POLICY PAPER

Integrity control of public contractors: EU practice and contracting in the Albanian context

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I. Introduction

Public procurement is one of the most important subjects in the economy of any country. The legal means by which the state buys public goods and services are public contracts, that follow public procurement procedures. Based on the "Open Corporates" statistics, currently there are 283 concession companies, 17,500 public contractors and 265 publicly owned companies that operate in Albania.
In a general analysis over the essential principles and rules on which a public procurement in EU member states must be based [1], as well as the basic rules taught to students in the first year of university according to the professor George Lyncht[2], we can summarize in function of this document, as follows:

a) Transparency
b) Integrity of economic operators and reliability of the respective information,
c) An economy based on the best quality/price ratio
d) Fairness in an assessment, by making what is the best to buy objective,
e) Competition – the process should not be manipulated for the benefit of any economic operator or individual involved
f) Accountability – anyone involved in the procurement process is responsible for their actions and decisions in relation to the public procurement process.

In this context, the control of the integrity of these entities is essential in the fight against corruption, the increase of transparency and efficiency in the use of public funds, as well as the increasing of public trust in the management of these funds. Public procurement is often perceived by way of stigma, as a tool of corruption, whenever it involves companies whose integrity is difficult to be verified, because they were created only a few days prior. In recent years' developments, various PPPs have been awarded to companies established just days before the procurement process took place, with headquarters in an apartment offshore.

Think for a few minutes if the leaders of the institutions had control over these companies and divulged their beneficial owners to the public, what a positive impact it would have on transparency and better management of public funds. However, integrity in procurement procedures does not only constitute a public interest, but it is also in the interest of the honest business itself, (that is, the private actor) as only this way can fair procurement procedures and equal competition be guaranteed for all.

Therefore, under the circumstances, the main issue we need to address is what integrity control means and what are the components of this control, followed by (i) EU legislation and practice for the integrity control of public contractors; (ii) Albanian legislation regarding the control of public contractors; (iii) fiscal havens and the current circumstances (iv) in a

[1] European Commission, Public Procurement: Legal rules and implementation, www://single-maket-economy.ec.europa.eu/single-market/public-procurement/legal-rules-and-implementation_en
[2] Jorge Lynch, Procurement Class Room Webpage, https://www.procurementclassroom.com/author/jlyncht

special chapter we will deal with the law on the final ownership and the openings present in it, which contribute to the integrity control of public contractors as well as (v) presenting, ultimately, a number of recommendations which will aim to increase integrity control in public contracts based on this document.

II. Integrity control of contractors (economic operators) in public procurement procedures

What does Integrity Control denotes in public procurement and what are its main components?

Integrity, according to "G20 - Principles for promoting integrity in Public Procurement" is a procurement system based on **transparency, competition and objective decision-making criteria, to prevent corruption and favoritism**. In function of this analysis, we will focus on the two main components:

- **The first and most fundamental** component is related to the transparency of the entities, without which it cannot even be presumed that there will be an integrity control following. We must know the actors, the economic operators, the visible and the invisible ones, in order to guarantee the integrity of the entity participating in public competition. Transparency is a key element of the decision-making that helps to prevent corruption. If we submit the transparency test to some of the most anathemized public procurements in the public discourse today, we would be surprised how the approach to this discourse would have changed. We must remember that the contracting authority during a public procurement process manages citizens' money, officials manage taxpayers' money, so responsibility and accountability must be firmly based on the transparency of the participating entity.

We often notice that procurements in the field of the construction of important public works involve, in the first stage, several reputed companies– which own a limited number of shares - which, once the tender is won, sell the shares to another company at a ridiculous price, establishing clearly the element that they participated in the procurement process only to "fill in the papers", i.e. the established criteria, and after receiving their reward, they leave. Then, the carrying out of the actual work is left to the company that did not meet the criteria, had they competed themselves. In the end, the public will receive a product that was not what was planned in the procurement procedures. Therefore, it clearly constitutes a problem that needs to be addressed in our recommendations.

- **The second component** it is that of reliability in relation to its ability to maintain the highest social, environmental and economic standards during the application of the public contract. This component is closely related to responsibility and accountability. Undoubtedly, the contracting authority and decision-making officials must bear

responsibility for the process, for the highest social standards are closely connected to economic ones, during a public contract.
They (the contracting authorities) are responsible for carrying out the integrity control and for this purpose, we must have accountability based on the principle of responsibility. The incumbents cannot escape the latter, by declaring that it was the stuff that prepared the papers in a certain way and they were required only to approve them, because avoiding accountability leads to a loss of public trust in the process. And justice has an indisputable role here.

