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POLICY PAPER

## **Public Procurement**

# **Albania through the lens of European Integration**

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## Introduction

This topic is not new in Albania, but it is increasingly important due to the fact that the public sector - i.e. the state - spends the largest percentage of the national budget through public procurement. Therefore, there is a need for implementing legal mechanisms that demonstrate transparency, competition, economization and non-discrimination, and enable the realization of the best value in procuring goods, works, and services. The topic is gaining importance due to the process of globalization, as well as due to the internal market in the territory of the European Union, which enables the free movement of goods, capital and services, as Albania aspires to become a member of this Union.

## Principles of public procurement from the EU perspective

Treaty on the Functioning of the European Union: The Treaty does not contain any specific provisions relating to Public Procurement. However, it has established a number of basic principles (Principles of the Treaty) on which the EU is based. Of these basic principles, the most important in terms of public procurement are the following:

- Prohibition of discrimination on the basis of nationality
- Free movement of goods
- Freedom to provide services
- Freedom of establishment.

**General principles of law:** In addition to these basic principles of the Treaty, some general principles of law have emerged from the case law of the Court of Justice of the European Union (ECJ). These general principles of law are important because they will often be used by the ECJ to fill gaps in legislation and to provide solutions to situations which are often very complex. The most important of these general principles of law in the procurement context are the following:

- Equality of treatment
- Transparency
- Mutual recognition
- Proportionality.

These general principles are applied independently of the relevant Public Procurement Directives<sup>1</sup>.

**Legal effects of the Directives:** Member States are obliged to take all appropriate measures to ensure compliance with the obligations arising from the Treaty or resulting from the actions taken by the EU institutions. The directives listed in the footnotes of the law "On public procurement", like all other directives, by definition are not directly applicable, which means that they are not automatically implemented.

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<sup>1</sup>European Commission, *Public Procurement - Current Legal Framework, Rules, Thresholds and Guidelines*, [https://ec.europa.eu/growth/single-market/public-procurement/legal-rules-and-implementation\\_en](https://ec.europa.eu/growth/single-market/public-procurement/legal-rules-and-implementation_en)





In order to produce their effects within the Member States, the Directives must be implemented or "transposed" into national law. Member States should therefore take the necessary measures to give full force to the provisions of the Directives in national law and to ensure that there are no other national provisions which impair the applicability of the provisions of the Directives. These measures usually take the form of a transposition of Directives into national law and the repeal of all conflicting legal provisions. Directives are binding only in terms of the result to be achieved while generally leaving it to national authorities to choose the form and methods. It is not necessary for EU Member States to produce an exact copy of the Directives in their national legislation, although it turns out that a large majority of Member States have done just that.

**Basic principles of public procurement:** From its inception, one of the main objectives of the European Union has been to create a common market that eliminates barriers to trade in goods and services between EU member states. Creating a common procurement market means removing barriers to trade arising from the procurement context. One of the main goals of public procurement legislation is to eliminate existing barriers and prevent new ones from being set up. It does this by applying the basic principles derived from legislation.

Although these principles are interrelated, they can be reduced to a number of basic principles:

- **Competition:** From an economic point of view, "competition" acts as an advertising procedure, by allowing different economic operators to communicate the prices at which goods and services are available in the market. These prices act as guiding signs and reflect the terms of supply and demand at any given time. They also reflect differences in the quality and terms and conditions of sale of the various (non-homogeneous) products available. This is why the announcement of calls for tender is so important. It guarantees the widest possible publication and competition, enabling economic operators from across the EU to participate and secure the largest possible selection.
- **Equal treatment and non-discrimination:** The concepts of equal treatment and non-discrimination are not the same. In general, all procurement legislation will seek to maintain equality between economic operators. However, in the EU context, equality will also be based on "nationality". Equal treatment is a concept that generally requires that identical situations be treated in the same way or that different situations should not be treated in the same way, and requires the same treatment for the same people. In the EU context, the concept of equal treatment also requires a definition, as, in this context, the concept of equality is also based on nationality or origin of goods. As a result, all economic operators with EU nationality and all offers, including goods originating in the EU, should be treated equally (this is the principle of non-discrimination).
- **Transparency:** Transparency has recently emerged as a principle, although it is probably best to think of it as a tool to be used to achieve other objectives.

For example:

- Publication and access to legislation provides clarity and security for all stakeholders and enables contracting authorities and economic operators to be aware of the rules of the game.
- Requirements for calls guarantee transparency in the publication process.
- Publication of technical specifications in advance and selection of criteria enables those interested to verify these specifications and criteria whether they are fair and non-discriminatory or not.





Registration and reporting requirements ensure that the actions of contracting authorities can be verified when appropriate. Registration and reporting requirements are also a fundamental aspect of "accountability", i.e., holding procurement officers accountable for their decisions and actions.

"Accountability": is also often a clear objective of national procurement systems and transparency provisions reinforcing this accountability. Some of the above principles have been articulated differently or have been combined in national legislation. Principles such as "economy and efficiency", "value for money", and "honesty" or "integrity" can be found as definitions in legislation.

Value for money: An important economic driver underlying procurement processes is the need to ensure that all purchases represent value for money. The directives do not specifically address this issue, but it is important to remember the need to ensure that value for money will be one of the key outcomes of the procurement process. The term value for money means the optimal combination of various cost-related and non-cost-related factors that jointly meet the requirements of the contracting authority. The elements that make up the optimal combination of these different factors differ from procurement to procurement and depend on the results required by the contracting authority for the exercise of the procurement in question.

### Legal framework as of 31 March 2021

Legislation in the field of public procurement was composed of law no. 9643, dated 20.11.2006, "*On public procurement*", as amended<sup>2</sup>, as well as Decision no. 914, dated 29.12.2014 of the Council of Ministers "*On the approval of public procurement rules*", as amended. These legal instruments were based on Directive 2004/18/EC, "*On the coordination of procurement procedures for the award of public contracts for works, supplies and services*" (public sector directive), Directive 2004/17/EC "*On the coordination of procurement procedures of entities operating in the water, energy, transport and postal services sector*" (utility directive), which are already repealed by the new directives of 2014, as well as on directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Directives 89/665/EC and 92/13/EC as regards the increase of efficiency for public contract review procedures.

