#ЕУ ЗА ТЕБЕ

Rule of Law, Climate Ambitions and Foreign Investments

Legal analysis of the overall impact of foreign investments on the rule of law and capacities of the Republic of Serbia to comply with the EU and UN environmental and climate standards and objectives

RERI Renewables and Environmental Regulatory Institute

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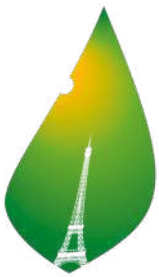
This legal analysis was conducted by the Renewables and Environmental Regulatory Institute based on the applicable legal framework in the Republic of Serbia, strategic and policy documents, publicly available documents and information, as well as presented cases from its legal practice, with the data available and provided until 31 July 2023. The analysis addresses the issues of the lack of ambitious climate goals in national strategic and legal framework, new State aid regulations, weaknesses of the Law on Public Procurement and Law on Mining and Geological Research, as well as deficiencies of inspection surveillance in the Republic of Serbia.

CONTENT

I

Lack of Ambitious Climate Goals in the Republic of Serbia

01 Paris Agreement and UN Framework Convention on Climate Change



By ratifying the Agreement, Serbia officially confirmed the necessity and willingness to adapt to changing climatic conditions

The Republic of Serbia has been a party to the United Nations Framework Convention on Climate Change ("Convention") since 2001, and ratified the Paris Agreement in 2017. With the ratification of the Paris Agreement, the requirements of this Agreement have become an integral part of the legal framework of the Republic of Serbia, including the obligation to reduce emissions of greenhouse gases ("GHG").

With the ratification of the Paris Agreement, the requirements of this Agreement have become an integral part of the legal framework of the Republic of Serbia, including the obligation to reduce emissions of greenhouse gases ("GHG"). By ratifying the Agreement, Serbia officially confirmed the necessity and willingness to adapt to changing climatic conditions, i.e., to submit to the Secretariat of the Convention a plan to adapt to changing climatic conditions. Serbia has also taken up the obligation of regular, biannual reporting on the implementation of its Nationally Determined Contributions to the achievement of the goals of the Agreement (NDCs), GHG emissions and their projections, implementation of policies and measures that lead to the reduction of emissions and the increase in the removal of emissions by sinks (mitigation). These reports should also include information on the vulnerability of sectors and systems, i.e., improving the efficiency of adaptation, as well as the needed and obtained financial assets, technical and capacity-building assistance. Although it is not an obligation, the inclusion of these elements in reporting under the Agreement increases the possibilities of securing financing from international funds, such as the Green Climate Fund.

The Paris Agreement defines the goals and actions necessary to achieve them in the period from 2021 to 2050 and functions on the principle of five-year cycles of increasingly ambitious climate actions implemented by the states that have joined the Agreement, starting from 2020. The Agreement also established the expectation that each subsequent NDC will be more ambitious than the previous ones and that they will "reflect maximum ambition". Thus, the NDCs define the path of decar-

bonization and achieving carbon neutrality.

However, the achievement of the goals of the NDCs is not enforceable, considering that the Paris Agreement does not define sanctions or measures of a similar nature in case of non-fulfilment of the actions. In general, absence of action is not expected regarding most other documents within the United Nations system, as it would affect the reputation of the state. In other words, failure to fulfil obligations does not have direct and distinguishable consequences and sanctions against the state, but significantly damages the state's global reputation. In addition to reputational risk, failure to comply with obligations also reduces the possibility of securing financial resources from bilateral funds and the Green Climate Fund (which are more favourable than other commercial sources of financing and include the possibility of securing grants). Also, the carbon intensity of government bonds is one of the criteria of the credit standing of the state.

Reporting, in accordance with the obligations from the Paris Agreement, is also achieved through biennial transparency reports (BTR), which may or may not contain a Report on Adaptation to Changing Climate Conditions. In accordance with the UNFCCC Decision,the first BTR should be submitted to the Secretariat by the end of 2024 at the latest. To developing countries, including Serbia, the Global Environment Facility (GEF) provides funds, upon request, for the preparation of these documents.

The existing strategic and normative framework, as well as the documents that are being developed, indicate that there are indications of low-carbon development policies in Serbia, but there are no guidelines for the development of policies leading to carbon neutrality by 2050. Namely, if the revised NDC is taken as a reference, which was adopted by the Government without public discussion, with a delay, and submitted to the UNFCCC secretariat in August 2021, the presented climate ambitions (economy wide target of 33.3% reduction of GHG emissions in 2030 compared to 1990, i.e., 13.2% of GHG emissions reduction by 2030 compared to 2010) do not express the ambition that may lead Serbia to achieve the goals of carbon neutrality by 2050. In this document, Serbia did not define the measures and activities that lead to achieving the predicted reduction of GHG emissions. The revised NDC states that they will be an integral part of the Low Carbon Development Strategy with the Action Plan. This Strategy was adopted in June 2023 containing certain measures, but the Action Plan with specific timeframes and financial framework was again absent.

In addition, the Republic of Serbia does not comply with its reporting obligations to the UNFCCC secretariat. According to the available data from the UNFCCC register, the Republic of Serbia submitted the Second National Communication in 2017 and did not submit the second Biennial Update Report (BUR) even though it was supposed to do so in 2019.