EU legislation and practice on the field of Public Procurement and elements of contractor integrity control

Directive no.2014/24/EC[3] of February 26, 2014 of the European Parliament and the Council of the European Union, created the basic standards of public procurement for the member states of the European Union. The directive, in its content, provides the regulation of the integrity control of contractors/applicants for public projects.

a. *Conflict of interest control:* In the 16th point of the preliminary statement of the above-mentioned directive, the control of the conflict of interest is foreseen. It stipulates that all member states must implement appropriate mechanisms to identify, prevent and resolve cases of conflict of interest present in procurement procedures. This obligation has been expanded in article 24 of the directive itself, which provides that: *"The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure."*
   Despite the above, there is no means provided in the directive to specify how it will be possible to identify cases of conflicts of interest. In practice, the subjects themselves declare the absence of conflict of interest, so this condition depends entirely on the willingness of the companies to be transparent with public bodies. The first step taken was the obligation to declare the beneficial owners, since clearly without knowing who the beneficial owners are, there can be no real control for the conflict of interest. This obligation was implemented with the 2019 amendments to the Money Laundering Directive[4]. We will deal with this issue

[3] Eur-Lex, Directive 2014/24/Eu of the European Parliament and of the Council, 2014, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024
[4] Eur-Lex, Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive

further down, in the third chapter of this document. In principle, we can say that this legal tool is not sufficient to concretely control cases of conflict of interest.

b. *Protection of the environment:* In the 88th and 91st points of the preliminary statement of the directive, it is also foreseen the obligation for entities applying for public contracts to implement the highest standards of environmental protection.
c. *Criminal control of subjects*: In the 100th of the preliminary statement of the directive stipulates the obligation for member states to exclude from internal procurement procedures entities convicted of membership in criminal organizations or those convicted of corruption, fraud, terrorism or its financing, employment of minors, human trafficking and money laundering. This obligation is also detailed in paragraph 1 of Article 57 of the aforementioned Directive. Based on said provision, the obligation to exclude these entities also applies when the convicted person is an administrator or a member of the management or supervisory board.
d. *Control over the payment of fiscal burden:* Again, in the 100th point of the preliminary statement, it is expressly provided that all entities that have not paid taxes or social contributions are ipso jure excluded from all public tender procedures. The same obligation is also provided for in paragraph 2 of article 57 of the aforementioned Directive, where it is clearly stated that this exception will extend up to the moment when the subject pays the fiscal liabilities to the state, including interest and/or penalties when the latter are applied.
e. *Reliability check:* referring to the 101st point of the preliminary statement, as well as article 18, paragraph 2 and article 57, paragraph 4, all entities that habe been found unreliable for violating the rules ofor the protection of the environmental or other social obligations, such as duties concerning persons with disabilities or other serious professional violations such as the law for the protection of competition and laws for the protection of copyrights. In addition, contractors who have shown low performance in previous procurement procedures such as for example the complete non-fulfillment of the obligations defined in those tenders or cases where the company seeks to impact decision-making by obtaining confidential information related to the procurement procedure.

The above-mentioned obligations remain in force not only before, but also after the public contract is signed. Even if a procurement procedure ends, but during the implementation it emerges that the entity is subject to one of the above-mentioned exclusion clauses, based on the article 57, paragraph 5, the contracting authority has the right to terminate the public contract.

2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73), as amended by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 (OJ 2018 L 156, p. 43), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L0849

Conclusion: From the above-mentioned analysis, it is quite clear that the Directive provides for several control mechanisms of the integrity of entities participating and competing for public contracts. However, it does not offer any provision that forbbid the participation, in the application procedure, of entities that are registered in fiscal havens, in which case the control of the integrity of the business and their owners is incomplete.

Albanian legislation and the instruments it provides to control the integrity of Public Contractors

Given that the Albanian legislation on public procurement[5] is an approximation of the aforementioned EU Directive, a similar situation presents itself in the domestic law, in which there is no provision/obligation to prohibit the participation in public procurement of companies registered in fiscal havens or other countries that do not offer an integrity control on businesses and their owners. However, there are some other control obligations which we will analyze below. In order to analyze the efficiency of these mechanisms, we will undergo a practical "test" on a case by case basis:

f. *Conflict of Interest:* Article 18 entitled "protection of the integrity of the procedure and general measures for the prevention of corruption" and article 19 "conflict of interest", provide that contractors who have or had commercial relations with any of the bidders or have family ties (it is in the circle of related persons) based on the definition of the special legislation for the prevention of conflict of interest, are excluded from the relevant public procurement procedures. If we were to subject this principle to the test of procurements made public by the media, for example, where family members are involved in the procedures, after the contracts have been concluded, the result is that they don't pass the test; the procedure must clearly provide, even after the contract has been signed, for an annullment of procedure – along with a reversal of its consequences - in order to protect the public interest.
g. *Criminal control of subjects:* Article 76 of the same law provides in letter (a) that any operator who is or has been convicted by a final court decision for any of the criminal offenses such as participation in a structured criminal group, terrorist organization, corruption, fraud, money laundering money, forgery or child labor is automatically excluded from public procurement procedures for a period of 5 years from the date of execution of the sentence. During the procurement procedure, one of the documents that must be submitted by the applying entities is the proof of judicial and criminal status, which reflects whether the entity or the members of the governing council/administrator have been convicted of one of the aforementioned crimes. If we examine the infrastructure procurement

