other ways.

The conflict of interests is also among the risks for appearance of corruption. All the observed countries have regulations concerning the conflict of interests in their systems. In Macedonia the president and all members of the Public Procurement Commission have an obligation to sign statements on the inexistence of the conflict of interests regarding procedures in which they are involved. However rules for preventing the conflict of interests, regardless whether they are generally applicable or specifically designed do not produce the best results. For example, no public procurement has ever been annulled in Serbia due to the existence of the conflict of interests, which suggests that the level of implementation of regulations that ought to ensure avoidance or resolving of conflict of interests, that is, sanctioning of abuse of public procurement for achieving personal or group gains that do not accord with the public interest, is very low.

Capacities of regulatory and review bodies in public procurement are usually under necessary levels which would enable their functioning in accordance with their competences. In given countries the employment of two new people are employed by these institutions while Slovak Public Procurement Office employs over 100 lawyers. As an illustration, Serbian Public Procurement Office employs less than 10 lawyers.

In order to gain a full insight into a public procurement system, it is not sufficient to analyze legal and institutional framework and regulations which advance this area. One must also analyze basic quantitative indicators of how the system works, as well as of the consequences these public affairs produce on the economic and social system. Not only that a state's product and taxpayers' money are re-distributed through public expenditures i.e. public procurement, a quantitative analysis of the working of a state procurement system is also important and necessary in that public procurement procedure i.e. money disbursed for these purposes, as well as the degree of regularity i.e. lawfulness of procedure itself,

determine the quality of public goods and services. They therefore also determine the degree of development of the welfare state and the living standard.

In order to better understand a system of public procurement in the Western Balkan region, we have compared basic statistical data pertaining to public procurement in Serbia, Montenegro, Macedonia and Bosnia and Herzegovina. The data pertain to 2011 and 2012, are expressed in foreign currency i.e. euro, as well as in percentages, and encompass statistics which shows:

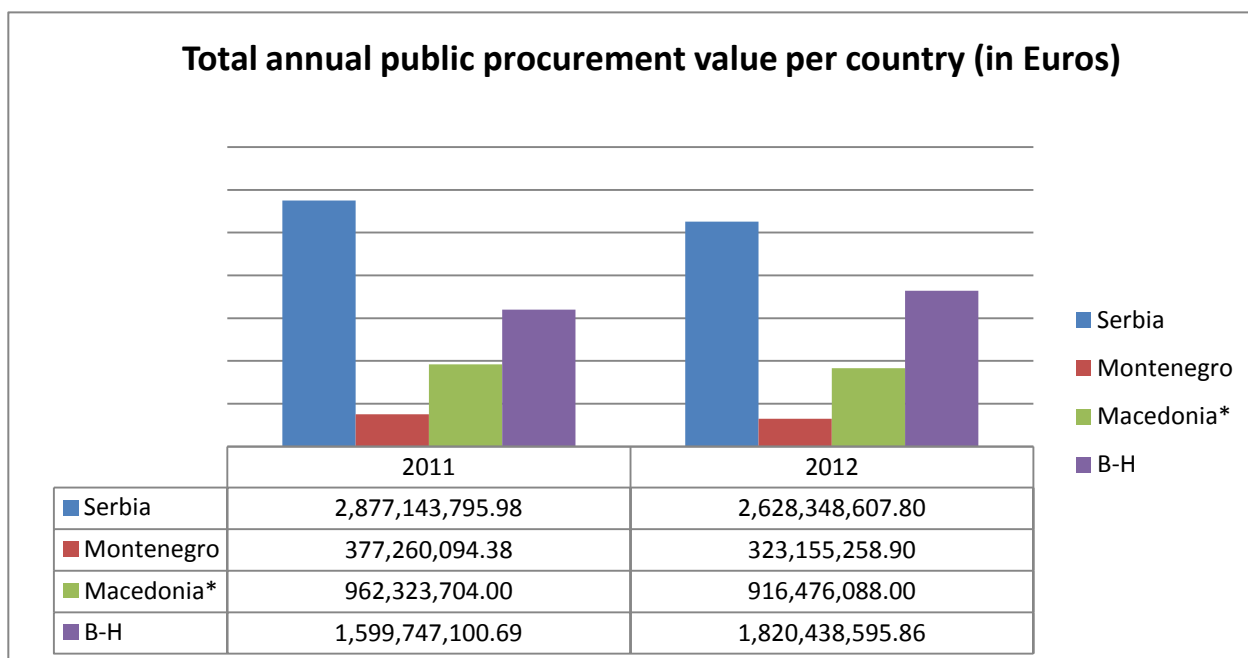
- total annual value of public procurement both absolute and relative to the gross domestic product and budgetary expenditures
- value of public procurement according to the subject of public procurement contract as well as percent of public procurement value according to the subject of public procurement contract
- public procurement value according to the type of conducted procedure and value structure of public procurement according to the type of conducted procedure, particularly procedures with the largest absolute and relative share in conducted procurements in countries covered by the research
- data which reflect intensity of competition in public procurement, with an average number of bids per tender i.e. awarded contract as an indicator

However, this comparative analysis of national public procurement systems remains incomplete for several reasons. One is that some data are missing because official statistics have not been collected, for example the data about the origin i.e. sources of funds disbursed in public procurement procedures. Furthermore, some statistics is incomplete because in some countries there are no centralized and publicly available data, such as the data on initiated misdemeanor or possibly criminal proceedings for violating public procurement laws. The third reason concerns the fact that the data are not comparable across countries, which is the case with data on public procurement values according to the type of the contracting authority, because definitions and structures of contracting authorities differ across countries.

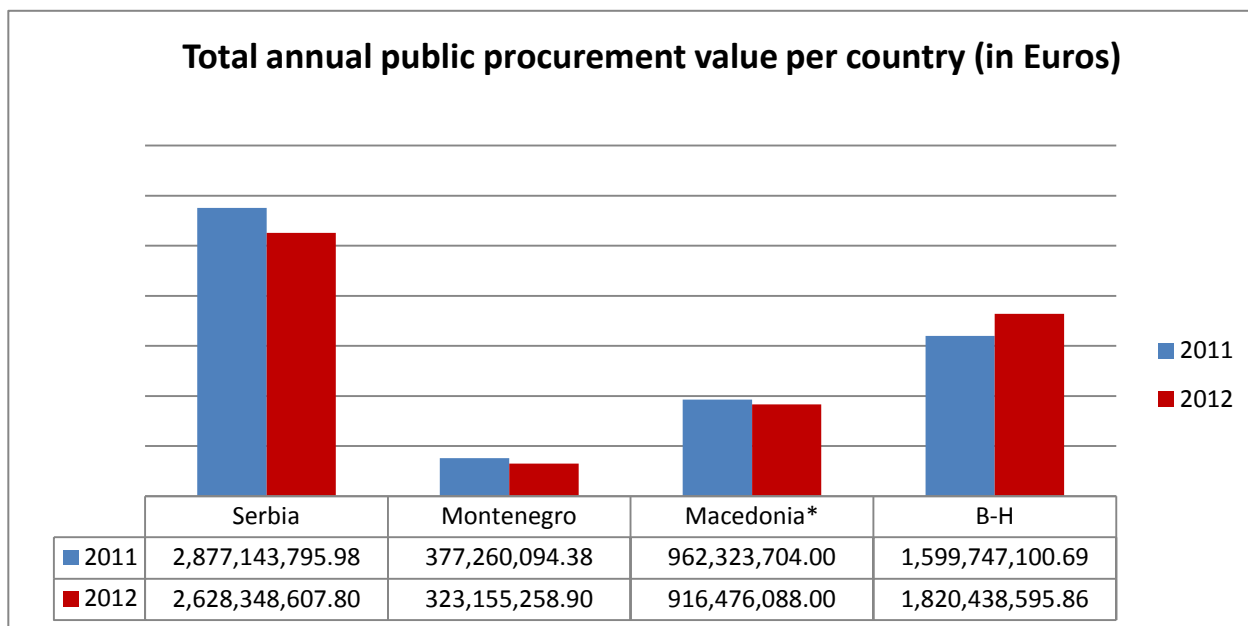
## **THE VALUE OF PUBLIC PROCUREMENTS**

The following tables and graphs show a total annual value of public procurement in four Western Balkan countries, namely Serbia, Montenegro, Macedonia and Bosnia and Herzegovina. The data on the total annual public procurement value in Macedonia are shown as values which include the value-added tax. Namely, the Public Procurement Bureau in charge of and disposing with data on public procurements conducted in Macedonia, in 2009 ceased to calculate public procurement values excluding the value-

added tax, with an explanation that only the data including the VAT are relevant because they display true expenses paid by institutions. The highest annual value of public procurement has been attained in Serbia, followed by Bosnia and Herzegovina, and subsequently Macedonia and Montenegro. The situation is the same in both years covered by the research. The annual value of public procurement decreased in 2012 in all countries except Bosnia and Herzegovina. There is a substantial difference among annual values of public procurements in Serbia and Bosnia and Herzegovina and the attained values in Montenegro and Macedonia, which is certainly a consequence of sizes of states and the volume of their respective public sectors.



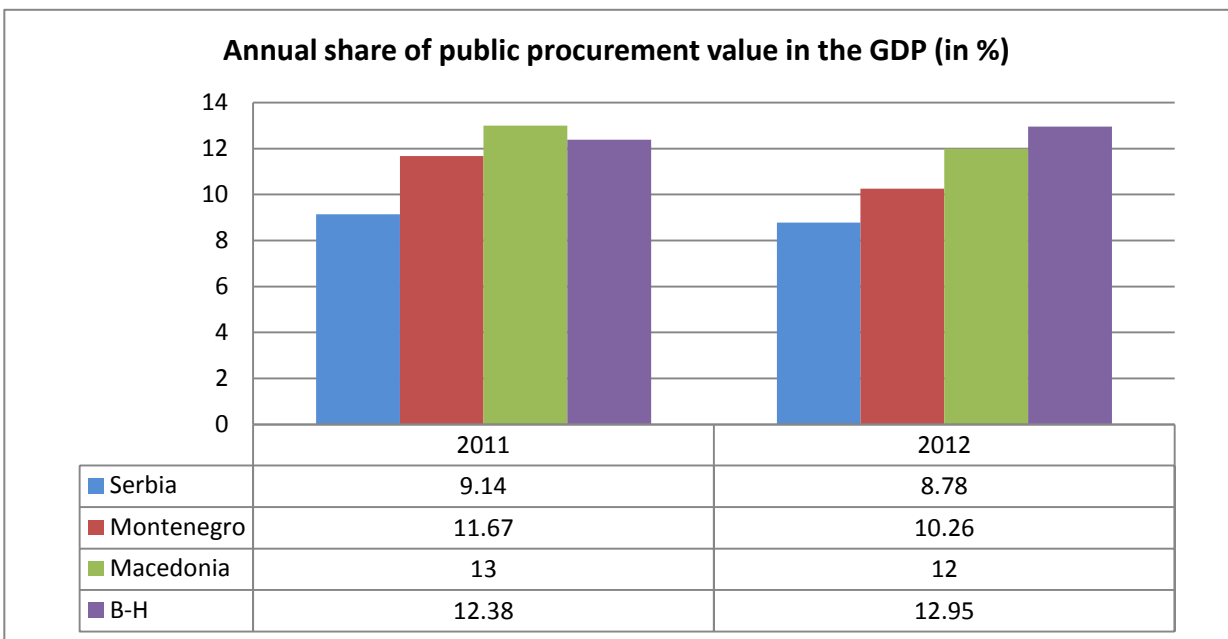
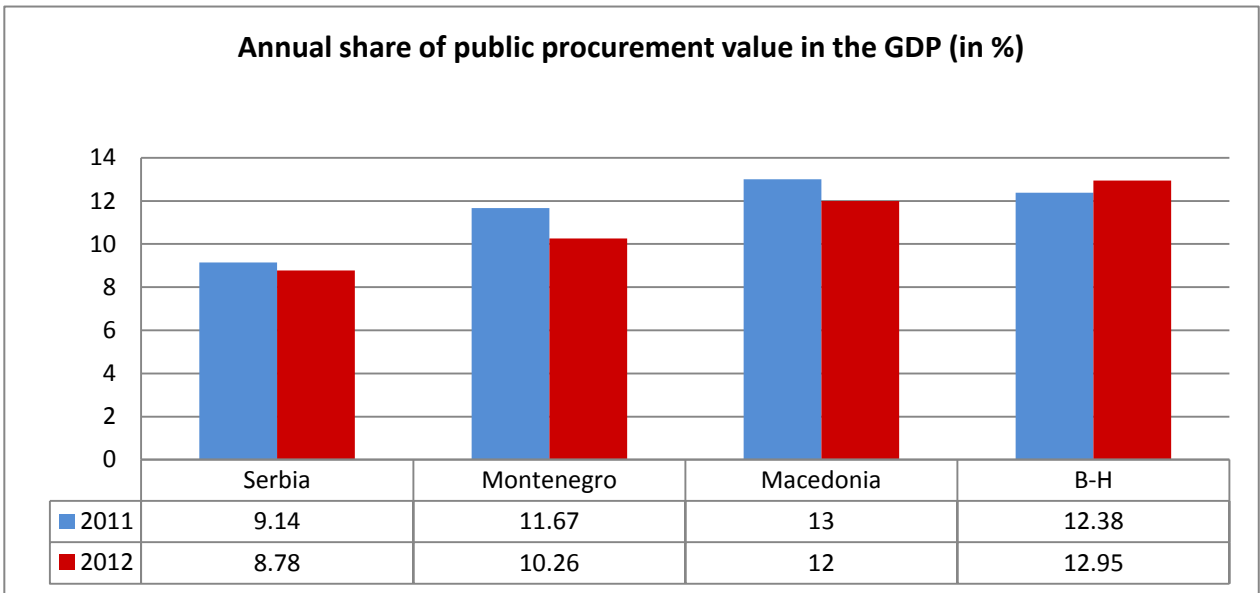
\* With the value-added tax



