



## A Legal Memo on Chinese investments in Serbia

March 2022

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 15 January 2022 on the weakening of law and transparency requirements have provided loopholes for large-scale infrastructure investments including that from China.

This legal analysis was conducted by the Renewables and Environmental Regulatory Institute (RERI)<sup>1</sup> based on 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 15 January 2022.

### The analysis addresses three issues:

1. Serbia's 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 a new Law on Public Procurement (*Official Gazette of the Republic of Serbia*, Nos. 91/2019, governing the planning of public procurement, including the conditions, manner and procedure for their conduct. The law was introduced instead of the previously valid Public Procurement Act (*Official Gazette of the Republic of Serbia*, Nos. 124/12, 14/15 and 68/15) and entered into force on 1 January 2020. Most of its provisions came into effect on 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.

#### Lack of transparency

The biggest problem in Serbia's national 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 Serbian government authorities to hide information, without a legal or security basis for doing so, when submitting documents to the online portal or responding 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.

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<sup>1</sup> RERI is a non-governmental and non-profit organization that aims to promote and improve rights to a healthy and preserved environment and to sustainable management of natural and renewable energy resources. It achieves its objectives by utilizing legal tools and promoting access to justice in the field of environmental protection as a basic human right.



Furthermore, as we will see in section II, Serbia tries to attract foreign investors by making it easier for them to perform business activities in Serbia. To this end, a large number of tax exemptions has been established, bureaucracy in doing business has been reduced and numerous provisions, which apply to domestic investors, do not apply to foreign investors. Thus, when it comes to the Public Procurement Law, a major transparency challenge i.e. lack of transparency can be found in its Article 11. This prescribes that the provisions of this Law do not apply to public procurements and design contests that contracting authorities or entities are obliged to conduct in accordance with the procurement procedures established under an international agreement. This includes other acts pursuant to which an international law obligation was created, and which are concluded by the Republic of Serbia with one or more third countries or their inner political-territorial units, and relating to supplies, services or works intended for joint use or exploitation by the signatories.

In the sense of abovementioned, an international agreement is defined as one concluded by the Republic of Serbia in writing with one or more states, or with one or more international organizations, and regulated by international law, regardless of whether it is contained in one or more interrelated instruments, and regardless of its name.

This therefore, limits the possibility of monitoring these procedures by interested public in cases where the projects are being implemented through international agreement.

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

Under the previous law governing public procurement, the threshold for contracting authorities imposing obligation to conduct public procurement for all types of procurement was 500,000 RSD (approx. €4,250). The new law sets a higher threshold and 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 RSD (approx. €8,500) and for works 3,000,000 (approx. €25,500).

This increases the possibility of abuse, as less procurements are now obliged to follow the new procedures.

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

The new terms and standards for how contracts are awarded under Serbia's Law on Public Procurement appear to have been changed, in order to increase the discretion available to contracting authorities. Instead of bids being judged on prescribed criteria, such as the lowest cost, it appears that 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**

A further problem with the Law on Public Procurement is its 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 in Serbia often abuse this right to avoid public tenders, even in situations where they have the time to plan.



## Expropriation under the 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 (Linear) 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<sup>2</sup>. In the context of the draft Law on Expropriation from 2021, which received criticism with regard to short deadlines it leaves to property owners, it should be noted that this law already provides short deadlines when it comes to expropriation.

Thus, for example, Article 12, Paragraph 6 of the Law on Special Procedures prescribes that the owner of the immovable property shall give a response to the expropriation proposal within five days from the receipt of the expropriation proposal at the latest, in writing or to state it to the record to the competent authority. Furthermore, this law is accompanied by bylaws, i.e. three Regulations have already been adopted during 2021 regarding this law, which determine the conditions and manner of choosing a strategic partner for projects of particular importance.

Having in mind that this law is *lex specialis*, principle which states that more specific rules will prevail over more general rules, the expropriation for construction and reconstruction of projects of particular importance for Serbia are performed in accordance with the procedure set in this law and not Law on Expropriation, resulting in the application of short deadlines.