[5] Public Procurement Agency, Law n. 162/2020 "On Public Procurement", https://www.app.gov.al/legjislacioni/prokurimi-publik/ligji/

procedures as an example and put it to the test, is it possible to observe a lack of provisions about what happens when the beneficial owner of the winning operator, turns out to have a terrible criminal record? [6] For example, convicted of international drug trafficking. The issue here can be complicated, what will be done with the contract, guarantees, bank loans, beneficiaries, etc., so a clearer legal provision is needed on the one hand to cut off the supply of public money (according to the contract) to the operator owned by individuals with criminal records and on the other hand, the protection of public interest and entities that have cooperated in good faith, such as banks.

h. *Control over the payment of the fiscal burden*: Paragraph 2 of provision 76, also provides for the obligation to exclude from public procurement all those entities that have not paid taxes or social security contributions. Again, this obligation is controlled by the contracting authority, forcing the applying entities to submit a tax certificate, tesifying that the company has no unpaid fiscal burden.

i. *Reliability Control:* Another obligation during the control of the integrity of the applying entities in public procurement procedures is that of reliability control. Accordingly, referring to paragraph 3 of article 76, any economic operator is disqualified from participating in the procurement procedure if they are found in one of the following situations: i) the contracting authority or entity proves that there is a violation of the applicable obligations concerning the legislation on the protection against discrimination, as well as environmental, social and labor legislation; ii) the economic operator has gone bankrupt or is subject to bankruptcy procedures; iii) the economic operator has been declared guilty by a final court decision for a serious professional violation; iv) the contracting authority or entity proves that the economic operator has entered into agreements with other economic operators whose purpose is to distort competition; v) the economic operator is in a situation where conflict of interest is present; vi) the economic operator has withdrawn from signing the contract in a procurement procedure developed by the contracting authority or entity itself.

   This condition applies within one calendar year of withdrawal; vii) the economic operator has shown significant or continuous deficiencies in fulfilling an essential criterion of a previous contract with a contracting authority or entity or a concessionary contract; viii) the economic operator has submitted false statements in providing the information required to prove that there are no grounds for disqualification or the meeting of the selection criteria; ix) the contracting authority has factual information that the economic operator has undertaken to improperly influence the decision-making process of the contracting authority or entity. As discussed in the introductory part, a significant number of operators act as described in point iv) as above. They form a union of

[6] Open Data Albania, Alessio – 2014 Business Passport, https://opencorporates.al/sq/nipt/l41713003m

operators to win the tender by obtaining the documentation of a company with experience in the construction of a certain work, and then as soon as the implementation begins, they buy the quotas of this company.

Again, the Albanian legislation as well lacks any provision that prohibit the application in the procurement procedures of subsidiary entities of foreign companies or other companies whose ownership is registered in fiscal havens or countries listed on the black/grey list of the EU Council. This is an essential deficiency of the legislation during the control of the integrity of the subjects in public contracts, considering that these companies will benefit from public funds.

In the following chapters we will first analyze the fiscal havens (and the EU Council's black/grey list countries), followed by the law on the declaration of beneficial owners, the steps forward that this legislation has taken to combat awarding public contracts to companies registered in these jurisdictions, as well as loopholes present that this new law has left open, which can be used by companies to avoid integrity control during procurement procedures.

III. Tax havens, the EU blacklist and the current situation

The stigmatization carried out in the public discourse in Albania and not only, towards "Offshore" companies, or "Fiscal havens" as a specific case, is not constructive. When "Offshore Company", "Fiscal Paradise" is mentioned in public, the audience immediately synthesizes its logic with concealment of income, deviations, illegality, money laundering, corruption, corrupt politicians, etc. This does not apply only to the citizens with an average sense of judgement or investigative journalists, but also politicians and lawyers. Most of the world's richest people keep a portion of their income in bank accounts known as tax havens. The capital held in tax havens constitutes about 10% of the world's global capital. The companies that have benefited the most from the application of tax havens are Pfizer, Apple, MicroSoft, Nike, etc..

