



## A Legal Memo on Chinese investments in Serbia

October 2020

This is an analysis on public procurement regulations, freedom of access to information of public importance, and practical implications of realisation of foreign investments declared as projects of national interest within the Republic of Serbia and Serbian legal system.

This analysis assesses how on the basis of the applicable legal framework in the Republic of Serbia, publicly available documents and information, and presented cases from its legal practice, with the data available and provided until 31 July 2020,<sup>1</sup> the weakening of law and transparency requirements have provided loopholes for large-scale infrastructure investments including that from China.

### The analysis addresses three issues:

1. Serbia's new Public Procurement Law weakens transparency and is more open to abuse;
2. The government often declares projects, particularly Chinese investments in polluting industries, to be of national interest so that it can apply laws flexibly;
3. Government authorities often attempt to avoid complying with requests for information in whole or part under the Law on Access to Information.

### I A WEAKER PUBLIC PROCUREMENT LAW

On 23 December 2019, the National Assembly of the Republic of Serbia adopted the new Law on Public Procurement (Official Gazette of the Republic of Serbia, no. 91/2019) (the **Law on Public Procurement**). The new law governs the planning of public procurement, including the conditions, manner and procedure for their conduct. It was introduced instead of the previously valid Public Procurement Act (Official Gazette of RS, No. 124/12, 14/15 and 68/15) and entered into force on 1 January 2020. Most of its provisions took effect from 1 July 2020.

This section considers the most significant aspects of the new law on procurement, highlighting how it weakens existing regulations governing competition, transparency and environmental protection.

#### Rushed introduction of an online portal

One of the major changes in the new law is the introduction of a Portal of Public Procurement. This online system will be used to manage the most important aspects of public procurement, including the submission and opening of bids, requests for the protection of rights, and any disputes arising from decisions of the contracting authority. The use of the online portal should be paused. Just six months passed between the adoption of the public procurement law and its full implementation. This was not enough time to test the portal's functionality, adopt the relevant bylaws needed to implement the law, and educate prospective bidders and procuring entities, such as government departments, on how to use the system.

Government portals have experienced significant omissions and irregularities in the use of data and these experiences should be used to inform delivery of the new portal.<sup>2</sup>

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<sup>1</sup> Except for the data regarding the freedom of information request for the source of financing for construction of TPP Kolubara B, which was updated with information provided up to 4 September 2020.

<sup>2</sup> One such example is the CEOP portal, which registers various construction permits, accompanying documents and decisions, as well as appeals and further decisions. We noticed a lack of reliability in the data provided by this portal.

## **Lack of transparency**

The biggest problem in the public procurement process is the low level of transparency. Although there is an online portal, information on procurements is not always readily accessible to the public. In many cases, searching for information on public procurements and the rules that govern them is hampered by technical issues and the lack of clear criteria for data entry. RERI found that transparency was lowest in procurements that were not tendered publicly. Low transparency was also observed in the responses to requests for information of public importance.

It is common for government authorities to hide information without a legal or security basis for doing so when submitting documents to the online portal or responses to information requests. This may include protecting the name of the legal entity, as well as the official case number and other data that should be available to the public.

## **Higher cost thresholds for public procurement**

Another significant change from the previous law is a higher threshold before legal entities (contracting authorities) must conduct public procurement for goods, services and works. This

increases the possibility of abuse because fewer procurements are obliged to follow the new procedures. Under the previous law, the threshold for all types of procurement was 500.000,00 RSD (approx. 4.250,00 EUR). The new law distinguishes between goods and services on the one hand and works on the other. The limits for goods and services is now 1.000.000,00 RSD (approx. 8.500,00 EUR) and for works 3.000.000,00 (approx. 25.500,00 EUR).

## **Greater discretion in how contracts are awarded**

The new terms and standards for how contracts are awarded under the Law on Public Procurement have been changed to increase the discretion of contracting authorities. Instead of bids being judged on prescribed criteria such as lowest cost, contracting authorities can now base their decisions on what they deem to be the most economically advantageous bid. This could include:

- The bid price;
- The application of a cost effectiveness approach, such as a life-cycle cost assessment;
- An assessment of the relationship between price and quality that may consider qualitative, environmental and or social criteria related to the subject of the public procurement contract.

