PUBLIC-PRIVATE PARTNERSHIPS – CORRUPTION RISKS AND OVERT VIOLATION OF THE LAW

TRANSPARENCY SERBIA

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What are public-private partnerships and what are the related corruption risks?

Although almost all corruption is a "partnership" of individuals or groups from the public and private sectors, it does not necessarily mean that every public-private partnership will be corrupt. On the other hand, the fact is that this type of contractual engagement creates significantly greater corruption risks than those encountered in other forms of state business.

Public - Private Partnerships (PPPs) represent a form of business of public sector institutions, where they, through a commercial contract arrangement, work with a selected private company in areas traditionally falling within the domain of the public sector. PPP can refer to project development, facility construction, project financing, infrastructure management, service provision to citizens and the economy and other areas. The PPP project can be implemented by a private partner or a joint venture that forms a public and private partner on an agreed scope.

These contracts are most often characterized by longevity, especially when it comes to very valuable investments, which can only be paid in the long run. Projects are financed in a mixed way, often with the participation of end users, citizens who use services. In most cases, the public partner is dedicated to overseeing the execution and creating the conditions for the contract to be implemented, while the private one undertakes the production of project documentation, the provision of funding and the management of the project. Each such partnership must contain rules on the sharing of responsibilities, risks and benefits of project implementation.

PPPs look attractive to decision-makers, or the public sector, because, on the one hand, an infrastructure object is obtained or the problem of providing services to citizens is solved, while costs that would otherwise arise through public procurements or the work of state authorities and public enterprises can "conceal" or delay. The need for borrowing and the credit burden of the state or local self-government is reduced, and instead of capital investment, an investment that has to be done at once, through the PPP, the authority gets the opportunity to allocate the costs, which are reflected in reduced or absent revenues, over a number of years. This reduction in income is less visible than the profits generated through PPPs. Public private partnership, however, does not mean that the authorities spend less public money - money is only paid later and in a different dynamics than in cases when the state itself purchases goods, services and works, and a private company carries out business *for the state, not with it.*

A good reason for using PPPs is the well-proven assumption that the private sector is more efficient than the public sector in business. It is considered that the participation of private sector partners reduces the costs of implementing the project. Competitive procedures in choosing a private partner and a good risk allocation should really ensure that the project costs are minimal. Also, when a private partner is entrusted with the long-term management of the PPP-related facility (e.g. motorway, factory, stadium), he has an interest in completing the construction as soon as possible, in accordance with the budget and that all maintenance and management costs are adequately accounted for, or smaller. All of this, however, falls apart when there is no competition in partner selection, where risks are not well distributed and when there is no control over the implementation of contractual obligations. This last risk is particularly high in situations where a private partner has the ability to reduce profits in a joint venture or in an object that is jointly managed by showing increased costs or lower incomes.

In the practice of other countries, there have been some shortcomings of the public-private partnerships, among which are the slow implementation, the inflexibility of a long-term

arrangement, insufficient transparency regarding the commitments made by PPPs in future years and the lack of precise information on benefits that will a public partner have from investments, a risk distribution that favors a private partner, and more. On the other hand, there are cases where PPP has made better risk management, greater innovation, greater expertise, better maintenance of facilities, greater discipline related to the project budget, and more.

According to the current legislation in Serbia, a public-private partnership is defined as long-term cooperation between a public and a private partner for the purpose of providing financing, construction, reconstruction, management or maintenance of infrastructure and other facilities of public importance and provision of services of public importance. It can be contractual, institutional or in the form of a concession.

PPPs are regulated by the Law on Public-Private Partnerships and Concessions.[1] Despite numerous announcements, plans of the Government of Serbia and obligations related to Serbia's EU path, this Law has not been changed in the last seven years.

Contractual partnership implies mutual rights and obligations in carrying out a PPP project, with or without concession elements, which **the contracting parties regulate by public contract**. The public contract granting the concession governs the rights and obligations of the grantor of the concession and the concessionaire.

Institutional PPP is based on the relationship between the public and private partners as members of a joint company that carries out the PPP project, where this relationship can be based on the share capital in a newly founded company or on the acquisition of an proprietary share, i.e. capital increase of an existing company. Founder's and management rights are regulated freely between the members of the newly formed company in accordance with the Law on Companies. With this form of PPP, the public body initiates the procedure for selecting a private partner, applying the criteria prescribed by the Law on PPP. After the private partner selection procedure has been carried out, the public body and the selected private partner conclude an agreement on the establishment of a joint company for the purpose of implementing the PPP project.

A concession is a contractual PPP with elements of a concession, in which a public contract regulates the commercial use of natural resources, i.e. goods in general use that are in public ownership or the performance of activities of general interest, which the competent public body cedes to a local or foreign person, for a specific period of time, under specially prescribed conditions, with the payment of the concession fee by the private or public partner, whereby the private partner bears the risk related to the commercial use of the concession object.

Public-private partnership **is never the only way** to satisfy a specific need of the citizens that is taken care of by the public sector. If, for example, there are not enough public garages in a city, the city can finance the construction from the budget or from loans, select a contractor through public procurement, and then maintain the facility by charging fees to the users. If the construction of a garage in a particular place is a commercially profitable activity, the city can, after passing urban plans, lease the land to the company that makes the best offer. Such a company then bears the eventual business risks and reaps the profit, while the city receives a one-time payment to the budget. The city's decision should depend on the assessment of the investment in relation to current and future revenues - if the city judges that the contract is more profitable in the long term than a one-time fee, then it should opt for public procurement. If the assessment is to the contrary, it should provide an opportunity for the private sector to try its luck. Whatever the assessment, it would be much more difficult to justify the decision to enter into a public-private partnership than into some of the simpler business arrangements. That partnership, as described, could take various forms - for example, the city and a private firm would create a joint venture that would build a garage and share profits and costs in some proportion. Or, for a private person to build a facility and collect income, but for the city to guarantee him compensation for the minimum number of garage spaces rented, so as to prevent potential losses. If the garage turns out to be doing well, it could mean that the city reduced public revenues by opting for a PPP. If the garage operator is running at a loss and survives only owing to city subsidies, then the initial assessment of the need for a garage was wrong and a waste of public resources.

1 "Official Gazette of RS", no. 88/2011, 15/2016 and 104/2016.

MAIN PROBLEMS AND POSSIBLE SOLUTIONS

Planning process

When deciding on the use of public funds, whether real estate, state-owned enterprises or budget funds, the underlying risk lies in the fact that this decision does not reflect public or predominant public interest, but it is made in accordance with the private one.

Choosing "wrong priorities" can be the result of ignorance, but also corruption - when a decision-maker, a person who grants that decision, or a person who can influence them, has a private interest in carrying out a public project, to implement it in a certain way or with a particular partner.

At the first level, therefore, the risk of corruption in planning may exist when deciding to **enter a particular project at all**, whether it will be subsequently implemented as a public-private partnership or in some other way (e.g. through the public procurement of works) .

Once the priorities have been determined, the way to solve them should be chosen. As we have already described, public-private partnerships are never the only possible solution, but there are others, which carry less risks of corruption and waste of public resources due to wrong assessments.

The planning process should ensure that public-private partnerships are selected only when this is precisely the best solution - that is, in the long run, the most cost-effective when taking into account all relevant stakeholders. This implies recognizing these long-term goals, identifying possible ways to solve the problem, and then a properly performed analysis that will lead to the selection of the best solution. Only when all these factors are recognized and when the correct data on their significance is obtained there will be an opportunity to face arguments and to make the right decision.

The correct decision on PPP implies not only the selection of this type of contract, but also **the proper selection of the type of public-private partnership that is most favorable for a public partner** (e.g. a concession or a joint venture).