At the end of 2017, from a study conducted by Forbes International, it appears that more than 10% of Cash money is located in offshore companies in tax havens.[7]. This outcome can shock many individuals automatically thinking (opinion bias) that this is money linked precisely to organized crime, terrorism, corruption, etc. But this is not true. The U.S. Pirg Education Fund also conducted a 2017 study that found that 73% of Fortune 500 companies (at least 366 companies) have money in offshore companies in tax havens[8]. These companies

[7]Kenneth Rapoza, Forbes "Tax Haven cash rising, now equal to at least 10% of World GDP", https://www.forbes.com/sites/kenrapoza/2017/09/15/tax-haven-cash-rising-now-equal-to-at-least-10-of-world-gdp/?sh=4da299b570d6

[8]U.S Pirg Education Fund, "Study: 73% of Fortune 500 Companies used offshore tax havens", https://uspirg.org/neës/usf/study-73-fortune-500-companies-used-offshore-tax-havens-2016

together have at least 9,755 branches registered as offshore companies in tax havens whith a joint capital of 2.6 Trillion Dollars. Some of the companies mentioned are giants like Apple, Pfizer, Microsoft, General Electric etc. This study has also been defended by The Visual Capitalist, which has released a list of the largest companies that hold capital in the bank accounts of their branches, registered in tax havens.[9]

At the meeting of May 25, 2016, the Council of Europe proposed the construction of a common strategy for punishing cases/states that do not exchange information with the European Union regarding tax issues (tax havens).[10] The EU has also published a list known as the black list of countries that do not cooperate with the EU, in particular in the context of the exchange of information on tax issues. There are 12 jurisdictions on this list as follows: (i) American Samoa; (ii) Anguilla; (iii) the Barbados Islands; (iv) Fiji; (v) Guam; (vi) Palau; (vii) Panama; (viii) Samoa; (ix) Seychelles; (x) Trinidad and Tobago; (xi) British and American Virgin Islands; (xii) Vanuatu.[11]

The European Union has a second watch list or otherwise known as a gray list which is widely monitored for the implementation of transparency practices related to tax issues with EU law enforcement institutions as follows: (i) Albania (ii) Andorra; (iii) Armenia; (iv) Aruba; (v) Belize; (vi) Bermuda; (vii) Bosnia and Herzegovina; (viii) Batswana; (ix) Cape Verde; (x) Cayman Islands; (xi) Cook Islands; (xii) Curacao; (xiii) the Faroe Islands; (xiv) Macedonia; (xv) Greenland; (xvi) Guernsey; (xvii) Hong Kong SAR; (xviii) Isle of Man; (xix) Jamaica; (xx) Jersey; (xxi) Jordan; (xxii) Labuan Island; (xxiii) Liechtenstein; (xxiv) Maldives; (xxv) Mauritius; (xxvi) Montenegro; (xxvii) Morocco; (xxviii) Nauru; (xxix) New Caledonia; (xxx) New Caledonia; (xxxi) Niue; (xxxii) Oman; (xxxiii) Peru; (xxxiv) Qatar; (xxxv) Saint Vincent and the Grenadines; (xxxvi) San Marino; (xxxvii) Serbia; (xxxviii) Swaziland; (xxxix) Switzerland; (xl) Taiwan; (xli) Thailand; (xlii) Turkey; (xliii) Uruguay; (xliv) Vietnam.[12]

The EU has taken several initiatives, directed against the states present on the black/grey list, aiming to put them under fire and push them to implement fiscal policies, in accordance with international standards, respectively:

(i) The twelve aforementioned jurisdictions do not have the right to benefit from any funds from the EU, namely, the European Fund for Sustainable

[9]Jeff Desjardins, Visual Capitalist, "The Fortune 500 Companies with the most cash in offshore tax havens" https://www.visualcapitalist.com/fortune-500-companies-cash-offshore-tax-havens

[10]Council of the European Union, "Commission Communication on an External Strategy for Effective Taxaction and Commission Recommendation on the implementation of measures against tax treaty abuse" – Council Conclusions 25th of May 2016, https://data.consilium.europa.eu/doc/document/ST-9452-2016-INIT/en/pdf

[11]Council of the European Union, "The EU list of non-cooperative jurisdiction for tax purposes" 18th of February 2020 https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv:OJ.C_.2020.331.01.0003.01.ENG>

[12]European Parliament, "List of tax havens by the EU", https://www.europarl.europa.eu/cmsdata/147404/7%20-%2001%20EPRS-Briefing-621872-Listing-tax-havens-by-the-EU-FINAL.PDF

Development, the European Fund for Strategic Investments, the Lending Mandate (ELM), the General Security Framework.[13]

(ii) As for other measures, every EU country has the right to implement its own mechanisms to guarantee protection against cases of abuse in tax havens. However, in reference to the Code of Conduct Group (Business Taxation) of the Council of Europe on November 25, 2019, it has been agreed between member tates to renew the monitoring mechanisms for financial transactions in/from tax havens.[14]