## Defining projects of particular importance for the Republic of Serbia

Definition of the projects of particular importance is quite vague and lacks clarity. As such, excessively wide discretionary powers are available to the government. This 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>4</sup> According to the law, 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, as well as ensure and improve the population's subsistence, social development, and environmental protection, thereby enhancing the overall living standard of citizens of the Republic of Serbia.

In accordance with the Law on Special Procedures, projects involving 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.

In connection with projects of particular importance (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.

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- 2 It is the Law on Special Procedures, a short name for the law on the construction and reconstruction of linear infrastructure of particular importance to the Republic of Serbia. Serbia's Ministry of Construction, Transport and Infrastructure's terminology for linear infrastructure is incorrectly termed as 'Line Infrastructure'. See <https://www.mgsi.gov.rs/sites/default/files/LAW>
  - 3 Law on Special Procedures for the Implementation of the Project of Construction and Reconstruction of Line Infrastructure Structures of Particular Importance to the Republic of Serbia, *Official Gazette* of RS, number 9 from 04 February 2020
  - 4 According to the Article 3 of the Law, "line infrastructure object" is a public transport infrastructure (road, 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.

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 often place private interests ahead of those of the public.

On the other hand, there is no legal definition of the national interest in Serbian law, nor are there strictly and clearly defined conditions that must be met for it. Therefore, one more benefit for foreign investors was proposed in the amendments to the Law on Expropriation.<sup>5</sup> Even though this amendment was not adopted,<sup>6</sup> this is an obvious direction of the state to easily declare the private interests of foreign investors as the public interest.

Namely, the Draft Law envisaged, among other things, that the government may determine the public interest for the implementation of projects for the construction of facilities of importance to the Republic of Serbia, in case those projects are implemented on the basis of an international agreement.<sup>7</sup> However, there are no criteria set to determine whether some agreement-based project is in the public interest, which could lead to excessively wide discretionary powers of the government. That means the government could practically declare the public interest only on the basis of fulfilling one condition - that a certain international agreement has been signed, which would later be the basis for expropriation of private property.

However, it is important to recognize that the absence of those provisions in the legal documents was not perceived as an obstacle for the privileged foreign investors in the past. Therefore, their inclusion appears to be an attempt to fit already established practices into the legal streams and make it even easier for certain foreign investors to candidate their activities to be of the public interest.

Failure to use tools such as 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 Ministry of Construction, Transport and Infrastructure, as well as local authorities, often fail to respond to citizen petitions calling for environmental protection and checks on the construction of projects. Even when they perform such checks 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>5</sup> Draft Law on the Amendments of the Law on Expropriation available at: <https://otvoreniparlament.rs/uploads/akta/Predlog>

<sup>6</sup> Voting details for the Law on Amendments to the Law on Expropriation, 26 November, 2021 <https://otvoreniparlament.rs/glasanje/4643>

<sup>7</sup> Article 5 of the Draft Law on the Amendments of the Law on Expropriation.

## Construction of the Linglong Tire factory

In February 2019, the Serbian government declared that the construction of the Linglong Tire factory was a project of national importance. This decision and the legal basis for it was neither explained nor made public. It is unclear whether the decision allows the project to effectively circumvent Serbia's legal framework.<sup>8</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 public land were transferred directly and without compensation to the ownership of the company Linglong International Europe d.o.o.<sup>9</sup> Given the special status of the project, the investor was exempted from applicable fees for predesignating agricultural land for construction.<sup>10</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". The investor first requested a permit to construct a fence, followed by another permit to construct auxiliary facilities (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.<sup>11</sup> So far, the City Administration of the City of Zrenjanin, according to publicly available information, issued nine construction permits for construction of the factory itself, violating the regulations in the field of planning and construction, environmental protection, as well as the general administrative procedure. However, this did not cover the development of the entire factory – the investor separated the project into two parts and postponed impact assessment of the rolling mill - which would manufacture rubber bands, and is the part of the project with the potentially highest impact on the environment - for a later phase when the construction of the all the previously mentioned facilities had already significantly progressed.<sup>12</sup> The investor also excluded the rolling mill from the EIA study and developed a separate study for that part of the factory.<sup>13</sup>

By utilizing these methods the investor presented the construction of this last part as a *done deal* to the authorities.