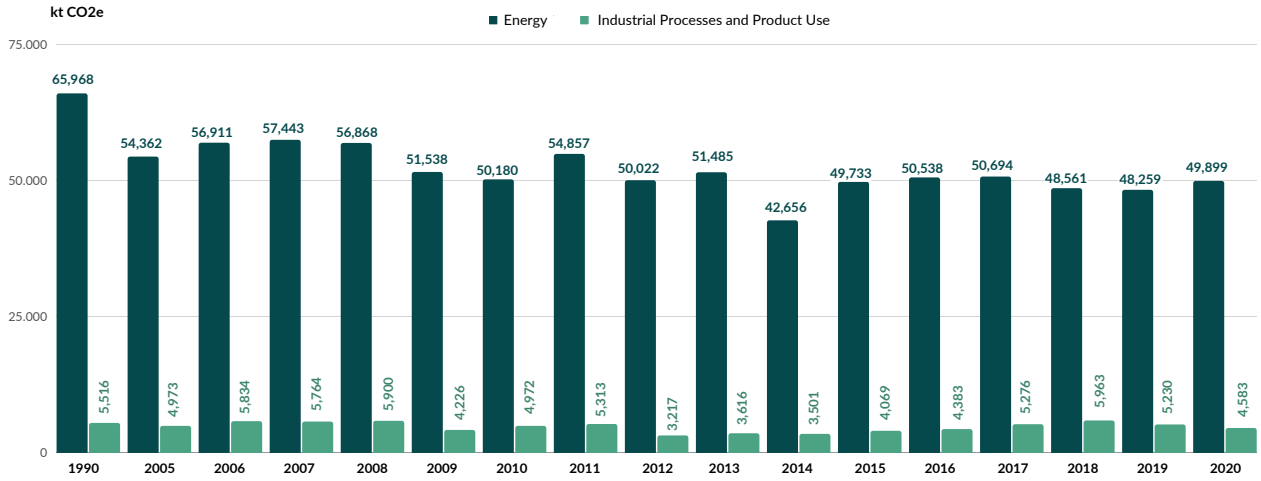
28%

Total GHG emissions reduction in 2020

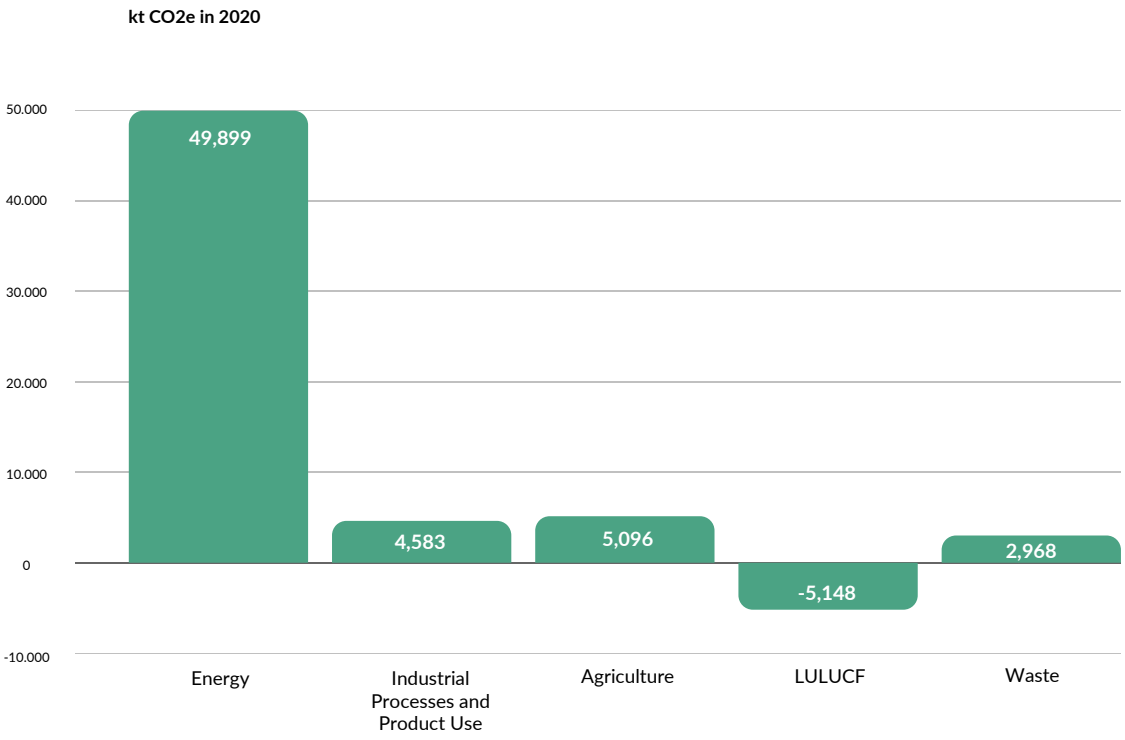
GHG inventory

The inventory of GHG emissions conducted by the Serbian Environmental Protection Agency is not publicly available, despite an explicit legal provision, thus the public in Serbia has no information of the structure of emissions, their level, and especially no impact on the ambition of international goals.[1] Presentation of relevant information and documentation is a prerequisite for any discussion and goal setting. Thus, for example, it can be concluded from the GHG inventory that Serbia already reduced total GHG emissions by over 28% in 2020, and that the goal of 33.3% by 2030 cannot be considered ambitious. Total GHG emissions with LULUCF in 1990 were 80,088 kt, while in 2010 the emissions reduced to a total of 57,125 kt and remained on the same level, with a total of 57,398 kt CO2e, in 2020. It can be concluded as well that the energy industry accounts for about 80% of total GHG emissions, thus that it is necessary to reduce emissions originating from the thermal power plants ("TPP") if a significant reduction in emissions is to be achieved.

[1] RERI obtained the GHG emissions inventory through request for access to information of public importance.



Source: GHG Emissions inventory kept by the Environmental Protection Agency



Source: GHG Emissions inventory kept by the Environmental Protection Agency

02 Process of Serbia's Accession to the European Union

The process of Serbia's accession to the European Union implies the harmonisation of national legislation with the legislation of the European Union. When it comes to the area of climate changes, the basis of this harmonisation is the harmonisation with the EU Law on Climate Change ("European Climate Law"), which introduces into the legislative framework of the European Union the objectives established by the EU Green Deal. This primarily implies achieving climate neutrality (achieving net zero GHG emissions) in 2050, as well as reducing GHG emissions by 55% by 2030 compared to 1990 emission levels.

The European Climate Law is based on Regulation (EU) 2018/1999, which with certain amendments became binding for Serbia through the Energy Community Treaty, i.e. through the Decision of Ministerial Council 2021/14/MC-EnC of November 2021.This Regulation ensures the inclusion of climate change issues in sectoral planning, primarily in the energy sector.

The European Climate Law establishes the need to improve relevant legislation, such as the LULUCF (land use, land-use change, and forestry) Regulation, regulations related to the functioning of the GHG emissions trading system, etc. In addition, the European Climate Law establishes a system for monitoring progress in achieving goals, as well as sectoral policies that lead to climate neutrality. The Law also prescribes the obligation to develop long-term strategies that define the path to climate neutrality and which are developed for a period of 30 years, and revised every 5 years.

By signing the Sofia Declaration on the Green Agenda for the Western Balkans in November 2020,Serbia undertook to work with the European Union to achieve the goal of a carbon-neutral European continent in 2050. Thus, Serbia has committed itself to harmonisation with the European Climate Law, further harmonisation with the EU ETS, i.e., the introduction of carbon taxes, but also to the development of adaptation and decarbonization strategies. Serbia also undertook to set goals for the year 2030. Achieving these goals is supported through the Economic and Investment Plan of the European Union for the Western Balkans.