In the Albanian legislation as well, there are several monitoring mechanisms have been implemented regarding the transfer of funds to/from fiscal havens, respectively:

(i) Article 6 of Regulation 1/2013 "On the licensing and exercise of activity by non-bank financial entities", in point 7/1 provides that: "In the event that the Bank of Albania ascertains, or has reasonable doubts that the capital structure or source is related to persons for whom there are final criminal penalties, who have family ties or close personal work or business relationships according tolegal definitions, with the proposed shareholders/partners, **or is related to companies registered in fiscal or offshore havens, it notifies and requests from the General Directorate of Prevention of Money Laundering if there is information about the proposed shareholders/partners and suspend the licensing procedure until a response from the latter**.*"*

(ii) According to Chapter III of Law no. 9917, dated 19.05.2008 "On the prevention of money laundering and financing of terrorism" as well as Regulation no. 44, of the Supervisory Authority of the Bank of Albania dated 10.06.2009 for the "*Prevention of money laundering and financing of terrorism*", offshore clients are classified as a high-risk category and an increased monitoring (enhanced vigilance) is applied to their financial activity. We must emphasize that non-resident individuals, non-resident companies, non-profit organizations, politically exposed persons (PEP) are also classified in this category.

(iii) Meanwhile, in 2020, the Parliament of Albania approved law no. 112/2020 "*On the registering of beneficial owners*"[15] in the framework of the alignment of Albanian legislation with that of the EU, namely Directive no. 849/2015 of the European Parliament and the Council, dated May 20, 2015, "On preventing the use of the financial system for the purposes of money

[13]European Council "Taxation: EU list of non-cooperative jurisdictions", https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions

[14]Council of the European Union, "Code of Conduct Group (Business Taxation)" November 25, 2019, <https://data.consilium.europa.eu/doc/document/ST-14114-2019-INIT/en/pdf>

[15] Directorate of Taxation, DCM with no. 1088, dated 24.12.2020, "On determining the manner and procedures of registration and publication of data for beneficial owners as well as notification by the competent state authorities and obliged entities, https://www.tatime.gov.al/shkarko.php?id=9514

laundering or terrorist financing, which amends regulation no. 648/2012 of the European Parliament and of the Council and repealing Directive 60/2005/EC of the European Parliament and of the Council and Directive 70/2006/EC". (More detailed analysis regarding this legal initiative can be found in chapter 4 below).

Given that, as we have stated above, in Albania there is no legislative obligation to exclude from public procurement procedures entities that are registered (or have registered owners) in fiscal havens or on the black/grey list of of the Council of the EU (EU non cooperative jurisdictions and high risk third country lists), in the following we will analyze some statistical data collected by "Open Corporates Albania" for companies registered after 2017.

In Albania, referring to the data collected after 2017, there are 701 business companies that are registered as branches/subsidiaries or owned by commercial companies in the black/grey list countries mentioned above. Of these companies, about 33 of them exercise activity in one of the categories described below, which are considered delicate and for which, a stricter integrity control is required:

Category	**Number of subjects**
Albania 1 Euro	2 subjects
Companies liccensed by ERE	3 subjects
Banks	2 subjects
Strategic Investitors	3 subjects
Concessions	8 subjects

If before we stated that we do not support the stigmatization of companies registered in fiscal havens or more complicated cases, such as offshore ones, we meant that as a principle acquired during our professional experience; whereas, in the context of public procurements, it is incomprehensible why the government should entrust public money to a company registered in a tax haven, whose main purpose is fiscal evasion. In Albania, as in every democratic country in the world, everyone, Albanian or foreigner, is free to create legal business schemes and register them in tax havens. Everyone in Albania, whether Albanian or foreigner, has the right to benefit from the advantages explored above, just like Apple, Pfizer, Microsoft, General Electric.

But when it comes to public assets and public contracts, the issue gets complicated. The loophole allowing the addition of shareholders, not showing the real owners if they own less than 25% (that you can keep an infinite number with less than this quota) and they can hide indefinitely and that way, hiding the control of conflict of interest, corrupt elements and bringing integrity control close to null and voide. Let's look at an Austrian case: "Karl-Heinz Grasser, former Minister of Finance in Austria was sentenced two years ago (December 6, 2020) to 8 years in prison for his role in a high-profile corruption scandal. Grasser was found

guilty of embezzlement, bribery and falsifying evidence in a deal to sell thousands of state apartments. The court in Vienna finds that Grasser was involved in the transaction worth more than 9.6 million euros, in three bank accounts in Liechtenstein, known as a Fiscal Haven by the EU, on the same list where the Cayman Islands are. "Why do honest business people need an account in Liechtenstein?" - said judge Marion Hohenecker in 2020 at the Court of Vienna as she sentenced the former finance minister to 8 years in prison.