Since the goal of planning, when performed in the public interest, comes down to that it is necessary **to choose between several possible public interests**, which cannot be realized at the same time, then it would be **precisely the citizens whose property it is all about, are supposed to be given the opportunity to declare themselves.**

Although the purpose of public-private partnerships is primarily to meet certain needs of citizens, **public-private partnership regulations do not contain rules that would ensure the voice of citizens being heard**. This applies equally to the time when the public-private partnership is planned, as well as for the period when it is realized (satisfaction with the use of services).

There are no legal obstacles for authorities to collect this data, but there is also no obligation to do so, except indirectly. Thus, in some cases there is an obligation to organize a public debate in the preparation of certain documents, which may be related to the latter public-private partnership. A typical example is the mandatory procedure for the drafting of certain urban planning documents, when the so-called "public review", which represents a type of public discussion in the preparation of regulations. Those planning documents typically contain plans for the construction of specific facilities (e.g., roads, water treatment facilities, sports facilities). The construction of these facilities and the provision of services may be the subject of a concession or other form of public-private partnership. However, the method of realization of a particular project is usually not known at the time of the public review. Exceptions are situations when plans are adapted to agreements already reached or the actual situation, instead of the other way around.

In other cases, public debates are not mandatory, except in exceptional cases. Namely, public debates must be organized as part of the process of drafting of laws, and decisions on public-private partnerships are made when the necessary laws are already in force. Exceptions are situations, primarily at the local level, when a public debate on the budget is organized and when the proposal for a decision on the budget or the accompanying bylaws contain data that is essential for the implementation of the PPP (e.g., the share of the public partner in the joint venture, relieving the private partner from paying certain fees). At the national level, there is neither an explicit obligation nor a practice of organizing budget discussions, while at the local level, according to the current draft

of amendments to the Law on Local Self-Government, it is planned to introduce the obligation to hold a public debate on the budget. In this way, the legal framework that helps to reduce the risk of corruption in public-private partnerships will be at least slightly improved.

The precondition for declaring citizens would be the obligation of the authorities to draw up and publish a plan for public-private partnerships at an annual or perennial level.

A public discussion of the planned PPP projects would have been possible even before it was included in the plan. This would enable citizens to declare their project priorities. When there is already an analysis that shows that public-private partnership is the best solution, a public debate could also make sense if new issues arise, for example, in relation to the price of services to be paid by end-users, in terms of the efficiency of technology that will to be sought from a potential private partner, etc.

Implementation of the contract

The risks of corruption that may arise in the implementation of public-private partnership contracts are numerous. The natural **tendency of the private partner to reduce their obligations**, to overcome the risks of doing business to a public partner and to increase their own profits is not corruption for themselves. However, **the occurrence of such damage** to the public partner and public interest in general **may be related to corruption** with the public partner. This can be a matter of corruption that arises in the early stages of negotiation and contracting (some provisions favoring the interests of a private partner are entered into the contract or the provisions that protect the interests of the public partner in crisis situations are not included), but also those to which comes in during application. A typical example would be corruption related to overseeing the fulfillment of contractual obligations, which aims to ensure that the level of fulfillment of the obligations of the private partner, which is an essential element of the contract, does not undergo supervision at all or that the information is wronged.

Similarly, **there are risks when it comes to achieving benefits for the public partner**. A typical example would be managing a joint venture, where mainly the (private) partner dictates the dynamics of spending of funds and does business with related parties, benefiting when a joint venture spends assets or even operates in its entirety at a loss. The absence of supervision over contract implementation processes can significantly reduce the revenue generated by the public partner, and this lack of supervision can be the result of poor planning and negotiation, as well as corruption during the implementation of the contract.

Citizens and execution of the contract

In order for citizens and other interested parties to contribute to the suppression of corruption during the execution of the PPP contract, **there should be an obligation of a state body**, whether it is a public partner or an external supervisory authority, to monitor the implementation of the public-private partnership contract thus **collecting data from interested parties.**

Namely, as soon as there is an obligation to monitor the implementation of the contract, to keep a written record of it, the chances of corruption being detected will increase. Consequently, the chances of someone risking by entering into corrupt relationships will be decreased. Furthermore, the collected material on the implementation of the contract allows for subsequent insights and other irregularities, which may also be related to corruption, to be seen. However, **it must not all be left to the functioning of the supervisory authority itself**. It is not a rare situation when there is an obligation to carry out surveillance, but it is not defined how it must be conducted, at what time intervals, or how detailed, so the control itself is ineffective due to corruption. A frequent excuse in such situations is the lack of capacity (whether it is real or fingered), which explains that the supervisory authority could not determine that there was an irregularity.

Possible solutions for such disagreements are the inclusion of citizens. When the supervisory authority is obliged to collect and consider what the interested parties indicate to it, whether it is about service users, non-governmental organizations that monitor, political opponents of the government or about competing companies, their information and reports should be carefully examined and the results of this inquiries to inform the applicant. A corrupted supervisory authority will then not be able to say that the problem "has not been noticed" but will have to look back at it somehow.

Related to this is the issue of whistleblower protection. In the current legal system, whistleblowers can only be citizens, and not legal entities, if they are revealing irregularities or threats that are related to the work of state bodies, but also private sector organizations. However, the Law on Protection of Whistleblowers requires that there

is some form of prior connection between the person reporting the irregularity and the organization where the violation occurred. It can be an employment relationship, another relationship similar to employment, ownership in a company, and the like. When it comes to public sector organizations, the relationship that the legislator recognizes as valid for protection is also the relationship between the provider and the user of the service. However, since in the case of public-private partnerships the service can be provided by a private partner or a joint venture between private and public, it would be logical for them to be included as well.

Finally, **the implementation of a contract is not only a goal per se** but it is also necessary to determine what the needs of the citizens are and to what extent they are satisfied. Therefore, a PPP or supervisory authority (e.g. a line ministry) should monitor the situation in the area and collect information on the effects of the implementation of the contract from the service user. This can be done through specially organized surveys among citizens or through constantly open channels of communication with them.

Increasing transparency

One of the most reliable ways to fight corruption is to increase the transparency of all important parts of the procedure. It is insufficient in the case of public-private partnerships.

The "Register of Public Contracts", in fact, does not contain the contracts proper, but only certain information from these contracts. Also, neither in that register, nor anywhere else, reports on the implementation of the contract and the conducted supervision are published.

In the process of selecting a private partner for a significant number of public-private partnerships, the procedure from the Law on Public Procurement is applied. Although the law is exemplary in terms of transparency, there is still room for improvement. For example, the contract model and the notification about the selection of the most favorable bid are released, but not the document itself - the contract; information is released that a request for the protection of rights has been submitted, but not the text of that request or any other document on the basis of which it could be concluded what is the subject matter of the dispute. In addition to improvements, there is still significant room for improvement of technical solutions and general usability of the Public Procurement Portal, especially through connection with other databases, and structured publication of individual data collected. With regard to the specifics of public-private partnerships, the public should be provided with those documents that do not exist as such in the public procurement procedure, and hence said Law does not even mention the obligation to publish them.

In addition to transparency, which is ensured by the publication of documents and other information in advance (on the website and in special databases), it is very important for authorities to act on requests for access to information of public importance, based on the law that governs this matter since 2004. Currently, the Law on Free Access to Information of Public Importance does not bind some of the participants in a public-private partnership (e.g., a joint venture in which the state is a minority owner). The inclusion of these companies in the Law would enable better control of the use of public resources, and thus would not interfere with the possibility of withholding certain information, so that competitors on the market would not learn the business secrets of the company.