Also, the legislation in the field of public procurement contains two decisions of the Council of Ministers, which further regulate centralized procurement at the government level, namely DCM no. 81<sup>3</sup>, dated 14.2.2018, "*On the establishment, organization and functioning of the Concentrated Purchasing Agency*", and DCM no. 82<sup>4</sup>, dated 14.2.2018, "*On authorizing the Concentrated Purchasing Agency for conducting public procurement procedures in the name and on behalf of the Prime Minister's Office, ministries and subordinate institutions, for certain goods and services*".

<sup>2</sup>Public Procurement Agency, Law no. 9643, dated 20.11.2006, "*On public procurement*", as amended, <https://www.app.gov.al/GetData/DownloadDoc?documentId=5a6fa8ae-6fec-48bc-bdf1-bc419c0b4734>

<sup>3</sup>Concentrated Purchasing Agency, no. 81 dated 14.2.2018, "*On the establishment, organization and functioning of the Concentrated Purchasing Agency*", <http://abp.gov.al/wp-content/uploads/2018/07/VKM-nr.-81-date-14.2.2018.pdf>

<sup>4</sup>Public Procurement Agency, DCM no. 82, dated 14.2.2018, "*On authorizing the Concentrated Purchasing Agency for conducting public procurement procedures in the name and on behalf of the Prime Minister's Office, ministries and subordinate institutions, for certain goods and services*", <https://www.app.gov.al/GetData/DownloadDoc?documentId=b40d686d-8b11-4235-9237-d6a76106b204>





Another area interacting with public procurement in Albania is the field of concessionary agreements and PPPs, which is regulated by law 125/2013, "*On concessions and public private partnership*", as amended<sup>5</sup>, which is based on directive 2014/23/EU for the award of concessionary agreements. This law is also supported by three bylaws, namely: DCM no.280, dated 7.4.2020<sup>6</sup> "*On the approval of the regulation on the functioning of the selection committee for concession/PPP projects and the criteria for evaluating the requests of contracting authorities for support with specialized expertise*"; DCM no.285, dated 10.4.2020 "*On the organization and functioning of the Concession Treatment Agency (ATRAKO)*"<sup>7</sup>.

The field of public procurement includes also procurements in the field of defense and security, which is regulated through bylaws adopted by DCMs or instructions issued by each institution, according to the respective field, without clear and unified rules. However, with the finalization of the law on procurement in the field of defense and security and its approval by the Assembly in April 2020, these types of procurement will be regulated through this law, which is drafted in accordance with Directive 2009/81/EC on procurements in this field. In order for the new law to be fully applicable, it is necessary to draft and adopt the relevant bylaws, for which a transitory period is foreseen.

The institutions responsible for these areas include:

- Public Procurement Agency;
- Public Procurement Committee;
- Ministry of Finance and Economy (ATRAKO);
- Ministry of Defense;
- Ministry of Internal Affairs;
- Central Purchasing Agency.

The Public Procurement Agency (PPA) is the policy-making institution in the field of public procurement in Albania and some of its main tasks include proposing regulatory measures, verifying the legality of the public procurement system, preparing standard tender documents, assisting and drafting capacity building programs in the field of public procurement, as well as the exclusion of economic operators from participating in public procurement procedures. The PPA is a budgetary institution under the Council of Ministers. Its scope was clearly defined in Article 13 of Law no. 9643, dated 20.11.2006, "*On public procurement*", as amended<sup>8</sup>.

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<sup>5</sup>Concession Treatment Agency, Law 125/2013, "*On concessions and public private partnership*", as amended, [http://atrako.gov.al/wp-content/uploads/2015/09/Ligji-Nr.125\\_2013-p%C3%ABrdit%C3%ABsuar.pdf](http://atrako.gov.al/wp-content/uploads/2015/09/Ligji-Nr.125_2013-p%C3%ABrdit%C3%ABsuar.pdf)

<sup>6</sup>Official Journal, DCM no.280, dated 7.4.2020 "*On the approval of the regulation on the functioning of the selection committee for concession/PPP projects and the criteria for evaluating the requests of contracting authorities for support with specialized expertise*", <https://qbz.gov.al/eli/vendim/2020/04/07/280>

<sup>7</sup> Official Journal, DCM no.285, dated 10.4.2020 "*On the organization and functioning of the Concession Treatment Agency*", <https://qbz.gov.al/eli/vendim/2020/04/10/285/5075cdd9-37f4-483b-8030-c3f04652f9b7>

<sup>8</sup>Public Procurement Agency, Law no. 9643, dated 20.11.2006, "*On public procurement*", as amended, <https://www.app.gov.al/GetData/DownloadDoc?documentId=5a6fa8ae-6fec-48bc-bdf1-bc419c0b4734>





The Public Procurement Commission (PPC) is the highest administrative body for reviewing complaints in the field of procurement. The CPC is an independent institution, whose members are elected by Parliament, following a selection procedure conducted by the Council of Ministers, and reports to the Parliament. The CPC reviews complaints about procurement procedures, competitive procedures for concessions, PPPs, and mining permits.

The Concession Treatment Agency (ATRAKO) is an institution under the Ministry of Finance and Economy and its main tasks include providing assistance to Contracting Authorities in concession projects and public-private partnerships, as well as in developing procedures, providing assistance in drafting and unifying standard tender documents for concession/PPP procedures and organizing training for the staff involved in implementing concession/PPP projects. The competencies of ATRAKO are defined in law 125/2013, "*On concessions and public-private partnership*", as amended<sup>9</sup>.

The Central Purchasing Agency (CPA) is a budgetary institution under the Ministry of Interior and functions as a central purchasing body for the Prime Minister's Office, line ministries, and subordinate institutions. The CPA exercises its competencies based on DCM no. 81, dated 14.2.2018, "*On the establishment, organization and functioning of the Central Purchasing Agency*", and DCM no. 82, dated 14.2.2018, "*On authorizing the Central Purchasing Agency for conducting public procurement procedures, in the name and on behalf of the Prime Minister's Office, ministries and subordinate institutions, for certain goods and services*".

The Ministry of Defense and the Ministry of Interior are the main institutions responsible for procurement in the field of defense and security.