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**8** 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 Construction 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.

**9** Contract on the alienation of real estate in public ownership from 28 March 2019.

**10** 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, 9/20 and 52/21).

**11** Those ten phases include facilities for production of truck and bus tires, passenger tires and tractor tires, but also facilities such as steel warehouses and hazardous waste Location conditions no. ROP-ZRE-7166-LOC-1/2020 from 20 May 2020 issued by City Administration of the City of Zrenjanin.

**12** Construction permit issued by the Provincial Secretariat for Energy, Construction and Transportation ROP-PSUGZ-13164-CPIH-9/2021, no. 143-351-249/2021 from 14 May 2021.

**13** Decision of the Provincial Secretariat for Urbanism and Environmental Protection no. 140-501-1164/2020-05 from 11 June 2021. 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.

Non-transparency and irregularities in those procedures can be summarized through following:

- 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;
- 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 scrutiny, by restricting the participation of interested members of the public in the presentation of the study;<sup>14</sup>
- Of particular concern is that all of the construction permits for the tire factory were issued without necessary conditions of the Nature Conservation, given that Carska Bara, a special nature reserve, is located only two kilometers from the location where the factory is being constructed;
- All of the construction permits for tire factory were issued prior to obtaining the EIA approval, i.e. prior to determining the environmental impact of the project;
- The EIA study did not consider the impact of drilling five wells, as per the investor's plans, which caused great concern among locals people – especially they were already facing issues related to contaminated drinking water for more than 16 years;<sup>15</sup>
- The local authority suspended the EIA procedure for the auxiliary facilities by claiming that there were no conditions for continuing with it. This was despite strong interest in the project during the public consultation process, including the submission of 215 public opinions, all of which were declared by the local authority as "groundless";
- The public was prevented from participating in the public presentation and public debate due to the misuse COVID-19 restriction measures, first in September 2020, when an impact assessment study for the production complex was presented, and then in February 2021, when public presentation for the rolling mill was to be held;
- Although there was no indication of any incident, violent behavior or disturbance of public order or peace regarding the project in Zrenjanin nor in Novi Sad and citizens did not gather with the intention of protesting, police were present at the public presentations.

Based on the irregularities, RERI filed fifteen claims before the Administrative Court requesting to annul decisions related to construction works and EIA procedure as illegal.<sup>16</sup>

Moreover, Linglong is performing construction works without a construction permit, which was determined by the inspection authorities, upon RERI's request. However, although the construction without a construction permit is a crime and is punishable by imprisonment of six months to five years and a fine, the acting inspectors did not file criminal charges. This led to RERI filing two criminal complaints against those responsible, in July 2020<sup>17</sup> and in June 2021.<sup>18</sup>

Despite the presented irregularities, in June 2020 the Commission for State Aid Control, confirmed that state aid granted to Linglong International Europe doo Zrenjanin for the construction of a tire factory in Zrenjanin for the amount of €83,490,605 was harmonized with rules for state aid.<sup>19</sup> However, it appears that state aid granted was not in line with the Stabilization and Association Agreement or with national legislation.

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**14** 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.

**15** Location conditions no. ROP-PSUGZ-13164-LOCH-2/2020 from 17 July 2020, issued by the Provincial Secretariat for Energy, Construction and Transport.

**16** Ten claims related to the construction permits (nine appeals were rejected on the ground that RERI is not entitled to be party to the procedure) and five related to the EIA procedure.

**17** Responsible in Linglong International Europe Ltd. Zrenjanin, China Energy Engineering Group Tianjin Electric Power Construction Co., Ltd. and CRE International Ltd. Belgrade.

**18** The criminal complaints were submitted against Linglong International Europe Ltd. Zrenjanin as a legal entity and responsible persons within the company.

**19** Decision of the Commission for State Aid Control no. 401-00-00049/2020-01/7 from 05 June 2020.

The competent authorities failed to declare that on top of the aid of more than €83 million, the state awarded additional benefits to Linglong through a long-term corporate tax holiday and duty-free import schemes. Moreover, Linglong received indirect state aid in the form of the development of infrastructure dedicated to the project through public resources. In effect, the total aid is likely to have exceeded the maximum aid allowed to large investment projects.