The absolute value of conducted public procurements on an annual level may not be a sufficient indicator to analyze the importance of this type of public expenditure in terms of value. The ratio between the value of procurements and the value of total budgetary expenditures, or the gross domestic product, might be more telling about the degree of state involvement in economic transactions. Moreover, comparing these data with similar ones in other countries, primarily those in one's geopolitical neighborhood and displaying a similar level of development, provides a better insight into whether public procurement expenditures are excessive and whether there is room for savings. The following two charts show the shares of total annual values of public procurement in gross domestic product and public expenditures of countries covered by the research.

In all countries covered by the research, the share of public procurements in 2012 GDP decreased when compared to 2011 except in Bosnia and Herzegovina, as can be seen from the amount of absolute value. However, the greatest share of GDP is redistributed by way of public procurement in Macedonia and Bosnia and Herzegovina, followed by Montenegro and lastly, the lowest share of public procurement in public expenditures can be found in Serbia. In order to gain a full insight, it is necessary to consider absolute amount of funds disbursed on public procurement in the four states. For the sake of comparison, the lowest share of public procurement in the GDP was found in Serbia, although the total value of public procurement was the highest precisely in the same country as compared to other countries in both years covered by the research. Montenegro has an average share of public procurement in the GDP in this regional comparison, but the total value of public procurement in Montenegro is the lowest among four countries. The highest share of public

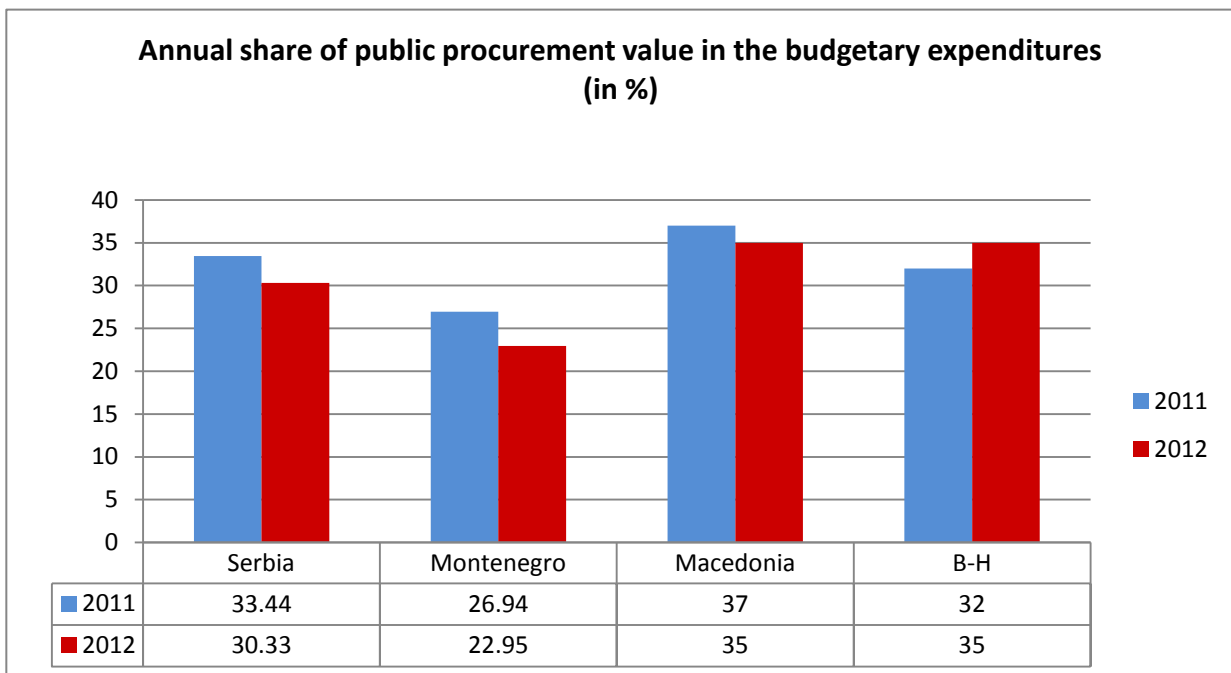
procurement in the GDP was recorded in 2011 in Macedonia, namely 13% and the lowest in Serbia, namely 9.14%. In 2012, the highest share of public procurement in the GDP was found in Bosnia and Herzegovina – 13% and the lowest in Serbia – 8.78%. The average share of public procurement expenditures in the GDP in 2011 was 11.6% and in 2012 almost 11%.

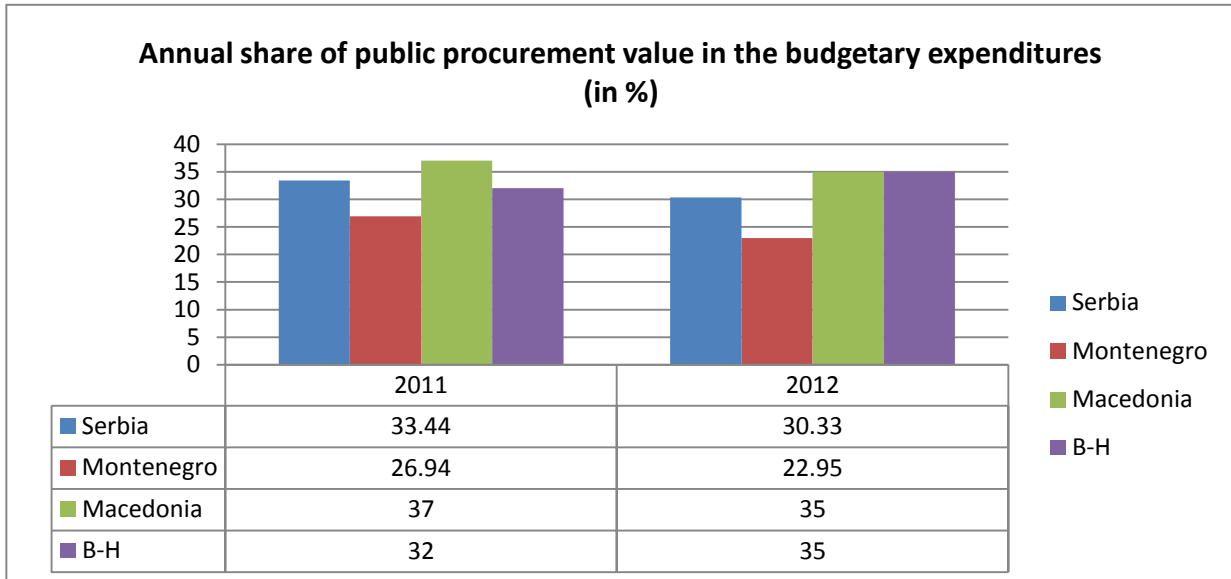


As far as the share of public procurement expenditures in the total budgetary expenditures is concerned, the average is close to 32.4% in 2011, that is, 30.8% in 2012. Below-average



values were recorded only in Montenegro, while in other countries the share of public procurement in public expenditures was average or above-average. The greatest share was found in Macedonia, followed by Bosnia-Herzegovina, Serbia and finally Montenegro in both years covered by the research. The difference between the lowest recorded share in 2011 in Montenegro and the highest in Macedonia is almost 10 percentage points. The difference is even bigger in 2012 and equals 12 percentage points. Once again, the data show that in all countries, except in Bosnia and Herzegovina, there was a decrease of the share of public procurement in the total budgetary expenditures in 2012 compared to 2011.