### **European Commission Report for Albania 2019<sup>10</sup>:**

Albania is moderately prepared regarding public procurement. Progress has been made over the past year, in particular through the amendment of the Law on Concessions and Public Private Partnership (PPP) to remove benefits in exchange for unsolicited proposals in line with the Commission's recommendations and the newly adopted procurement law in the field of defense and security. Further efforts are needed to improve compliance with procedures and prevent corruption in the procurement cycle. The Commission's recommendations from 2019 have not been fully implemented and remain still valid.

Next year Albania should, in particular:

- adopt the new planned law on public procurement and the law on defense procurement in order to further harmonize the legal framework with EU directives;
- approve the prepared public procurement strategy in accordance with the comprehensive public financial management strategy;
- Provide the necessary administrative capacity to the contracting authorities and the institution of high control.

<sup>9</sup>Public Procurement Agency, Law no. 9643, dated 20.11.2006, "*On public procurement*", as amended, <https://www.app.gov.al/GetData/DownloadDoc?documentId=5a6fa8ae-6fec-48bc-bdf1-bc419c0b4734>

<sup>10</sup>European Commission, *Albania Country Report 2019*, <https://ec.europa.eu/neighbourhood-enlargement/system/files/2019-07/20190529-albania-report.pdf>





## European Commission Report for Albania 2018<sup>11</sup>:

Albania has a level of preparation in public procurement. Efforts are needed to improve compliance with procedures and prevent corruption in the procurement cycle. Little progress was made last year to further align with the *acquis* on strengthening the public and the procurement review system.

In the coming year, Albania needs in particular to:

Fully transpose the 2014 EU public procurement directives, including in the field of utilities, concessions and defense procurement;

→ further strengthen the administrative capacity of the Public Procurement Agency and contracting authorities;

→ systematically follow up on conflicts of interest and strengthen state audit capacities in this respect.

The new law no. 162/2020 "*On public procurement*"<sup>12</sup>, entered into force on March 31, 2021

The need to draft this law came as a result of the need to regulate the legislative framework for public procurement, based on various recommendations of international organizations, such as: European Commission, World Bank, OECD/SIGMA, recommendations given by the High State Audit, as a result of various problems encountered in practice in the procurement process or requests for changes from different institutions, according to their respective areas of competence.

The new law "*On public procurement*" brings innovations in several areas, such as:

- Clarification of the scope of law, specific exemptions and mixed procurement contracts;
- Introduction for the first time of the concept of reserved contracts and contracts between entities within the public sector;
- Provision for preliminary and periodic releases of information, as tools to increase transparency, and enable economic operators to familiarize with the data of a concrete planned procurement object well ahead of time;
- The law sets low and high monetary thresholds, where for all procedures above the high monetary threshold the provisions of the directive are maintained, providing for shorter deadlines for procedures below this threshold, i.e. for the national procedures;

<sup>11</sup>European Commission, *Albania Country Report 2018*, <https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/20180417-albania-report.pdf>

<sup>12</sup>The Parliament, *Law 162/2020 "On Public Procurement"*, <https://www.parlament.al/Files/Akte/20210107122902ligj%20nr.%20162%20dt.%2023.12.2020.pdf>







- Provision for procurement procedures according to the relevant EU directives, envisaging new procurement procedures, with phases, such as: competitive negotiated procedures, competitive dialogue and partnership for innovation;
- Simplified procedures in the procurement of sectional activities. The draft law deals in its entirety with both the procurement of the classical and the sectional sector, with definitions in the articles that apply to both sectors, as well through a special chapter, with specific regulations for the sectional sector (which includes activities pertaining to transport service, water, energy, gas, postal services, ports and airports);
- Facilitate the participation of economic operators in public procurement procedures, through the use of a summary self-declaration form, instead of some certificates issued by public authorities or third parties;
- Provide for the use of the criterion for evaluating the "most favorable bid economically", which is identified on the basis of price and cost, using the method of cost effectiveness;
- Provide for a bid guarantee, as a protective measure for contracting authorities, in case of withdrawal of the bidder;
- Referring to the provisions in the directive, the Law recognizes for the first time the concept of reducing the number of qualified economic operators in phased procedures, if such a thing is defined as an option by the contracting authority in the tender documents;
- Reduction of the minimum term of the period of exclusion of economic operators from the right to win public contracts, starting from 3 months;
- Provision of a waiting period, during which the contracting authority may not sign a contract, a period which starts from the announcement of the winner;
- Facilitation of procurement of social services and other special services, which are subject to a special, simplified procurement regime;
- Increase the control role of the PPA in terms of verifying compliance with the law on procurement procedures, including canceled ones, and monitoring the implementation of contracts;
- Complaints of economic operators, both in the contracting authority and in the Public Procurement Commission, shortening the process of administrative review of the complaint deadlines;
- Introduction for the first time of the concept of modification of contracts, as well as cases of invalidity of contracts<sup>13</sup>.

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<sup>13</sup> Albanian Parliament, *Assessment Report on the draft-law "On Public Procurement"*,  
<https://parlament.al/Files/ProjektLigje/20200907142101RELACION%20-%20PROKURIMI%20PUBLIK.pdf>





## Report of the European Commission for Albania, dated 19.10.2021<sup>14</sup>:

Albania is moderately prepared in public procurement. Good progress has been made, in particular with the adoption of the new public procurement law and public procurement strategy following extensive public consultation. Further efforts are needed to improve compliance with procedures and prevent corruption in the procurement cycle. The Commission's recommendations from 2020 were largely implemented. The recommendation for adequate administrative capacity is reflected in the public procurement strategy 2020-2023 and now requires follow-up.

In the next year, Albania should:

- approve the remaining legislation for the implementation of the new public procurement law;
- develop and implement an electronic contract management system and electronic complaint register to improve monitoring and transparency;
- ensure that the terms of intergovernmental agreements concluded with third countries are in line with the requirements of the *acquis* included in the SAA, especially in the field of public procurement.