03 Energy Community

By the decision of the Ministerial Council 2021/14/MC-EnC of November 2021, the Contracting Parties to the Energy Community, including Serbia, undertook to develop long-term strategies ("LTS") and integrated plans for energy and climate ("NECP") for the periods from 2025-2030 and 2031-2040. Member states are required to submit the first NECPs by 30 June 2024, while the draft had to be submitted by 30 June 2023 at the latest. The NECP contains a list and descriptions of policies, measures and activities that should be implemented to reduce GHG emissions and achieve carbon neutrality. Starting from March 2025, the member states are obliged to submit a report every two years to the Energy Community Secretariat on the implementation of their NECPs. The Contracting Parties are required to submit their first LTS to the Energy Community Secretariat by January 2029. Strategies are developed for a period of 30 years and revised, if necessary, every 5 years. Starting from March 2023 and every second year thereafter, the Contracting Parties shall report to the Energy Community Secretariat their strategies and plans for adaptation to changing climate conditions, while from July 2023, as well as every year after that, they will also report on the funds that have been collected through carbon taxes or similar mechanisms.

The members of the Energy Community are also obliged to develop a strategic plan for reducing methane emissions from the energy, agriculture, and waste management sectors. The plan should include short-term and medium-term policies and measures to reduce emissions, including circular economy principles. In accordance with the recognized need to reduce methane emissions from the three aforementioned sectors, the EU, in cooperation with the USA, launched a global initiative to reduce methane emissions during the summit in Glasgow, which aims to limit methane emissions to 30% compared to the emissions of this gas in 2020. Serbia is a member of this initiative.

National Energy and Climate Plan of Serbia

Serbia, as a Contracting Party to the Energy Community Treaty, started developing the NECP in February 2021. The Ministry of Mining and Energy only opened a public debate on this key strategic document in June 2023. However, the plan that is currently in the phase of public consultations does not provide answers to key questions, so the public remains deprived of answers to questions such as how the energy sector will be decarbonized, when Serbia will stop producing electricity from coal, whether Serbia will introduce some of the carbon charging systems, in which way the Carbon Border Adjustment Mechanism ("CBAM") will affect industry and energy.

Goals

Increasing the share of renewable energy sources ("RES") is one of the key ways to achieve decarbonization goals. As the draft NECP proclaims as one of the most important goals the increase in the share of RES, it is surprising that the goal related to RES has been changed in relation to the goal established by the Decision of the Ministerial Council of the Energy Community 2022/02/MC-EnC of December 2022 in a way that it is decreased by 7.1%. At the same time, the goals related to the reduction of GHG emissions remain approximately the same. It is not clear how, even with reaching the share of 40.7% of RES in gross final energy consumption ("GFEC"), as stated in the Decision of the Ministerial Council of the Energy Community and a 33.6% share of RES in GFEC, as stated in the draft NECP, approximately the same reduction in GHG emissions is reached (40.3% – including LULUCF by 2030 compared to 1990). There is no expert analysis, calculation and projection based on relevant data in the NECP, which would measure the contribution of the goals set by the plan to the achievement of the goal set in the Green Agenda. It is necessary to develop a clear strategy for reaching zero net carbon emissions and set a precise time frame, which is not reflected in the NECP.

Completion of phase-out of electricity production from coal

One of the reasons for the lack of ambition can be found in the absence of clear and concrete measures to reduce GHG emissions from TPPs (which are responsible for about 80% of GHG emissions in Serbia). The draft NECP states that one of the key goals is "an ambitious but realistic programme to reduce the share of lignite in electricity production, i.e., the phase-out of lignite, by up to 25% in 2030 compared to 2019." However, the plan does not provide an answer to the question of what "up to 25%" means. The draft NECP also states that "coal-fired thermal power stations are expected to cease generating electricity by 2050." Thus, the plan once again fails to set concrete and measurable energy policy goals. Compliance with the set goals is impossible to achieve without significantly reducing the production of electricity from coal. In this sense, it is necessary to determine a clear and precise date for the end of electricity production from coal, and after that it is necessary to clearly determine the time periods and deadlines for the withdrawal of thermal energy capacities, and to present to the public in a timely and clear manner the social and economic implications of the decisions that are being brought and the goals which are set up. The Draft NECP does not foresee new thermal capacities, however the Draft Spatial Plan of the Republic of Serbia from 2021 until 2035 envisages construction of new production capacities in the electric power sector by 2035 (facilities with a total installed capacity of 3,300 MW), and the Ministry of Construction, Transport and Infrastructure is further progressing with the development of the Spatial Plan for the special purpose area for construction of Kolubara B (it obtained SEA approval in 2021 and the procedure for adoption of the plan is still in place). However, Ministry of Mining and Energy strongly opposed construction of new thermal capacities.

CBAM

The NECP does not analyse the impacts of CBAM implementation. The plan only shows in principle the commitment to cross-border carbon taxation. Serbia can avoid cross-border taxes if it introduces some carbon charging mechanism at the national, or regional level that is compatible with the ETS system in the EU, whereby all charged amounts would go to the national budget.

04 National legal framework

In order to fulfil the obligations under the Paris Agreement and the harmonisation process with the EU legislation, the EU legislation, the Law on Climate Change was adopted in March 2021. It is important to note that there was an unjustified delay regarding the adoption of this law, bearing in mind that the adopted regulation does not differ from the document that was put up for public discussion in 2018.

The Law on Climate Change refers to the key instruments for reducing GHG emissions and adapting to changing climatic conditions but does not represent a normative instrument for achieving carbon neutrality by 2050. In addition, it is important to emphasise that, within its negotiating position for chapter 27, Serbia requested transitional periods for the implementation of the Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 ("ETS Directive"), stating that there is no possibility to use the Modernisation Fund and that the introduction of a national carbon charging system would represent a burden to the industry (particularly in energy).