This new discretionary approach combined with poor transparency is more open to abuse and may be expected to lead to greater arbitration of decisions.

## **Abuse of the negotiating procedure**

Another major problem with the Law on Public Procurement is the negotiating procedure, which allows the submission of bids without public tender. In practice, it is possible that in an open or restrictive procurement, a contracting authority may not receive any bids or that all bids are inadequate. It is also possible that the contracting authority can invoke the protection of exclusive rights when it assesses that the procurement can only be performed by one bidder. In extraordinary circumstances, non-competitive procurement is also possible. Contracting authorities often abuse this right to avoid public tenders, even in situations where they have the time to plan.

## Law on Special Procedures

On 4 February 2020, the National Assembly adopted the Law on Special Procedures for the Implementation of the Project of Construction and Reconstruction of Line Infrastructure of Particular Importance to the Republic of Serbia (Official Gazette of RS, no 9/2020) (Law on Special Procedures), which entered into force on 12 February 2020.

This new law applies to the construction and reconstruction of transport projects that the government deems will have a positive impact on the country's development.<sup>3</sup> Such projects should provide balanced regional and local economic development, improve international, regional and interior land connections, and prevent the degradation of the parts of the territory of the Republic of Serbia. Projects should also ensure and improve the population's subsistence, social development and environmental protection thereby enhancing the overall living standard of the citizens of the Republic of Serbia.

In accordance with the Law on Special Procedures, the projects of construction and reconstruction of public line transport infrastructure and the projects of construction and reconstruction of line utility infrastructure are of particular importance to the Republic of Serbia (**PPI**).

In connection with PPI, particularly where the implementation of projects is urgent or in jeopardy and where a preliminary feasibility study with the general project has been carried out, the government may decide that the project or certain stages and activities of the project are not subject to the regulations governing the public procurement procedure. Instead they become subject to a special procedure for selecting a strategic partner for the purpose of implementing a project of particular importance to the Republic of Serbia.

In the case of PPI that are carried out in Serbia on the basis of international agreements and bilateral agreements, they shall be governed by the rules defined in those agreements and contracts without the obligation to follow the public procurement procedure. This applies to the selection of contractors, the provision of design and control of planning and technical documentation, provision of project management or part of the project management, expert supervision of the execution of works, and technical inspection for construction and reconstruction projects.

Certain provisions in the Law on Special Procedures effectively weaken the Law on Public Procurements by explicitly excluding its application. Considering the unclear and overly broad definition of the term "project of particular importance for the Republic of Serbia", the Law on Special Procedures may weaken the basic principles of competition and transparency in Serbia and lead to abuse and a greater degree of arbitrariness in its interpretation.

## II PROJECTS OF NATIONAL INTEREST

To attract foreign investments, the government of Serbia often declares projects to be of national interest so that it can apply laws flexibly or selectively to benefit investors. Such investments lack transparency and place private interests ahead of those of the public.

Failure to use tools such as the environmental impact assessment (EIA), which is key to transparent and participative decision-making, enables projects to proceed despite potentially harmful impacts on the environment and local communities.

Inspectorates within the Ministry of Environmental Protection and local authorities often fail to respond to citizen petitions calling for environmental protection and checks on the construction of projects. Even when they perform and determine irregularities, inspectors do not use their full legal powers to act. This serves to encourage poor levels of transparency from investors and the violation of applicable regulations.

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<sup>3</sup> According to the Article 3 of the Law, "line infrastructure object" is a public transport infrastructure (road, 3 railway, water, air and metro, as well as line infrastructure of cable cars as a subsystem of public transport of persons), line communal infrastructure, as well as facilities in their function.