Albania's public procurement market represented about 9.4% of the GDP in 2020 compared to 4.8% in 2019. The growth was driven mainly by post-earthquake reconstruction and a decline in GDP due to the economic impact of COVID-19. In 2020, the average number of bids for tender is 2.57 compared to 2.37 in 2019 and 3.05 in 2018. The planning and preparation of public procurement procedures are generally transparent, and efficient public procurement principles and forecasts are published regularly. The new public procurement law, in line with EU directives, provides for the use of the most economically advantageous tender. However, the simplified procurement regime for social services and the innovation partnership procedure still require the adoption of regulations, as well as capacity building in contracting authorities. All legal and financial instruments used in the field of public procurement and concessions, including intergovernmental agreements concluded with third countries for the implementation of joint projects, must comply with the principles of transparency, competition, equal treatment and non-discrimination. In monitoring the signing and implementation of the contract, after close monitoring by the PPA, the number of negotiated procedures without prior publication has continued to decline in 2020, regardless of COVID-19 and reconstruction (to 151 from 192 in 2019 and 531 in 2018). In 2020, the number of negotiated procurement procedures "without prior publication regarding COVID-19 and post-earthquake reconstruction, reached 191 and 74, respectively, accounting for 1.45% and 1.47% of the total value of procurement in that period. The use of framework agreements remained high in number (677 in 2020, compared to 763 in 2019 and 627 in 2018) with further increase in the value procured through framework agreements (around € 216 million in 2020, compared to around € 166 million in 2019 and about 86 million Euros in 2018).

Albania has a central electronic public procurement portal where it publishes tender and contract notices, as well as other important information and instructions. Use of the portal is mandatory, including high value procurement. Standard tender documents for each type of procedure and contract are published on the PPA website, and the procurement forecast register is prepared and posted online.<sup>15</sup>

<sup>14</sup>European Commission, *Albania Country Report 2021*, [https://ec.europa.eu/neighbourhood-enlargement/albania-report-2021\\_en](https://ec.europa.eu/neighbourhood-enlargement/albania-report-2021_en)

<sup>15</sup> Ibid.





## CONCLUSIONS AND CHALLENGES

### I.

#### Harmonization and cooperation

Public Procurement is a dynamic field that is constantly changing and evolving as a result of changes in the trade and business climate, as well as technological developments and improvements. On the other hand, public procurement has a cross-sectional nature being closely interrelated with other important areas, such as: fight against corruption, free and fair competition, health and consumer protection, environmental protection, business climate and development of small and medium enterprises (SMEs), sustainable development, etc.

It is clear that having good laws on the financing of political parties, high ethical standards in the civil service, low concentration of suppliers, a satisfactory level of resources and technical expertise as well as transparent information on the controlling bodies of civil servants or elected officials in charge of public procurement, stronger anti-corruption laws would contribute to public procurement in procedure and results as required by the European Union and reduce the importance of corruption in public procurement. It is worth mentioning that the implementation of anti-corruption or competition laws (usually entrusted to the competition authority) is completely independent of the implementation of anti-corruption laws (usually entrusted to anti-corruption bodies and the judiciary). Systematic exchange of information between enforcement agencies and joint investigations is highly recommended. In particular, it would seem appropriate to systematically open a competitive investigation into procurement markets for which evidence of corruption has been found.

On the other hand, an increased effort should be made to better harmonize and guarantee the practical implementation of the provisions of other laws in relation to the field of public procurement. For example, according to Article 92/1 of the Electoral Code, the fourth paragraph stipulates that “4. *Natural persons or legal entities that have made donations to an electoral subject or its candidates in elections, may not benefit for a period of up to 3 years after the election date any public contracts, public-private partnership contracts or any other funds with a total value exceeding the amount of ALL 10 million, including as subcontractors of a public contract/concession.* ”

Other points of Article 92/1 of the Electoral Code, on the other hand, define prohibitive criteria for funders of electoral subjects, the verification of which is a direct responsibility of the CEC, at least from the relevant provisions of the law "On public procurement" and the Electoral Code. It is not clear how this legal provision should be implemented in the post-election periods by the procurement authority and other central public procurement institutions.





## II.

### Public procurement strategy<sup>16</sup>

The Council of Ministers, by its decision no. 850, dated 4.11.2020 has approved a National Strategy for Public Procurement for 2020-2023 and an action plan for its implementation”.

This strategy states that the purpose of effective procurement is to provide goods and services with lower prices and better quality. In this sense, the main objectives, on which the activity of Albanian institutions 2020 - 2023 should be based, are as follows:

- Increase transparency;
- Improve efficiency in the use of public funds;
- Improve public procurement planning;
- Improve contract management;
- Improve the institutional framework responsible for public procurement;
- Improve the centralized procurement system;
- Improve the regulatory and institutional framework for reviewing complaints;
- Professionalize the public procurement function;
- Improve the legal framework;
- Improve the electronic procurement system;
- Ensure sustainable public procurement procedures in compliance with social welfare, environmental protection, etc.;
- Increase the participation of SMEs in public procurement procedures.

The above components require a timely implementation of all the objectives set in accordance with the action plan.

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<sup>16</sup>Public Procurement Agency, *Public Procurement Strategy 2020-2023*,  
<https://www.app.gov.al/GetData/DownloadDoc?documentId=4b54d140-e98b-434b-abfb-d3966453b8dd>



### III.

#### Decision of the Constitutional Court no. 29 dated 02.07.2021<sup>17</sup>

On 05.07.2018, the Assembly, upon a proposal of the Council of Ministers, approved law no. 37/2018 "On determining a special procedure for negotiating and signing a contract for the "Design and implementation of the urban project and the new building of the National Theater" <sup>18</sup>. The law was sent to the President to be decreed.

The President, by his decree no. 10849, dated 27.07.2018<sup>19</sup>, decided to return law no. 37/2018 for reconsideration to the Assembly, reasoning, in a concise manner, that it violates the principle of equality before the law and the freedom of economic activity, the national identity and heritage, the principle of decentralization, and the principle of local autonomy.

The Assembly, in its plenary session of 20.09.2018, after approving the decree for the review of the law, approved law no. 37/2018, dated 20.09.2018 "On determining a special procedure for negotiating and signing a contract for the "Design and implementation of the urban project and the new building of the National Theater"( law no. 37/2018 ).

The President decided to return law no. 37/2018, explaining that all the arguments accompanying his previous decree had not been objectively reviewed by the Assembly and that the findings on the unconstitutionality of this law remained the same as in the previous law.

The Assembly, in its plenary session of 25.10.2018 decided to reject decree no. 10908<sup>20</sup>, dated 11.10.2018 of the President on the review of law no. 37/2018.

The court, in its jurisprudence, gave a wide interpretation of the concept of freedom of economic activity. According to the court, this freedom mainly means the right to enter into contracts, individually or collectively, freely and on the basis of personal will, the right to choose the activity that the individual wants to exercise, the right to choose a job according to preference, etc. This freedom includes all rights relating to the production, distribution or consumption of goods and services.