In order to ensure the full implementation of the Law on Climate Change, it is necessary to adopt a large number of by-laws. However, not all by-laws necessary for its implementation have been adopted to date.
Based on the Law on Climate Change, the following by-laws have been adopted so far:

- Rulebook on verification and accreditation of verifiers of reports on greenhouse gas emissions;[2]
- Decree on types of activities and gases with a greenhouse effect;[3]
- Rulebook on data on fuel economy and CO2 emissions from new passenger vehicles;[4]
- Rulebook on the contents of the national greenhouse gas inventory and the national report on the greenhouse gas inventory; [5]
- Low Carbon Development Strategy of the Republic of Serbia for the period from 2023 to 2030 with projections up to 2050, from which the goal of reducing GHG emissions originates – a document whose adoption is belated (the public consultations on this document, which have undergone no changes in the meantime, were held in 2019) and which needs to be thoroughly revised.[6] The Low Carbon Development Strategy provides for "harmonising the levels of Serbian GHG emissions with those in the EU, in an economically acceptable and socially just way", and in order for this to be truly possible, it is necessary to determine the year of achieving carbon neutrality (which is not the case now), because it states that this is not possible until 2070;
- Regulation on types of data, bodies and organisations and other natural and legal persons that submit data for the creation of a national greenhouse gas inventory, which, apart from improving cooperation and coordination between state bodies and strengthening the capacities of the Serbian Environmental Protection Agency and other entities involved in collecting the necessary data, does not require additional contributions.[7]

[2] Rulebook on verification and accreditation of verifiers of reports on greenhouse gas emissions ("Official Gazette of RS", no. 107/21).

[3] Decree on types of activities and gases with a greenhouse effect ("Official Gazette of RS", no. 13/22).

[4] Rulebook on data on fuel economy and CO2 emissions from new passenger vehicles ("Official Gazette of RS", No. 107/22).

[5] Rulebook on the contents of the national greenhouse gas inventory and the national report on the greenhouse gas inventory ("Official Gazette of RS", No. 55/23).

[6] Low Carbon Development Strategy of the Republic of Serbia for the period from 2023 to 2030 with projections up to 2050 ("Official Gazette of RS", No. 46/23).

[7] Regulation on types of data, bodies and organisations and other natural and legal persons that submit data for the creation of a national greenhouse gas inventory ("Official Gazette of the RS", No. 43/23).

II

NEW STATE AID REGULATION IN THE ENERGY SECTOR -

a way to improve environmental protection and achieve net-zero emissions?

In accordance with the Law on the State Aid Control [8] State aid is any actual or potential public expenditure or realized decrease in public revenue granted by the State aid provider in any form, which puts a certain market participant in a more favourable position compared to competitors or gives priority to the production of certain goods and/or services, which distorts or threatens to distort competition on the market and affects trade between the Republic of Serbia and the Member States of the European Union. The State aid shall be considered carefully and rationally to prevent public financial support to future sub-optimal investments. The regulation of State aid is of particular importance to the energy sector, considering that there is a traditionally high level of involvement of government in processes of energy production and supply. Therefore, it is important to analyse two by-laws that are directly related to the granting of the State aid in the energy sector: Regulation on the conditions and criteria for compliance of State aid for environmental protection and in the energy sector and Regulation on the conditions and criteria for the compliance of State aid for investment in sectors important for reaching the net-zero GHG emissions.[9]

[8] Law on State Aid Control ("Official Gazette of RS", No. 73/19).

[9] Regulation on the conditions and criteria for compliance of State aid for environmental protection and in the energy sector ("Official Gazette of RS", No. 99/21) ("Regulation on the SAEP") and Regulation on the Conditions and Criteria for the Compliance of State Aid for Investment in Sectors Important for Reaching the Net-zero GHG Emissions ("Official Gazette of RS", No. 45/23) ("Regulation on the SASI").

01 Regulation on the conditions and criteria for compliance of State aid for environmental protection and in the energy sector

The Regulation on the SAEP determines the conditions and criteria for State aid compliance in order to improve environmental protection and the development of the energy sector in the Republic of Serbia.[10] The Regulation was adopted in order to transpose the Commission Regulation (EU) No. 651/2014 [11] declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and on the basis of Guidelines on State aid for environmental protection and energy 2014-2020 [12] . The Regulation refers to aid granted to market participants in the energy sector, as well as State aid for environmental protection to all market participants, regardless of the sector of the economy and the activities they perform. The Regulation on the SAEP governs the compliance of State aid that will be awarded for the relocation of economic entities to new locations for the purpose of environmental protection, for measures of production adequacy for electricity producers, for the preparation of an environmental impact study, and for investment in energy infrastructure. Finally, the Regulation prescribes the conditions and criteria for State aid for investment in recycling and reuse of waste, energy-efficient district heating and cooling, remediation process of contaminated sites, collection and storage of carbon, investment in energy efficiency measures, reduction of environmental duties, collection, and carbon storage, encouraging energy production from renewable energy sources.

Although the Regulation on the SAEP aims to promote environmental protection and support the energy sector, there are certain shortcomings and weaknesses that shall be further analysed.

In contrast to the Commission Regulation, as delineated in Article 2 paragraphs 101-131 under the category "Definitions applying to aid for environmental protection," the Regulation on the SAEP has failed to provide explicit definitions for fundamental concepts and terminologies. This omission is significant as it hampers the comprehensive understanding and formulation of intricate standards concerning the criteria and prerequisites governing the dispensation of State aid.

The principal deficiency observed regarding the Regulation on the SAEP is incomplete incorporation of provisions derived from Commission Regulation and EU Guidelines. This has resulted in the absence of a comprehensive regulatory framework pertaining to the criteria and standards essential for the assessment of State aid compliance in this domain.