By signing the Stabilization and Association Agreement with the European Union, the Republic of Serbia undertook not only to harmonize regulations in the field of state aid control with EU acquis, but also to implement them.<sup>20</sup> However, the state aid grantor failed to demonstrate that there are market failures that would justify the need for state intervention and to ensure that the common interest will be protected.<sup>21</sup>

When requested by RERI, government authorities declined to disclose information related to state aid granted to Linglong, providing a further example of the lack of transparency related to the funding of the project.<sup>22</sup>

The illegalities in the project implementation were further underlined when Serbian non-profit organizations dealing with human trafficking determined that *"in addition to seriously violating their labor rights, endangered health, and having in mind the working and accommodation conditions, potentially life, a large number of established facts indicate the possibility that workers are victims of human trafficking for the purpose of labor exploitation"*.<sup>23</sup> Following this discovery, in December 2021, Members of the European Parliament adopted an urgent resolution on forced labour in the Linglong factory and environmental protests in Serbia, which, among other things, pointed to *"the serious problems with corruption and the rule of law in the environment area, over the general lack of transparency and environmental and social impact assessments of infrastructure projects, including from Chinese investments"*.<sup>24</sup>

### Serbia Zijin Bor Copper (copper mining and smelting complex) – strategic partnership<sup>25</sup>

In August 2018, Chinese mining company Zijin Mining Group Co. became the largest shareholder in Bor copper mining and smelting complex, a state-owned production facility in difficulties, located in the city of Bor in eastern Serbia. That was Zijin's first Company in Serbia, and in the Balkans.<sup>26</sup>

The agreement concluded between the Serbian government, RTB Bor doo Bor and Zijin Mining Group Co., Ltd obliged the contracting partners to develop an EIA for the copper mining and smelting complex.<sup>27</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>28</sup> There is no evidence that an EIA study was conducted because, one was not approved by the Ministry of Environmental Protection.<sup>29</sup>

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<sup>20</sup> Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic Serbia, on the other hand (SAA) entered into force on 01 September 2013.

<sup>21</sup> The compliance with environmental regulations was not ensured and the Free Trade Zone in Zrenjanin already enjoys advantages over alternative locations. European Commission's Guidelines on regional State aid for 2014-2020 (2013/C 209/01), par. 39.

<sup>22</sup> The Commission for State Aid Control rejected the request for access to information by conclusion no. 4-00-00005/2021-01/4 from 4 February 2021, The Tax Administration refused to provide information related to the assessment of the market value of the land, stating that it is an official secret by its decision no. 037-02-00053/2021-1000 from 11 February 2021. The Government of Republic of Serbia did not responded on the FOI request up to date.

<sup>23</sup> More information available at: <https://www.a11initiative.org/en/request-for-the-urgent-reaction-of-the-competent-institutions-in-case-of-potential-human-trafficking-for-the-purpose-of-labor-exploitation-of-workers-from-vietnam-engaged-in-the-company-linglong/>

<sup>24</sup> More information available at: [https://www.europarl.europa.eu/doceo/document/RC-9-2021-0600\\_EN.html](https://www.europarl.europa.eu/doceo/document/RC-9-2021-0600_EN.html)

<sup>25</sup> The Chinese company Zijin officially took over RTB Bor as the majority owner on 18 December 2018 (Zijin acquired a share of 63% in the ownership structure).

<sup>26</sup> More information available at: <https://zijinbor.com/en/about/>.

<sup>27</sup> Page 20, 2.5 of the privatization agreement from 28 September 2018 (RTB Bor doo Bor was privatized).

<sup>28</sup> Page 21, 2.5, iii of the Agreement.

<sup>29</sup> Letter of the Ministry of Environmental Protection in case 480 09 011-00-478/20. RERI does not have information if such a study was developed considering that the Ministry of Mining and Energy did not respond to 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.