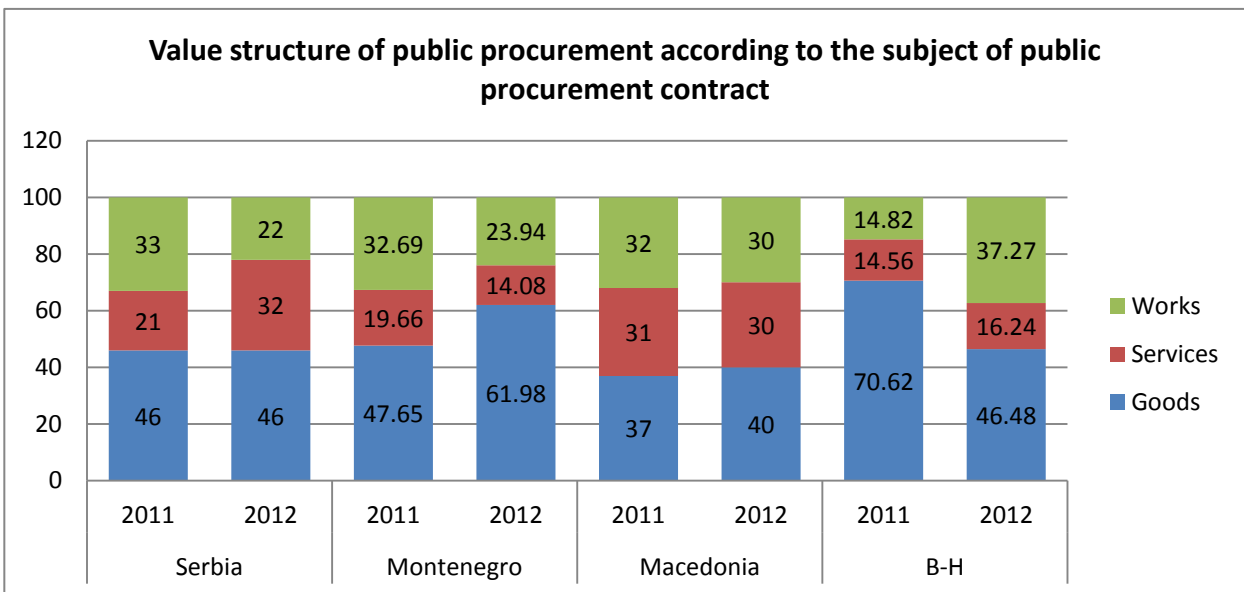
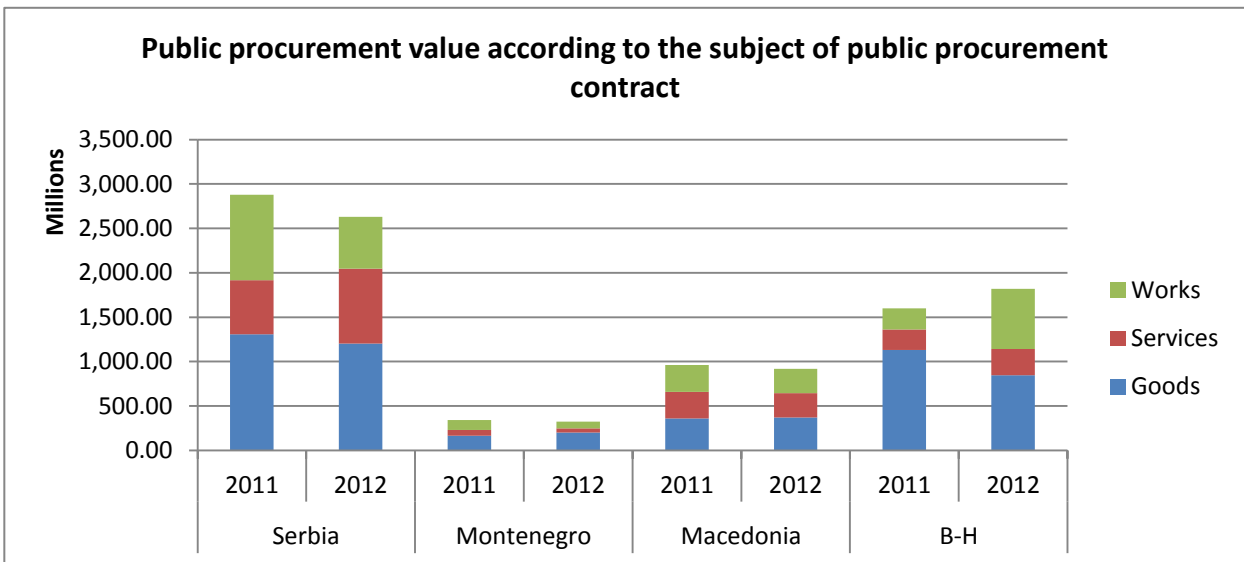


On average, public procurement constitutes around one-third of budgetary expenditures; around 11% of the gross domestic product is re-distributed by way of public procurement. If efforts towards fiscal consolidation, reduction of public expenditures and budget deficit i.e. efforts to approximate the Maastricht criteria, are taken into account, the greatest room for advancing efficiency obviously exists precisely in the area of public procurement.

### **THE VALUE OF PUBLIC PROCUREMENTS ACCORDING TO THE SUBJECT OF PUBLIC PROCUREMENT CONTRACT**

A comparison of the data on public procurement values according to the subject of public procurement contract reveals that in all countries covered by the research, the procurement of goods prevails. In 2012 in Serbia and Bosnia and Herzegovina the value of procured goods was lower than in 2011, however the share in the total value of public procurement remained unchanged in Serbia, while in Bosnia and Herzegovina that share decreased for some 25 percentage points. The value of procured goods increased in 2012 in Montenegro and Macedonia, as well as its share in the total value of procurement. The procurement of services also increased in 2012 in Serbia and Bosnia and Herzegovina, as well as their share in the total value. Montenegro and Macedonia recorded a decrease of values of procured services and its share in the total value. As far as procurement of works is concerned, all countries except Bosnia and Herzegovina have earmarked less money for

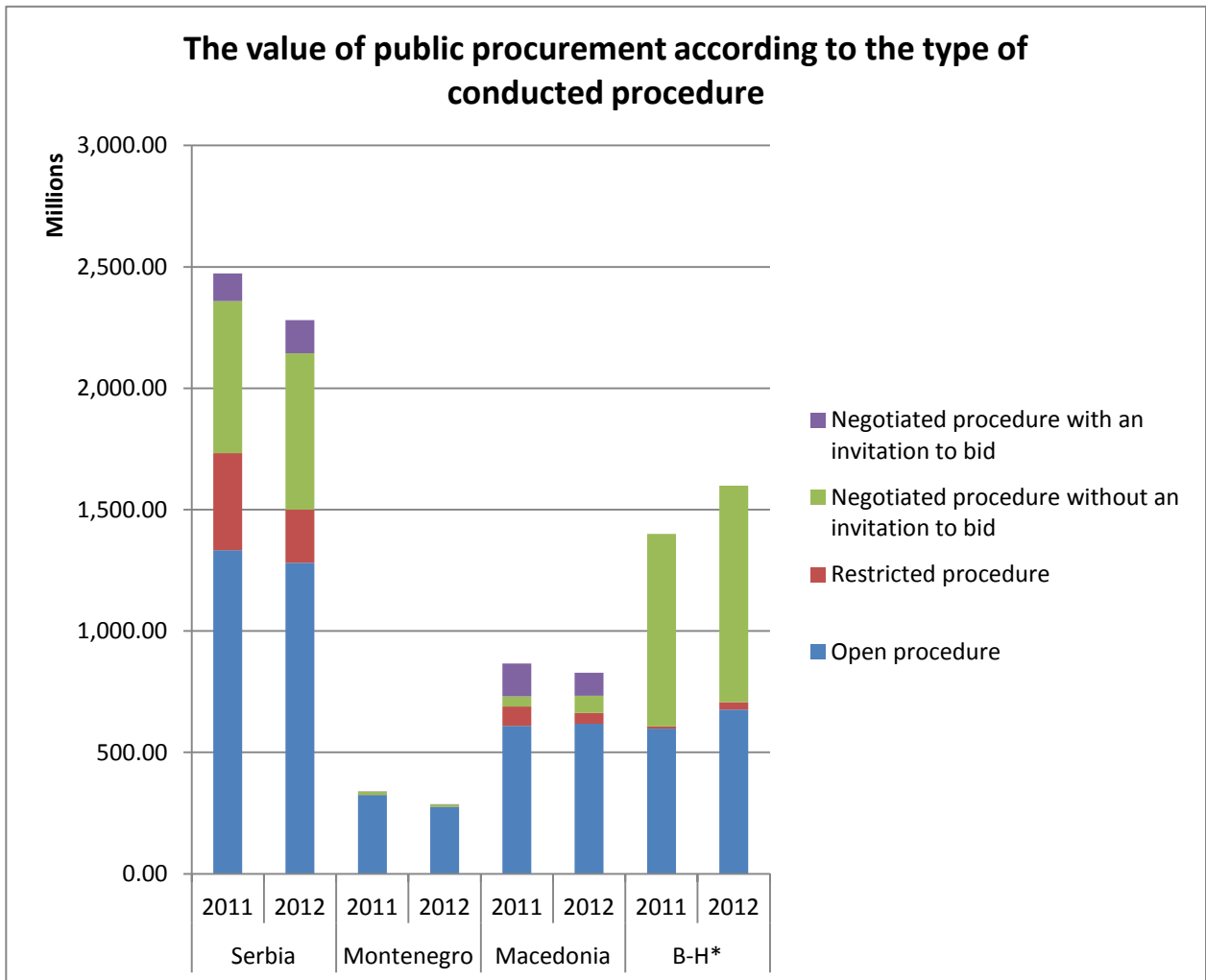
procurement of works in 2012 than in 2011. Relatedly, the share of procurement of works in the total value of procurement decreased in Serbia, Montenegro and Macedonia, but increased in Bosnia and Herzegovina for around 22 percentage points. The value structure of public procurement according to the subject of public procurement contract is the most well-balanced in Macedonia, while in other countries substantially larger portion of funds is spent on procurement of goods compared to procurement of services and works, as the following data testify.



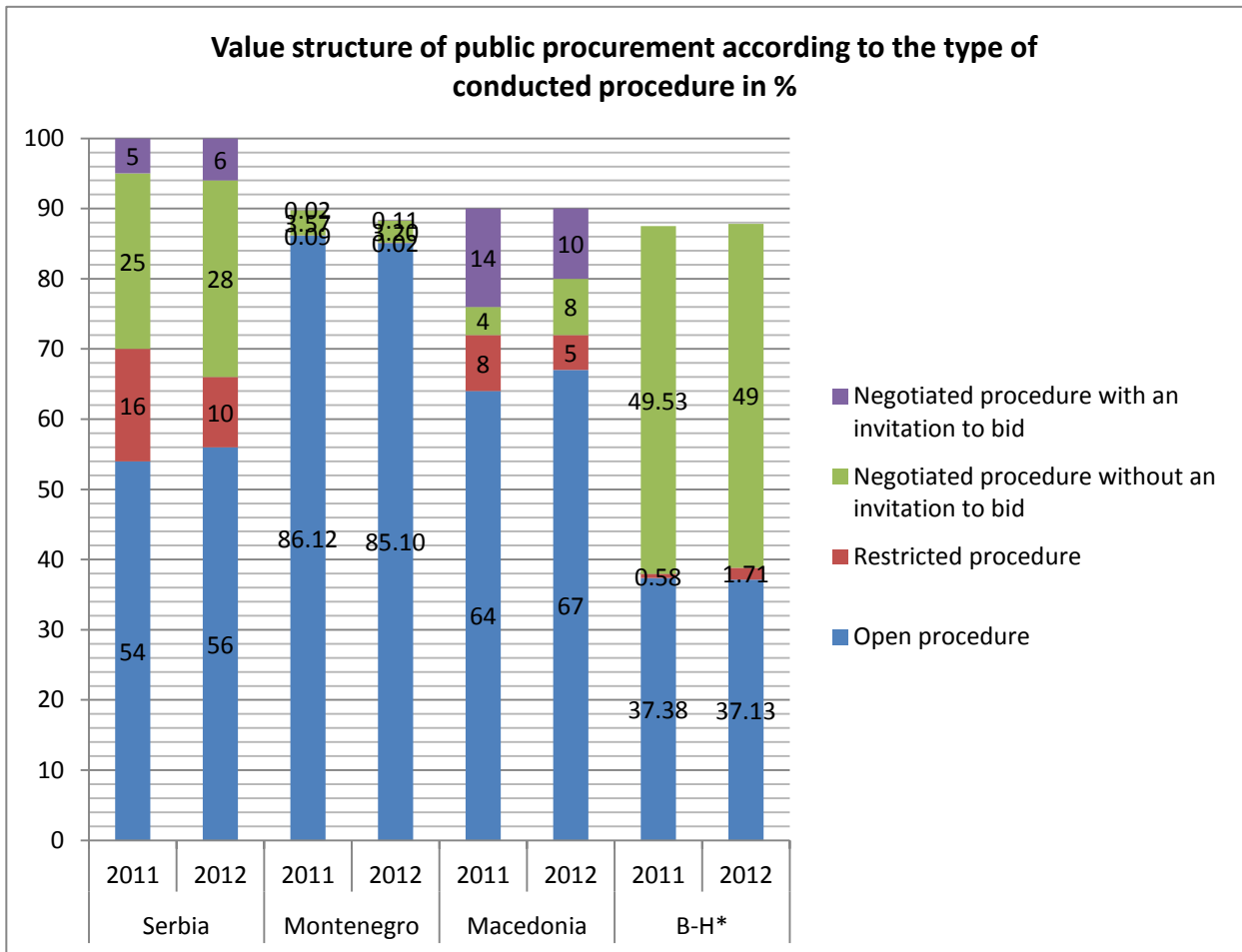
## **THE VALUE OF PUBLIC PROCUREMENTS ACCORDING TO THE TYPE OF CONDUCTED PROCEDURE**

The type of conducted public procurement procedure is the greatest indicator of transparency and the possibilities for abuse. An open procedure is recommended as the basic procedure that should be employed to conduct public procurement precisely because of the highest degree of transparency of the procedure itself. This rule is valid in all four countries covered by the research. In addition to the open procedure, each individual national system also employs other procedures for conducting public procurement, such as restrictive i.e. restricted procedure, negotiated procedure with or without an invitation to bid and several other standard and specific procedures. Simultaneously, the four aforementioned procedures are employed in all countries covered by the research and have the greatest absolute and relative significance in terms of public procurement value according to the type of conducted procedure. In all countries except Bosnia and Herzegovina negotiated procedure is classified into two types, with and without an invitation to bid.