Transparency would be more complete if information on planned and implemented public-private partnerships were included in various documents that are prepared in connection with budget planning or execution. As we explained earlier, data on PPPs and their impact on the budget is not always clearly recognizable, so they would be visible in the budget primarily when it comes to direct allocations of the public partner based on contractual obligations, regarding that type of arrangement. However, more could be said about other aspects, for example in the Fiscal Strategy, which is prepared by the Ministry of Finance, and is considered by the Government and the Assembly, and above all by the independent body, the Fiscal Council, as well as by interested international entities. It would be good to make it mandatory for the Fiscal Strategy, in addition to the data it must contain now (e.g., on planned economic growth, indebtedness, etc.), to include data on the expected effects of public-private partnership contracts. Namely, these contracts can have significant effects on public revenues or public expenditures, for example, in the case of renouncing some tax revenues in favor of a joint venture, through the separation of activities of public enterprises and giving contracts to a private partner, with the simultaneously assuming the company's liabilities and the like.

SUPERVISION AND OTHER CONTROL MEASURES

The supervision as a measure for reducing the risk of corruption functions as an element of ensuring (public) accountability, or putting invoices on performing a public business. In this regard, there is a significant area for improving control in the field of PPP, both at the legislative level and in practice.

In the current legal system, public-private partnerships are approved by the Government, apropos the Commission, as an "operational-independent" body. Such an approval may be inappropriate in some cases. As the budget, with all its items must be approved in the National Assembly, with only a small portion remaining for discretionary or hidden costs that the executive authority can do without prior approval, it would be logical for public-private partnerships to go through this the kind of parliamentary approval.

A distinction can also be made depending on the value of the contract, the total value of the public property covered by the contract or the duration of the state in which public property of higher value will be "locked up" (e.g., in the case of concessions), for which there are examples in the countries of the region. For such cases, it could be foreseen that entry into the PPP must be approved in advance by the National Assembly or even by a qualified majority of the total number of deputies. Norms on the disposal of public property of greater value should also find their place in the Constitution, during the next amendments thereto.

Parliamentary oversight is not always effective, but it is the basis of a separation of powers system. In this sense, there are already many cases where the Government or certain state administration bodies have to prepare reports for deputies on how they implement laws and strategic acts. In addition to direct reporting to the executive branch, the Assembly can also rely on regular reports from independent state bodies, which provide the legislative body with an annual review of actions related to the implementation of important regulations. The subject of their analysis is also primarily executive authorities. Thus, the Assembly receives a report on the audit of the statements of accounts, data on the fulfillment of the anti-corruption strategy, a review of the decisions of the Commissioner for Information that remained unimplemented, reports of the Fiscal Council and the State Audit Institution, data on the supervision of the implementation of the Law on Public Procurement prepared by the Office for Public Procurement and data on the performance of tasks within the jurisdiction of the Republic Commission for the Protection of Rights in Public Procurement Procedures.

However, there is no special channel for information about planned and executed public-private partnership contracts. In addition to the introduction of the obligation for the Government or the PPP Commission to prepare and submit these reports, the obligation of the National Assembly should be provided for to consider this report within a certain period, to draw conclusions related to it and monitor their fulfillment.

In the current Law on PPP, there is no clearly defined authority to supervise the implementation of the contract. Of course, there are certain duties of each public partner in this sense, which derive from the existing regulations, i.e. the obligation to "monitor the situation" in a certain area, and thus, indirectly, the contracts that have been concluded. However, it would be much better if there existed a clearly prescribed obligation to supervise the execution of contracts, in which the Commission for PPP with amended powers and status, or some other body, would have both the authority and the duty to collect data on the execution of certain contracts and the actions of public partners.

The rules on conflict of interest in Serbia are not always precise enough, and they were additionally violated after the adoption of the authentic interpretation of the term "public official" in the Law on Prevention of Corruption from February 2021. Furthermore, a part of people who could influence the decision-making process are not covered by those rules. The most important among them are advisors, who are not subject to the conflict of interest rules that apply to public officials, as well as those that apply to civil servants. In addition to special advisers, whose status should be regulated soon,[2] there are potential problems related to the role of specially engaged consultants who often have great influence on the decision to enter into a public-private partnership, on the choice of the type of arrangement, and even on the potential partner. The Law on PPP itself does not contain certain norms on conflict of interest that would be applied in such cases and on the basis of which those companies that are personally or financially connected to the consultants who prepared the documentation would be excluded from the bidding.

2 The draft amendment to the Law on Prevention of Corruption, which also contains provisions on special advisers to members of the Government of Serbia, was up for public debate in the summer of 2023.

In this regard, certain solutions can be found in the rules on conflict of interest, which are contained in the Law on Public Procurement. However, these rules are not at all adapted to the specifics of public-private partnership arrangements, and otherwise they have not proven to be particularly useful in the practice of applying the Law on Public Procurement.

The problem with supervision in general is that it prescribes what the authority can do, not what it must do. That is why surveillance data remains scant, and many failures remain undetected. In the context of public-private partnerships, certain financial results that are expected or achieved are very often highlighted. However, supervision that would be limited only to reviewing financial indicators or compliance with procedures, would not provide a complete picture of the execution of the contract. Namely, contracts are drawn up to meet the needs of citizens, so that is exactly what should be measured. If the goal was to satisfy the needs of a certain number of service users, then it is necessary to measure whether that goal has been achieved and to take measures if it is not.

One of the things that must be taken into account when forming a joint venture is what its costs will be. Namely, if the state, as a minority partner, agrees upon in the contract to receive a certain share of the joint venture's profits, and the private partner, as a majority, establishes control over management decisions, then it may happen that the public partner is damaged due to to inflating the costs, especially through doing business with related companies. One of the possible solutions for such cases, which would significantly reduce the possibility of corruption and damage to the public interest, would be the introduction of an obligation for such a joint venture to conduct public procurement in the same way as a business entity majority-owned by the state would conduct them. This includes the possibility to part of procurement (e.g., what is purchased for resale) is not carried out according to the procedures of the Law on Public Procurement. In this way, not only the interests of the public partner, but also far greater transparency would be ensured.

As already indicated in the part related to citizens' participation, there is a need to include the supervisory role of other authorities, especially those that have a role in budget control. Thus, the Fiscal Council could declare the impact of PPP on revenues and expenditures in the future, both now and in the future.

Even more significant is the role of the State Audit Institution. This body has the ability to evaluate the purposefulness of the public sector’s operations, so the subject of their interest could be the initial decision to enter this type of arrangement, as well as the reports on the implementation of the contract. Currently, the revision of expediency is very rare. The legal obligation does not exist, only the possibility. It would be appropriate to consider the introduction of an audit of the most valuable PPP contracts as a part of the mandatory audit program that is prescribed by the Law on the State Audit Institution.

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In every state government operation, **the greatest risk is discretion**, the situation in which an authority or an individual can, based on its free assessment, to decide whether or not to enter a particular job. When the discretion is not accompanied by the protection mechanisms, such as fundamental analysis, oversight, transparency and review of the decision, then the risk is even greater. When it comes to the public-private partnerships, the greatest risks exist in situations where it deviates from the general rules for the application of some of the legally admitted exceptions.

A typical example may be the situation of deviation from the application of the regular rules on PPP on the basis of the circumstance that the business is concluded with an economic entity from a country with which Serbia has concluded an interstate agreement of a particular type. In general, such arrangements should be avoided, because the intergovernmental agreement may circumvent the application of any law, until the agreement violates any constitutional norm.

In order to minimize these risks, it is necessary to establish the rules, either in the Law on the Public Private partnership or in a separate law governing the conduct of negotiations preceding the conclusion of the international agreements. The current regulations do not pay attention to these issues. In order to solve this problem, an obligation should be prescribed for negotiators who act on behalf of the Government or other authorities in Serbia to ask the other contracting party before the conclusion of an interstate agreement that the international agreement contains a clause on the application of domestic law on PPPs and concessions. In this way, it would not be easy to involve into the application of exceptions to the general legal regime.