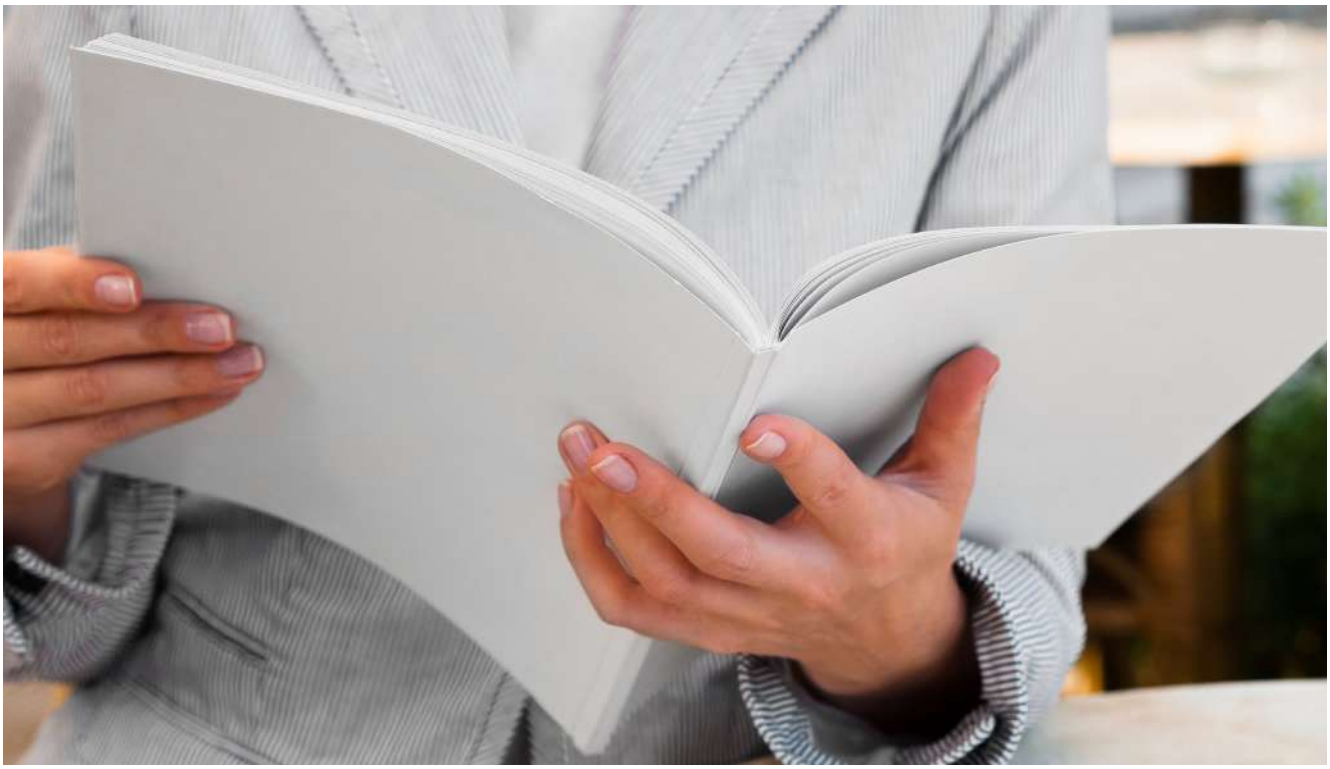
In May 2023, the Council of the Commission for State Aid Control of the Republic of Serbia adopted Guidelines for assessing the compliance of State aid for environmental protection and in the energy sector (the following text analyses the provisions of the Guidelines). [13]

[10] On October 30, 2021, the Regulation on the SAEP entered into force.

[11] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty ("Commission Regulation").

[12] Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01) ("EU Guidelines").

[13] Guidelines for assessing the compliance of state aid for environmental protection and in the energy sector ("Official Gazette of RS", No. 42/23) ("Guidelines").



Guidelines for assessing the compliance of State aid for environmental protection and in the energy sector

The Guidelines represent a set of guiding principles that are used to assess whether State aid for environmental protection and energy is in accordance with the by-law – the Regulation on the SAEP, as well as EU rules on State aid. The Guidelines were adopted based on Commission Regulation and the EU Guidelines. The Guidelines additionally delineate the *modus operandi* through which the Commission for State Aid Control conducts evaluations of State aid compliance within the purview of environmental protection and the energy sector. Furthermore, it incorporates and adopts the substantive content articulated within the EU Guidelines. Also, the Guidelines are intended to provide clarity and guidance to national authorities responsible for assessing State aid.

In accordance with the Guidelines, State aid for environmental protection and in the energy sector can be harmonised with the rules on granting State aid if:

1. it contributes to a well-defined objective of common interest;
2. there is a need for State intervention;
3. the State aid measure is appropriate;
4. it has incentive effect;
5. it is proportional (aid kept to the minimum);
6. the positive effects of the measure on competition and trade between the Republic of Serbia and the EU Member States outweigh the negative effects (if the negative effects on the distortion of competition and trade between the Republic of Serbia and the EU Member States are sufficiently limited),
7. the data on the aid are available to the public (if state aid is transparent).

Although the Guidelines aim to provide clarity and guidance to national authorities responsible for assessing State aid, there are shortcomings and weaknesses that shall be further analysed:

Lack of definitions

In comparison to the Commission Regulation, as delineated in Article 2, paragraphs 101-131 under the category "Definitions applying to aid for environmental protection," and in comparison to the EU Guidelines, as delineated in Article 1.3 under the category "Definitions" the Guidelines have failed to provide explicit definitions for fundamental concepts and terminologies. This omission might carry significant implications as it could impede thorough comprehension and development of intricate standards governing the criteria and prerequisites for the allocation of State aid.

Lack of a protective condition in connection with the granting of State aid – firms in difficulty

The EU Guidelines prescribe[14] that environmental and energy aid may not be awarded to firms in difficulty as defined for the purposes of these Guidelines by the applicable Guidelines[15] on State aid for rescuing and restructuring firms in difficulty as amended or replaced. For the purposes of these Guidelines, an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term.[16] Given that its very existence is in danger, an undertaking in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. In contrast to the above, the Guidelines did not take over this protective provision, thus failing to define and regulate the basic level of protection in connection with the possibility of granting State aid.[17]

[14] Article 1.1, paragraph 16 of the EU Guidelines.

[15] Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01).

[16] Therefore, an undertaking is in difficulty if at least one of the following circumstances occurs: (a) In the case of a limited liability company where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital; (b) In the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses; © Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors; (d) In the case of an undertaking that is not an SME, where, for the past two years: i. the undertaking's book debt to equity ratio has been greater than 7,5 and; ii. the undertaking's EBITDA interest coverage ratio has been below 1,0.

[17] This kind of clause is not included in the Regulation on the conditions and criteria for the compliance of state aid for rehabilitation and restructuring of market participants in difficulty ("Official Gazette of the Republic of Serbia" Nos. 62/21 and 43/23).

Lack of defining the need for state intervention

While it is widely acknowledged that competitive markets typically yield favourable outcomes concerning pricing, production levels and resource utilization, the existence of market failures may warrant government intervention to enhance market efficiency.[18] Notably, State aid measures can, under specific conditions, rectify these market deficiencies and thereby contribute to the realization of common objectives, particularly when the market, in isolation, falls short of achieving optimal outcomes. To evaluate the efficacy of State aid in achieving these objectives, it is imperative to initially diagnose and precisely define the issue requiring attention. State aid should be directed toward scenarios where its application can bring about substantial enhancements that the market, in isolation, is incapable of delivering. To establish guidelines ensuring that aid measures achieve the common objective, States should identify the market failures hampering an increased level of environmental protection or a well-functioning secure, affordable, and sustainable internal energy market. According to the Guidelines, there is a need for state intervention if State aid can, under certain conditions, correct market failures in terms of prices, production and use of resources and thereby contribute to the achievement of a goal of common interest.[19] However, the Guidelines failed to stipulate that the mere existence of market failures is not sufficient justification for state intervention, as stated by the EU Guidelines. [20] In particular, other policies and measures may already be in place to address some of the market failures identified. Examples include sectoral regulation, mandatory pollution standards, pricing mechanisms such as the EU Emissions Trading System ("ETS") and carbon taxes. Additional measures including State aid may only be directed at the residual market failure, i.e., the market failure that remains unaddressed by such other policies and measures. It is also important to show how State aid reinforces other policies and measures in place that aim at remedying the same market failure. Therefore, the case for the necessity of State aid is weaker if it counteracts other policies targeted at the same market failure. By recognising the market failures as sufficient justification for state intervention, the adopted Guidelines leave space for disorderly, excessive, and arbitrary state intervention in the Republic of Serbia. This could also lead to State aid being granted that has a negative impact on competition, as well as on the market in the territory of the Republic of Serbia in connection with projects in the field of environmental protection and energy.