Conclusion: Offshore companies, whose owners are registered in a tax haven, are legal in principle, however, the risks that the chosen legal form will be used for activities in violation of Albanian and international legislation, increase. That is especially true in the case of public projects, when these companies are set to receive benefits (money or public assets), when the control of their integrity becomes of paramount importance, as they can serve as a tool for corrupt practices.
It is difficult to understand why the public contracting authority would encourage and contract an economic operator whose purpose is the fiscal evasion of public money, when is the legal obligation of said public authority to act as guardian for the public money and fisal responsibility. In this sense, in the following section, we will analyze the first step that was taken by the Albanian legislation in order to declare the beneficial owners and if this tool is sufficient to increase the public's credibility in cases of public procurement.

IV. Law no. 112/2020 and the spaces present in it that (do not) contribute to the control of contractors' integrity

In order to implement the recommendations of MONEYVAL, after the establishment of the inter-institutional work group that had the task of reviewing the Albanian legislation, evaluating the best practices and drawing up recommendations for the creation of the Register of Beneficial Owners, the National Business Center drafted the draft law *"For the register of Beneficial Owners"*.[16]

According to the Relation accompaining the Draft law, the purpose of the latter was the creation, operation and administration of the Register of Beneficial Owners, in whose function the term "beneficial owner" was defined, concerning economic entities registered in the Republic of Albania, upon which the legal burden to disclose information would fall.[17] Always referring to the Report, the draft law would regulate the procedures and means of maintainance of the beneficial owners' registered data, as well as provide for punitive measures in case of non-registration or non-fulfillment of legal obligations. In this context, the Assembly of Albania, on July 29, 2020, approved law no. 112/2020 "*On the register of beneficial owners*". It is worth noting that the law no. 112/2020 has been partially aligned

[16] Parliament of the Republic of Albania, Relation of the draft law "On Beneficial Owners", http://www.parlament.al:5000/Files/20200717100130RELACION%20-%20REGJISTRI%20I%20PRONAREVE%20PERFITUES.pdf
[17] Ibid.

with Directive (EU) 2015/849 of the European Parliament and the Council and therefore, the provisions of this Directive have been transposed into domestic law.[18]

Subsequently, the law determines which entities will be considered as reporting entities, in terms of the legal obligation to register the beneficial owners in the Register. Thus, in reference to Article 2 of the law, it includes all legal entities registered in the Republic of Albania, except natural persons, traders registered in the commercial register; legal persons and enterprises, where the sole shareholder is a central and/or local institution of the Republic of Albania; religious communities and political parties.

With regards to law no. 112/2020 "*For beneficial owners*", the beneficial owner is the individual who owns or controls the entity and/or the individual on whose behalf a transaction or activity is being carried out and that in reference to point 1, article 3 , of the law, includes at least: (i) the individual who owns or ultimately controls a legal entity,
through direct or indirect ownership of a sufficient percentage of shares or voting rights or participation in the capital of that entity, included through the holding of shares, or through control through other means, or benefits from transactions carried out by the legal entity on its behalf; (ii) the founder or legal representative or the individual who is crucial to the organization's decision-making or controls the election of the majority of the organization's decision-making or executive bodies.[19]

The legislator, in points 2 and 3, of Article 3, has made a differentiation in the type of ownership by determining that ownership is divided into two categories: direct and indirect ownership. Direct ownership is "ownership held by an individual of 25% or more of the shares/equity shares or ownership interests in a reporting entity", while indirect ownership is defined as "ownership held or control exercised by the same individual in one or more legal entities that individually or jointly own 25% or more of the shares/equity shares or ownership interests in a reporting entity." [20] In this sense, all legal entities that are registered in the Republic of Albania have the obligation to register the beneficial owners, who are those partners or shareholders who own at least 25% of the quotas or shares of the entity's capital.

Despite the legal obligation that exists towards them, only about 20% of the entities registered in the Republic of Albania have registered the beneficial owners in the relevant Registry. This figure, in the circumstances where we have not received an official response

[18] Directive (EU) 2015/849 of the European Parliament and the Council, dated May 20, 2015, "On the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, which amends Regulation (EU) no. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, as amended". CELEX number 32015L0849, Official Journal of the European Union, series L, no. 141, dated 5.6.2015, p. 73–117
[19] Law no. 112/2020 "On the register of beneficial owners", dated 29.7.2020, Official Gazette No. 149, dated August 13, 2020, Pg. 9477.
[20] Ibid, Pg. 9478.

from the relevant authorities to our request for information, remains unofficial and only based on the information we possess.

