

EU PUBLIC PROCUREMENT REFORM AND ITS REFLECTIONS IN SOUTH-EASTERN EUROPE: IS CROATIA READY?

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ABSTRACT

The 2014 reform of the European Union procurement directives represents a significant, resounding leap towards an upgraded public spending sector. After a decade of successful implementation, the previous directives were modernized in an attempt to enhance efficiency and transparency in procurement procedures. As all other EU member states, Croatia is obligated to implement the directives in the prescribed implementation deadline, which is approaching swiftly. However, despite such a deadline, Croatia is only just turning its attention to the necessary harmonization. Statistical data and case studies show numerous shortcomings in the current system of Croatian public spending, and indicate that there may not be enough time to rectify them. Historical tendencies demonstrate that Croatia nurtures a tradition of harmonization devoid of side activities to ensure successful implementation and harmonization often occurs solely on paper. With this in mind, this paper represents, other than an introduction of the latest changes in EU public procurement and the events which lead to them, it highlights the most significant defects of the Croatian public procurement and strive to identify why it could prove difficult to correct solely by implementing the new directives to the Croatian law.

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1. INTRODUCTION

Public spending in the European Union (“EU”) is one of the key ingredients of its unified market policy - approximately a fifth of all goods, works and services in the EU is procured in that manner.¹ The global economic crisis made it obvious that the sector needed to become more efficient and transparent through the stronger regulation.² Notable effort was put in identifying and addressing the changes which were most necessary and, in 2014, two new directives, the public procurement and the concessions directive, were introduced. Numerous changes were put forward with the aim of facilitating participation in procurement procedures for both the contracting authorities and tenderers, while the final implementation deadline (for the majority of amendments) has been set for April 2016.³ In this paper, we address the most important changes occurring within the general procurement framework (utilities and concessions excluded) and the difficulties we believe Croatia will face in their implementation. As the newest member-state and a country whose legal order is often spoken as one of the most harmonized in the EU, Croatia firmly nurtures the tradition of literal implementation. Unfortunately, research has shown that everyday business reality rarely corresponds with this level of harmonization. It is for this purpose that the chapters below focus mainly on the negative sides of Croatian public procurement, exposing its weak spots in legal security, transparency and efficiency. Also, it should be noted that implementation in Croatia is often conducted without any research, preparation and/or coordination with relevant addressees. In respect to the latest procurement changes, information gathered shows that the reform has not echoed in Croatia as it has in other EU countries⁴ and that little or no research or education has commenced with the purpose of bringing the 2014 changes closer to the business community. How severely will this impact Croatia’s ability to successfully implement the 2014 procurement directives?

¹ European Commission’s Single Market Scoreboard, Public Procurement section; http://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm, last accessed on 15/5/2015.

² Communication from the Commission: EUROPE 2020 - A strategy for smart, sustainable and inclusive growth COM(2010) 2020, p. 8.

³ See Article 90 of the 2014 Directive (as subsequently defined), Article 106 of the 2014 Utilities Directive (as subsequently defined) and Article 51 of the Concessions Directive (as subsequently defined).

⁴ See the Comparative survey on the transposition of the new EU public procurement package on <http://www.publicprocurementnetwork.org/docs/ItalianPresidency/documento%206.pdf>, last accessed on 15/5/2015.

2. THE DECADE OF EVOLUTION

The changes occurring in public procurement can be traced back as far as 2010, with EU's new political strategy - Europe 2020⁵, adopted by the European Commission (“**Commission**”). The global financial crisis made it clear that economic growth would not be possible without serious amendments to the applicable regulatory frame, including extensive legal reform of the 2004 procurement Directives⁶. Seven flagship models were designed to ensure economic prosperity - the modernization of public procurement was to be part of the Economic Innovation and the Resource-efficient Europe flagships⁷. The Commission initiated a large scale public debate in January 2011 and collected the received replies in a Green Paper⁸. It was clear that numerous changes were to be made in order to achieve the above stated EUROPE 2020 goals, as well as to meet the business community's requests.⁹ Furthermore, a comprehensive research was conducted regarding the overall effect of the 2004 Directives¹⁰, upon which the Commission was due to present its legislative proposals for the implementation of key actions.¹¹ The formal proposal, though, was preceded by the Single Market Act¹², in which the Commission emphasized its view on public procurement being the twelfth lever of economic growth. The

⁵ Communication from the Commission as of 3 March 2010 - COM(2010) 2020.

⁶ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

⁷ Communication from the Commission of 3 March 2010 - COM(2010) 2020, p. 13, 16, 17 and 18. See also Council Recommendation 2010/410/EU on broad guidelines for the economic policies of the Member States and of the Union.

⁸ Green Paper on the modernization of EU public procurement policy - Towards a more efficient European Procurement Market, COM(2011) 15.