Another measure that would help in this would be the establishment of an obligation for the public partner to ensure maximum disclosure of data also in the conditions of PPP implementation in the framework of an interstate agreement. This means that the public partner should publish all those documents where secrecy is not determined by a special decision, based on the law. In other words, the presumption must be in favor of the public of the documents. It goes without saying that confidentiality of data should not be stipulated in the international agreement itself as a principle, but possibly as an exception that can be applied in accordance with Serbian laws.

It is especially important that the public partner prepares a feasibility study for these PPPs as well. It is an act that can show (prove) that the implementation of the project was justified, and that PPP is the right model to implement the project. This is something that is foreseen in the current Law on PPPs and Concessions. However, when the application of the Law is excluded, based on a hierarchically higher legal act (international treaty), then the implementation of this important anti-corruption principle becomes impracticable. This issue is particularly important in situations where the international contract also provides for the financing of the project (loan) and the execution of works (instead of PPP or public procurement).

Finally, this type of contract significantly reduces competition, because as the subject of an international contract and as the goal of an exception from the application of the Law, the exclusion of competition and the awarding of the contract to a predetermined partner/contractor or potential partners are limited to the circle of those originating from the country with which such contract was concluded. Therefore, amendments to the law should oblige the public partner in such situations to ensure competition to the extent possible even under the conditions of the implementation of the exempted PPP. In any case, even when it is not possible to ensure competition, the public partner would have to be aware of the risks it brings, oversee whether they have occurred and inform the public about the findings of that oversight.

Penalties

The Law on Public-Private Partnerships does not contain penalties, which is one of its main disadvantages. Only when a legally regulated system contains penalties, as a threat in the case of prohibitions, restrictions and obligations, it can be said that the legal norms are complete. Of course, this does not mean that anything can be done with impunity within public-private partnerships. On the contrary, the most difficult and imaginary abuses are punishable by the criminal offenses, on the basis of a criminal case relating to public procurement procedures, or as abuse of office in general. In addition, pursuant to the Law on Public Procurement, some actions are punished by the misdemeanor penalties.

When considering possible changes to legislative concepts for the purpose of punishment, several directions should be taken. The criminal offense of misconduct in public procurement should undergo significant changes as well. It now contains both misconduct by the ordering parties and the illegal arrangements of the bidders. During such changes, the specific features of public-private partnerships should also be taken into account. For example, the estimated value of a public procurement over a certain amount results in a longer prison sentence for the perpetrators of this crime. On the other hand, with public-private partnerships, there are more parameters for calculating the value of the contract than with procurement, and the question is what could be included - the value of the investment or the value of the expected income of the private partner, direct investments of the public partner or profits lost due to tax relief and other exemptions, etc.

Basically, and in connection with the Law on PPP proper, a misdemeanor, or even a criminal sanction should be prescribed for the case of concluding a contract without a previously conducted procedure in accordance with the law. Misdemeanor penalties should also exist for failure to submit mandatory documents or those documents and information that the PPP Commission specifically requests. Finally, we should not forget the penalties in case the public partner fails to publish all legally required information and documents on its website or on the website of the joint venture it has with a private partner or fails to submit information for publication in the Register.

DIFFICULTIES IN IMPLEMENTATION, CIRCUMVENTION OF REGULATIONS AND OVERT LAWLESSNESS

Transparency Serbia has been persistently trying for years to follow the fate and implementation of two public-private partnerships in the capital city - the concession for the Belgrade airport and the "Belgrade Waterfront" project. In the first case, the partnership was contracted according to the provisions of the PPP Law, but many questions remained unanswered, including those that had to be resolved before the decision to enter the concession was made.

When it comes to the "Belgrade Waterfront" project, the implementation of the Law was circumvented by bringing the project under the interstate agreement between Serbia and the UAE, where the majority partner in the joint venture that is the beneficiary of this project is registered. Moreover, that initial deviation from the general legal regime, applied during the selection of a private partner, still serves today as an excuse to deny the public information about the implementation of the contract.

What is not known about the concession for the Airport

In July 2023, the Minister of Construction, Transport and Infrastructure, Goran Vesić, called for an urgent meeting[3] the management of the French company Vinci, which according to the concession contract manages the Belgrade Airport. Vesić stated that this company “owes answers to many questions” related to the number of employees and the functioning of the equipment. He also claimed that the state of Serbia has fulfilled its contractual obligations, but that Vinci has not. However, instead of stating exactly which obligations have been breached, Minister Vesić stated that the company representatives “did not hear what President Vučić said”, who, as Vesić said, “before the first plane to Chicago took of, publicly asked Vinci to install new conveyors” and to employ more staff.

After the meeting, Vesić said that “he reminded Vinci of the obligations under the concession agreement and that the Government of Serbia, which has fulfilled all its obligations under that agreement, expects them to provide enough people and that all services at the airport are fulfilled regularly and without excessive waiting time.”

The problems in the management of the Belgrade airport were obvious in this period, and it is certainly good that the relevant ministry reacted to it. However, in the absence of information from the contract itself, citizens cannot conclude whether the problem arose because the concessionaire "Vinci" is not respecting its obligations, or whether part of the blame for the resulting also lies with the representatives of our state, for example, in the event that the contractual obligations are not defined precisely enough, or due to failure to perform supervision in a timely manner.

Transparency Serbia asked the Ministry of Finance in 2019[4] for monitoring reports, i.e., the reports on the fulfilment of the obligations of private partners in the projects “Nikola Tesla Airport” and “The Belgrade Waterfront.”

We were told that[5] all information related to the airport concession are secret and that the Belgrade Waterfront is not a PPP and therefore the requested information cannot be supplied.[6]

The airport concession contract was never made public. In the so-called "register of public contracts" only some information from it was published, as well as a list of annexes, from which it can be seen that only some of them are of a confidential nature. On the other hand, since 2017, Transparency Serbia has been trying to get at least information that preceded the decision to give the airport in concession at all. The Ministry and the Commission for Public-Private Partnerships referred to the fact that according to the decision of the Government of Serbia, these are strictly confidential documents and that only the Government can decide on the abolition of secrecy. The Government has also withheld information, and TS has been conducting administrative disputes against the Government in this regard for seven years![7]

3 https://www.mgsi.gov.rs/cir/aktuelnosti/vesitsh-koncesionar-aerodroma-sutra-mora-da-pruzhi-objashnjenje-i-da-objavi-plan

4 https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Zahtev_Ministarstvo_finansija_-_aerodrom_koncesija_izve%C5%A1taji.pdf

5 https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Odgovor_Ministarstvo_finansija_-_odbijen_zahtev.pdf

6 https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Odgovor_Ministarstvo_finansija_-_Beograd_na_vodi.pdf

7 https://www.transparentnost.org.rs/images/dokumenti_uz_vesti/Tu%C5%BEba_protiv_Vlade_-_Koncesija_za_aerodrom.pdf

LAWLESSNESS

As great as the corruption risks are when entering into public-private partnerships by applying regulations, such risks skyrocket when these regulations are openly violated. As part of PPP oversight, we have overseen two such projects. While the first one can be proven to have been contracted in violation of the law and to the detriment of public resources (Prokop), in the second case (General Staff building) we can for now speak of illegal contracting and damage waiting to happen.

Case study: Prokop

The construction of the building of the Belgrade Center Railway station (Prokop) is a clear example of the transfer of state land without an economic calculation that would justify it, carried out outside of the law and with the connivance of a whole series of institutions.