The ECJ has also stated that if a measure taken by the state entails inequality of opportunity between economic operators and, consequently, distorts competition, then such a measure constitutes a violation of EU competition law (C-462/99, *Connect Austria*

<sup>17</sup>Constitutional Court, *Final Decisions*, Decision no.29 dated 02.07.2021

[https://www.gjk.gov.al/web/Vendime\\_perfundimtare\\_100\\_1.php](https://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php)

<sup>18</sup> The Parliament, Law no. 37/2018 "On determining a special procedure for negotiating and signing a contract for the "Design and implementation of the urban project and the new building of the National Theater"<https://www.parlament.al/Files/ProjektLigje/20180926123505ligje%20nr.%2037.%20dt.%2020.9.2018%20i%20ishikuar.%20i%20rivotuar.pdf>

<sup>19</sup> The Parliament, Presidential Decree No. 10849, dated 27.07.2018 on the review of law no. 37/2018,

<https://www.parlament.al/Files/ProjektLigje/20180903113228dekret%2010849.pdf>

<sup>20</sup> The Parliament, Presidential Decree No. 10908 on the review of law no. 37/2018,

<https://www.parlament.al/Files/LigjeRishqyrtim/Dekreti%20nr%20%2010908.pdf>



*Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission*, 22 May 2003, § 84<sup>21</sup>). Even when public procurement has been the subject of review, the ECJ has concluded that according to the principle of equal treatment of economic operators, the purpose of which is to promote the development of a healthy and effective competition between operators participating in a public procurement procedure, the latter should be given equal opportunities in formulating their bids, which means that operators should be subject to the same conditions. Furthermore, the principle of equal treatment means that bidders must be on an equal footing, both during the stage of preparing their procurements and when bids are evaluated by the contracting authority... In all procurement procedures, the contracting authority must determine and verify whether there are real risks that something could distort competition (*T- 292/15, Vakakis kai Synergates - Symvouloigia Agrotiki Anaptixi AE Meleton v European Commission*, 12 February 2019, §§ 97 and 100).

From the evidence administered during the trial it is concluded that the European Commission in relation to law no. 37/2018 states: “ *Regarding competition and state aid, this law only defines the procedure for evaluation and negotiation of the contract with the selected company (...) Although at this stage no violation of the SAA is found, services of the commission continue to encourage the Albanian authorities to follow compliance with EU public procurement principles and to guarantee non-discriminatory market access. In this regard, the Commission's services welcome the commitment of the Albanian authorities to amend the law, with the aim of presenting an open call for the implementation of the National Theater development project, where any private party can submit a proposal for the project.*”

The court found that law no.37/2018 approved on 05.07.2018, in point 8 of article 1 provided that the contract between the owner-state and the private partner must contain the proposal submitted by the company "F" sh.p.k. Meanwhile, law no. 37/2018 approved on 20.09.2018, after its reconsideration by the Assembly, in point 1 of article 8 provides that the contract between the owner-state and the selected private party must contain the proposal submitted by the latter, not mentioning any private entity nominally or predetermined for the realization of the project.

In its jurisprudence, the Court has assessed that the addition of criteria by the legislator in order to exercise a certain activity, is within its scope of action and evaluation. It is the right of the legislature to assess, on a case-by-case basis, the need for intervention through a new regulation. The court in its jurisprudence has emphasized that, despite the discretion of the legislator to act within its normative space, clearly and on a case by case basis defining the goals it seeks to achieve, it is unacceptable in a rule of law to undertake and approve legislative initiatives unfounded on preliminary assessments or studies.

In the case under review, it does not appear that full and substantiated assessments have been made on the manner of exchange of state property, also in relation to its economic assessment. Furthermore, the Court considers that the criterion provided in point 3 of article 6 of law no. 37/2018 makes favorable treatment for the company, which owns a part of the properties in the area where the project will take place, including the construction of the new building of the National Theater, in relation to other private entities, which may have expressed interest in competing to carry out this

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<sup>21</sup>The Court of Justice of the European Union, *C-462/99, Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission*, 22 May 2003, § 84, <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=102229&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=7447426>





development project. This criterion is not only discouraging for other private companies, but also impossible to meet by them, since they are placed before the condition to reach an agreement with the company "Fusha" sh.p.k. Consequently, the Court considers that this restriction does not meet the criterion of proportionality.

#### IV.

### **Normative Act no. 9, dated 16.12.2019 "On coping with the consequences of natural disasters"<sup>22</sup>**

By Normative Act no. 9, dated 16.12.2019 "*On coping with the consequences of natural disasters*", the Council of Ministers has approved the rules for the functioning of bodies responsible for the rehabilitation and reconstruction of communities and territories affected by natural or other disasters, as well as the development of new territories, defining their duties and responsibilities, reconstruction process programs, the functioning of the reconstruction fund and relevant procedures. The purpose of this Normative Act is to address the consequences of natural disasters that occur in part or in the entire territory of the Republic of Albania, as well as other disasters that, due to their intensity, scale and extent, require immediate intervention by all civil protection institutions and other state authorities and lead to the declaration of a state of emergency in accordance with the provisions of the legislation applicable to civil protection. This Normative Act describes also the procurement procedures applicable in cases of coping with the consequences of natural disasters.

The normative act with the power of law became subject to an appeals in the Constitutional Court<sup>23</sup>. The Albanian Institute of Science asked, via a petition submitted to the Constitutional Court on September 28, 2021, for the repeal of said act. The normative act with the power of law, concerning the aspect that regulates the public procurement procedure, fails to respect these basic principles in the field of public procurement, which are an essential part of economic freedom and equality protected by the Constitution of the Republic of Albania.

As specified in Annex 1 below, due to the major procedural distortions contained in this normative act with the force of a law, such act fails to provide equal and non-discriminatory treatment for all economic operators, as well as value for money, integrity, public trust, and transparency.