The Bosnia and Herzegovina legislation does not recognize this type of classification. Consequently, the data on the value of public procurements conducted employing the negotiated procedure are provided jointly including procedures with and without an invitation to bid.

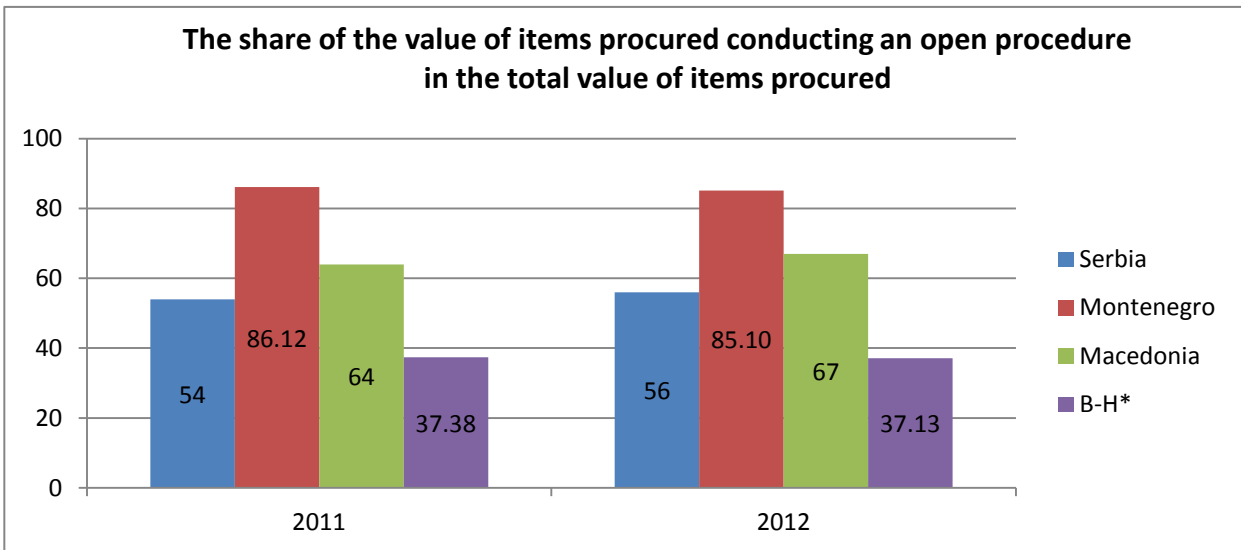
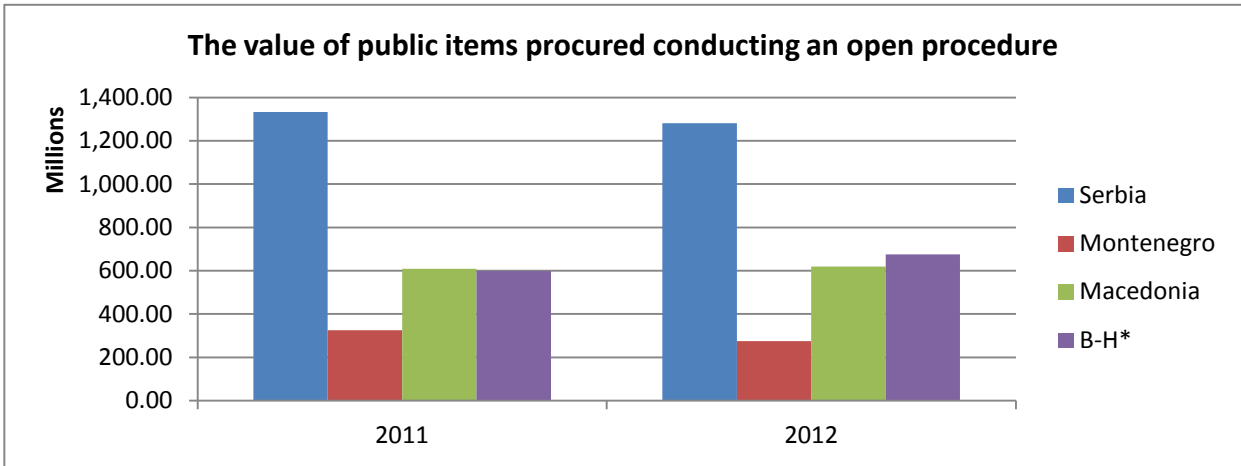


*\* in the case of Bosnia and Herzegovina, green represents public procurement values disbursed through negotiated procedure jointly with or without an invitation to bid*



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An open procedure prevails among procedures for conducting public procurements in Serbia, Montenegro and Macedonia. The value structure of public procurement shows that in both years covered by the research, the share of the open procedure is larger than 50% in Serbia, that it is around 65% on average in Macedonia, while in Montenegro it is extremely high and approximates 85% on average. In Bosnia and Herzegovina the share of the open procedure is around 37%, which is the lowest level among the countries covered by the research.



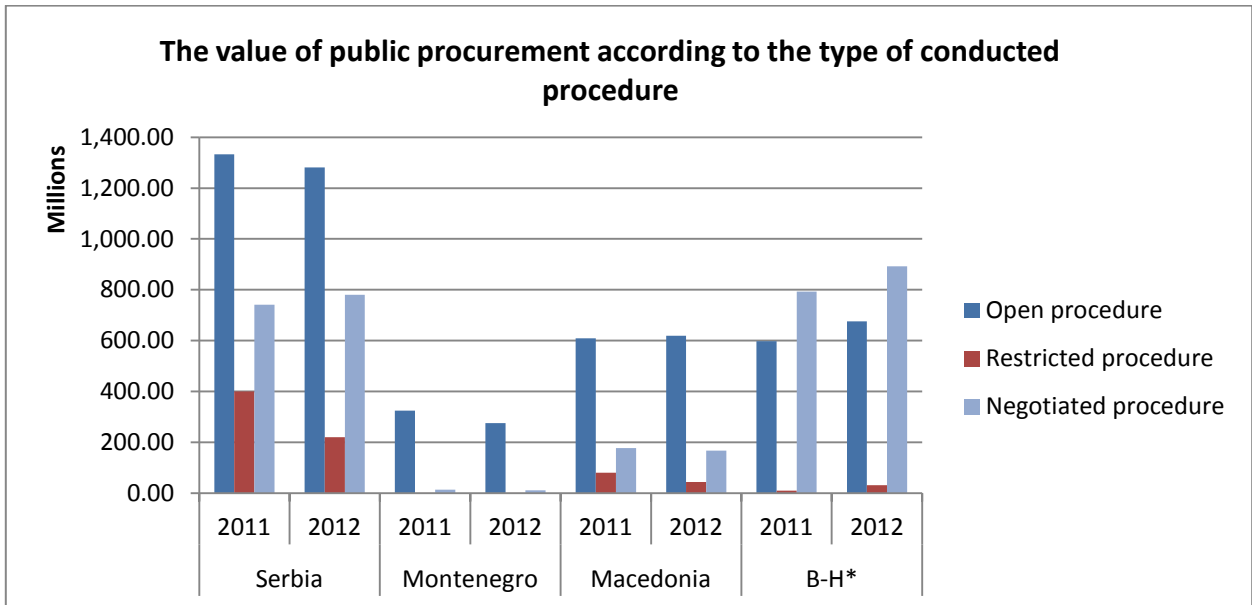
The share of restricted procedures is very low in all countries except Serbia. Namely, the percent of values of public procurements conducted in this way in Montenegro is at the level lower than 0.1% and in Bosnia and Herzegovina it is between 0.5% and 1.7% in both years covered by the research. In Macedonia the percent of restricted procedure ranges between 5% and 8%. In Serbia, as already mentioned, that percent is much bigger and stands between 10% and 16% of the total public procurement value.

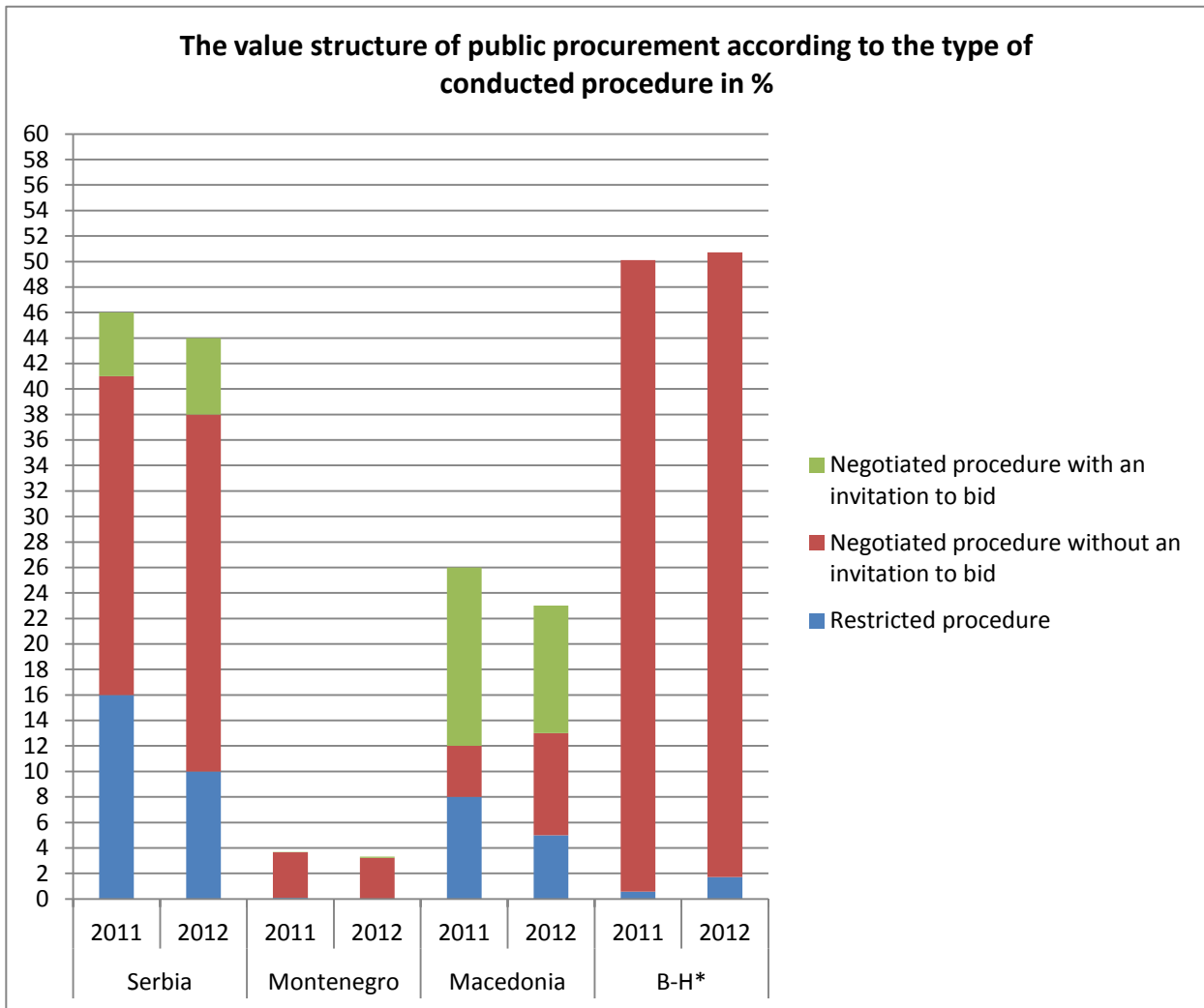
In all countries except Bosnia and Herzegovina the negotiated procedure is classified into the procedure with and without an invitation to bid, whereby negotiated procedures with an invitation to bid possesses greater transparency. In Serbia the percent of negotiated procedure with an invitation to bid stands at 5% to 6% in both years covered by the research, in Macedonia it is the second absolutely and relatively most significant procedure