One of the main reasons why this figure continues to remain low, two years since the adoption of law no. 112/2020 "*On the Register of Beneficial Owners*" was passed, is also related to the sanctions that arise, as a result of non-implementation of the obligations defined in the law. Although law no. 112/2020 was amended twice, the first time with normative act no. 12, dated 25.3.2021[21], approved by law no. 55/2021, dated 4.5.2021 and the second time, revisions were made through law no. 6/2022, dated 27.1.2022[22], again sanctions may not be considered capable of forcing subjects to fulfill legal obligations.
Thus, Article 13 of Law no. 112/2020 establishes that the initial failure to register the information circa the beneficial owner or the non-registration of changes in the information already recorded in the register, constitute administrative offenses and are punishable by a fine, which is seen as the main type of administrative sanction that can be given to entities that do not respect legal obligations.
At the same time, point 4, article 13, of the law "*On the Register of Beneficial Owners*" stipulates that the NBC and the authority responsible for maintaining the Register of NGOs for reporting entities, will not provide services, and will change the status for reporting entities from the "active" status to the "suspended" status in the commercial register and in the Register of Non-Profit Organizations. However, this legal definition, from the point of view of the legislative technique, also because the term "suspended" is not recognized by the law on commercial companies or the organic law of the NBC, is unclear and leaves room for subjective interpretation concerning the question whether the "suspended" status in the relevant register means the suspension of the entire activity of an entity or only the suspension of the provision of services by the National Business Center.

In the framework of public procurement procedures, if we refer to article 76, of law no. 162/2020 "*On public procurement*", which defines the mandatory criteria for the disqualification of economic operators from public procurement it emerges that failure to fulfillment obligations arising from law no. 112/2020 "*On the Register of Beneficial Owners*" is not one of the criteria that leads to the disqualification of economic operators, thus allowing them to, despite the non-fulfillment of the legal obligation for the initial registration of data or the registration of changes to the data reflected in the register, can participate in public procurement procedures just like any other economic operators, who have fulfilled those same obligations.[23]
Another issue that has been identified concerns the minimum threashold of ownership of quotas or capital shares, provided for in law no. 112/2020 "*On the register of beneficial*

[21] Normative act of the Council of Ministers no. 12, dated 25.3.2021, Official Gazette No. 49, dated March 29, 2021, Pg. 5223
[22] Law no. 6/2022 "On some changes and additions to the law no. 112/2020, "On the register of beneficial owners, amended", Official Gazette No. 25, dated February 15, 2022, Pg. 2799.
[23] Law no. 162/2020, dated 23.12.2020 "On public procurement", Official Gazette No. 30, dated February 26, 2021, Pg. 3920.

owners", for which exists a legal obligation to record information. As discussed earlier, although our law has partially absorbed the provisions of Directive (EU) 2015/859 of the European Parliament and the Council, it has still maintained the same minimum threashold with the Directive, despite the fact that according to point "i", of letter "a", paragraph 6, of article 3, of the Directive, States enjoy the right to set a lower ownership quota threashold, based on their assessment.

In this context, it is necessary to emphasize that the quota ownership threashold, as defined in law no. 112/2020 "*On the Register of Beneficial Owners*", leaves room for the subjects to divide, split and fractionate the quotas or shares they own in an entit, through one of the ways of alienating quotas or shares, provided for in law no.9901, dated 14.4.2008 "*For merchants and commercial companies*"; thus, transmutating law no.112/2020 into an impratical and impossible to apply form, and hiding the beneficial owners of the entity. And, in any case, the latter is dedicated to the fight against money laundering mainly and not solely to public procurement, which is the focus of this analyses.

Policymaking outcomes are often subject to the principles of checks and balances and constitutional control, and judicial control is often decisive. In that respect, we must add another gap present in the above-mentioned EU Directive for the registration of beneficial owners, which was also influenced by a decision of November 22, 2022 (preliminary question) of the Court of Justice of the European Union, namely Decision C-37/20 and C-601/20. In this decision, the Court found that access to the register of beneficial owners, at any time and by ordinary citizens, violates basic rights to private life and the obligation to protect personal data. [24] This verdict has yet to be adopted in Albania, as currently on the official website of the NBC, all the information concerning the beneficial owners of the registered entities can be found. Its fair to think that this position of the EU Court of Justice, if it will be implemented vis-à-vis in Albania as well, will make it even more difficult to control the integrity of the subjects by other actors, such as civil society organizations or the media.