The purpose of public procurement is to include and enable the participation of as many bidders as possible, in terms of the number of tenders submitted. The more bidders we have, the better, and less expensive the products and services we get as the contracting authority will be, hence the purpose of this principle. Therefore, the tendency is to increasingly encourage and motivate more and more suppliers in the most efficient and effective way possible. It is also inexplicable why such normative

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<sup>22</sup>Minister of State of Reconstruction, Normative Act no. 9, dated 16.12.2019 "*On coping with the consequences of natural disasters*", [https://rindertimi.gov.al/wp-content/uploads/2020/02/akt-normativ-2019-12-16-9\\_Per-perballimin-e-pasojave-te-fatkeqesise-natyrore.pdf](https://rindertimi.gov.al/wp-content/uploads/2020/02/akt-normativ-2019-12-16-9_Per-perballimin-e-pasojave-te-fatkeqesise-natyrore.pdf)

<sup>23</sup>Albanian Institute of Science, *Repeal of Chapter VI, PUBLIC PROCUREMENT PROCEDURES, articles 40 - 44, and article 4, point 7 and point 9, of the normative act with the force of law no. 9, dated 16.12.2019 "On coping with the consequences of natural disasters", approved by the Assembly of Albania with law no. 97/2019, on 18.12.2019*, [https://ndiqparate.al/wp-content/uploads/2021/09/AIS-Gjykaten-Kushtetuese\\_bilingual-2.pdf](https://ndiqparate.al/wp-content/uploads/2021/09/AIS-Gjykaten-Kushtetuese_bilingual-2.pdf)





act, which has the power of a law, containing special procurement provisions and procedures, and which is subject to this appeal, continues to remain in force even though Albania is “*de jure*” and “*de facto*” in a normal situation, without any restrictions imposed by any state of emergency. Law no. 162/2020 “*On public procurement*”, entered into force on March 31, 2021, as an organic law that fully regulates the field of public procurement, is drafted according to the directives of the EU legislation in the field of procurement. It, therefore, does provide solutions for every situation, be it in a state of emergency or in any other normal state applicable to the contracting authority. There is no logical reason to justify the coexistence of a normative act with the force of a law on procurement procedures and law no. 162/2020 “*On public procurement*”.

Data on the number of contracts signed with the negotiated procedure without prior announcement, designed to cope with the consequences of the COVID-19 pandemic, as well as the negotiations for the Reconstruction for the January-December 2020 period:

As the largest buyer of goods and services in the country, the executive is placed in the most unique position to promote and advance competition in order to create a strong economy from a trade perspective, as well as an economy that promotes full and free participation of anyone wishing to participate. Therefore, any normative act affecting public procurement should seek to achieve competition in terms of this double-level perspective. The commercial nature of competition means that a wide range of suppliers must be given the opportunity to make bids for procurement, and the state authority must then select the contractor whose bid represents the best value for money option

In Albania, there is a specific phenomenon in the field of procurement. The more the legal basis of public procurement is improved, the proportionately larger the number of special procedures circumventing such procurement provisions is, both by special laws and by decisions of the Council of Ministers. The law “*On public procurement*” is a law evaluated by local actors, international actors and the bodies of the European Union as a good law in accordance with the best standards in this field. Consequently, what remains a challenge is its proper implementation.

Being a comprehensive procurement law, it does provide for legal solutions for every concrete situation in which the public authority may find itself. Therefore the approval and implementation of special *ad hoc* procedures outside the provisions of this law, constitutes a serious obstacle in the way of European integration.







## V.

### Key Findings

Public Procurement is a dynamic field that is constantly changing and evolving as a result of changes in the trade and business climate, as well as technological developments and improvements. Procurement has a cross-sectional nature and is closely interrelated with other important areas, such as: the fight against corruption, free and fair competition, health and consumer protection, environmental protection, business climate and development of small and medium enterprises (SME), sustainable development, etc.

It is clear that having good laws on financing political parties, high ethical standards in the civil service, low concentration of suppliers, a satisfactory level of resources and technical expertise, as well as transparent information on the controlling bodies of civil servants or elected officials in charge of public procurement, stronger anti-corruption laws would contribute in public procurements meeting, in procedure and results, the requirements of the European Union and reduce the spread of corruption in the area.

In order to achieve this goal:

- It is worth mentioning that the implementation of anti-corruption or competition laws should not be independent of the implementation of anti-corruption laws (usually entrusted to anti-corruption and judicial bodies). Systematic exchange of information between law enforcement agencies and joint investigations are highly recommended measures in the Albanian circumstances. In particular, it seems appropriate to systematically open a competitive investigation into procurement markets for which potential evidence of corruption has been found.
- We need to better harmonize the implementation of different laws in Albania that regulate the same topic, as illustrated in the case of the missing legal provisions regarding the full implementation of Article 92/1 of the Electoral Code. The scope should be to avoid the creation of legal pockets that increase the likelihood of abuse.
- We need to avoid frequent changes in procurement legislation. This is a lesson learned from past experience. Although there are many skeptics about this (justice reform with frequent changes of laws is a clear indicator), frequent changes need to be eliminated and transparency and inclusiveness must be ensured throughout the legislative process.
- There is a specific phenomenon in Albania in the field of procurement. Thus, the more the legal basis of public procurement is improved, the greater the number of special procedures that circumvent these procurement provisions, both by special laws and by decisions of the Council of Ministers. The law "On public procurement" has been assessed by local and international actors, and the bodies of the European Union; it is a good law that respects the best standards in the field.





- Being a comprehensive procurement law, it provides and finds legal solutions for any concrete situation in which the public authority can be found, therefore the approval and implementation of special *ad hoc* procedures outside the provisions of this law, constitutes a serious obstacle in the path towards European integration.
- A valuable lesson for the regulation, in the future, of special laws/DCMs should serve the decision of the Constitutional Court regarding the so-called special law "On the construction of the National Theatre". With a unique procedure and duration of proceedings by both the executive and the Assembly, the content of the special law was subject to a constitutional judgment that found it to be unconstitutional, for more than one reason. From this decision we can draw a series of valuable lessons and steps on how to and how not to act.
- We believe that one of the first lessons, that should become a habit, is self-restraint; the Council of Ministers and the Assembly should exercise self-restraint before issuing exclusionary procedures outside the common rules. If we cannot manage to restrain ourselves, then, we need to establish strong legal mechanisms so that exclusion does not become the rule.
- In addition to the necessary legal basis, Albania has also completed its strategic framework for procurement through its relevant strategy 2020-2023. This strategy clearly defines the objectives and path that will be followed for the development of this field and the operators involved by the end of 2023. Its implementation remains a challenge and especially, the following of all the steps and the completing of the tasks on time.