⁹ A synthesis document containing all the collected questions is available on the webpage of the Commission http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.htm, last accessed on 15/5/2015.

¹⁰ Commission staff working paper - Evaluation Report Impact and Effectiveness of EU Public Procurement Legislation SEC(2011) 853.

¹¹ For a more comprehensive approach on the proposed changes, see Kynoch, Alex, Ware, Peter, Public Procurement Reform: Impact on Contracting Authorities and Tenderers, Credit Control, vol. 34, Issue 3, 2013, p. 13.

¹² Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the committee of the regions Single Market Act - Twelve levers to boost growth and strengthen confidence – “Working together to create new growth” COM(2011) 206/4.

Proposal¹³ itself was issued in December 2011, announcing the change that was to occur in EU public procurement and its two main objectives - first and foremost, the efficiency of public spending had to be increased in light of the global economic crisis and, secondly, the social role of public procurement had to be fulfilled through various social policies.¹⁴ Finally, in February 2014, EU's new procurement mechanisms were introduced - Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ("**2014 Directive**") and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC ("**2014 Utilities Directive**").¹⁵

3. WHAT HAS CHANGED?

The 2014 Directives are, perhaps, one of the most significant changes that have occurred in a large EU regulated sector in recent times. Due to the large number of introduced changes, we will limit our scope to the changes occurring within the general procurement regime of the 2014 Directive, without addressing changes from the utilities and concessions sector.¹⁶

The 2014 Directive consists of four major sections - its recitals, its contents list, its material provisions divided into subsections and its annexes containing lists and forms which are to facilitate its implementation. The majority of its provisions are mandatory and the 2014 Directive is to be implemented by 18th April 2016, while implementation of some provisions can be postponed until 2018. The 138 recitals of the 2014 Directive show the evolution of public procurement, the reasons behind the adopted changes and the most important sections of the 2014 Directive, but they are also an excellent reminder of the scope

¹³ Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 896 ("**Proposal**").

¹⁴ For more detail, please see page 2 of the Proposal.

¹⁵ The 2014 Utilities Directive and 2014 Directive to be jointly referred to as „**the 2014 Directives**“. Also, it should be mentioned that a new Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts ("**Concessions Directive**") was entered into, governing wholly for the first time the field of concessions on a EU level.

¹⁶ For more information on changes occurring in these areas, please see http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/reform-proposals/index_en.htm, last accessed on 15/5/2015.

of the 2014 changes.¹⁷ With respect to the material provisions, a significant amount of changes has been introduced in order to facilitate the procedure in whole, but numerous provisions address issues specific to either side of the procurement procedure.¹⁸ Therefore, for the sake of clarity, changes in material provisions are diverged with respect to whom they are addressed.

With respect to contracting authorities, the most significant changes are apparent in the increasing number of procedures available, allowing for greater flexibility and cooperation between contracting authorities and tenderers. The two main types envisaged by the 2014 Directive are the open and the restricted procedure, while competitive procedure with negotiation, competitive dialogue and innovation partnership are also available.¹⁹ The former negotiated procedure with prior publication has been replaced by the somewhat altered “competitive procedure with negotiation”²⁰. Innovation partnership, on the other hand, is a completely new procedure, made available for “where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market.”²¹ With respect to all procedures, the 2014 Directive shows a significant trend toward shortening the deadlines available to tenderers in order to submit their bids and participate in the procedure. Furthermore, contracting authorities are authorized to exclude certain types of contracts or certain products or services from public procurement, for instance, public contracts between entities within the public sector or “in-house” contracts.²² Namely, provided certain conditions under the 2014 Directive are met²³, a contract awarded by a contracting authority

¹⁷ The introduction of recitals showcasing the documents’ provisions below could be considered not only welcomed in light of the document’s length and size, but also mandatory. For more information, please see Klimas, T. and Vaičiukaitė, J. The law of recitals in European community legislation, *ILSA Journal of International & Comparative Law*, vol. 15, 2008; available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159604, last accessed on 8/5/2015.

¹⁸ For a detailed insight into the changes in the 2014 Directives in the context of EU public contract law, see Caranta, Roberto, The changes to the public contract directives and the story they tell about how EU law works, *Common Market Law Review*, vol. 52, 2015, p. 391–460.

¹⁹ The different types of procedures are governed by Chapter I of the 2014 Directive.

²⁰ See recital nos. 42 - 45 and Article 29 of the 2014 Directive.

²¹ Recital no. 49 of the 2014 Directive.

²² Article 12 of the 2014 Directive.

²³ „a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments; (b) more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and (c) there is no direct private capital participation in the controlled legal person

will fall outside the scope of the 2014 Directive and enable contracting authorities to be exempt from public procurement rules.²⁴ Certain services have been excluded from the scope of the 2014 Directive²⁵ such as, for instance, legal services which are “provided by bodies or individuals designated or selected in a manner which cannot be governed by procurement rules”²⁶. Apart from the aforesaid, contracting authorities have been given other various possibilities which extend their authority in procurement procedures - wider powers when excluding bidders due to previous transgressions (Article 57), specifying labels when initiating procedures (Article 43), allowing for previous involvement of candidates and tenderers (Article 42) etc.