## Construction of the Linglong Tire factory

In February 2019, the Serbian government declared that construction of the Linglong Tire factory was a project of national importance. This decision and the legal basis for it was not explained or made public. It is unclear whether the decision allows the project to effectively circumvent Serbia's legal framework.<sup>4</sup>

Following the signing of the Memorandum of Understanding between the Government of Serbia and Chinese company Shandong Linglong Tire Co. Ltd., more than 96 hectares of land were transferred directly and without compensation to the ownership of the company Linglong International Europe d.o.o.<sup>5</sup> Given the special status of the project, the investor was exempted from applicable fees for redesignating agricultural land for construction.<sup>6</sup>

RERI started monitoring the project because it suspected the investor was attempting to avoid requesting an EIA for the whole project by dividing it into multiple parts and phases, a practice known as "salami slicing". To do this, the investor first requested a permit to construct a fence, followed by another permit to construct auxiliary works (two phases). Finally, the investor requested a construction permit for the factory itself (ten phases), which was subject to the development of an EIA study. Due to salami slicing, the non-competent authority (the local authority city of Zrenjanin) issued the construction permits and decided on the EIA study rather than the authorities in the Autonomous Province, a higher instance authority. This limited transparency.

Furthermore, the city of Zrenjanin issued the construction permits for the first phase of the auxiliary works just three days after Serbia declared a state of emergency due to COVID-19, which limited public scrutiny.<sup>7</sup> Unfortunately, no decision was made by the authorities on whether an EIA study would be required, even though this was contrary to the provisions of the Law on Planning and Construction and the Law on Environmental Impact Assessment. Secondly, the investor did not obtain a decision from the Institute of Nature Conservation concerning the effects on nature as required under the Law on Nature Protection and Regulation on Location Conditions.<sup>8</sup>

Based on these irregularities, RERI submitted an appeal to the second instance authority within the Autonomous Province of Vojvodina Provincial Secretariat for Energy, Construction and Transportation. However, the authority denied RERI a right to participate in the procedure, preventing the civil society organization from representing the public interest.

The local authority suspended the EIA procedure for the auxiliary facilities because it determined that there were no conditions for continuing with it. This is despite strong interest in the project during the public consultation process and the submission of 215 public opinions, which were declared by the local authority as "groundless".

The investor had to conduct an EIA for the factory itself. However, the rolling mill that would manufacture rubber bands was not included in the study (another EIA study for that part of the process has been announced).

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<sup>4</sup> The suspension of Serbia's legal system due to a so-called "project of public interest" is not a unique case. In 2015, the *Law on Determining the Public Interest and Special Procedures for Expropriation and Issuance of a Building Permit for the Realization of the Construction Project "Belgrade Waterfront"* (Official Gazette of the RS, nos. 34/15 and 103/15) was passed. This derogated the Law on Expropriation, the Law on Planning and Construction and the Law on General Administrative Procedure, through *lex specialis*. This case represents the first of its kind in which the construction of commercial facilities aiming to satisfy private interests was declared as a project of public interest.

<sup>5</sup> Contract on the alienation of real estate in public ownership from 28 March 2019.

<sup>6</sup> Fee for the conversion of the agricultural land into construction land - Article 88, par. 7, Law on Planning and Construction (Official Gazette of RS, nos. 72/09, 81/09, 64/10, 24/11, 121/12, 42/13, 50/13, 98/13, 132/14, 145/14, 83/18, 31/19, 37/19 and 9/20).

<sup>7</sup> Construction permit issued by the City Administration of City of Zrenjanin, ROP-ZRE-2176-CPI-2/2020, no. 351- 3/2020-15-IV-05-02 from 18 March 2020.

<sup>8</sup> Law on Nature Protection (Official Gazette of RS, nos. 36/09, 88/10, 91/10, 14/16 and 95/18) and Regulation on location conditions (Official Gazette of RS, nos. 35/15, 114/15 and 117/17).

### **Serbia Zijin Bor Copper (copper mining and smelting complex) – strategic partnership<sup>9</sup>**

The agreement concluded between the Serbian government, RTB Bor doo Bor and Zijin Mining Group Co., Ltd obliged contracting partners to develop an EIA for the copper mining and smelting complex.<sup>10</sup> However, the agreement stipulated that the investor would not be liable for any additional investments to ensure compliance with environmental standards and regulations following an EIA. Essentially, the state explicitly and in writing undertook to refrain from imposing such an obligation.<sup>11</sup> There is no evidence that an EIA study was conducted because one was never approved by the Ministry of Environmental Protection.<sup>12</sup>

Although the company is responsible for air pollution of heavy metals and sulphur dioxide that far exceed legally binding limits, the environmental inspector, under the Ministry of Environmental Protection, only submitted three charges for commercial offences between January 2019 and January 2020. And these only resulted in small fines between 1.5 to 3 million RSD (approx. 12.000-25.000 EUR).