In brief, public procurement is an important aspect of Albanian public life and reality. Therefore, it is subject to the same general rules of assessment that are applied today for the Albanian state and society.

On the path towards European Integration there is a sentence that we hear very often, which has now become a postulate: "*You have good laws, but you face challenges implementing them*". Therefore, the fair and complete implementation of legislation, including the public procurement law, remains key to Albania's successful European journey.



## Annex I<sup>24</sup> – Differences between the Normative Act and the 2006 and 2020 laws “On public Procurement”

FINDINGS	NORMATIVE ACT no. 9	LAW no. 9643/2006	LAW no. 162/2020
<p>Public Procurement Law is an organic law that regulates all public procurement for goods, services, and public works. The approval of special norms and rules for the procurement of goods, works, or services, in this case, is superfluous because, as Law no. 9643 (which was in force at the time of the adoption of Normative Act No. 9 as well as Law No. 162/2020 have clearly and exhaustively defined the procurement procedures in cases of emergencies (such as in the case of Natural Disaster Situation).</p> <p>It is worth mentioning here the negotiated procedure without publication of the contract notice, which is basically provided by the legislator as the procurement procedure which is used by the contracting authority for emergency cases.</p> <p>In conclusion, we can say that Law no. 9643 in force at the time of approval of normative act no. 9, as well as Law no. 162/2020, have exhaustively provided the procurement procedures used by the contracting authority for emergency cases.</p>	<p><b>Article 40</b> provides for the establishment of special rules applicable to the procurement of goods, works, and services.</p>	<p><b>Article 1.</b> The object and purpose are to determine the rules that apply to the procurement of goods, works, and services by contracting authorities.</p>	<p><b>Article 1.</b> The scope sets out the rules for procurement procedures by contracting authorities and entities for public contracts and design contests.</p>
<p>Definition of an accelerated procedure in Normative Act no. 9, and further still the determination with DCM no. 199, dated 04.03.2020 <b>of the concrete Restricted Procurement Procedures (two stage procedures) directly affects the promotion of competition of economic operators and their participation in the procedure.</b> On the other hand, the Organic Public Procurement Law, both the old and the new one, clearly provide for the cases when this</p>	<p><b>Article 42</b> Public procurement procedure for reconstruction, “The implementing unit uses the accelerated procedure, according to the provisions of this act, for the selection of the winners of the framework agreement for the reconstruction process.</p> <p>DCM no. 199 dated 04.03.2020, the Council of Ministers has approved the standard tender documents templates, where in their point</p>	<p><b>Article 30</b> stipulates that Open Procedure is the preferred procedure in procurement.</p> <p><b>Article 31</b> The restricted procedure stipulates that 1. The restricted procedure is used by the contracting authority to conduct a procurement leading to the award of a public contract, when:</p> <p><b>a) the goods, services or related work due to their/their very complex or special character can be</b></p>	<p><b>Article 42</b> Open procedure stipulates that 1. The open procedure is a one-stage procedure, in which any interested economic operator can participate. DCM no. 285 dated 19.05.2021 New Public Procurement Rules, Article 48 Restricted procedure, stipulate that:</p> <p>1. Restricted procedure, according to article 43 of the PPL, is a two stage procurement procedure, which can be used by any contracting authority/entity that procures</p>

<sup>24</sup>Ibid, page 15.



<p>type of procedure can be used and mainly when the goods, works, or services have a complex character, it is more economically convenient for the contracting authority to first examine the technical capacity of contractors or when dealing with complex contracts. In this case, mainly constructions (apartments and educational facilities) are procured and the nature of procurement in relation to the situation of the Albanian market of companies operating in the field of construction is very favorable.</p> <p>Also, from the verification of bids and contracts signed so far within the reconstruction process, it results that the bids are almost 100% equal with the estimated value and this automatically proves the fact that this type of procedure has not promoted participation or competition between Economic Operators.</p>	<p>4.1 it is determined that the Type of Procurement Procedure will be a Restricted Tender in the framework of the Reconstruction Process.</p>	<p><b>supplied or executed by economic operators who have the appropriate technical, professional or financial capacity;</b>  <b>b) it is more economically advantageous for the contracting authority to first examine the capacity and qualifications of the interested economic operators and then invite those who have certain specific minimum qualifications to submit bids.</b></p>	<p>works/services/goods, in which any interested economic operator may participate.</p> <p>2. <b>The contracting authority/entity in selecting this procedure must take into account:</b></p> <p>a) <b>the complexity of the object of the contract;</b>  b) <b>the market situation;</b>  c) <b>the expected number of bidders.</b></p>
<p>The shortened deadlines for acceptance of bids by economic operators have drastically limited the competition, as it is almost impossible to prepare a large set of documents for a period of 10 days.</p> <p>The 10-day deadline also excludes "de facto" offers from foreign operators. It is worth mentioning here that a foreign operator has the obligation to submit official documentation with the Apostille stamp.</p>	<p><b>Article 42</b> Public procurement procedure for reconstruction, point 8, stipulates that the Documentation is submitted in the electronic procurement system. <b><u>The deadline for receipt of documentation is 10 calendar days from the date of publication of the notice.</u></b></p>	<p><b>Article 43</b> Time limits for submission of requests to participate and submit bids, point 2 stipulates that: In the open procedure, with a value higher than the upper monetary limit, the deadline for submission of bids is not less than 52 days from the date on which the contract notice was posted on the website of the Public Procurement Agency.</p>	<p><b>Article 42</b> open procedures, point 2 stipulates that: 2. <b>For procurement procedures above the upper monetary limit, the minimum deadline for receipt of bids is not less than 35 days from the date on which the contract notice was announced.</b></p>
<p>Deadline 2 days for the appeal against the criteria of the procurement procedure, defined in the Normative Act no. 9 is extremely restrictive for economic operators who may file claims for illegal qualification criteria. We clarify the fact that it is precisely the qualification criteria that create premises/incentives or make it impossible to participate in a procurement procedure.</p> <p>On the other hand, the 3-day deadline for handling the</p>	<p><b>Article 42</b> Public procurement procedure for the reconstruction, point 9, stipulates that: In the case of complaints about tender documents, economic operators <b>complain within 2 days from the publication of tender documents</b> to the Public Procurement Commission (PPC), <b>which reviews the complaint and makes a decision within 3 days from the date of filing the complaint in accordance with the provisions of the</b></p>	<p><b>Article 63</b> The rights of the interested person, point 1.1 determines that: In the case of <b>complaints about tender documents, economic operators can complain to the contracting authority within 7 days from the date of publication of the contract notice on the website of the PPA.</b> <b>Item 9 provides that: PPC makes a decision, no later than 15 days after receiving the requested info or doc.</b></p>	<p><b>Article 110 Deadlines for Appeal</b> stipulates that:</p> <p>1. <b>In procurement procedures above the upper monetary limit, in case of complaints for tender documents, economic operators have the right to complain within 10 days from the publication of the contract notice</b> or the publication of the change of requirements in the tender documents.</p> <p><b>In procurement procedures below the upper monetary threshold this deadline is 7</b></p>