In respect of tenderers, the most significant change is the introduction of the European Single Procurement Document (“**ESPD**”) and the alleviation of the burden of proof. The ESPD is a standardized form which allows tenderers to confirm simply, clearly and without further cost, that they fulfill conditions necessary to participate in the tender and that none of the exclusion grounds exist in relation to them.²⁷ It is, also, the intended purpose of this document to

with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person.“

²⁴ This provision stems from the practice of the Court of Justice of the European Union, from case C-107/98 *Teckal Srl v Comune di Viano* [1999] ECR I-8121. It is a procedure in which rules for determining what constitutes an in-house contract were determined and a two stages functional test was formed (see paragraph 50 of the judgment). The purpose of the test is to determine whether the contract has been entered into by a contracting authority and a person separate from that authority as well as whether that person „carries out the essential part of its activities with the controlling local authority or authorities.” See more in Bovis, Christopher H., *The challenges of public procurement reform in the single market of the European Union*, ERA Forum, vol. 14, Issue 1, 2013, p. 35-57, and Bovis, Christopher H., *Regulatory Trends in Public Procurement at the EU Level*, EPPPL, vol. 4, 2012, p. 221-227

²⁵ For details on special regime services in light of the 2014 Directives, see Loboja, Ante, *Usluge u posebnom režimu javne nabave s osvrtom na novo uređenje prema novim direktivama EU*, *Financije pravo i porezi*, vol. 11/14, 2014, p. 135-142.

²⁶ Recital no. 25 of the 2014 Directive.

²⁷ More specifically, according to Article 59 of the 2014 Directive, that they fulfill the following conditions:

- „(a) it is not in one of the situations referred to in Article 57 in which economic operators shall or may be excluded;
- (b) it meets the relevant selection criteria that have been set out pursuant to Article 58;
- (c) where applicable, it fulfills the objective rules and criteria that have been set out pursuant to Article 65.

Where the economic operator relies on the capacities of other entities pursuant to Article 63, the ESPD shall also contain the information referred to in the first subparagraph of this paragraph in respect of such entities.“

identify national authorities competent for issuing the necessary documents, should they subsequently be requested by the contracting authority.²⁸ Although this will not release tenderers from proving their worth entirely (taking into account the power of the contracting authorities to, subsequently, request delivery of supporting documentation) it is a monumental shift in responsibility, cost and length of procedure. The Commission seems to be aware of this and “shall review the practical application of the ESPD taking into account the technical development of databases in the Member States and report thereon to the European Parliament and the Council by 18 April 2017.”²⁹ Tenderers’ life has also been made easy by two additional changes which will enable the “sharing of the load”. First, the rules on subcontracting have been clarified - tenderers will have more possibilities to use subcontractors, but will need to clearly specify which sections of the contract-awarded they will not be partaking in. Payments can be made directly by the contracting authority to the subcontractor, but the subcontractor may also be requested to provide proof of their ability to conduct the works/services or deliver the goods requested, or can even be made jointly liable with the chosen tenderer.³⁰ Secondly, the modification of contracts and framework agreements during their term has been facilitated and simplified, following certain conditions. These provisions enable tenderers to modify the contract without having a new procurement procedure, but transparency must be obeyed by publicizing the modification.³¹ This represents a significant step forward in respect of the increasing legal security and efficiency in the procurement procedures.

4. MEANWHILE, IN CROATIA

Directives are, as is common knowledge in our time, mechanisms of harmonization, and not unification.³² Member states are, to the extent of not acting contrary to the goals set out in directives, allowed to implement them as they see fit, adapting them to their needs. Croatia is, unfortunately, a novice in EU implementation, despite the decade spent in pending membership with the

²⁸ In connection to this and in order to make the ESPD viable, the e-Certis data base is to be updated regularly with the relevant national authorities. For further detail please see Article 61 of the 2014 Directive and the e-Certis website <http://ec.europa.eu/markt/ecertis/login.do>, last accessed on 10/5/2015.

²⁹ Article 59, paragraph 3 of the 2014 Directive.

³⁰ See recital no. 105 and Article 71 of the 2014 Directive.

³¹ Article 72 of 2014 Directive.

³² Article 288 of the consolidated version of the Treaty on the Functioning of the European Union.