The Zijin Mining Group is currently expanding the mining complex without the correct mining, environmental and construction permits.<sup>30</sup> Not only have the authorities failed to sanction violations of the law by Zijin, but they proudly participated in the promotion of the project. For example, Serbia's Minister of Environmental Protection Irena Vujović visited and praised construction of the facilities, constructed without construction permit and EIA approval. Local residents are particularly concerned by the gypsum disposal from the desulphurization process. An EIA is needed to determine whether gypsum is hazardous waste, having in mind that waste gas is absorbed with lime milk to produce gypsum. It is questionable what this product contains because the smelter waste gas, in addition to sulfur dioxide, contains mercury, arsenic, cadmium, nickel.<sup>31</sup> A EIA has yet to be carried out.

Following numerous overlooked requests to the competent inspection authorities to determine illegalities and initiate the procedures, RERI submitted criminal complaint against Serbia Zijin Bor Copper for performing construction works without a construction permit. In addition, RERI submitted request for initiation of commercial offence procedure due to illegal construction without EIA approval.

The investor appears to be attempting to avoid environmental impact assessment by splitting the project into several smaller ones – i.e. 'salami slicing'. Although the Ministry of Environmental Protection and Government of Republic of Serbia issued two decisions rejecting the company's intentions to develop the EIA for individual parts, the company has been mainly successful in avoiding having the project subjected to proper impact assessment.<sup>32</sup>

Zijin Mining Group is responsible for high emissions of sulfur dioxide dangerous to human health in Bor, recorded as many as 25 times during 2020 alone, almost double that of 2019 (13 times).<sup>33</sup> During the same period, the concentration of heavy metals such as arsenic was recorded at almost 50 times higher than the value determined in order to avoid, prevent or reduce harmful effects on human health and/or the environment as a whole.<sup>34</sup> This trend continued in 2021, and intensified by the end of the year with the beginning of work on what the Serbian government and Chinese embassy are styling as new "green mine" – due to its claimed environmental standards - at Čukaru Peki near Bor.<sup>35</sup>

In Bor, per official data, a significantly higher risk for specific cancers and notably lung cancer was registered for both genders.<sup>36</sup> Following an analysis of mortality for all causes of death, a higher risk of mortality in Bor was perceived in almost all groups. A higher risk of diseases of the respiratory system, as well as for congenital deformities, malformations and chromosomal aberrations were also noted in the studied groups of Bor.<sup>37</sup>

Although Zijin Mining Group is responsible for air pollution containing heavy metals and sulphur dioxide that far exceed legally binding limits, the environmental inspector, under the Ministry of Environmental Protection, only submitted requests for initiation of commercial offences which resulted in small fines between 1.5 to 3 million RSD (approx. €12,000-€25,000).

In addition to the issues related to air quality, the local community is facing issues related to water pollution. Results of water sampling initiated by RERI showed that in March 2021, the water in Pek river contained high concentrations of copper, arsenic and lead.

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**30** More information available at: <https://www.reri.org.rs/en/the-minister-of-environmental-protection-is-satisfied-with-the-progress-of-the-construction-of-illegal-facilities-in-bor/>

**31** *Ibid.*

**32** More information available at: <https://www.reri.org.rs/en/salami-slicing-cant-pass-after-all-ministry-of-environmental-protection-rejects-zijins-request-to-decide-on-the-need-for-environmental-impact-assessment/> and <https://www.reri.org.rs/vlada-republike-srbije-ponistila-resenje-ministarstva-zastite-zivotne-sredine-da-nije-potrebna-procena-uticaja/>.

**33** More information available at: [http://www.sepa.gov.rs/download/izv/Vazduh\\_2020.pdf](http://www.sepa.gov.rs/download/izv/Vazduh_2020.pdf)

**34** In November 2021 the target value of 6ng/m<sup>3</sup> for Arsenic in the air was exceeded for almost 330 times, reaching a maximum value of 1978,3 ng/m<sup>3</sup>. See [https://bor.rs/wp-content/uploads/2021/12/Izv.-Bor\\_NOV-2021.pdf](https://bor.rs/wp-content/uploads/2021/12/Izv.-Bor_NOV-2021.pdf) *Ibid.*

**35** Serbian Mining and Energy, 21 January 2022 Mihajlovic in Bor: Sustainable mining is the future of Serbian economy <https://www.mre.gov.rs/en/aktuelnosti/saopstenja/mihajlovic-bor-sustainable-mining-future-serbian-economy>

**36** *Improving Contaminated Sites Management in Serbia*, Ministry of Health, Ministry of Environmental Protection and Institute for Public Health Milan Jovanovic Batut, 2020.