Regulations were ignored also during the last stage of works on the tracks and platforms, when in 2014, the agreement was concluded in violation of the anti-corruption provisions of the Law on Public Procurement, since the same person appeared in the public procurement procedure both on the side of the client and on the side of the bidder to whom the contract was ultimately granted. The administrative court found illegality, but the entire procedure was not completed before the works themselves were completed[8]. Asked about the ruling of the Administrative Court during the official opening of Prokop in January 2016, Aleksandar Vučić, the then Prime Minister – asked the „Istinomer“ journalist not to listen to such things on that day. „Unlike others, I will not allow those who have the least rights to talk about it, to talk about any corruption or crime or anything. Especially because I know that neither I nor anyone else has ever taken a single dinar,“ Vučić said, thus outlining how the state will position itself regarding the construction of the missing station building.

In the same year, the Republic Directorate for Property of the Republic of Serbia announced a non-binding public invitation[9] for the collection of letters of interest in the construction of the Belgrade Center Railway Station building and accompanying commercial facilities, in accordance with the urban project for the station no. “X-10 350.13-54/2016”, confirmed by the Secretariat for Urban Planning and Construction Affairs of the City of Belgrade on October 26, 2015.

"Construction is carried out by the Republic of Serbia investing land and enabling construction on already built facilities, and the Potential Partner finances the construction of the Railway Station Building and commercial facilities (joint construction). The railway station building is being built according to the parameters that have already been determined by the Urban Planning Project and, by law, is the public property of the Republic of Serbia. Potential partners can provide their conceptual solution for the Railway Station Building in accordance with urban planning parameters and static limitations, and competent bodies and authorities will assess whether it is possible and necessary, according to that conceptual design, to change the existing Urban Project," the invitation states. It emphasizes that it is published only for the purpose of market research, and in that sense does not oblige the Directorate to initiate any procedure for the selection of partners.

Despite the interest expressed by Danish and Dutch investors, as well as the domestic company MPC Holding, according to Politika[10], the state did not initiate the public procurement procedure. Instead, in July 2019, the Directorate released a new call related to the same urban project[11] (only with the addition of the construction of parking lot that will also be in public ownership next to the station building), which is no longer non-binding and in which letters of interest have been replaced by bids, but without stating the legal basis on which such a procedure is carried out and which contains a note saying that if only one bid is submitted at the public call, it will be taken into consideration. An important note – if we bear in mind that unlike in 2016, when the Directorate’s call was posted on the websites of the City of Belgrade and “Beogradčvor”, the new call was posted only on the website of the Directorate and was not translated in English.

8 https://www.nin.rs/arhiva/vesti/36693/direktna-pogodba-u-inat-svim-zakonima

9 https://arhiva.rdi.gov.rs/doc/oglasi/PROKOP%20JAVNI%20OGLAS_SRB.pdf

10 https://www.politika.rs/sr/clanak/363987/Polovinom-oktobra-tender-za-sine-na-Mostu-na-Ad

11 https://arhiva.rdi.gov.rs/doc/oglasi/BEOGRAD%20CENTAR%20%20Oglas%2016.07.2019..pdf

The fact that the call was even announced was first mentioned in the media in an article in Politika from December 2019, saying that the only bid was submitted by the company Railway City d.o.o. and that, with the consent of the Government, negotiations with this company are ongoing.[12] Although it took a year to sign the contract with Railway City[13], there is suspicion that the Directorate adapted the call to this particulary company. In addition to the fact that the advertisement was pretty much hidden, as confirmed b the fact that previously interested investors did not respond to it, unlike the call from 2016, where potential partners were required to submit the proper references, this provision was supplemented in the new call with the not that “references of related entities are also considered adequate” – without which Railway City, as company established only three months before the call for bids, would not even be able to compete.

"This contract undoubtedly represents a public-private partnership, so in accordance with the Law on PPPs and Concessions from 2011, a different procedure had to be implemented." By law, the project had to be first approved by the Commission for Public-Private Partnerships, and then the procurement procedure had to be carried out, where the criteria for selecting partners would be precisely determined, where there would be protection of the bidder's rights, which was not the case here. Furthermore, such a procedure would also guarantee the public release of key information about the conducted procedure, the obligations of the private partner and the state's investments, which is currently not ensured", the joint statement by the Coalition for the Supervision of Public Finances and Transparency Serbia said, with a call to the Government to urgently make it publicly available all the documentation and the signed contract, and the conclusion that, judging by the available data, the Directorate chose a private partner in an illegal manner.[14]

This was followed by the Directorate's response, saying that the entire procedure "is public and transparent in every part and confirmed by the appropriate decisions of the Government of the Republic of Serbia", that it was not carried out in accordance with the Law on Public-Private Partnerships and Concessions because it was not a long-term cooperation between the public and private sectors, as well as that it is a project of special importance for the Republic of Serbia. The Directorate tried to substantiate this position by referring to the provisions of two other laws that cannot be applied to this case - for example, to Article 88 of the Law on Planning and Construction, which refers to the change of use of agricultural and forest land, even though it is a concrete slab above the railway station, the construction of which began half a century ago.

There were two legal possibilities for carrying out this project: either to implement a public-private partnership procedure or separate procurements for the construction of the station building and for the sale of construction land on which commercial facilities will be built. And since the Directorate decided on a procedure that is not regulated by any legal act and at the same time fails to ensure an adequate level of transparency and does not enable the protection of the rights of interested partners, Transparency Serbia and the Coalition for the Supervision of Public Finances submitted an initiative to the Public Prosecutor's Office of the Republic to file a lawsuit for establishing nullity of the signed contract[15]. However, Deputy Public Prosecutor Predrag Ćetković disregarded the violation of the legal procedure and the damage caused to the public interested, focusing solely on the issue of transparency of such a procedure. He concluded that, since nobody other than the Railway City company from Belgrade responded to the Directorate’s advertisement and since no complaints whatsoever were subsequently filed, there is no evidence that the lack of transparency caused damage to anyone and therefore no reason for the Prosecutor’s Office to initiate proceedings.[16]

It is not clear how prosecutor Ćetković interpreted the fact that only one company responded to the advertisement as confirmation of sufficient transparency of the procedure, and even less how he imagined that anyone would complain about it, since the first opportunity to find out in the media that this is "public" call was announced at all, came exactly four months after the term for submission of bids expired. Subsequent letters by Transparency to the Republic Public Prosecutor Zagorka Dolovac[17] remained unanswered and thus the prosecutor’s office joined the long list of institutions that see nothing objectionable in the sham procedure, since the Government, the Ministry of Finance, the Ministry of Construction, the City of Belgrade and the State Attorney’s Office delegated their representatives to the commission that selected Railway City’s bid (along with the companies “Infrastructure Railways of Serbia” and “Beogradčvor”).

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12 https://www.politika.rs/sr/clanak/444921/Holandsko-bugarska-kompanija-potencijalni-graditelj-Prokopa

13 https://www.politika.rs/sr/clanak/462901/Prokop-mora-da-saceka-ispitivanja-ploce

14 https://www.transparentnost.org.rs/index.php/sr/aktivnosti-2/naslovna/11859-nezakonito-odabran-partner-za-izgradnju-stanicne-zgrade-na-prokopu

15 https://transparentnost.org.rs/images/dokumenti_uz_vesti/Inicijativa_RJT-u_za_podno%C5%A1enje_tu%C5%BEbe_za_utvr%C4%91enje_ni%C5%A1tavosti_ugovora-Prokop.pdf

16 https://transparentnost.org.rs/images/dokumenti_uz_vesti/Odgovor_VJT_-_ni%C5%A1tavost_Prokop.pdf

17 https://transparentnost.org.rs/images/dokumenti_uz_vesti/Inicijativa_RJ%D0%A2_-ni%C5%A1tavost_ugovora_Prokop.pdf

However, the illegality of the procedure is only part of the story, and it seems that in this particular case, the public interest would have been violated even if the Law on Public-Private Partnership had been applied. Namely, the Director of the Republic Directorate for Property stated that, according to the assessment of the City Expertise and Assessment Institute, 7.43 million euros are needed for the construction of the station building,[18] which in itself puts a question mark on the need to look for a private partner. Looking at the Public Investment Plan of the City of Belgrade for the period 2020-2022, it contains 218 capital expenditure projects (which would certainly include the construction of station building from the city budget) with a total value of 870 million euros. This means that the completion of Prokop would require less than one percent of the capital expenditures budget. The decision not to finance the station from the city budget becomes even more strange taking into account that in 2021, the list of planned investments includes the reconstruction and extension of the Kalenić open market, with a projected 11.8 million euros, while the Kalenić open market already existed and was in operation, Belgrade did not have any station building at the central railway station, since the old one was closed due to the Belgrade Waterfront.