EU's watchful eye hovering over it.³³ Croatian legislators take pride in implementing EU directives literally, rendering the implemented changes seldom applicable in real life due to being either too advanced or too incoherent in respect of the remainder of the legal system. Implementation cannot be both a cause and a purpose to itself - it is no different with the 2014 Directives. The Croatian Government plans to introduce amendments to the Croatian Public Procurement Act ("PPA") in the third quarter of 2015³⁴. If amendments to the PPA are to occur when planned, status research and impact assessments should have been well on their way, particularly due to the fact that the Croatian public procurement sector cannot be deemed as advanced as the majority of EU member states implementing the changes. This lack of preparation, paired with the currently existing discrepancies between the proposed changes and the inherent shortcomings of the Croatian public procurement sector, could render successful implementation difficult.

4.1. HISTORICAL TENDENCIES

It is noteworthy to say that, while Europe was getting ready for the 2004 public procurement reform, Croatia was just setting up its public spending framework. Namely, although Croatia has regulated its public procurements since 1995³⁵, it caught on with modern tendencies only upon initiating negotiations with the EU and the World Trade Organization ("WTO"). Under the Act on confirming the protocol on the accession of the Republic of Croatia to the Marrakesh Agreement Establishing the World Trade Organization³⁶ Croatia became a party of the WTO and, thereby, undertook to coordinate its public procurement rules with those of the WTO. Additionally, in 2001, the Act on

³³ See http://ec.europa.eu/enlargement/countries/detailed-country-information/croatia/index_en.htm.

³⁴ As stated in the Plan of harmonization of the legislation of the Republic of Croatia with the *acquis communautaire* of the European Union for 2015, full text available on http://narodne-novine.nn.hr/clanci/sluzbeni/2015_03_25_518.html, last accessed on 8/5/2015. Please note that the Government's plan does not foresee reasons for amendments; however unofficial information confirms that the changes will come as a consequence of the EU public procurement reform.

³⁵ Early on, Croatia regulated its public procurement by regulations. Thus, the first Regulation on the procurement of goods and services and assigning works was entered into in 1995 (Official Gazette no. 13/95), while two other regulations under the same name followed (Official Gazette nos. 25/96 and 33/97). The first piece of legislation with the power of an act was entered into on 1997 - the Act on the procurement of goods and services and assigning works (Official Gazette no. 117/01).

³⁶ NN no. 13/00; international agreements section.

confirming the Stabilization and Association Agreement between the Republic of Croatia, of the one part, and the European communities and their member states, of the other part³⁷ was entered into and Croatia's road to EU membership had officially begun. Under the Stabilization and Association Agreement ("SAA"), it was concluded that public procurement rules were in pressing need for harmonization with EU legislation.³⁸ To facilitate competition and develop its public procurement rules under controlled market conditions, Croatian companies were immediately permitted to participate in EU tenders, while EU based entities would not be allowed to participate in Croatian tenders for a period of, at the latest, three years after the SAA is ratified.³⁹ Following these efforts and EU based solutions, the first PPA was published in 2001⁴⁰, as a more than welcomed upgrade to the Act on procurement of goods, services and assignment of works.⁴¹ Croatia's membership in the EU shined a much needed light - public procurement was beginning to show as an area with undermined strength and possibilities. The PPA has been since then amended several times - in 2005, 2007, 2008, 2011, 2013 and 2014⁴². The amendments from 2007 and 2011 were introduced as new acts, while other changes were presented as amendments to the relevant versions of PPA. Croatia's pending EU membership made the 2004 Directives a mold according to which relevant versions of the Act were formed⁴³, but only the 2011 PPA⁴⁴ was formally declared to be aligned with applicable EU directives.⁴⁵ As part of Chapter 23,

³⁷ NN no. 14/01; international agreements section.

³⁸ For more detail, please see Article 72 of the SAA.

³⁹ Ibid.

⁴⁰ NN no. 117/2001.

⁴¹ See Parać, Gordana, *Postupak nabave robe, usluga i ustupanje radova; Pravo i porezi*, vol. 4, 2002, p. 75.

⁴² NN no. 117/2001, NN no. 92/05, NN no. 110/07, NN no. 125/08, NN no. 90/11, NN nos. 83/13, 143/13, NN no. 13/14.

⁴³ See Brkić, Karmen, *Postupci javnih nabava prema direktivama EU-a, Financije i porezi*, vol. 5, 2007, p. 115-119.

⁴⁴ The 2011 PPA entered into force on 1st January 2012, except some of its provisions which entered into force when Croatia acceded to the EU. See Palčić, Ivan, *Javna nabava i pristupanje RH Europskoj uniji, Financije, pravo i porezi*, vol. 7/13, 2013, p. 175-180.