**37** *Ibid.*



Although the state's environmental inspector, after numerous requests, determined the irregularities, they did not initiate any criminal procedure.<sup>38</sup>

RERI filed two criminal complaints against the company and responsible persons within the company due to suspicion that they committed the crime of Environmental Pollution, by discharging mining and wastewater containing large amounts of heavy metals into the rivers Mali Pek and Pek and by emitting sulphur dioxide in the amounts dangerous to human health.<sup>39</sup>

According to the Integrated Pollution Prevention and Control Law the company, as a large polluter, had an obligation to obtain IPPC permit no later than 31 December 2020. Instead of enforcing the obligation, Serbian government decided to prolong the obligation for operators to obtain the permit until 31 December 2024.<sup>40</sup>

### **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 a 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>41</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>42</sup>

The EIA for the existing steelworks 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 was not functioning, HBIS Group had not fulfilled its obligations regarding measurement, which should have been a priority to ensure that all environmental measures were met.<sup>43</sup> In the same recommendation, the Ombudsman determined that the Ministry of Environmental Protection had failed to determine whether the company had implemented measures from the latest EIA, especially obligations regarding air quality monitoring stations. Once it finally came into operation, Radinac caused Serbia's longest periods of air pollution recorded in 2020 – 148 days of excessive pollution.<sup>44</sup>

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<sup>38</sup> Letter of the Ministry of Environmental Protection no. 914-480-501-00014/2021-07 from 05 May 2021.

<sup>39</sup> More information available at: <https://www.reri.org.rs/en/reri-filed-criminal-charges-against-zijin-and-the-responsible-director-for-environmental-pollution/>

<sup>40</sup> More information available at: <https://www.reri.org.rs/en/government-of-republic-of-serbia-once-again-proposed-delay-in-application-of-the-law-on-the-integrated-prevention-and-pollution-control/>

<sup>41</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>42</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 of the Ombudsman No. 13-22-3212/18 from 04 November 2019).

<sup>43</sup> The Recommendation of the Ombudsman No. 13-22-3212/18 from 04 November 2019.

<sup>44</sup> More information available at: [http://www.sepa.gov.rs/download/izv/Vazduh\\_2020.pdf](http://www.sepa.gov.rs/download/izv/Vazduh_2020.pdf)



HBIS Group is failing to measure air quality in accordance with the national legislation and prescribed standardization, according to the reports provided by the Serbian Environmental Protection Agency.<sup>45</sup> In addition, the company does not have measuring plans developed in accordance with the law for the years 2018, 2019 or 2020 and does not submit regular emission reports.<sup>46</sup>

According to Serbia's Integrated Pollution Prevention and Control Law, the company, as a large polluter, had an obligation to obtain an IPPC permit no later than 31 December 2020. Instead of enforcing the obligation, the Serbian government decided to defer the obligation for operators to obtain the permit until 31 December 2024.

### III FREE ACCESS TO INFORMATION

In May 2021, Serbia's Ministry of Public Administration and Local Self-Government announced the public consultation on the Draft Amendments to the Law on Access to Information.<sup>47</sup> The proposed amendments provided for the serious breach of the Aarhus Convention and already established free access to information practices and principles. However, the Ministry proposed to widen the space for denying access to information requests providing highly discretionary powers to the authorities, which could result in significant limitations in accessing information.