[18] N. Gregory Mankiw, Principles of Economic, Boston: Cengage Learning, 2017.
[19] Article 12 of the Guidelines.
[20] Article 3.2.2. paragraph 36 of the EU Guidelines.

02 Regulation on the conditions and criteria for the compliance of state aid for investment in sectors important for reaching the net-zero GHG emissions

In June 2023, the Government of the Republic of Serbia adopted the Regulation on the SASI which is based on the Industrial Policy Strategy of the Republic of Serbia from 2021 to 2030. The aim of the adoption of the Regulation on the SASI is proclaimed to be improvement of the competitiveness of Serbia as an investment location for investors in sectors important for reaching a zero rate of greenhouse gas emissions in the European area. The Regulation applies to the production of equipment which is used to achieve zero greenhouse gas emissions (batteries, solar panels, wind turbines, heat pumps, electrolysers, carbon collection and utilisation equipment and carbon collection and storage equipment, etc.), production of components for previously mentioned equipment and production or reuse of raw materials necessary for the production of previously mentioned equipment and/or components. The Regulation on the SASI takes over the content of the section 2.8. from the Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia.[21]

Although the Regulation claims that its aim is to improve the competitiveness of Serbia as an investment location for investors in sectors important for reaching a zero rate of greenhouse gas emissions in the European area, there are shortcomings and inconsistencies that shall be further analysed:

[21] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia OJ C 101, 17.3.2023, (2023/C 101/03) ("EU Net-zero Transition Framework");

Lack of clarity

The Regulation on the SASI is a set of rules that govern the provision of State aid for investment in sectors important for reaching the zero rate of greenhouse gas emissions. However, the Regulation does not provide a clear definition of "investment in sectors important for reaching the zero rate of greenhouse gas emissions" which could lead to inconsistent interpretations by the authorities. It is not clear how the investments covered by the Regulation were identified as those that contribute to reaching zero GHG emissions, since they were not prioritised in the Low Carbon Development Strategy adopted at the same governmental session.[22] It is even less clear how the planned investments contribute to achieving zero emissions since the Regulation provides for the obligation that the investment must remain in the same area for at least 5 years after the investment, and the deadline for submitting the investment application is 31 December 2025.

In accordance with the Regulation on the SASI, the following condition is prescribed: the investment must remain in the same area for at least five years, i.e. in case of SMEs three years after the completion of the investment project, whereby the replacement of plant or equipment that has become obsolete or broken during the period of the investment's continuation is allowed, but no new State aid can be granted for these purposes. [23]

In contrast to the Regulation on the SASI, the EU Net-zero Transition Framework stipulates that the beneficiary must commit to maintain the investment in the area concerned for at least five years, or three years for SMEs, after the completion of the investment. Such a commitment should not prevent the replacement of plant or equipment that has become outdated or broken within this period, provided that the economic activity is retained in the area concerned for the minimum period. However, no further aid may be awarded to replace that plant or equipment.

Lack of a protective condition in connection with granting of State aid – firms in difficulty

The EU Net-zero Transition Framework prescribes that State aid in this sector may not be awarded to firms in difficulty as defined for the purposes of the EU Net-zero Transition Framework by the applicable Guidelines on State aid for rescuing and restructuring firms in difficul-

[22] Law Carbon Development Strategy of the Republic of Serbia for the period from 2023 to 2030, with projections until 2050 ("Official Gazette of RS", No. 46/2023).

[23] Article 6 of the Regulation on the SASI.

ty as amended or replaced.[24] For the purposes of these Guidelines, an undertaking is in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term. Given that its very existence is in danger, an undertaking in difficulty cannot be considered an appropriate vehicle for promoting other public policy objectives until such time as its viability is assured. In contrast to the above, the Regulation on the SASI took over the above content and prescribed the following: State aid is harmonized if it is given to a firm that is not in difficulty in terms of the provisions regulating the control of state aid. [25]

Lack of transparency

The Regulation on the SASI failed to regulate one of the most important protective institutes related to the granting of state aid - Monitoring and Reporting, in accordance with section 3, articles 87-92 of the EU Net-zero Transition Framework.[26]

[24] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, 17.3.2023 (2023/C 101/03).

[25] Article 7, paragraph 2 of the Regulation on the SASI.

[26] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia OJ C 101, 17.3.2023, (2023/C 101/03).

III

Weaknesses in implementation of public procurement rules

The Law on Public Procurement governs the planning of public procurement, including the conditions, manner and procedure for their conduct.[27] Although the revised legal framework was supposed to harmonise the public procurement processes with EU standards and regulations, the European Commissionin 2022 noted that there was no progress in Chapter 5 – Public procurement, which has been recognised as one of the Fundamentals of the accession process. This section considers the most significant aspects of the law on procurement, highlighting how it weakens existing regulations governing competition, transparency and environmental protection.

01 Lack of transparency

Transparency is essential to maintain public trust in the procurement process. Lack of openness and clear communication can lead to suspicions of favouritism and corruption. For instance, if the criteria for selecting a supplier are not clearly defined or if the evaluation process lacks transparency, there might be doubts regarding the fairness of the awarding of contracts. Transparency can be improved by ensuring that all relevant information about the procurement process, including bid evaluations and contract awards, is readily accessible to the public. However, the Law on Public Procurement prescribes numerous exemptions from the application of the prescribed public procurement rules.

The total value of the public procurements from sectoral subjects was

57,9%.

The biggest problem in Serbia's national public procurement process is the low level of transparency. This problem is also recognized by the European Commission in its 2022 report on Serbia, which pointed out that investments in environmental protection still lack an effective institutional set-up and transparent procedures. In 2022, the share of public procurements from the electricity sector in the total value of the public procurements from sectoral subjects was 57.9%.