⁴⁵ Article 1 paragraph 5 of the 2011 PPA states that the PPA should be considered harmonized with the following EU directives: both 2004 Directives, Directive 2005/75/EC of the European Parliament and of the Council of 16 November 2005 correcting Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Commission Directive 2005/51/EC of 7 September 2005 amending Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC of the European Parliament and the Council on public procurement, Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives

Judiciary and fundamental rights, harmonizing public procurements played a significant role in combating large-scale corruption and ensuring interagency cooperation in Croatia.⁴⁶ As a business sector, public procurement was one of the areas which most lacked transparency and was generally considered as a failure. Consequently, the numerous amendments to the PPA mentioned above should be regarded as continuous efforts made in ensuring that the existing faults are, in part or in whole, remedied.⁴⁷ However, despite such efforts, an entirely integrated and harmonized system has not yet been produced. As stated in the Commission's reports in the final stages of Croatia's EU accession, "Further efforts are required", particularly in certain areas - implementation at a local level, and legal remedies.⁴⁸ How will this need for further efforts collide with Croatia's obligation to implement the 2014 Directives by April 2016?

4.2. CROATIA VS. 2014 DIRECTIVE

On an EU level, the 2014 changes are the product of thorough reflection, research and consultation and are introduced after almost a decade of the previous system's successful application. In Croatia, on the other hand, changes to be introduced by implementing the 2014 Directive will be the result of obligatory harmonization with a system which is significantly more advanced and complex. Can we expect successful implementation if the 2014 Directive is to be copied into an incoherent, nontransparent system still not entirely rid of corruption? The information shown below indicates a strong contrast between

89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, and articles 2, 12 and 13 of Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defense and security, and amending Directives 2004/17/EC and 2004/18/EC.

⁴⁶ For more details, please see The Chapter 23 Report issued by the Croatian Government on 12th May 2011, available on <http://www.mvep.hr/custompages/static/hrv/files/pregovori/5/p23.pdf>, last accessed on 9/5/2015.

⁴⁷ See Ljubanović, Boris and Britvić-Vetma, Bosiljka, *Hrvatsko pravo javne nabave - usklađenost s pravom Europske unije*, Zbornik radova Pravnog fakulteta u Splitu, vol. 48, 2011, p. 407 - 417.

⁴⁸ See the Commission Staff Working Paper Croatia 2011 Progress Report, SEC(2011) 1200 on http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/hr_rapport_2011_en.pdf, last accessed on 12/5/2015 and Communication from the Commission to the European Parliament and the Council on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership, COM(2012) 601, Brussels, on http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/hr_rapport_2012_en.pdf, last accessed on 12/5/2015.

the expected changes and the current state of play in Croatia, and raises questions as to whether and to what extent Croatia is (not) ready for the changes.⁴⁹

Primarily, certain shortcomings could be detected in connection to the current state of Croatian economy. One of the major roles of the 2014 Directive changes is the strengthening of the role of SMEs⁵⁰, meritorious for the EU member states' economic drive. In Croatia, according to the unified EU definition of SMEs⁵¹, more than 92% of SMEs are micro enterprises, while only the remaining 8% are small and medium enterprises⁵². SMEs are responsible for 50.6 of the country's GDP and employ 68.83% of the total workforce.⁵³ Since this puts Croatia significantly below the European average⁵⁴, a wide consensus exists that SMEs should be aided with their increasing importance in the nation's economy. However, most recent documents concerning SME development in Croatia do not consider public procurement as a lever of growth. The 2013-2020 SMEs development strategy of the Ministry of entrepreneurship mentions procurement procedures only in the context of "aiding the Ministries and public entities in enforcing public procurement procedures which would facilitate competition for such contracts to SMEs"⁵⁵, without any further elaboration. The 2013 Report on small and medium enterprises of the Centre for the development policy of small and medium enterprises and entrepreneurship fails to mention possible difficulties SMEs face in public procurement procedures at all, leaving no place for recommendations on future developments,

⁴⁹ Please note that a wide variety of experiences show that there are currently more than several shortcomings to the Croatian procurement system. However, due to limitations in available statistic data and published case studies, this paper has deliberately been limited to only those shortcomings which could have been presented through verifiable, publicly available data.

⁵⁰ See recital 78 of the 2014 Directive.

⁵¹ SMEs are considered to be enterprises which employ fewer than 250 persons and have an annual turnover not exceeding 50 million euro, and/or an annual balance sheet total not exceeding 43 million euro. For more detail see Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (2003/361/EC).

⁵² To be exact, 92.2% are micro enterprises, 6.3% are small and 1.2% are medium enterprises. See Strategy of small and medium entrepreneurship development 2013–2010 of the Ministry of entrepreneurship on http://www.minpo.hr/UserDocsImages/STRATEGIJA_PRESS.pdf; last accessed on 10/5/2015.