<p>complaint by the Public Procurement Commission is completely nonobjective. In law no. 9643 the deadline for handling the complaint is 15 days while in Law no. 162/2020, it is 30 days.</p> <p>The definition of such a narrow deadline directly violates two of the principles of the Normative Act no. 9 and specifically: 1) equal and nondiscriminatory treatment for all economic operators; ç) integrity, public trust and transparency are violated</p>	<p><b>Code of Administrative e Procedures and this act.</b></p>		<p><b>days.</b> <b>Article 115 “Treatment of the complaint by the CPC”,</b> point 4 stipulates that: For procurement procedures above the monetary upper limit, the PPC takes a decision no later than 30 days after receiving information or documentation from the contracting authority or entity.</p>
<p>Here too, the Legislator has shortened the deadlines for the evaluation of bids by 5 days and taking into account the fact that mainly procurement procedures that are conducted based on normative act no. 9 are procedures above the upper monetary threshold, and have a volume of documentation, then the 10-day deadline for bid evaluation puts in serious difficulty the quality of evaluation and the possibility of objective verification of all documentation submitted by bidders. Even with this definition, two of the principles of Normative Act no. 9 and specifically: 1) equal and nondiscriminatory treatment for all economic operators; ç) integrity, public trust and transparency, are violated.</p>	<p><b>Article 42</b> Public procurement procedure for reconstruction, point 9, stipulates that: After the deadline for submission of requests to participate, as defined in the contract notice, CA selects candidates within 10 calendar days. Complaint may be filed with the PPC against the decision of the CA for the selection of candidates within 3 days from the notification of the winning candidates. The PPC reviews the complaint and makes a decision within 5 days from the date of filing the complaint.</p>	<p><b>Law no. 9643</b> did not provide any deadline for evaluation of bids, while DCM no. 914 "On the Approval of Public Procurement Rules" issued pursuant to Law 9643, in Article 66, point 2 provided that: <b>The duration of the evaluation procedure should not exceed 15 (fifteen) days, except in other cases otherwise specified in these rules.</b></p>	<p><b>Law no. 162/2020</b> does not provide a deadline for the evaluation of bids, while DCM 285 “On the Approval of public procurement rules” Article 82 Review and evaluation of bids provides that: The duration of the evaluation procedure should not exceed <b>20 (twenty) days for procedures above the upper monetary limit and 15 (fifteen) days for procedures below the upper monetary limit</b>, except in other cases otherwise specified in these rules.</p>
<p>Even in the value of contract insurance which is provided at 5% higher in the Normative Act compared to Law no. 9643 and law no. 162/2020, there is a step back and discrimination of economic operators that compete and sign accelerated procedures, in relation to economic operators that compete or are selected winners in normal procurement procedures. Again, this legal provision violates one of the principles of Normative Act no. 9 and specifically: The principle of equal and nondiscriminatory treatment for all economic operators;</p>	<p><b>Article 43</b> The conclusion of contracts after the framework agreement, point 4, stipulates that: “4. Immediately, but in any case no later than 5 days after the announcement of the winning bid, the contracting authority invites the winning operator to enter a contract. <b><u>Prior to signing the contract, the winning economic operator must submit to the contracting authority a contract insurance of 15% of its value.</u></b></p>	<p><b>Law no. 9643</b> does not provide for contract insurance measure, while DCM 914 “On the Approval of public procurement rules” Article 24 Contract insurance stipulates that: “Contract insurance guarantees the contracting authority in cases of breach of contract. <b>Prior to signing the contract, the bidder selected as the winner must submit to the contracting authority a contract insurance of 10% of its value.</b></p>	<p><b>Law no. 162/2020</b> does not provide for contract insurance measure, while DCM 285 “On the Approval of public procurement rules” Article 36 - Contract insurance stipulates that: 1. Contract security guarantees the contracting authority/entity in cases of breach of contract. <b>Prior to signing the contract, the bidder selected as the winner must submit to the contracting authority/entity a contract insurance of 10% of its value.</b></p>





**ANNEX 2 - Restricted Procedures (Earthquake Reconstruction Program) and Negotiations without Notice during 2020<sup>25</sup> and 2021, Number of Procedures and Estimated Tender Value (minus cancellations)**

2021

2020

Total Estimated Value of Procurement Procedures (in ALL minus VAT)	147.774.069.034	267.765.243.763
Estimated Value of Restricted Procedures (Reconstruction Process) in ALL minus VAT	19.333.466.996	69.164.367.246
Restricted procedures (Reconstruction)	137	108
Local Restricted procedures (Reconstruction)	134	92
International Restricted procedures (Reconstruction)	3	16
Negotiations without Notice	244	504
Total Estimated Value of Negotiations without Notice (in ALL minus VAT)	4.881.668.882	6.968.096.300
No. of Restricted Procedures Ratio	0,8%	0,58%
Estimated Value of Restricted Procedures Ratio	<b>13,1%</b>	<b>25,8%</b>
Negotiations without Notice Ratio	1,4%	2,7%
Estimated Value of Negotiations without Notice Ratio	3,3%	2,6%
Estimated Value of Negotiations without Notice plus Restricted Procedures	24.215.135.878	76.132.463.546
Estimated Value of Negotiations without Notice plus Restricted Procedures Ratio	<b>16,4%</b>	<b>28,4%</b>
Total Number of Un Annulled Procedures	<b>17.400</b>	<b>18.540</b>

<sup>25</sup>Public Procurement Agency, *Export of Data on Procurement Procedures*, <http://app.gov.al/eksportimi-i-procedurave-te-publikuara/>





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