In other words, the selected approach seems illogical only until we consider the possibility that it is a deliberate misuse of public resources. Publicly available records from the Real Estate Price Register of the Republic Geodetic Authority show that as of 2019, construction land near Prokop was sold for around 600 euros per square meter, while the most expensive plot was sold for 2,000 euros per square meter. Even if they gave a very cautious estimate that the state could have achieved a price of 500 euros per square meter at the public auction for the land on the slab above Prokop next to the station building, that would mean that by selling the land it could have earned over 18 million euros, i.e. two and half times the money it estimated that it needed to invest in the station building[19].

In addition to the fact that Railway City obtained the land on the slab extremely cheaply, it was also enabled to build on it much more commercial space than was foreseen by the Urban Project for the realization of which it was engaged. In the invitation of the Directorate, it is emphasized that potential partners "can provide their conceptual solution for the Railway Station Building with parking spaces", that the competent authorities will evaluate "whether it is possible and necessary, according to that conceptual solution, to change the existing Urban Project", but such the definition suggests adjusting the parameters from the UP to the concrete conceptual solution of the station building. Nevertheless, the new urban project commissioned by Railway City and confirmed by the Ministry of Construction in March 2021 allows the construction of 55,000 square meters of business and commercial content,[20] while the original design foresaw almost 50% less – 30.000 square meters.[21]

But that's not the end of the benefits that the private partner received either! Since in the scope of the original Urban Planning project, in addition to the slab above Prokop, there was also an unconstructed plot between Prokop and Stjepana Filipović Street, which also originally belonged to the Railway City company. In a special procedure, the City initiated the drafting of a Detailed Regulation Plan for that plot, which provided for the construction of residential apartments, but it turned out that such construction could trigger a landslide and endanger neighboring buildings, which is why the plan was not adopted.[22] However, regardless of the fact that the Directorate's public call stated that the private partner will receive the right to build on all included plots that "meet al the technical conditions for construction", which turned out not to be the case with the green area along Stjepana Filipovića Street, the Directorate decided to "compensate" the private partner.

"At the end of July 2022, the Republic of Serbia fulfilled the obligations assumed by the framework agreement on joint construction and transfer of rights to immovable property and in accordance with the Government's decision to declare the construction project of the railway station building 'Belgrade Center', parking lot and accompanying commercial facilities in Belgrade as a project of public importance, the commercial company Railway City d.o.o. Belgrade transferred the cadastral plot 1222/21 CM Novi Beograd for the contracted works on the construction of the station building and accompanying facilities at the Prokop location", the Directorate specified.[23]

It is a plot on the corner of Milutina Milankovića Street and Omladinskih brigada Street, with an area of 10,641 square meters - about two hundred square meters more than the plot in Stjepana Filipovića Street, which remained in public ownership. Five months later, the City confirmed the urban project for a residential and business complex of over 38,000 square meters on this donated location, and for the purposes of realizing the project, Railway City established a daughter company, Project B-40, which started construction in December 2023. Thus, from the initial idea of allowing a private partner to build 30 thousand commercial square meters at the expense of investing in a station building, a total of 93,157 square meters of business and residential space was reached.

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18 https://www.politika.rs/sr/clanak/472009/Stanicna-zgrada-na-Prokopu-kostace-7-43-miliona-evra

19 https://www.transparentnost.org.rs/sr/aktivnosti-2/pod-lupom/12588-nin-o-prokopu-skupa-rupa-po-meri-privatnika

20 https://www.mgsi.gov.rs/sites/default/files/UP%20ZS%20Prokop%201%20-%20350-01-02005-2020-11.zip

21 https://www.politika.rs/sr/clanak/444921/Holandsko-bugarska-kompanija-potencijalni-graditelj-Prokopa

22 https://www.transparentnost.org.rs/sr/aktivnosti-2/pod-lupom/12588-nin-o-prokopu-skupa-rupa-po-meri-privatnika

23 https://www.politika.rs/sr/clanak/526794/Stanicna-zgrada-u-Prokopu-pa-stanovi-u-Novom-Beogradu

According to the analysis of the weekly NIN, the price of donated land in a location where construction of up to nine floors is allowed and in a municipality where the average price of both old buildings and new buildings is the highest, could not be less than 800 euros per square meter. Which means that the land itself in Block 40 is worth at least as much as the estimated value of the construction of the station building, and that Railway City in return received land worth at least 3.5 times more.[24]

On top of all that, during the official opening of the station building, Aleksandar Vučić announced that Telekom and Dunav osiguranje are moving in, and that a new city center will be created in Prokop,[25] which means that the state is planning to mobilize at least companies in majority public ownership, in order to ensure that the commercial facilities of the private partner do not remain vacant.

Case study: Generalštab

The case of the intended construction of a hotel on the site of the General Staff complex (GSC) damaged in the NATO bombing in 1999 represents the culmination of all the previously mentioned processes and introduces a new element into the game - complete neglect of the protection of cultural assets. The decision from 2005 on establishing GSC as a cultural monument under the name "Buildings of the General Staff of the Army of Serbia and Montenegro and the Ministry of Defense in Belgrade" prescribed protection measures that include "preserving the authentic appearance, horizontal and vertical dimensions, constructive and form elements of architecture as well as the original materials", but also the ban on the construction and installation of objects that, due to their purpose, size, volume and shape, can threaten or degrade the cultural monument and its protected environment[26].

Nevertheless, treating this location as the equivalent of Hercegovačka Street, which is worth demolishing, even if illegally, just to build something bigger, started in 2013, when, along with the contract for the sale of the agricultural combine collective to Al Dahra, the possibility was mentioned in discussions with Sheikh Muhammad bin Zayed to build the al Nahyan hotel. Admittedly with a certain reserve, except for the scale of the investment. "If someone doesn't want people to invest one, two or three billion in Serbia, and if someone doesn't want five or six hundred people to get a job, we won't do it." I will not participate in quarrels, Sheikh Muhamed told me that he will not participate in something that people in Serbia are against," Aleksandar Vučić said on the occasion.[27].

Before the search for a less squeamish business partner began, the Ministry of Construction and Urbanism launched an initiative to remove the General Staff complex from the list of cultural assets, by first sending a building inspection that determined that the damaged buildings posed a threat to the safety of "citizens passing by around those buildings, both on the sidewalk and in vehicles", and then, based on the inspection report, the Institute for the Protection of Cultural Monuments of the City of Belgrade was contacted. The director at the time, Milica Grozdanić, publicly took the position that the inspector's finding was not a sufficient reason to revoke the status of a cultural asset, and the former Minister of Construction, Velimir Ilić, complained: "They were not ready to remove that protection, they consider it to be of extremely great artistic value." I don't understand them, I really don't understand them, and no one does." The general misunderstanding of the urge to protect cultural monuments on the part of those vested with this duty may have influenced Milica Grozdanić, whose term of office expired in May 2013, not to be re-elected to the position. The government offered the location to Donald Trump, who was also considering the construction of a luxury hotel in Belgrade, and even his representatives visited the General Staff in January 2014,[28], but the deal did not happen.