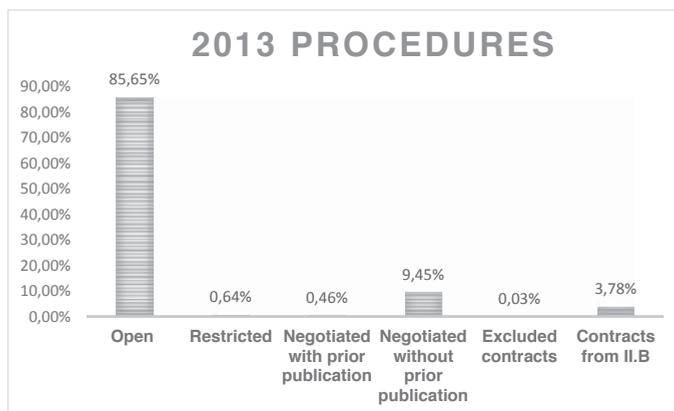
⁵³ Ibid.

⁵⁴ See the Commission's 2014 Annual Report on European SMEs on http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/files/supporting-documents/2014/annual-report-smes-2014_en.pdf, last accessed on 10/5/2015.

⁵⁵ Page 26, Strategy of small and medium entrepreneurship development 2013 – 2010 of the Ministry of entrepreneurship, available on <http://www.minpo.hr/UserDocsImages/Strategy-HR-Final.pdf>, last accessed on 10/5/2015.

particularly in light of the 2014 Directives.⁵⁶ This hardly constitutes a welcome for the 2016 changes to be integrated in the PPA.

But, perhaps the best example of existing discrepancies between the Croatian and EU public procurement law could be the changes to be introduced regarding different procurement procedures. As seen above, the 2014 Directive provides that, apart from the open and restricted procedure, three other types of procedures will be made available.⁵⁷ This broadening of the contracting authorities' liberty to choose an adequate procedure should be regarded as an entirely positive step, an almost necessary diversification. But, what about its possible effects in Croatia? Croatian contracting authorities have, up to now, also enjoyed the option of choosing from several different procedures.⁵⁸ However, the mere possibility of selecting from different procedures does not mean that the contracting authorities took to these options. The statistical information⁵⁹ available from the Ministry of Economy's Directorate for the public procurement system tells a different story.



It is obvious - in Croatia, an overwhelming majority of open procedures take place.⁶⁰ Why is this case? Unfortunately, formal statistical data were never

⁵⁶ http://www.cepohr.hr/Izvjesce%20o%20malim%20i%20srednjim%20poduzecima%202013_CEPOR.pdf, last accessed on 10/5/2015.

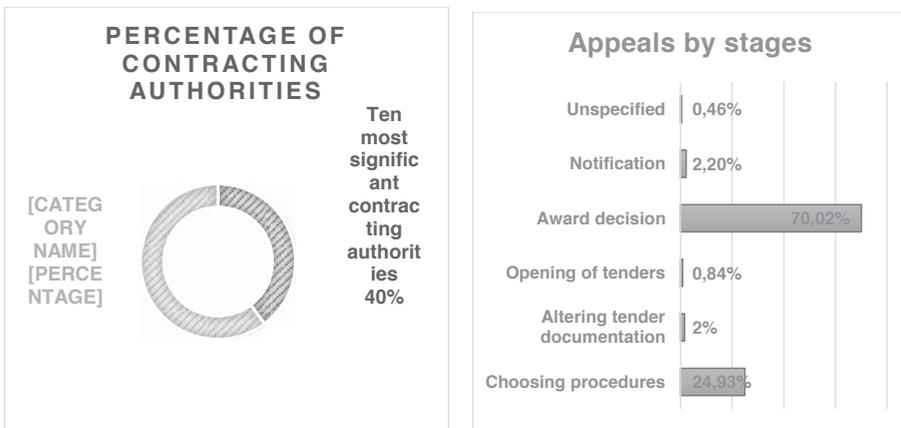
⁵⁷ The different types of procedures are governed by Chapter I of the 2014 Directive.

⁵⁸ Generally, under Article 25 of the PPA, the open and restricted procedure were available, as well as the negotiated procedure either with or without prior publication and the competitive dialogue.

⁵⁹ See webpage of Directorate for the public procurement system <http://www.javnabava.hr/default.aspx?id=3425>; last accessed on 10/5/2015.

⁶⁰ With minimal deviations ranging up to one percentile, statistic data is almost identical for 2011 and 2012 as well.

collected, so we are left to speculate, at least to a certain extent. Experiences show that, since only the open procedure can be applied without fulfilling additional conditions under the PPA⁶¹, this is an easier and least risky option for contracting authorities, which are reluctant to risk the procedure failing at the very beginning. This is particularly applicable to the top ten contracting authorities (responsible for nearly 40% of total procurement procedures in Croatia⁶²), which are highly likely to often choose open procedures and stick to them. Furthermore, and as seen below from the 2013⁶³ statistic data of the State Commission for Supervision of Public Procurement Procedures (“**State Commission**”)⁶⁴, the decision on the choice of procedure has the second highest appeal rate. Since tenderers either appeal against the choice of procedure (or the award decision, as the ranking first), or hardly appeal at all, choosing an open procedure seems prudent.