with 10 to 14% of the total public procurement value. The share of this procedure in the total procurement value in Montenegro is negligible, practically at the level of a statistical mistake and ranges from 0.02% to 0.11% in both years covered by the research. As far as conducting negotiated procedure without an invitation to bid is concerned, in Serbia and Montenegro this is the second absolutely and relatively most significant procedure, the share of which in the total public procurement value stands between 25% to 28% in Serbia, which is extremely high, given that one fourth of the value of all public procurements is disbursed conducting this procedure. In Montenegro the share of this procedure is around 3.4% on average. In Macedonia 4% to 8% of the value of public procurements is disbursed conducting negotiated procedure without an invitation to bid, so the share is similar to the share of the restricted procedure. In Bosnia and Herzegovina the situation is specific. Almost 50% of public procurements are conducted employing negotiated procedure, which is an extremely negative indicator given the recommendation that an open procedure should prevail as the basic type of procedure.

Thus an assessment of the level of transparency of public procurement in terms of the value structure of public procurements according to the type of conducted procedure would suggest that the highest level of transparency and observance of regulations to employ an open procedure as the basic procedure has been attained in Montenegro. It is followed by Macedonia where open procedure is conducted in over 60% of cases. In Serbia more than one half of procurements are conducted employing an open procedure, however a high share of negotiated procedure without an invitation to bid in over 25% of cases mars the picture and classifies the public procurement system in Serbia among the less transparent in the region, displaying a high potential for occurrence of irregularities. The grimmest situation is certainly in Bosnia and Herzegovina, where negotiated procedure prevails in almost 50% of cases, while only 37% of values of goods, services and works publicly procured are conducted employing an open procedure, which is significantly lower percent than in other countries covered by the research. This state of affairs is perhaps best illustrated by the following graphs.







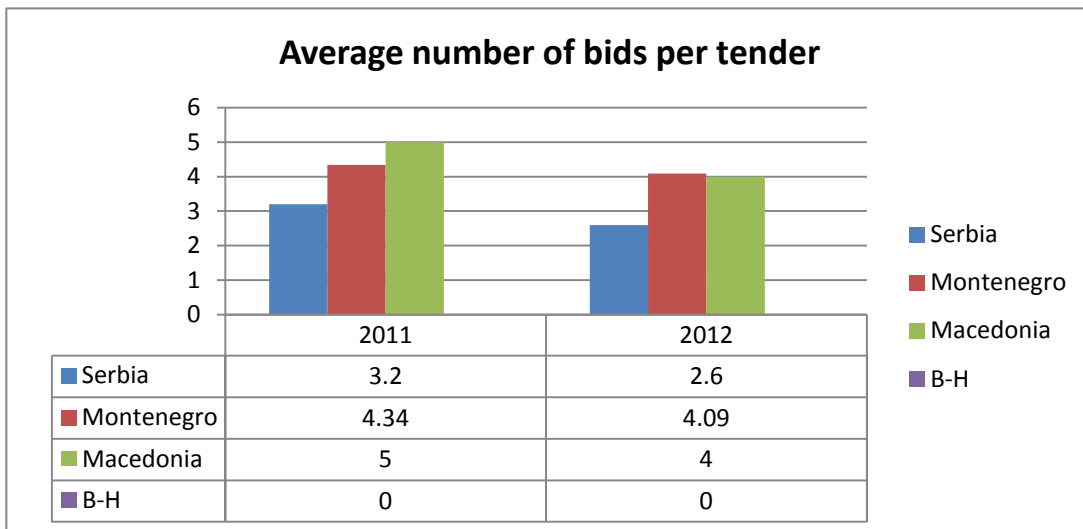
*\* in the case of Bosnia and Herzegovina, red represents public procurement values disbursed through negotiated procedure jointly with or without an invitation to bid*

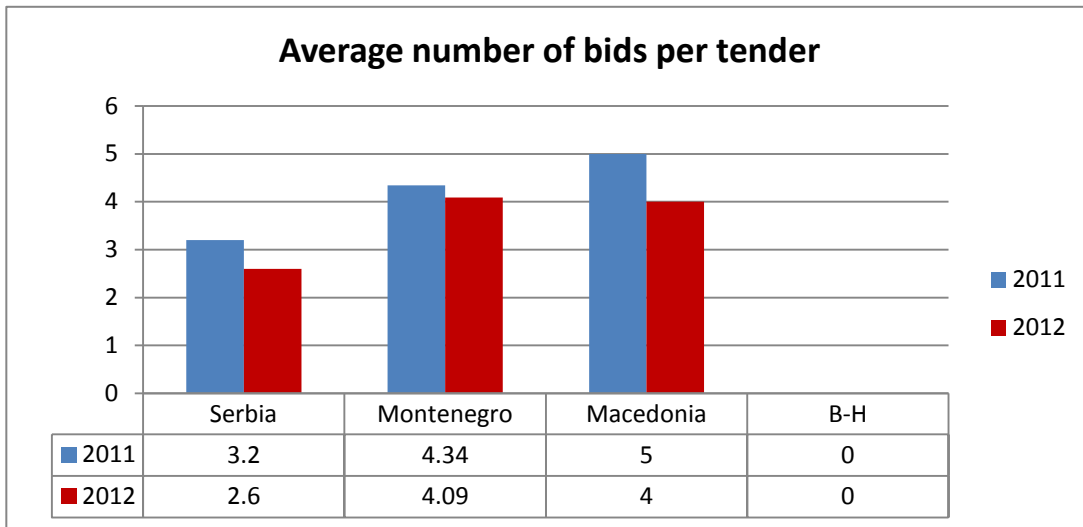
### THE INTENSITY OF COMPETITION

The public procurement systems which employ less transparent types of procedure, such as those without an invitation to bid, are characterized by expectedly lower intensity of competition among bidders, due to the low level of public information and impossibility of bidders to submit their bids. The intensity of competition is best graded in terms of an average number of bids per tender i.e. the awarded contract and the percent of contracts awarded to the only bid. The intensity of competition is an important indicator because a higher level of competitiveness leads to lower prices i.e. higher quality of procured items, as

well as to lower and more purposeful budgetary expenditures earmarked for public procurement.

The following graphs display the data concerning the average number of bids per tender in Serbia, Montenegro and Macedonia. This type of data is not available for Bosnia and Herzegovina given that it is not a part of official statistics kept by the Public Procurement Agency of Bosnia and Herzegovina and cannot be found in SIGMA reports. Thus the comparison among countries has to remain incomplete. Even though previous analysis has concluded that the public procurement system in Montenegro can be considered the most transparent one, given that the open procedure is the prevailing type of public procurement procedure, the intensity of competition indicator is not the highest in this country. The highest degree of competitiveness is recorded in Macedonia with 5, that is, 4 bids per awarded contract in years covered by the research. It is followed by Montenegro with around 4.2 bids per tender and the lowest level of competitiveness is found in Serbia with only 2.6 bids per tender in 2012 (but bearing in mind the lack of data for Bosnia and Herzegovina). In all countries there is a decrease of intensity of competition in 2012 compared to 2011, which is also a negative indicator.





## **HARMONIZATION OF THE LEGISLATION WITH THE EU DIRECTIVES**

This analysis is conducted within the project Towards Efficient Public Procurement Mechanisms in the EU (potential) Candidate Countries. It concerns 4 Balkan countries, namely Serbia, Montenegro, Macedonia and Bosnia and Herzegovina. It is primarily legal analyses as it is the comparison of the relevant public procurement legislation (hereinafter referred to as the “**PPL**”) in above mentioned countries.

As far as the structure is concerned, it consists of 4 parts as follows:

1. Thresholds
2. Contracting authority/entity
3. Review of public procurement
4. Structures implementing public procurement functions.

Each part is internally structured in the same way: first we provide short overview of EU requirement in the given issue, than we describe policies adopted in selected Balkan counties. Finally we postulate the position to what extent the solutions are in line with EU requirements and when possible we provide policy recommendations to improve the regulation to be in line with EU rules.

### **1: Thresholds**

#### ***EU requirements***

The thresholds are regulated by the directives 2004/17/EC and 2004/18/EC, as amended by the Commission Regulation (EU) No 1251/2011. Given the EU monetary union, the thresholds are established in EURO. The value of the thresholds in national currencies of those member states who do not participate to the monetary union are revised every two years from 1 January 2004. The thresholds differ depending on the sectors, they are applied to. At the time of writing they are following.

- 1) Work contracts: 5 000 000 EUR
- 2) All supplies and services contracts, all design contests: 400 000 EUR

*Government authorities:*

- 1) Works contracts, works concessions contracts, subsidised works contracts: 5 000 000 EUR
- 2) All contracts concerning services listed in Annex II B, certain telecommunications services and R&D services; all design contests concerning these services and all subsidised services: 200 000 EUR
- 3) All contracts and design contests concerning services listed in Annex II A except contracts and design contests concerning certain telecommunications services and R&D services: 130 000 EUR
- 4) All contracts and design contests concerning services listed in Annex II A except contracts and design contests concerning certain telecommunications services and R&D services: 130 000 EUR
- 5) Supplies contracts awarded by contracting authorities operating in the field of defence: Concerning products listed in Annex V: 130 000 EUR
- 6) Supplies contracts awarded by contracting authorities operating in the field of defence: Concerning other products: 200 000 EUR

*Sub-central contracting authorities:*

- 1) Works contracts, works concessions contracts, subsidised works contracts: 5 000 000 EUR
- 2) All service contracts, all design contests, subsidised service contracts, all supplies contracts: 200 000 EUR

***Thresholds adopted in selected countries***

**A) Serbia**

Thresholds established by the Serbian PPL are the following:

- ✓ For procurement of goods, services and works of the same kind, whose estimated value, at the annual level, is lower than 400.000 dinars (3546.15 EURO), contracting authorities are not obliged to apply the provisions of the Serbian PPL.
- ✓ Low-value public procurement, for the purposes of this Law, is procurement of goods, services or works of the same kind, whose estimated value, at the annual level, is lower than 3.000.000 dinars (26 596.16 EURO).

We also add the information that the contracting authority having total value of public procurements that fulfil requirements from this Law for application of electronic auction exceeding the amount of 700,000,000 dinars (6 205 770.53 EURO) at the annual level is obliged to establish IT system and electronic auction.