### **Hesteel Serbia Iron & Steel d.o.o. Beograd (former Železara Smederevo)**

HBIS Group Serbia Iron and Steel d.o.o. Beograd, a subsidiary of Chinese company HBIS Group Co., owns the steel factory and conducts business using a trade port on the Danube River in the city of Smederevo. Between 2003 and 2011 the factory was managed by US Company U.S. Steel Serbia, but from January 2012 the factory was returned to the Republic of Serbia. In April 2016 the factory was sold to HBIS Group.<sup>13</sup>

In November 2019, the Serbian Ombudsman, which investigates public complaints against government institutions, determined that the Inspectorate for Environmental Protection did not exercise its full legal powers to reduce air pollution, instead choosing only to charge the company with small fines.<sup>14</sup>

The EIA for the existing ironworks complex in Smederevo envisaged several air protection measures, including the establishment of two measuring stations at Radinac and Rajla. The Ombudsman concluded that as the measuring station in Radinac is not functioning, the Investor had not fulfilled its obligations regarding measurement, which should be a priority to ensure that all environmental measures are met. In the same Recommendation the Ombudsman determined that the Ministry of Environmental Protection had not determined whether the company had implemented measures from the latest EIA, especially obligations regarding air quality monitoring stations.

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<sup>9</sup> The Chinese company Zijin officially took over RTB Bor as the majority owner on 18 December 2018 (Zijin acquired share of 63% in the ownership structure).

<sup>10</sup> Page 20, 2.5 of the privatization agreement from 28 September 2018 (RTB Bor doo Bor was privatized). <sup>11</sup> Page 21, 2.5, iii of the Agreement.

<sup>12</sup> Letter of the Ministry of Environmental Protection in case 480 09 011-00-478/20. RERI do not have information if such a study was developed considering that Ministry of Mining and Energy did not respond on RERI's FOI request. However, if an EIA study was developed, according to the Law on EIA, it had to be approved by the Ministry of Environmental Protection.

<sup>13</sup> The entire agreement is available on the website of the Ministry of Economy: [http://www.privreda.gov.rs/wp-content/uploads/2016/04/ASPA-FINAL-Asset-Sales-And-Purchase-Agreement-initialized\\_1.pdf](http://www.privreda.gov.rs/wp-content/uploads/2016/04/ASPA-FINAL-Asset-Sales-And-Purchase-Agreement-initialized_1.pdf)

<sup>14</sup> The locals complained to the Ombudsman stating that due to the work of this factory, they have not been able to live normally, that the facades of houses, fences and gates are covered with dust every day, which they breathe, and requested that the factory be required to install adequate filters, as well as the construction of measuring stations in the surrounding villages (p2 of the Recommendation).

### III FREE ACCESS TO INFORMATION

Access to information in the Republic of Serbia is regulated under the Law on Free Access to Information of Public Importance (*Official Gazette of the Republic of Serbia*, nos. 120/04, 54/07, 104/09 and 36/10) (**Law on Access to Information**).

It is increasingly common for government authorities to avoid providing information of public importance by prolonging deadlines, failing to respond to requests, and only providing information once the Commissioner has intervened. This is most common when the requested information is linked to projects declared to be of national interest.

This section considers how government authorities use the Law on Access to Information to avoid complying with requests either in whole or part.

#### Time limits

Under normal circumstances, government authorities are required under the Law on Access to Information to provide information within 15 days of receipt of a request. However, it has become the norm for authorities to interpret requests using the extraordinary legal deadline of 40 days. This is reserved for requests that the public authority has a justified reason for which it cannot act within the regular timeframe.