It seemed that the intention to transform the administrative core of the city into something more commercial had been abandoned, until March 2024, when the Ecological Uprising organization published the Proposal of the Government's Conclusion on the signing of the investment agreement "in order to carry out the project of revitalization and development of locations in the city of Belgrade which includes, cad. plots no. 969/1, and 804/2"[29] – that is, the plots of land where the buildings of the General Staff and the Ministry of Defense are located, but also two other officially declared immovable cultural assets: the old building of the General Staff and the Barracks of the VII Regiment.

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24 https://www.transparentnost.org.rs/sr/aktivnosti-2/pod-lupom/12588-nin-o-prokopu-skupa-rupa-po-meri-privatnika

25 https://www.politika.rs/sr/clanak/579262/Vucic-otvorio-stanicu-Prokop

26 https://beta.rs/content/201841-zavod-za-betu-generalstab-pod-zastitom-nije-bilo-predloga-za-ukidanje-statusa-kulturnog-dobra

27 https://www.b92.net/biz/vesti/srbija/ostace-rusevine-ako-gradani-to-hoce-686083

28 https://www.slobodnaevropa.org/a/25228574.html

29 https://nova.rs/vesti/biznis/pogledajte-dokument-koji-dokazuje-da-vlada-planira-da-pokloni-rusevinu-generalstaba-porodici-trampovog-zeta/

The document in question refers to the Memorandum of Understanding, signed on behalf of the Government by the Minister of Construction, Goran Vesić, with Kushner Realty LLS, and stipulates that the Republic of Serbia and Atlantic Incubations Partners LLC (as a related entity of Kushner Realty LLS) establish a limited liability company, to which the Republic of Serbia would lease unbuilt construction land on the mentioned two plots for 99 years, free of charge, with the possibility of converting the right of lease into ownership upon bringing it to its intended purpose, that is, upon obtaining a legally valid operating permit for constructed buildings - also free of charge. In practice, this means that the land will be donated, except for an unlikely scenario in which 99 years will not be enough to complete the planned construction, while the provision "unbuilt", apart from the green areas at the corner of Nemanjina and Kneza Miloša streets, obviously also includes the area that the state will clear away from protected buildings.

The extent to which the plots in question are planned to become "unbuilt" before construction begins, for now we can only guess based on Aleksandar Vučić's statement from March 2024: "I hope that we will only have enough time to move the Ministry of Defense and the General Staff, and after that to restore the magnificent building of the Seventh Regiment that looks towards Manjež." These are great results, great investments". Which suggests that the building of the Ministry, which has remained in operation, is awaiting demolition too, while the building of the old General Staff is in the "probably not" category, and that "large investments" are desirable even at the cost of a temporary suspension of the activities of the Ministry of Defense, if an adequate site is not found to relocate it before the excavator's arrival in Nemanjina.

The document also foresees that before concluding the Agreement on the establishment of the company and defining further steps to realize the project, the state will first fulfill its obligation to declare it a project of special importance. This very clause rebuts Minister Vesić, who denied the possibility of leasing land without compensation[30], since the Regulation governing this issue (Regulation on the conditions, method and procedure under which construction land in public ownership can be sold or leased at a price lower than the market price, as well as without compensation (free of charge), as well as the conditions, method and procedure of exchange of properties[31]) explicitly allows something like that in the case of the construction of facilities of importance for the Republic of Serbia. Moreover, according to the Regulation, in that case, no elaboration on the justification is made, and it is also allowed to avoid the collection of bids through a public advertisement and to conclude a direct contract.

Another allegation made by Goran Vesić in March - that there are several interested companies that "want and see the possibility" to invest in the location where the General Staff building is located[32] - cannot be verified. Only the names of the two related companies – Atlantic Incubation Partners LLC and Kushner Realty LLS – have been made public from the document published by the Ecologic Uprising organization, as well as the fact that on May 15, 2024, the “Complex Revitalization Agreement” was signed with the company “Affinity Global Development” of the former Federal Secretariat for National Defense”[33]. However, since the same person stands behind all three companies – Jared Kushner – it seems likely Vesić was referring to a fourth company owned by the same owner. But regardless of whether there was an unrelated legal entity in the game, the basic question remains where did any company’s where did any company’s interest in this business come from? The land has not been advertised for sale, no international tender has been announced for the reconstruction of the GSC, no urban plan has been adopted that envisages any other buildings on the site of the existing ones in Nemanjina Street, nor was there an urban and architectural competition for the future layout of the location. On the other hand, in a normal procedure, not a single private investor would think of initiating a plan change on a site that contains three cultural monuments, and is also located within a protected spatial cultural-historical unit (Area along Kneza Miloša Street), whose protection measures include the preservation of the valued building stock, the preservation of the public purpose and character of the buildings and space as an administrative center, the prohibition of construction that may threaten or damage the authenticity of the environment, and the obligation to prepare a cultural heritage impact study. In such circumstances, the interest of several companies can arise only through direct dealings with them, without any legal procedure and with an unclear goal to be achieved.

All this was done in a very non-transparent procedure, since despite Goran Vesić's claim that the document published by the Ecological Uprising "is not a secret, but was adopted at a public meeting".[34] The public did not only ignore that a search for a partner was underway for the “revitalization” of the GSC, but it could not even find out that the insider who brought the document did not show up, as such decisions are not usually posted on the Government’s website in the section of acts adopted on Government sessions. Furthermore, the adoption of acts

30 https://www.danas.rs/vesti/ekonomija/vesic-jos-nisu-dogovoreni-finansijski-detalji-i-detalji-zakupa-kompleksa-generalstaba/

31 https://pravno-informacioni-sistem.rs/eli/rep/sgrs/vlada/uredba/2017/46/1

32 https://insajder.net/prenosimo/vesic-nekoliko-kompanija-zeli-da-investira-u-lokaciju-generalstaba-ali-jos-nema-dogovora

33 https://www.srbija.gov.rs/vest/783247/potpisan-ugovor-o-revitalizaciji-kompleksa-bivseg-ssno.php

34 https://insajder.net/prenosimo/vesic-potvrdio-da-se-pregovara-o-poklanjanju-lokacije-generalstaba-u-beogradu-americkim-firmama

concerning the fate of GSC was not mentioned at all in the Government Work reports for 2020, 2021 and 2022 (the one for 2023 is not yet available). Meanwhile, Jared Kushner confirmed the authenticity of the document in the New York Times four days after it was published, in an interview where he presented more information about the deal than we had received from state officials: the preliminary agreement is that the state's ownership share in the future joint venture will be 22%, the value of the project is estimated at about 500 million dollars and the plan is to build a luxury hotel, as well as a museum and a memorial that will be designed by Serbian architect[35] After signing the contract with Kushner's Affinity Global Development, Goran Vesić clarified that the memorial complex will be dedicated to "all the victims of the NATO aggression in 1999, the exact toll of which Serbia unfortunately still does not have after a quarter of a century", and that it will be financed by investors, but owned by the Republic of Serbia, which will manage it and decide on the content. The also announced an international architectural competition, instead of the expected hiring of Serbian architects.

The need to build the missing Memorial Center dedicated to the NATO bombing could justify the free transfer of land, as much as the construction of a hotel and commemorative complex sounds like an unusual concept. This would make the whole business a public-private partnership, in which the private partner is enabled to build commercial facilities within the framework of the construction of a public purpose facility, which will a return on investment. The problem is that in this case, the Law on Public-Private Partnership was completely circumvented and - unlike the case of Prokop - no attempt was made to create a semblance of compliance with the procedures, as there was no public call of any kind.