Regardless the reasons behind it, open procedures are publicly and strongly preferred in Croatia. Having this in mind, the EU’s efforts in the 2014 Directive on broadening the number of available procedures should be welcomed, but it should not be expected that Croatia will partake in the diversification with large numbers. A similar conclusion can be drawn for framework agreements (accounting for less than 20% of procurement procedures on a national

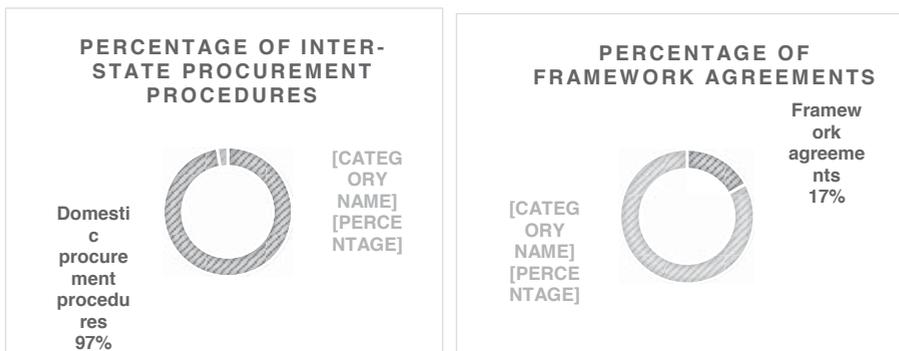
⁶¹ Article 25 of the PPA.

⁶² For more detail, please see the Directory for the public procurement system’s report for the year 2013, p. 27. The top ten contracting authorities are HŽ Infrastruktura d.o.o., Zagrebački holding d.o.o., Hrvatske autoceste d.o.o., Grad Zagreb, HEP d.d., HEP - ODS d.o.o., Hrvatske ceste d.o.o., INA – Industrija nafte d.d., HEP – Proizvodnja and Jadrolinija. Together, they amount to 39.75% of the total public procurements in Croatia.

⁶³ Statistical data for the year 2014 are still not available.

⁶⁴ The State Commission is the central authority for the control of public procurement procedures in Croatia.

level⁶⁵) and inter-state procurements as well. Inter-state procurement, particularly addressed in the 2014 Directives⁶⁶, accounted for only 2.63% of the 2013 contracts, a total of 169 contracts.⁶⁷ We assume that the state of the Croatian public procurement sector or the state of its economy in general, could have repealed the majority of foreign investors; so we should not hope for these numbers to change, if the current state does not change.



Furthermore, recent developments in Croatian public procurement seems to lead away, and not toward the main objectives of the 2014 Directive - reducing costs of procurement procedures and ensuring transparency and efficiency.⁶⁸ Different procedural safeguards in the appellate stage, inherent to procurement procedures as a whole, have been challenged before the Croatian Constitutional court in order to determine their unconstitutionality and inapplicability.⁶⁹

⁶⁵ 2013 Report of the Directory for the public procurement system, page 34.

⁶⁶ See recitals 55 and 73 of the 2014 Directive.

⁶⁷ 2013 Report of the Directory for the public procurement system, page 45.

⁶⁸ This, in our opinion, can be seen from both numerous recitals, as well as material provisions of the 2014 Directive. See, for example, the transparency requests from recitals no. 45, 52, 58, 29, 61, 68, 73, 90, 105, 110 and Section 2 – Publication and transparency, as well as efficiency requests from Article 67, 83 and 86 in the 2014 Directive.

⁶⁹ Remedies in procurement procedures are governed by a separate mechanism – Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improve the effectiveness of review procedures concerning the award of public contracts (so called Remedies Directive). However, due to the inherent connection between remedies and the general system of public procurement as governed by the 2014 Directives, and due to the upcoming changes in the Remedies directive as a result of the 2014 reform (the Commission launched a Consultation on Remedies in Public Procurement on 24/4//2014, see http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8244&lang=en&title=Consultation-on-Remedies-in-Public%20Procurement, last accessed on 14/5/2015), they have been addressed in this paper as well.