RERI submitted a FOI request to the local authorities (the City Administration of Zrenjanin) requesting the documentation related to the submission of a Work Notice by the investor Linglong Tire Europe d.o.o for the construction of auxiliary facilities within the tire factory. The local authorities informed RERI (document no. 037-19/20-IV-01-01 on 7 May 2020) of the prolongation of the deadline (40 days), although the documents that RERI requested were available in the online database (but not publicly available). After a complaint to the Commissioner the local authority provided some of the information but did not include those documents that were essential to the request.

#### Administrative silence

It is increasingly common for FOI requests to be unanswered. According to the Law on Access to Information, the applicant is entitled to first submit a complaint to the Commissioner if a public authority fails to respond to a request within the statutory time limit. If a higher government authority fails to respond to a FOI request then the applicant is entitled to file a claim before the Administrative Court. This represents a legal barrier because the government has, so far, only acted on FOI requests submitted by RERI following claims to the Administrative Court. The procedure before the court further prolongs the process of obtaining information, especially bearing in mind the efficiency of the judiciary in Serbia.

RERI submitted FOI requests to the government on 15 May 2020 and 24 June 2020, seeking access to the government's conclusion that the Tire Factory Construction Project of the Investor "Shangdong Linglong Tire Co. Ltd" would be designated a project of national interest. After submission of the claim before the Administrative Court, the government requested further specification of the request, claiming that it was not precise enough. This is despite the fact that RERI, in its original request stipulated the date of issuing, the no. of the document, the date of the government session, the name of the investor and the location, as well as the subject of the information.<sup>15</sup>

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<sup>15</sup> Letter of the Government of the RS 61 no. 07-3980/2020 from 27 July 2020.

## Denial of access to information

There are five reasons why the public authorities may deny FOI requests according to the Law on Access to Information: 1) life, health and safety of a person; 2) judiciary; 3) national defense, national and public safety; 4) national economic welfare and 5) classified information (state, official, trade secret etc.). In addition, there is a general clause stipulating that the FOI request may be limited to prevent a serious violation of an overriding interest based on the Constitution or law (e.g. rights of privacy).

Public companies, such as EPS, often reject FOI requests, calling upon the exemption provided under the Law on Access to Information, which stipulates that making available the information or document "may impede the achievement of justified economic interests of the public company" as well as "that requested information are being considered trade secrets."

However, they are not providing evidences (burden of proof is always on the public authority) that there is a regulation or official act that stipulates that requested information is a trade secret and that the economic interests of the public company outweigh the interests of the public to know (the conditions must be met cumulatively).<sup>16</sup>

RERI submitted a FOI request on 4 June 2020 to Elektroprivreda Srbije (EPS), a public company, requesting the agreement concluded between EPS and Power Construction Corporation of China for the construction of the thermal power plant Kolubara B.

EPS denied the request on the grounds that doing so would make available information or a document for which regulations or an official act based on law stipulate that it shall be kept as a state, official, business or other secret, i.e. the disclosure of which could lead to difficult legal or other consequences for the interests protected by law, which outweigh the public interest in accessing the information. EPS did not explain why it considers that in this case the company's interest, with 100% state share in the capital structure, prevails over the public's right to information, as well as that EPS have already published on its website information that the public has a justified interest to know.

Following the first FOI request, RERI submitted another requesting the source of financing for the construction of Kolubara B. EPS responded that all information related to Kolubara B is considered secret.

Renewables and Environmental Regulatory Institute – "RERI" is a Serbia-based nongovernmental and non-profit organization, founded with the aim to achieve objectives related to promotion and improvement of rights to healthy and preserved environment, sustainable management of natural and renewable energy resources. For more information, please visit <http://reri.org.rs>

Just Finance International works to ensure that the public budget spent globally on development and infrastructure finance is contributing to the advancement of sustainability for populations and the environment. The team at Just Finance has monitored foreign direct investments in large scale infrastructure sector in the Western Balkans since late 2013. Just Finance is a program of VedvarendeEnergi, a Danish development and environmental NGO. For more information, please <https://justfinanceinternational.org>

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<sup>16</sup> According to Article 4 of the Law on Access to Information justified public interest to know shall be deemed to exist whenever information held by a public authority concerns a threat to, or protection of, public health and the environment, while with regard to other information held by a public authority, it shall be deemed that justified public interest to know exists unless the public authority concerned proves otherwise.