And how would the invitation be announced? When the Republic Directorate for Property was looking for partners for the construction of a station building on Prokop, the deal involved the realization of the already confirmed Urban Project. In the case of the General Staff, the absence of a design is not merely one of a series of legal problems, but something that completely prevents competition, since the construction of a memorial that will only be designed in the future may even mean a facility of 1,000 or 50,000 square meters. Of course, there is also the "trifle" that formally applying for participation in a project that envisages the demolition of a protected cultural monument, could constitute complicity in the criminal offense of "destruction and damage to another's property", which provides for a mandatory prison sentence of between six months up to 5 years for an act committed against cultural property (it is interesting to note that for the destruction of cultural monuments in war a greater penalty is prescibed than in peacetime conditions, when the Minister of Construction gets a burst of inspiration).

The government still hasn't solved that problem, but it is working intensively on it: according to Novi Magazin, at the beginning of June, the director of the Republic Institute for the Protection of Cultural Monuments, Dubravka Đukanović, was told at a meeting with the Minister of Finance Sinisa Mali that she must either remove the protection from the General Staff or resign[36]. She decided to resign and it is expected to appoint a person who will reduce the illegality of the entire project in a timely manner, which would confirm the thesis of lawyer Jovan Rajić that the Memorandum of Understanding in practice has become the highest act in the legal order of Serbia, to which all others adapt.

35 https://www.nytimes.com/2024/03/17/us/politics/kushner-deal-serbia-trump.html

36 https://novimagazin.rs/vesti/325419-direktorka-zavoda-za-zastitu-spomenika-podnela-ostavku-zbog-generalstaba

RECOMMENDATIONS[37]

1. **Enabling greater participation of the citizens in making decisions on planning public-private partnerships and in monitoring their implementation**; to achieve this goal, it is necessary to have prescribed:

- The obligation to draft and publish an annual or multi-year plan of concessions and other public-private partnerships (such as a public procurement plan);
- The obligation to organize a public discussion of the plan and/or individual PPP projects before the procedure for selecting a private partner begins, with the possibility to modify the plan based on the proposal and remarks from the public debate;
- The obligation to monitor the implementation of the PPP contract and to gather information from the interested persons;
- The extension of the notion of excitation, so that in addition to the users of services provided by the authorities, it includes the users of the services of the private partner who conducts the PPP project and the joint venture;
- The obligation to collect information on the effects of the implementation of the PPP contract and the purpose for which the public-private partnership has been launched (eg user service surveys) as a part of the monitoring of the situation in the area.

2. **Increasing transparency in public-private partnerships and concessions**, **this includes:**

- Regulating public data standards and registries of the public contracts by the law;
- The establishment of the Public Contracts Registry, in which all public private partnership contracts and reports on their implementation, will be published;
- Extension of the circle of information to be published on the public procurement procedure preceding the conclusion of the public-private partnership contract (in connection with the amendments to the Public Procurement Law);
- The prohibition to be designated as secret contract provisions or parts of other documents in which the obligations of the public partner are prescribed or explained;
- The conduction of joint enterprises formed within public-private partnership, under the term "authorities" in the sense of the Law on Free Access to Information of Public Importance (which allows control over the use of public resources, which does not affect the possibility of denying certain information as competitors in the market would not find business secrets of companies);
- Including information on planned public-private partnerships and the implementation of existing budget documents (primarily the Fiscal Strategy), in order to review the effects of these contracts on public revenues and public expenditures.

3. **Strengthening the effectiveness of oversight of public-private partnerships planning and the performance of contractual obligations of a private partner;**

- Prescribing the National Assembly's competence in the approval of PPPs and concessions with very long lifetime or those involving a high value public property;
- Imposing the obligation of the Government and / or the Commission to periodically report to the National Assembly on the implementation of the public-private partnership contract and the National Assembly's obligation to consider these reports within a certain time-limit and to make conclusions in this regard ;
- Prescribing the authority that will be in charge of overseeing the implementation of the contract (PPP Commission or other body);

37 In this part, a part of the recommendations from the document is taken: "Analysis of the risk of corruption in the regulations on public-private partnership", Transparency - Serbia, Belgrade, November 2017.

- Specifying the rules on conflict of interest in relation to public-private partnerships, since the general rules relating to public officials and civil servants do not include all relevant actors (eg hired advisors), and, on the other hand, the rules of the Public procurement are not fully adequate for public-private partnerships;
- Prescribing the minimum control elements so as to include not only legal and financial indicators, but also other data that refer to the achievement of project objectives (eg the number of service users);
- Prescribing the obligation to conduct a competitive procedure with the application of the norms or at least the principles of the Public Procurement Law, for procurement by a joint venture formed within the framework of a public-private partnership project;
- Introducing the rules that would ensure that the Fiscal Council, from the point of view of its competencies (for example, the impact of implementing projects on the budget in the coming years), be expressed in the plans of public-private partnerships and / or individual projects;
- Specifying the possibility that the State Audit Institution, as a part of the revision of expediency, will consider the implementation of the public-private partnership contract, as well as the initial decision on the conclusion of this legal transaction.

4. **The provision of special control measures in cases where the anti-corruption mechanisms of the Public Private Partnership Act do not apply due to the existence of a permitted exception to the application of that law (e.g. interstate agreements) and the avoidance of such arrangements,** which includes:

- Prescribing the obligation of the negotiator on behalf of the Government before concluding an interstate agreement to require that the international agreement contains a clause on the application of domestic law on PPPs and concessions;
- The obligation of the public partner to publish all the documents which also apply to such PPP and for which reasons for secrecy are not determined by a special decision;
- Obligation of the public partner to draft and publish a feasibility study; 11
- Obligation of the public partner to provide competition to the extent possible, or to inform the supervisory authority and the public about what he has done to prevent the occurrence of adverse effects due to lack of competition.

5. **Provision of the penalties for violations of the rules on public-private partnerships,** which, inter alia, includes:

- Specifying the criminal act relating to abuses in public procurement and unauthorized arrangements by the bidders so as to include all cases of the most serious misconduct in public-private partnerships;
- Criminal or misdemeanor penalties in case of concluding a contract without a prior procedure;
- Misdemeanor penalties for failing to provide mandatory or specially requested documents to the PPP Commission;
- Misdemeanor penalties for failure to publish mandatory documents on the website of the public partner / joint venture;

6. **Improving the legal position of the Commission for Public Private Partnerships in the direction of strengthening independence**, which preserves:

- A clear definition of the legal nature of this body, which now does not correspond to the classification of organs and organizations that make up the public sector of Serbia. In view of the competencies currently in place, and especially if those competencies are expanded as necessary, the Commission could be formed and as an independent state body. At the very least, the Commission could be formed as a separate administrative-professional organization (such as the Public Procurement Directorate). The Commission could also perform other related tasks;
- The professionalization of the management by the Commission, the reduction of the number of members and the abandonment of the current concept that forms the Commission as a set of representatives of ministries and other bodies that may also be stakeholders in individual PPP projects;
- Enabling the work of the Commission in continuity by the fact that the mandate of the members of the Commission would not be related to the mandate of the Government or the National Assembly (prescribing a

five-year mandate if it is a matter of election in the Assembly, appointing an officer on the basis of a conducted competition, if the Government does so, specifying reasons and procedures for eventual dismissal of a member of the Commission),

7. Short-term measures

- Examining the grounds for concluding all contracts that by their nature constitute a public-private partnership, and have not been concluded with the application of the rules from the Law on PPPs and Concessions, that is, the Law on Public Procurement and possible criminal and other responsibility of the participants;
- Releasing of information on the supervision that has been carried out so far over the implementation of PPP contracts, including contracts that have been concluded without the application of the Law;
- Releasing of more detailed information on all approved PPP projects on the Commission's website, including information on the time of submission of documentation and decision-making by the Commission;
- Covering all perceived corruption risks and other problems in the practice of applying regulations with future amendments to the Law on PPPs and Concessions, and not just harmonization with relevant EU directives, which is the primary goal of the amendments planned so far.

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