The public debate on the draft law was never organized.<sup>48</sup> Nevertheless, after serious pressure, mainly coming from civil society, the final version of the Law on Access to Information (*Official Gazette of the Republic of Serbia*, nos. 120/04, 54/07, 104/09, 36/10, and 105/21) ("**Law on Access to Information**") was considerably less harmful than was initially proposed. However, the final version of the Law on Access to Information did not eliminate the prohibition on filing a complaint to the Commissioner, in cases where information is denied by the Government, the National Assembly, the President, the Supreme Court, the Constitutional Court, or the Republic of Serbia's Public Prosecutor's Office. Au contraire, the law expanded the authorities that are above the jurisdiction of the Commissioner, by adding the National Bank of Serbia to the list of privileged authorities. In these cases, it is possible to initiate only administrative disputes, which in practice can last for years.<sup>49</sup>

This is of particular importance regarding the impossibility to initiate the procedure before the Commissioner against the Government of the Republic of Serbia. It is increasingly common for the Government to avoid providing information of public importance by failing to respond to requests, while only sporadically providing information once the procedure before the Administrative Court has been initiated. This is most common when the requested information is linked to projects declared to be of national interest.

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<sup>45</sup> Reports provided by the Serbian Environmental Protection Agency - Report no. 20-06-675 from 30.04.2020, Report no. 20-06-1765 from 12.10.2020, Report no. 20-06-1725 from 05.10.2020, Report no. 20-06-1079 from 06.07.2020, Report no. 20-06-1081 from 06.07.2020, Report no. 20-06-1764 from 12.10.2020, Report no. 20-06-1709 from 30.09.2020, Report no. 20-06-1125 from 14.07.2020, Report no. 20-06-2018 from 20.11.2020, Report no. 20-06-1939 from 04.11.2020, Report no. 20-06-1507 from 21.09.2020, Report no. 20-06-636 from 10.04.2020, Report no. 20-06-1057 from 02.07.2020, Report no. 20-06-1962 from 09.11.2020, Report no. 20-06-1079/1 from 06.07.2020, Report no. 20-06-1769 from 13.10.2020, Report no. 20-06-1837 from 20.10.2020, Report no. 20-06-1058 from 02.07.2020 and Letter from the Ministry of Environmental Protection no. 011-0-896/2020 from 07.09.2020.

<sup>46</sup> *Ibid.*

<sup>47</sup> More information available on the website: <http://mduls.gov.rs/javne-rasprave-i-konsultacije/javna-rasprava-o-nacrtu-zakona-o-izmenama-i-dopunama-zakona-o-slobodnom-pristupu-informacijama-od-javnog-znacaja/>, 10.12.2021.

<sup>48</sup> Instead, the group of CSOs gathered in the Coalition for free access to information organized so called „shadow” public consultations. Although other representatives of public authorities were invited, only Commissioner for Information of Public Importance participated in the event. More information available on the website: <https://spikoalacija.rs/izmene-zakona-o-slobodnom-prustupu-informacijama-stite-organe-vlast/>, 09.12.2021.

<sup>49</sup> The procedure before Administrative court could last up to two years from our practical experience although according to the Article 27 of the Law on Access to Information the administrative dispute initiated related to exercise of access to information request is considered urgent. For example, RERI submitted FOI requests to the government on 15 May 2020.

RERI submitted a FOI request to the Government of the Republic of Serbia on the 6<sup>th</sup> of August 2021 requesting the documentation containing information on which projects were declared by the Government to be projects of national interest for the Republic of Serbia in the period from 1<sup>st</sup> of January 2012 until the receipt of the FOI request. Since the Government did not provide information within the prescribed time frame, RERI submitted an additional request on 16 September 2021. The government also failed to act upon the additional request; as consequence on 25<sup>th</sup> of October 2021 RERI submitted the claim to the Administrative Court. To date the court has not decided upon RERI's claim.

### Legal deadlines

Under normal circumstances, authorities are required, under the Law on Access to Information, to provide information within 15 days of having received 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. However, during the COVID 19 pandemic the authorities are, as a rule, invoking a 40 days deadline, by calling upon the exceptional circumstances caused by the pandemic, without providing any proof or causal connection.

RERI submitted a FOI request to the Ministry of Environmental Protection on the 1<sup>st</sup> of September 2021, requesting information related to the environmental impact assessment transboundary consultations for the project of construction of TPP Ugljevik 3 in Bosnia and Herzegovina. The Ministry of Environmental Protection informed RERI on the 14<sup>th</sup> of September 2021 of the prolongation of the deadline (40 days), although they did not provide any reason and/or evidence for the prolongation.