The first case regards the right of the parties to review the received bids and pertaining documentation in order to draft the appeal. Namely, until recently, Croatian tenderers were precluded to copy or in any other way duplicate documents from other bids which they had reviewed for the purpose of submitting an appeal, except by hand.⁷⁰ Since the provision made appeal drafting an almost impossible procedure, a claim was brought before the Constitutional court arguing that the provision impairs transparency and, practically, rids the parties of the right to legal remedy. This was accepted by the Constitutional court, which concluded that the limitation is contrary to the provisions of the Administrative Procedure Act as the underlying act governing the appellate procedure. Also, such a strong limitation was found to have lacked any real explanation as to why it had been placed in the PPA in the first place. Additionally, the court took into account the importance of relevant technical data, specifications and other similar documents in procurement procedures, and the extremely short appellate deadlines. Consequently, the provision was declared as disproportionate, without legitimate cause and unconstitutional in nature; therefore it was repealed.⁷¹ Furthermore, latest regulatory changes also prove that Croatia is still far from a comprehensive legislative procurement framework. Public procurement procedures cost a fair amount of money for the parties involved - particularly tenderers, which face high costs when putting together their bids, as well as when filing for legal protection. Unfortunately, for Croatian tenderers, appeals are an everyday occurrence - in 2013, a total of 22025 procedures were initiated, whereas a total of 2135 appeals were received by the State Commission. This indicates that every tenth procedure is appealed against, at least in one stage.⁷² In any event, to successfully submit an appeal, the appellant must pay a submission fee amounting between HRK 10,000 and 100,000 (i.e. approx. between EUR 1,400 and 14,000), depending on the procurement value.⁷³ The higher the value of the procurement, the higher the value of the fee, meant to be paid in order to discourage appeals submitted for purposes other than procedural safeguards. The same formula was applied when calculating attorneys' costs in the appellate procedure, all in accordance with the Croatian Bar Association's Tariff. However, since Croatia has adopted the "loser pays" principle, and since high procurement values lead to significant attorneys' costs, public contracting authorities were

⁷⁰ Articles 102, paragraph 3 and 165 paragraph 3 of the PPA, now repealed by case U-I-1678/2013 [19/12/2013], Constitutional court of the Republic of Croatia, NN no. 13/2014.

⁷¹ Ibid.

⁷² See p. 21 of the 2013 State Commission report.

⁷³ The average value of procurement contracts in 2013 is somewhere along the lines of HRK 1,220,309 (EUR cca 160,566), placing the majority of contracts in the highest submissions fee rank. See p. 11 of the Directorate's 2013 report.

in danger of significant monetary liability.⁷⁴ In order to minimize the chances of that happening, the high submission fee was kept, but the attorneys' costs were lowered. In 2014, the Act on the State Commission for the control of public procurement procedures⁷⁵ governing the structure, organization and competencies of the State Commission was amended in one article (Article 3, paragraph 3). The appellate stages of procurement procedures were legally prescribed as "inestimable", disabling attorneys from charging anything more than HRK 500 (approx. EUR 65) for representation of their client throughout the appellate procedure, irrespective of the value of the procurement at hand. In this manner, tenderers were degraded by law in their ability to protect their rights in the appellate procedure or to be fully reimbursed for the costs they incurred. As the provision directly discriminates and infringes the right to equal treatment (as well as the right to legal security, taking into account the manner in which it was introduced), the provision's constitutionality was challenged early on in 2015; the decision of the Constitutional court is expected in the course of this year. However, despite the unquestionably positive effect of the Constitutional court's interventions, they remain a subsequent reaction initiated by private individuals. The current stage of development in the procurement sector should allow for identifying its weak spots beforehand and preventing rights' infringement from occurring, instead of remedying them.

Finally, it should be noted that the data and examples above portray only a limited section of the actual situation in Croatia, one which could have been derived from available statistical data and published case studies. The data is not wholesome and does not do Croatia's procurement system justice when it comes to its qualities, but such was not this paper's purpose. Its purpose was to show a significantly negative trend in the procurement sector, leading away from the modern European solutions and to the conclusion that Croatia is deeply unprepared for a procurement system to be introduced early on in 2016.

5. CONCLUSION

The public procurement sector is one of the most important pillars of economic stability. In light of the global financial crisis and the increasing worth of goods, works and services procured via such procedures, it was more than obvious that the sector needed regulatory enhancement. In 2014, after a wide public debate and significant research, three new directives governing the field

⁷⁴ In 2013, a total of HRK 6,5 million (EUR cca 855,263) was awarded in costs. However, filed appeals requested for more than HRK 24 million to be awarded. See p. 58 of the 2013 State Commission report.

⁷⁵ NN nos. 18/2013, 127/2013, 74/2014.

entered into force. Member states of the EU, Croatia included, have until April 2016 at the latest to implement these directives and little can be done about the proximity of this upcoming deadline. Croatia, however, as a member state which has been implementing EU law for the least amount of time, seems to be utterly unprepared for the solutions of the 2014 procurement reform. Sectors which are to experience most changes upon implementation are precisely those which, currently, fall short of the benchmark according to available statistical data. This necessarily leads to the conclusion that Croatia will most likely not be ready for full implementation by early on next year, if certain matters are not addressed immediately. The Government, as well as competent Ministries, who have already set a date for the legislative changes in the relevant act to occur, should begin conducting research or initiate public debate in respect of the upcoming legislative changes and their likely impact on the future of Croatia's public procurement. When aiming for successful change, it seems this would be a good place to start.

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