[27] 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 organisations, and regulated by international law, regardless of whether it is contained in one or more interrelated instruments, and regardless of its name.

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 are hampered by technical issues and the lack of clear criteria for data entry. 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. Furthermore, there is a tendency in Serbia to attract **foreign investments** by making it easier for them to perform business activities in Serbia. Therefore, a large number of tax exemptions have been established, bureaucracy in doing business has been reduced whereas numerous provisions, which apply to domestic investors, do not apply to foreign investors. Thus, when it comes to the Law on Public Procurement, a major transparency challenge i.e. lack of transparency can be found in its Article 11, which 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,[28] or other act pursuant to which an international legal obligation was created, and which is 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. Therefore, the possibility of monitoring these procedures by the interested public in case of projects being implemented through international agreement is constricted. This is particularly important having in mind that 17 of the 20 most valuable public procurements concluded by the public sector in Serbia in 2020 were concluded on the basis of international agreements that are exempt from the application of the Law on Public Procurement.

> The European Commission in its Report warned that a high number of exemptions from the Law on Public Procurement poses a serious risk of corruption in public procurement. The increasing number of exemptions from the application of the Law on Public Procurement, totalling 67% (EUR 3.2 billion) of the cumulative value of public procurement contracts in 2021, and a large number of inspected irregularities in public procurement contracts found by the State Audit Institution raise very serious concerns which risk backsliding in this area. The Public Procurement Office has reported that the worth of public procurements exempted from the Law on Public Procurement was RSD 747.6 billion, pointing out that the increase in the percentage of exemptions was mostly caused by the energy crises.[29] In 2021, the State Audit Institution identified contracts worth EUR 150 million that were exempted from public procurement procedures with no valid justification, accounting for 33% of all identified irregularities.

[28] 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 organisations, and regulated by international law, regardless of whether it is contained in one or more interrelated instruments, and regardless of its name.

[29] The analysis by Public Procurement Office suggests that energy crisis and disruptions in coal production led to the need for procurement of increased quantity of coal for electricity production (exemption based on Article 16, paragraph 1, point 3), disturbances in electricity production, which resulted in the need to purchase increased amount of electricity (exemption based on Article 16, paragraph 1, point 4), while the disturbances on the gas market resulted in the need to procure a larger amount of gas (exemption based on Article 14, paragraph 1, point 3 of the Law on Public Procurement).

Lack of personnel capacities and insufficient training of personnel engaged in public procurement has been identified as the main cause for such irregularities.

02 Lack of Expertise

Procurement officials need to have sufficient knowledge and expertise in the energy sector to effectively evaluate bids and negotiate contracts. Although the Law entered into force more than two years ago, when conducting public procurement procedures, contracting authorities still make various omissions, for example when defining the subject of the public procurement or the criteria for the selection of the bidders. Lack of personnel capacities and insufficient training of personnel engaged in public procurement has been identified as the main cause for such irregularities. Adequate training and professional development programmes can enhance their capabilities and help them make informed decisions.

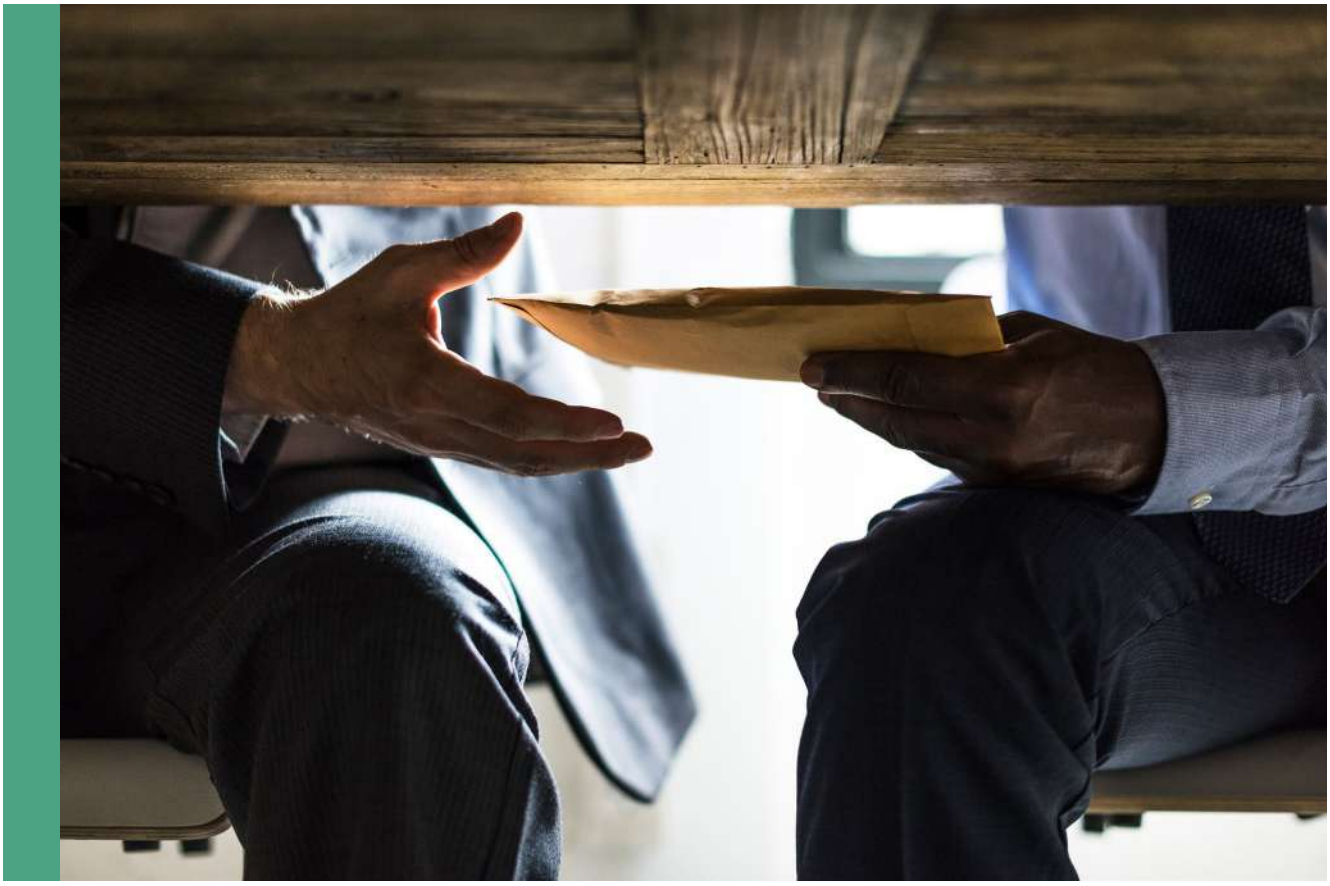
According to the Corruption perception index, Serbia has faced a significant decline in the last