V. Recommendations

As we've already concluded, the control of the integrity of companies that receive public funds/assets is a very important process, which constitutes the main pillar of the essential principles of public procurement, wich aim to protecting the public goods, free competition and the fight against corruption. Integrity control is a key element and inextricably linked to accountability and responsibility. Finding the most efficient mechanism to exercise this control, as well as the further elimination of the consequences even when this control has turned out to be insufficient, increases accountability and automatically also public trust. On

[24] CJEU, Joint Cases C-37/20 and C-601/20, "Preliminary ruling for two cases WM, Sovim Sa before the Luxembourg District Court" 2022:912.

the other hand, the legislation is not complete, especially because there is no legal means to stop companies that are registered in tax havens in black/grey list countries from participating in public procurements, i.e stop them from competing.
Despite the fact that the law on the declaration of beneficial owners made some steps forward in this context, this initiative is not sufficient to guarantee open, fair and competitive public procurements, as well as immune to corruption. Regarding the above, taking into consideration the nature of the problems we've touched, it is considered necessary to offer two main recommendations and others with a specific nature:

The main recommendations are based on the analysis of the principles of public procurement and integrity control which we've already analyzed elsewhere in this document.

Recommendation 1: In accordance with EU practice, the establishment of legal penalties regarding the public contracts which have been found in violation of the principle of integrity, after the veracity of claimes has been proved following the conclusion of the contract (punishment of economic operators when they have circumvented the self-declaration regarding criminal records, or they have played the system, by colluding with companies with the aim of distorting competition).

Recommendation 2: Prohibiting/restricting economic operators that are registered in fiscal havens from competing in public procurements, until a better control of money laundering is ensured and Albania leaves the *watch list*, the list of countries at risk for money laundering.

Recommendation 3: The same integrity control principles should be extended not only to the company winning the public contract, but also to subcontractors which undertook to work for those same public contracts.

Recommendations of specific nature: After Albania has been expulsed from this list (grey list for the prevention of money laundering) then we could offer more specific recommendations for the intervention of the legislator through amendments, such as in law no. 112/2020 "*On the register of beneficial owners*", as well as in law no. 162/2020 "*On public procurement*". At the same time, the intervention of the executive would be necessary through the amendment of the Decisions of the Council of Ministers, and more specifically through the amendment of Decision no. 285, dated 19.5.2021 "*On the approval of public procurement rules".*

Recommendation 1: Concerning the law no. 112/2020 "*On the register of beneficial owners*", the proposed changes consist of:

(i) Amendment of points 2 and 3, of article 3, of law no. 112/2020, reducing this threashold to the lowest possible extent, aiming either to reduce or remove the possibility of alienating quotas or capital shares with the intention of deviding or fractioning them, in order to avoid the obligation to register information

regarding the beneficial owners. From the point of view of the legislative technique, this revision can be directed only towards entities that seek to participate in public procurement procedures (economic operators).

(ii) Amendment of point 4, article 13, of law no. 112/2020, further defining and clarifying what is meant when the status of the company is changed to "suspended", in those cases when the subject does not pay the fine and does not perform the initial data registration or the data change registration. The revision must be such as to penalize from exercising commercial activity all entities that do not fulfill their legal obligations during this time period.

Recommendation 2: Concerning the law no. 162/2020 "*On public procurement*", the proposed changes are as follows:

(i) The addition of a letter or point in Article 76 of Law no. 162/2020, to clearly sanction that failure to register the beneficial owners or changes to the information, reflected in the register constitutes a disqualification criterion from the public procurement procedure.

(ii) Addition of a provision prohibiting the participation of offshore registered entities in all types of public procurement procedures valued above the upper monetary limit.

Recommendation 3: In Decision no. 285, dated 19.5.2021 "*On the adoption of public procurement rules*", it is proposed that in Article 26, who concerns the Rules, a point be added, in such a way that in the summary form of the self-declaration of the subjects, the latter self-declare that have performed the registration of the beneficial owners and/or have reflected all the changes that occurred in the data register of the beneficial owners, until the moment of entry into the public procurement procedure. At the same time, in the same article, it is proposed to add a point, through which the subject self-declares that it is not registered offshore. Thus, pursuant to point 6, article 26, of the Decision, the contracting authority/entity would have the opportunity to ask the qualified tenderer for proof and supporting documents of the self-declaration, the first, as in any case, the authority/entity the contractor would enjoy the right to perform the necessary verifications on the authenticity of the information declared by the economic operator.

Recommendation 4: Control mechanisms by private actors, including the media and civil society organizations, should be incentivized. An example of success in controlling the integrity of public procurements was the Integrity Pacts, drawn up in the 90s in cooperation between the EU and Transparency International, through which civil society organizations together with public actors regularly controlled procurement procedures. Such a quasi-legal tool can also be used in Albania with the aim of increasing the transparency and control of public procurement procedures, increasing responsibility, accountability, the fight against corruption and strengthening public confidence in the protection of money and the public good.

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