## **B) Montenegro**

The public procurement procedure shall be determined according to the estimated value of the public procurement which is classified into the following value scales:

- ✓ I Value scale – in cases when the estimated value of the public procurement is up to EUR 5,000, the contracting authority shall perform the direct agreement;
- ✓ II Value scale – in cases when the estimated value of the public procurement exceeds EUR 5,000 up to EUR 25,000 for procurement of goods or services, or when the estimated contract value exceeds EUR 5,000 up to EUR 50,000 for procurement of works, the contracting authority shall perform the shopping method;
- ✓ III Value scale - in cases when the estimated value of the public procurement exceeds EUR 25,000 for procurement of goods or services, or when the estimated contract value exceeds EUR 50,000 for procurement of works, the contracting authority shall perform some of the procedures listed in Article 20 items 1 to 7 of this Law.

For public procurement with estimated value within Value scales I and II, the procedures listed in Article 20 items 1 to 7 of the Montenegro Public procurement Law may be applied (open procedure, restricted procedure, negotiated procedure with prior publication of a contract notice, negotiated procedure without prior publication of a contract notice, framework agreement, consulting services, contest)

## **C) Macedonia**

Macedonian PPL establishes mandatory public procurement process in line with the EU thresholds. The thresholds are:

- ✓ 20.000 EURO in Denars (VAT excluded) for goods and services and
- ✓ 50.000 EURO in Denars (VAT excluded) for works.

The simplified competitive procedure with publication of contract notice is mandatory for every procurement from 500 EURO up to 20.000 EURO for goods and services and 50.000 EURO for works, VAT excluded.

## **D) Bosnia and Herzegovina**

The Bosnian PP law differs between primary threshold values and international threshold values.

Primary threshold values:

- ✓ When the contract value amounts to or exceeds KM 50 000 (25 564,59EURO) in the case of goods and services, or KM 80 000 (40 903.35EURO) in the case of works, the contracting authority shall proceed according to the rules set forth in Chapter II of the Bosnian PPL (primary contracts award procedure).
- ✓ When the contract value is lower than 50 000 (25 564,59EURO) in the case of goods and services, or KM 80 000 (40 903.35EURO) in the case of works, the contracting authorities shall proceed according to the rules set forth in Chapter III of the Bosnian PPL (awarding of contracts below the primary threshold values).

International threshold values:

When the contract value, in the case of goods and services, amounts to or exceeds KM 500 000 (258 497.33 EURO) for State authorities or KM 700 000 (361 896.27 EURO) for local authorities or public entities as defined in Article 3, paragraph (2) of the Bosnian PPL (public entity as defined in this article), or, in the case of works amounts to or exceeds KM 2 000 000 (1 033 989.33 EURO), the procedure shall, except in the case of the services listed in Annex II, PART B of the Bosnian PPL, be open to international competition.

### **Conclusions and comments:**

The thresholds in all of the selected countries are in accordance with the EU public procurement legislation.

Laterally, we recommend to amend the provisions which put different threshold values for the international competitors in Bosnia and Herzegovina and to unify them with the primary thresholds applicable for the local competitors.



## 2: Contracting authorities/entities

When considering the application of the Public procurement law, it is necessary to determine whether the purchaser in question is a contracting authority/entity for the purposes of the given public procurement law. In fact, if the purchaser does not fall within the given category of the contracting authority/entity, it is not obliged to apply the public procurement prescribed procedures in order to obtain work, supply, or service.

The Directive 2004/17/EC provides following definitions:

"Contracting authorities" are State, regional or local authorities, bodies governed by public law, associations formed by one or several such authorities or one or several of such bodies governed by public law.

"A body governed by public law" means 1) any body established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, 2) having legal personality and 3) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

"A public undertaking" is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it.

A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

- hold the majority of the undertaking's subscribed capital, or
- control the majority of the votes attaching to shares issued by the undertaking, or
- can appoint more than half of the undertaking's administrative, management or supervisory body.

Contracting entities in the utilities sector regulated by the Directive 2004/17/EC are legal persons:

(a) which are contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 3 to 7 – so-called “activities in the utilities sector” They are gas, heat and electricity, water, transport services, postal services, exploration for, or extraction of, oil, gas, coal or other solid fuels, as well as ports and airports;

(b) which, when they are not contracting authorities or public undertakings, have as one of their activities any of the activities referred to in Articles 3 to 7, or any combination thereof and operate on the basis of special or exclusive rights granted by a competent authority of a Member State.

Importantly, for the purposes of the above Directive 2004/17/EC, "special or exclusive rights" mean rights granted by a competent authority of a Member State by way of any legislative, regulatory or administrative provision the effect of which is to limit the exercise of activities defined in Articles 3 to 7 to one or more entities, and which substantially affects the ability of other entities to carry out such activity.

Public sector directives, namely the Directive 2004/18/EC, specifically exclude from their scope contracts awarded by contracting authorities/entities exercising one or more activities in the utilities sector. Thus, all the public authorities/entities when exercising their activities in the utilities sector are covered by the Utilities Directive 2004/18/EC and they are supposed to follow the procedures and apply all the rules laid there. If the activity does not relate to utilities sector, they are covered by the public sector activities.

### **A) Serbia**

Under the Serbian PPL, the contracting authority is defined as

- 1) the budget beneficiary, and organization for compulsory social insurance and its users, within the meaning of the law governing the budget system.
- 2) legal entity established for performing activities of common interest, where any of the following conditions are met:
  - a. over 50% is financed from the contracting authority's funds;
  - b. contracting authority supervises the operation of that legal entity;
  - c. more than a half of members of that legal entity's managing body are representatives of the contracting authority.
- 3) public company.

At the beginning of a budget year, upon proposal made by line ministry in charge of finance and the Public Procurement Office, the Government determines the list of contracting authorities.

The list of contracting authorities is published in “The Official Gazette of the Republic of Serbia” and on the Public Procurement Portal.

The PPL includes also a general clause establishing that entities not on the list under Paragraph 2, which meet the conditions under Paragraph 1, are obliged to apply this Law.

## **B) Montenegro**

Under the Montenegrin PPL, the public authorities/entities are:

- 1) state administration bodies, local self-government units, public services and other beneficiaries of the Budget of Montenegro, that is the Budget of the local self-government unit and other public funds performing tasks of public interest. In relation to these public authorities an exception is applies under the Article 2 of the Montenegrin PPL. Diplomatic and consular missions of Montenegro abroad, military-diplomatic representatives and units of the army of Montenegro in the international forces and peacekeeping missions as well as for other activities performed abroad, the types of public procurement procedures as well as the manner of their conducting shall be regulated by the regulations of the Government of Montenegro, not by the Montenegrin PPL. All the entities who fall within the exception shall submit its request to be registered as the bodies with the exception within the List of contracting authorities;
- 2) business organizations and legal entities performing tasks of public interest:
  - a. where the state, or a local self-government unit possesses over 50% of the shares or stake in that business organization or legal entity; or
  - b. where more than half the members of that business organization or legal entity's managing body are representatives of the state administration body or the local self-government body; or
  - c. where the representatives of the state administration body or the local self-government body authority have more than half the votes in the managing body of that business organization or legal entity;
  - d. where the body referred to in item 1 of this paragraph supervises the operation of that business organization, or legal entity.
- 3) business organizations, legal entities, entrepreneurs and natural persons for procurement of goods, services and awarding work assignments that are funded by more than 50% from the Budget of Montenegro, local self-government unit and other public funds or by the funds of the business organization or the legal entity referred to in point 2 above;
- 4) procurement of goods and services and awarding work assignments for operations in areas of water management, energy, mining, telecommunications, postal services and transport, when these operations are performed in accordance with provisions of Articles 108 to 113 of the Montenegrin PPL. Under the Article 108 of the

Montenegrin PPL contracting authorities of public procurement in the water management, energy, mining, telecommunications, postal and transport sectors are the contracting authorities referred to above in the points 1 to 3 and the entities referred to in Article 109, when procuring goods, services or works necessary for the performance of the following activities (under the Article 110 of the Montenegrin PPL): 1) construction, maintenance, supply and exploitation of facilities for the production, transport or transmission and distribution of potable water, electricity, gas and heat; 2) exploration for or production of oil and gas (hydrocarbons), exploration for or extraction of coal and other solid fuels; 3) construction, maintenance and utilization of telecommunications networks and facilities and provision of telecommunication services; 4) construction, maintenance and utilization of facilities used in postal transport; 5) construction, maintenance and utilization of facilities used in air, sea, lake, river and railway transport, as well as regular urban and suburban passenger transport in road transport that is performed by buses. The subject of public procurement in the energy sector shall also be the procurement of electricity, oil and gas. Under the Article 109 of the Montenegrin PPL.

The list of covered parties referred to above in the point 4 shall be published at the public procurement portal of the competent state authority in Montenegro.

Importantly, The contracting authorities are obliged to implement this Law even in the cases when they are not included in the List referred to in paragraph 4 of this Article.

Article 109 of the Montenegrin PPL defines holders of special and exclusive rights. According to the wording of this Article, if, in accordance with the Law, special or exclusive rights have been granted to a person other than the contracting authority referred to in Article 2 of this Law to perform the activities referred to in Article 110 of this Law, the holder of such a right shall be obligated, when procuring goods, services or works necessary for the performance of such activities, to act like a contracting authority under the provisions of this Law.

A special or exclusive right referred to above is any right granted by the competent state authority or a local self-government unit, to a limited number of entities to perform the activities referred to in Article 110, as mentioned above, of this Law in a certain geographical area.

### **C) Macedonia**

Under the Macedonian PPL, the contracting authorities/entities are:

- 1) state authorities, local self-government units and the City of Skopje;

- 2) legal entities established for a specific purpose for meeting the public interest needs, which are of non-industrial or non-commercial nature, and which are mainly financed by the contracting authorities referred to above in the point 1) or by other such legal entities, or which are subject to control of their operations by the contracting authorities referred to above in the point 1) or by other such legal entities, or in which more than half of their governing or supervisory board members are appointed by the contracting authorities referred to above in the point 1) or by other such legal entities;
- 3) associations established by one or several contracting authorities referred to above in point 1) and point 2);
- 4) public enterprises, joint stock companies and limited liability companies wherein the contracting authorities referred to in point 1,2 and 3 above have dominant direct or indirect influence through ownership, i.e. if they hold the major share of the company's capital, have majority vote of the stockholders or appoint more than half of the governing or supervisory board members of the enterprise or the company, and which carry out one or more utilities activities (water supply, energy, transport, postal services, and other covered activities in the Macedonian PPL, concretely in its Chapter IX) in the cases when they award public procurement contracts or conclude framework agreements for the purpose of carrying out appropriate activities, and
- 5) any legal entity, other than those referred to in paragraph (1) items a), b) c) and d) of this Article, which carries out one or more activities referred to in Chapter IX Section 1 of the Macedonian PPL on the basis of a special or exclusive right, in the cases when it awards public procurement contracts or concludes framework agreements for the purpose of carrying out appropriate activities.

The Government of the Republic of Macedonia shall determine an indicative list of contracting authorities as referred to in the above point 1 to 5.