### Administrative silence

It is increasingly common for FOI requests to be unanswered by the Serbian authorities. 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 Serbian government on 15<sup>th</sup> of May 2020 and 24<sup>th</sup> of 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 to the Administrative Court, the government requested further specification of the request, claiming that it was not precise enough. This is despite RERI, in its original request, stipulated the date of issuing, the number 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>50</sup> To date the Court has not decided upon RERI's claim.

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<sup>50</sup> Letter of the Ministry of Environmental Protection no. 914-480-501-00014/2021-07 from 05 May 2021.

RERI submitted a request for initiating an extraordinary inspection on 2<sup>nd</sup> of April 2021 against Serbian Zijn Copper Doo Bor, to determine whether the operator, during the exploitation and processing of ores in mining and flotation facilities, exceeded the emission limit values in water. The acting inspector submitted a notification informing RERI of the measures taken by the company in order to comply with the legislation, but never shared any of the documents from the inspection surveillance procedure.<sup>51</sup> In order to obtain those data, RERI submitted a FOI request to the Ministry of Environmental Protection on 9<sup>th</sup> of July 2021. When the Ministry did not provide the requested information, RERI submitted a complaint to the Commissioner on 6<sup>th</sup> of December 2021. To date, the Ministry has not acted upon this request.

### 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.). New amendments to the Law (effective from February 2022) added two additional reasons to the above list: 1) intellectual or industrial property, protection of artistic, cultural, and natural resources; 2) the environment. 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 Serbia's state-owned electricity power company, Elektroprivreda Srbije (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." RERI obtained, through access to information procedure, the internal act of EPS - Decision on Trade Secrets (issued in 2015), which declared as a trade secret all data related to coal production and balance, as well as all data related to electricity production. In practice, that means that EPS declared all data related to the company's operations secret, contrary to the applicable regulations. It is worth reminding that EPS is fully financed by the public budget, so it is in the greater interest of citizens to know how these public funds are spent. However, it is almost impossible to obtain any data from EPS, despite several decisions of the Commissioner pointing out the illegality of rejecting RERI's requests for access to information of public importance.

By excluding the right of access to information, the authorities are not providing evidence (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, or that the economic interests of the public company outweigh the interests of the public to know (the conditions must be met cumulatively).<sup>52</sup>

Finally, Serbia's public authorities often do not react either upon request of the Commissioner or its decision and opt for paying fines instead of providing information to the interested public. This practically enables public money to flow from one budgetary line to another.

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<sup>51</sup> Letter of the Government of the RS 61 no. 07-3980/2020 from 27 July 2020.

<sup>52</sup> According to Article 4 of the Law on Access to Information, the 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 regarding 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.

RERI submitted a FOI request on 4<sup>th</sup> of June 2020 to Elektroprivreda Srbije (EPS), a Serbian public company and energy provider, 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. In addition that EPS has already published, on its website, some information on which the public has a justified interest to know.<sup>53</sup> Following RERI's complaint,<sup>54</sup> the Commissioner annulled EPS decision to deny RERI's FOI request.<sup>55</sup> Following the Commissioner's decision, EPS informed RERI that they had not concluded any agreement with Power Construction of China for construction of Kolubara B. As contradictory information remained on EPS's website, RERI once again complained to the Commissioner on 17<sup>th</sup> March 2021. The procedure before the Commissioner is still ongoing.

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, and that RERI is abusing its right to access to information as it had already requested the same information (referring to the case described above). Following RERI's appeal on the decision,<sup>56</sup> the Commissioner annulled EPS's decision of the EPS on 6<sup>th</sup> of July 2021.<sup>57</sup> To date, EPS has not acted upon the Commissioner's decision.

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<sup>53</sup> Decision no. 12.01.261183/2-20 from 19 June 2020.

<sup>54</sup> Complaint to the Commissioner from 17 September 2020.

<sup>55</sup> Decision of the Commissioner no. 071-01-1781/2020-03 from 25 January 2021.

<sup>56</sup> Complaint to the Commissioner from 17 September 2020.

<sup>57</sup> Decision of the Commissioner no. 071-01-2758/2020-03 from 06 July 2021.