#### **D) Bosnia and Herzegovina**

Under the Bosnian and Herzegovinian PPL:

- 1) A contracting authority is:
  - a) any administrative authority at BiH, Entity, Brčko District, Cantonal, City or Municipal level (hereinafter referred to as authorities at State or local levels of administration);
  - b) any public entity as defined in point 2 below;
  - c) any public enterprise carrying out one of the activities defined in paragraph (3) below over which a contracting authority may exercise a dominant influence by virtue of its ownership of it, its financial participation therein, or the rules which govern it.
- 2) A public entity as mentioned in point 1), item b), of this Article, means any entity:

- a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, and
  - b) having legal personality, and
  - c) financed, for the most part, by authorities at State or local levels of administration or by other public entities as defined in this paragraph; or subject to management supervision by those authorities or entities; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by authorities at State or local levels of administration or by other public entities as defined in this paragraph.
- 3) The activities carried out by public enterprises referred to in point 1), item c) above, consist in:
- a) the provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:
    - a. water; or
    - b. electricity; or
    - c. gas or heat;or the supply of water, electricity, gas or heat to such networks;
  - b) the exploitation of a geographical area for the purpose of:
    - a. exploring for or extracting oil, gas, coal or other solid fuels, or
    - b. the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;
    - c. the operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable;
- 4) Where an activity defined in point 3) above is, in addition, provided by one or more enterprises not falling within the definition of point 1), item c), the Council of Competition shall, upon the application of the Director of the Public Procurement Agency and on the basis of a request by a concerned contracting authority, declare whether the market for the activity in question is competitive. Where that relevant market is declared to be competitive, the Director of the Public Procurement Agency shall propose an amendment of this Law repealing the provisions of this Law to any defined contracting authority in respect of that activity.

Importantly, the Public Procurement Agency shall prepare lists of categories of contracting authorities in Bosnia and Herzegovina. Should a contracting authority as defined in the points 1) to 3) above not be on the lists established by the Public Procurement Agency, it is none the less covered by the Bosnian and Herzegovian PPL.

### **Conclusions and comments:**

Serbian PPL meets the requirement of the EU public procurement law, although the public undertakings are covered in a rather general way without any restrictions. This might cause difficulties for Serbian enterprises to move in competitive markets.

Montenegrin, Macedonian and Bosnian and Herzegovinian PPL are in accordance with the EU public procurement law, although they might not copy the structure of the EU public procurement directives.

## **3: Review rules of the public procurement**

Review process of the public procurement in EU is regulated by so called review directives:

- ✓ Council Directive 89/665/EEC,
- ✓ Council Directive 92/13/EEC,
- ✓ Council Directive 2007/66/EC.

Those Directives regulate review process for all decisions taken by the contracting authority in relation to contract award procedures falling within the scope of Directives 2004/17/EC and 2004/18/EC.

EU requirements on review processes concern three main issues:

- ✓ institutional setting for conducting review processes
- ✓ types of decisions and processes of the review
- ✓ the thresholds for compulsory review proceedings.

### **1) Institutional design of the review process**

#### ***EU requirements for institutional design of the review process***

There are two main sources of EU rules in the given area:

- ✓ EU Directives

✓ Decisions made by European Court of Justice<sup>2</sup>.

Article 2 of the Council Directive 89/665/EEC deals about institutional design of the review bodies:

- The powers for review may be conferred on separate bodies responsible for different aspects of the review procedure.
- Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such cases, provision must be made to guarantee procedures whereby any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review by another body which in a court or tribunal within the meaning of Article 117 of the EEC Treaty and independent of both the contracting authority and the review body.
- The members of such an independent body shall be appointed and leave office under the same conditions as the members of the judiciary as regards the authority responsible for the appointment, their period of office, and their removal. At least the President of the independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following the procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

As for the concrete institutional settings, EU allows for several models to be applied in this area as shown in following examples of the EU member states models.

**Model 1:** Judicial review – one review institution (e.g. France, Sweden, Great Britain, Finland, Italy, Lithuania, Holland)

**Model 2:** Combination of administrative and judicial review – two institutions. In several EU member countries non-judicial or quazi-judicial bodies were formed to deal with the review process at the first instance. The example is Cyprus, Czech Republic, Denmark, Poland or Slovakia. The appeal body in this model is the court.

### ***Institutional policies taken in selected countries***

#### **A) Serbia**

Serbia has adopted a review model 2: with two possible instances of review.

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<sup>2</sup> There are not many decisions made by the ECJ that would deal with the institutional design of the review bodies.



The first institutional instance is **Republic Commission for the Protection of Rights in Public Procurement Procedures**. The Commission has president and six members. The National Assembly appoints and removes from office president and members of the Republic Commission upon proposal of the committee of the National Assembly in charge of finances (hereinafter: the competent Committee) after the conducted public competition. President and members of the Republic Commission are appointed to a five-year period. The same person may be appointed as president of the Republic Commission twice.

As President of the Commission may be appointed person who meets requirements for the appointment of judge in basic court, except the condition concerning the Judiciary Academy, and has five years of work experience in the area of public procurement. He has salary equal to the salary of President of the Higher Court.

As member of the Republic Commission may be appointed person who meets requirements for the appointment of judge in basic court, except the condition concerning the Judiciary Academy, and has three years of work experience in the area of public procurement. As member of the Republic Commission may also be appointed person having higher education in the areas of legal, economic or technical – technological sciences from the second level studies (master academic studies, specialist academic studies, specialist professional master studies), or higher education which the law equates with the academic title of master at the basic studies in the duration of at least four years, and having at least five years of working experience in public procurements, acquired certificate for public procurement officer, and who fulfils other requirements prescribed for the work in civil service. Member of the Republic Commission has salary equal to the salary of a judge in the Higher Court.

Review proceedings in Serbia are regulated under Article 28 of the PPL. The supervision and monitoring is performed by the Civil Supervisor in relation to the public procurements over 1.000.000.000 dinars. For all procurements over one billion dinars appointment of Civil Supervisor is obligatory.

The review procedure is in the hand of two main courts: Administrative Court and the **Higher Misdemeanour Court**. The **Administrative** Court deals with the procedural and substantive disputes on public procurement in at the First instance. The Higher Misdemeanour Court deals with the disputes related to misdemeanor in public procurement at the first instance.

## **B) Montenegro**

Montenegro has adopted a review model 2: with two possible instances of review.

The first instance is **The State Commission**. It has a president and four members performing their functions as a profession. President and members of the State Commission are appointed by the Government, on basis of a public contest. For the president of the State Commission appointment eligible may only be a law school graduate with bar examination passed and with no less than eight years of work experience, or at least five years of the experience in public procurement area. For a member of the State Commission appointment eligible may only be a law school graduate who passed civil service exam, with no less than five years of work experience, or at least five years of the experience in public procurement area. The president and members of the State Commission shall be appointed for a period of five years and may be reappointed.

The **second instance is the court** as the Act stipulates: An administrative dispute may be launched against the decision of the State Commission.

## **C) Macedonia**

Macedonia has adopted a review model 2: with two possible instances of review.

At the first level the review is conducted by **State Appeals Commission**. It is composed of a president and four members. They are appointed through the open competition and dismissed by the Assembly of the Republic of Macedonia. They are appointed for a period of five years with a right to be re-appointed. The Macedonian public procurement act also defines the conditions under which one can become the member and the president of the commission. As for the president of the commission: a person who is a law graduate, has passed the bar exam, and has at least five years of working experience in legal field may be appointed as president of the State Commission.

At the second instance Public Procurement Act allows **for a court review**: an administrative dispute may be initiated before a competent court for resolving administrative disputes against the decision of the State Commission.

## **D) Bosnia and Herzegovina**

Bosnia and Herzegovina adopted a review model 2: with two possible instances of review.

**Procurement Review Body (PRB)** is the first instance. According to Public Procurement Act it is an independent administrative organization and consists of 3 members selected from experts on administrative law and administrative procedure and their status should equal to such of an independent judge and incompatible with any direct or indirect, permanent or periodical duty, with the exception of academic activities, and 3 (three) members who are experts in the fields of works, public purchase, transportation and strategic business management, selected by open competition. After completion of competition procedure, Council of Ministers proposes to the BiH Parliament members of the PRB, taking into the account that two members are from the FBiH and one from the RS.

**The decisions of the PRB may be appealed to the Courts** within a time limit of 45 (forty five) days after the decision is dispatched to the complainant. In case the decision is not brought to the Courts within that time limit, the decision of the PRB is final. The jurisdiction of the Courts arises only once the administrative review procedure before the PRB has been completed.

#### **Conclusions and comments:**

All of the compared countries adopted the review model 2, where the first instance review is done by quasi-judicial institution and appeal to the court is possible as well.

To support the independence of the first instance institutions it is possible to recommend to Montenegro to move the powers to appoint the members of the State Commission from government to Parliament. However, this recommendation does not result from EU review process requirements.

## **2) Review decisions and processes**

### ***EU requirements***

As for the review processes, EU Directive require effective review, and in particular, as rapid as possible review. It does not explicitly define specific number of dates that is required for rapid decision-making.

Directives also require that the domestic legislation of the member states allow for:

- interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damages.
- either set aside or ensure the setting aside of decisions taken unlawfully

- awarding damages to persons harmed by an infringement.

### ***Policies adopted in selected countries***

#### **A) Serbia**

The Commission has many competences, among others:

- decides on proposal of person who filed request for the protection of rights to allow or to cancel the given public procurement, or to prohibit the conclusion or performance of a public procurement contract;
- decides on expenses in the procedure for the protection of rights and expenses for the preparation of bid;
- imposes fines to contracting authority and the responsible person therein;
- annuls public procurement violable contract;
- conducts minor offence proceedings in the first instance;
- initiates procedure for annulment of public procurement contract and the contract may be annulled by the Court;

The Act also stipulates the dates that are compulsory for the work of the Commission to allow for rapid decisions: e.g. the Republic Commission must decide upon request for the protection of rights by resolution within 20 days from the day of receiving proper request for the protection of rights and no later than 30 days after submission of correct request for the protection of rights.

#### **B) Montenegro**

The State Commission must adopt a decision in respect of submitted appeal within 15 days from the day of receipt of the files and complete documentation on the public procurement procedure. The time limit may be extended for no more than 10 days in case there is a need for engagement of experts, obtaining opinions from the competent authorities and when the documents regarding the public procurement procedure are comprehensive, and the submitter of the complaint and contracting authority must be informed thereof. The State Commission must submit the decision within three days as of the day of its adoption to the appellant and contracting authority and publish it on its internet page.

In case of Montenegro The State Commission may, by means of a conclusion/decision, e.g:

- dismiss an appeal, if the appeal is unlawful, untimely and lodged by unauthorised person;
- deter further procedure, by receiving a written notice from the appellant on abandonment of the lodged appeal.
- adopt the appeal as grounded and annul the public procurement procedure and the adopted decision, point to the contracting authority to the irregularities made and order conducting of a new procedure and making of a decision or undertaking of necessary measures aimed at elimination of such irregularities.

Relatively high power is given to the Commission in following: State Commission may approve the continuation of the public procurement procedure, upon request of the contracting authority, in case that the contracting authority would **suffer significant material damage caused by suspension of the procurement procedure** that would be disproportionate to the value of the public contract or if the interest of Montenegro would be jeopardized

### **C) Macedonia**

The State Commission shall adopt a decision within a time period of 15 days as of the day of completion of the documentation for the appeal.

The filed appeal must suspend the signing of the public procurement contract and its implementation until the decision of the State Commission becomes final. The contracting authority may not sign the public procurement contract and proceed with its implementation within a time period of 12 days, that is five days in case of a simplified competitive procedure, as of the day of receipt of the decision for an individual right in the contract award procedure. PPL however defines some exemptions (e.g. upon a request of the contracting authority, the State Commission may approve the continuation of the contract award procedure).

The State Commission can abolish the decision, or annul the actions in the part where they are illegal. The public procurement contract can be annulled and voided under certain conditions. Annul is possible in case when the violation made in the contract award procedure is considered as a reason for annulment according to the provisions of this PPL and the laws regulating the administrative procedure.

### **D) Bosnia and Herzegovina**

Upon receiving the complainant's written appeal, the PRB must assure itself that the contracting authority has suspended the ongoing contract award procedure for a period of 5 (five) days, unless otherwise instructed by the PRB.

Review body may annul in whole or in part any act or decision of the contracting authority inconsistent with PPL. It can also instruct the contracting authority to correct any breaches and to proceed with the contract award procedure following correction:

- ✓ to order the termination of the contract award procedure;
- ✓ to make an award for damages to the complainant who as a tenderer has suffered loss or damage as a result of a breach of PPL.

### **Conclusions and comments**

Ex ante review is regulated in all compared countries and several actions are allowed for the review bodies to taken: to annul, abolish contracts etc. The public procurement acts however define some exemptions from the rule and the real adherence to EU rules in this field can be judged rather by analyses of concrete decisions in this regards rather than by comparing legislation.

### **3) Review Thresholds**

EU Directives require review process of public procurement regulated b for all decisions taken by the contracting authority in relation to contract award procedures falling within the scope of Directives 2004/17/EC and 2004/18/EC (see part. 2 of this legal analysis).

- A) Serbia
- B) Montenegro
- C) Macedonia
- D) Bosnia and Herzegovina

## 4: Public Procurement Offices

EU Directives do not explicitly define institutional structure to conduct functions related to implementation of public procurement rules in EU member states. EU Directive 18/2004 (art. 81) stipulates:

**Monitoring mechanism:** In conformity with 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 (1), Member States shall ensure implementation of this Directive by effective, available and transparent mechanisms. For this purpose they may, among other things, appoint or establish an independent body.

In many EU member states such institutional capacities are formed and OECD (2007) defines three types of public procurement functions:

- **core public procurement functions**, such as development of policies in the area of public procurement and legislative functions, development of secondary regulation in public procurement, international co-ordination, monitoring and control functions.
- **supplementary public procurement functions**, such as advisory functions, conducting education and training in public procurement, publishing functions.
- **other functions** such as central purchasing and review of public procurement.

Those functions are implemented through various institutional structures/settings in EU member states (based on OECD, 2007):

- Model 1: centralized model – the public procurement functions (mainly core) are conducted by a central state organizations. That is applied e.g. in Bulgaria, Cyprus, Czech republic, Estonia, Hungary, Lithuania, Latvia, Malta, Poland, Romania, Slovakia). There are two variations: either one central organization exists (the case of Slovakia) or there is so called dual-centralization (for example the case of Czech republic) where two organizations are formed to conduct public procurement functions.
- Model 2: semi-centralized model: a mixture between model 1 and model 3 that is applied in most of the “old” EU member states. This procurement structure is characterized by a mixed concentration of procurement functions being allocated to a limited range of institutions placed at various levels within the public administration (normally three or four institutions).

- Model 3: decentralized model – certain functions are assigned to a large number of bodies within the public procurement structure. Usually the countries within this model have more than 5 institutions. That is applied e.g. in Finland and Portugal.

## **Institutional design in selected Balkan countries**

### **A) Serbia**

Serbia applies **dual-centralization model** where public procurement function are conducted by two central organizations. The first one, **Republic Commission for the Protection of Rights in Public Procurement Procedures**, has been more discussed in part 3.

The second one is **The Public Procurement Office**. It is an organization, which conducts about 29 types of activities, e.g. it monitors the application of this Law, adopts bylaws and performs professional activities in the area of public procurement, monitors the conducting of public procurement procedures, controls the use of certain procedures, runs the Public Procurement Portal, prepares reports on public procurements, proposes measures for improvement of public procurement system, provides professional assistance to contracting authorities and bidders, contributes to the creation of conditions for economic, efficient and transparent use of public funds in public procurement procedures.

**The Public Procurement Office is mainly accountable to the government**, as its director appointed by the Government from among the ranks of public procurement experts, after having conducted public competition. As director of the Public Procurement Office may be appointed person having higher education in the areas of law, economy or technical sciences from the second level studies (master academic studies, specialist academic studies, specialist professional master studies), or higher education which the law equates with the academic title of master at the basic studies in the duration of at least four years, and having at least five years of working experience in public procurements and who fulfils other requirements prescribed for the work in civil service.

### **B) Montenegro**

Montenegro applies **dual-centralization model** – it has two main public procurement institutions– **Public Procurement Directorate** and the **Public Procurement Administration**.

**Public Procurement Directorate**, established by the law, supervises the legality and effectiveness of administration body operation. It has 18 civil servants and state employees,



whose work is divided within following areas:

- Sector for monitoring application of the legislation and for inspection control,
- Department for monitoring of the public procurement procedures and administration of the electronic public procurement,
- Department for professional development, training and international cooperation and
- Service for administrative and technical affairs and finances.

As far as the function of the Public Procurement Directorate are concerned, the Directorate:

- reviews complaints which have been made in public procurement procedures
- and make decisions in respect of them;
- examines in the appeal proceedings the regularity of application of this Law and propose and undertake remedy measures for identified irregularities in public procurement procedures;
- decides on requests of the contracting authorities whether to proceed with public procurement procedure when the appeal has been lodged in accordance with this Law;
- decides on the requests in respect of the costs of the appeal proceedings;
- monitors the execution of decisions in accordance with Article 132 paragraph 5 of this Law and undertake measures stipulated by the Law;
- performs control over public procurement procedures whose value exceeds EUR 500 000;
- cooperates and exchanges information in the area of public procurement with the competent authorities of other countries;
- adopts rules of procedure;
- to perform other tasks under the PPL in Montenegro.

**Public Procurement Administration**, established by the law performs the following tasks:

- monitor the implementation of the public procurement system as a whole;
- monitor the compliance of the PP legislation system with EU PP legislation;
- preparation and cooperation to the preparation of the PP law with the competent local and EU bodies;

- organize professional exams necessary for the performance of certain PP tasks and functions;
- if envisaged by the law, it gives its approval for the conduction of certain PP procedures;
- prepare and publish a list of bidders on the basis of decisions on selection of the most favourable bid;
- perform professional development and advanced training in the area of PP;
- provide advisory assistance to the contracting authority, if requested request;
- to publish PP documentation (procurement plans, contract notices, decisions on candidates' qualifications, decisions on selection of the most favourable bid, decisions on suspension of public procurement procedure, decisions on annulment of public procurement procedure, public procurement contracts, changes or amendments of public procurement plans, contract notices, decisions and contracts, as well as of other acts in accordance with PPL);
- administrator the List of contracting authorities on the Public Procurement Portal;
- create condition for wider electronic PP;
- submit to the Government annual reports on the PP;
- prepare and publish a common public procurement vocabulary on the Public Procurement Portal;
- perform inspection control;
- cooperate with international organizations, institutions and specialists in the field of PP;
- issue publications and other technical support literature in the area of PP;
- perform other tasks under the PPL in Montenegro.

### C) Macedonia

Macedonia applies **dual-centralization model**, where public procurement functions are conducted by two central organizations. The first one, **State Appeals Commission**, has been more discussed in part 3.

The activities in connection with the development of the public procurement system, as well as the provision of rationality, efficiency and transparency in the implementation of the public procurement are carried out by **the Public Procurement Bureau** as a body of the public administration within the Ministry of Finance.

Upon a proposal of the Minister of Finance, the Government appoints and dismiss the director for a period of four years.

The Bureau shall perform the following activities:

- initiate proposals for the adoption of legal and other acts in the field of public procurement to the Minister of Finance;
- monitor and analyze the enforcement of the law and other public procurement regulations, the functioning of the public procurement system, and initiate modifications for the purpose of improving the public procurement system;
- provide opinions regarding the provisions and the application of this Law;
- advise and assist the contracting authorities and the economic operators;
- prepare models of tender documentation and model forms for the procedures regulated by PPL;
- keep single records and maintain and update the records of the public procurement contracts, and make them available to the public on ESPP;
- monitor the timely submission of data and disable use of ESPP for users who disobey their obligations with regard to the use of ESPP;
- reschedule electronic auction in case of technical mistake, ESPP crash and upon decision of the State Appeals Commission;
- analyze the elaborations on non-implementation of electronic auction, in accordance with Article 123 of PPL and if the same are not well-founded, point the omission to the contracting authority
- propose Code of Ethics when implementing public procurement, adopted by the Minister of Finance;
- collect, process and analyze public procurement data and prepare statistical reports;
- immediately inform the contracting authorities, and if necessary, the competent authorities regarding the established irregularities from the received notifications;
- determine the minimum requirements regarding the professional qualification of persons performing professional tasks in the field of public procurement;
- organize and conduct training for civil servants and other competent persons in connection with public procurement;
- manage and operate its web page and the Electronic System for Public Procurement (hereinafter: ESPP);
- cooperate with international institutions and other foreign entities in the activities connected with the development of the public procurement system;

- realize international cooperation in connection with the public procurement system and plan and coordinate foreign technical assistance in the field of public procurement;
- submit an annual report to the Government regarding its activities in the functioning of the public procurement system;
- give guidelines and prepare manuals and comments on the rules for public procurement and publish an electronic bulletin;
- perform other activities in accordance with this Law;
- prepare instructions as internal guidelines for the preparation and implementation of education for public procurement and training of trainers for public procurement which are published on its website;
- remove negative reference published for an economic operator based on a decision of the competent authority;
- analyze justifications for not attaching the tender documentation to the contract notice and if they are unfounded it suggests contracting authority for committed omission.

#### **D) Bosnia and Herzegovina**

Bosnia and Herzegovina applies **dual-centralization model**, where public procurement functions are conducted by two central organizations. The first one, **Procurement Review Body**, has been more discussed in part 3.

Public Procurement Agency (hereinafter Agency) is established in Bosnia and Herzegovina as an independent administrative organization, with legal personality.

The Agency conducts following functions:

- Proposes amendments to this Law and its Implementing Regulations ensuring the effectiveness and suitability of that legislation;
- Reinforces the awareness among the contracting authorities and the suppliers of the public procurement legislation and its objectives, procedures and methods;
- Publishes procurement manuals and guidelines and development and maintenance of standard forms and models, according to the provisions of this Law and its Implementing Regulations, to be utilized by the contracting authorities;
- Provides technical assistance and advice to both contracting authorities and suppliers on the application and interpretation of the provisions of this Law and its Implementing Regulations;
- Establishes systems for monitoring the compliance of the contracting authorities

with this Law;

- Collects, analyses and publishes information about public procurement procedures and awarded public contracts;
- Develops a nation-wide electronic information system to supplement the Official Gazette to publish tender documents;
- Initiates and supports development of electronic procurement and communication within the field of public procurement;
- Publishes training information, manuals and other aids for professional development in public procurement;
- Maintains a register of accredited trainers in public procurement.
- Submits annual report to Council of Ministers of BiH.

The Director of Agency is accountable to the government as he is appointed to Senior Executive Manager pursuant to the provisions of the Law on Civil Service in the Institutions of BiH by the Council of Ministers of BiH for a period of 5 (five) years with the possibility of a single reappointment. The Director may be dismissed by the Council of Ministers of BiH on the proposal of the Board pursuant to the provisions of the Law on Civil Service in the Institutions of BiH. No open competition is required for being appointed to this position.

The Board of the Agency consists of 7 (seven) members. The members are: the Minister of Finance and Treasury of BiH, the Minister of Finance of BiH, the Minister of Finance of RS, and four experts selected by open competition as provided for in the Implementing Regulations. The Mayor of Brčko District appoints an observer from the District to the Board. The Director of the Agency as well is an observer to the Board. The members of the Board, apart from the Ministers or their representatives, but including the observer from the District, serves on the Board for 5 (five) years, with the possibility of a single reappointment.

### **Conclusions and comments**

Selected countries formed administrative capacity that implements public procurement functions. Three of them (Serbia, Bosnia and Herzegovina and Macedonia) introduced centralized model of institutional structure that implements public procurement functions. Montenegro works with dually-centralized model. All of those structural models are formally in line with EU requirements.

To what extent the real administrative capacity is developed to conduct public procurement functions cannot be concluded by legal comparative analyses.