5 years

03 High risk of corruption

Corruption can undermine the integrity of the procurement process, leading to unfair advantages for certain suppliers or contractors. This can be particularly harmful in the energy sector, where large infrastructure projects and significant financial transactions are involved. According to the Corruption perception index published every year by Transparency International, Serbia has faced a significant decline in the last 5 years. In 2022, Serbia had the lowest result since this index has been measured, placing it in 101st place out of a total of 180 countries included in the index. Compared to the data from 2012, Serbia has achieved a drop of twenty-one places on this list.[30] As an important instrument for implementation of the government's budget, public procurement is recognised as specifically susceptible to corruption or misuse of public finance. In September 2021 the Government of Serbia adopted the Operational Plan for the prevention of corruption in areas of special risk, which also identified public procurement as particularly sensitive to corruption. However, this plan is adopted only to bridge the period until the adoption of a new National Anti-Corruption Strategy with the Action plan, which has been delayed for full 4 years. To combat corruption, robust anti-corruption measures should be in place, including regular audits, strict enforcement of ethical standards, and protection for whistleblowers.

[30] Corruption Perception Index 2022, Transparency International: https://images.transparencycdn.org/images/Report_CPI2022_English.pdf



04 Limited Competition

A competitive procurement process is crucial to secure the best value for money and encourage innovation in the energy sector. If there are only a few companies capable of meeting the tender requirements, it reduces competition, and the government might not get the best deal. Encouraging more companies to participate and removing unnecessary barriers to entry can enhance competition and lead to better outcomes for the energy sector.

The report of the Public Procurement Office states that during 2022 average number of bidders in the procedure was

2,5

The report of the Public Procurement Office states that during 2022 the average number of bidders in the procedure was 2.5, while more than half public procurements were carried out with only one bidder. As some international studies show, limited competition increases the price of public procurement for 10-15% on average, and the Fiscal Council of Serbia has identified the problem of public procurements that exceed the market prices in Serbia's energy sector.

If the procurement process does not prioritise environmentally friendly solution

05 Insufficient Focus on Sustainability

The energy sector is moving towards sustainability and renewable energy sources. If the procurement process does not prioritise environmentally friendly solutions or energy-efficient technologies, it might hinder the country's progress in meeting its energy and climate goals. Including sustainability criteria in the procurement process can encourage the adoption of green technologies and practices.

*The data for 2022 show that the criteria has been implemented in only **0,44** of the total number of public procurements.*

06 Disregard for Social and Environmental Impact

Energy projects can have significant social and environmental impacts on local communities and ecosystems. Failing to consider these impacts during the procurement process can lead to negative consequences for affected communities and the environment. It is crucial to conduct thorough environmental and social impact assessments for major energy projects and ensure that mitigation measures are in place to address potential adverse effects. However, the social and environmental criteria are still not being implemented. The data for 2022 show that the criteria have been implemented in only 0,44 of the total number of public procurements.

The law sets a higher threshold and distinguishes between goods and services on the one hand and works on the other.

07 Higher 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 RSD 500,000.00 (approx. € 4,250.00). The new Law sets a higher threshold and distinguishes between goods and services on the one hand and works on the other. The limit for goods and services is now RSD 1,000,000.00 (approx. € 8,500.00) and for works 3,000,000.00 (approx. € 25,500.00).[31] This increases the possibility of abuse because less procurements are obliged to follow the new procedures.

[31] Article 27 of the Law on Public Procurement.

08 Greater discretion in how contracts are awarded

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

Contracting authorities can 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;
- the 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 discretionary approach, combined with poor transparency, is more open to abuse and may be expected to lead to greater arbitration of decisions. However, the practice of implementation so far shows that the price remains the main criteria, based on which 96% of the contracts have been awarded.

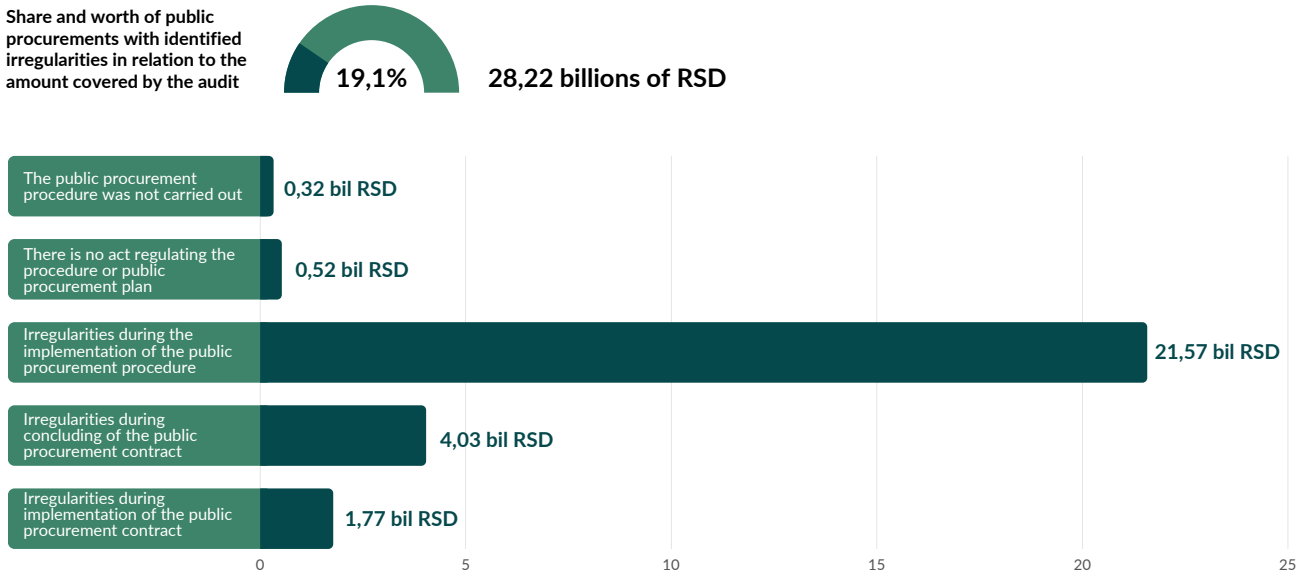
09 Abuse of negotiating procedure

Contracting authorities in Serbia often abuse this right to avoid public tender

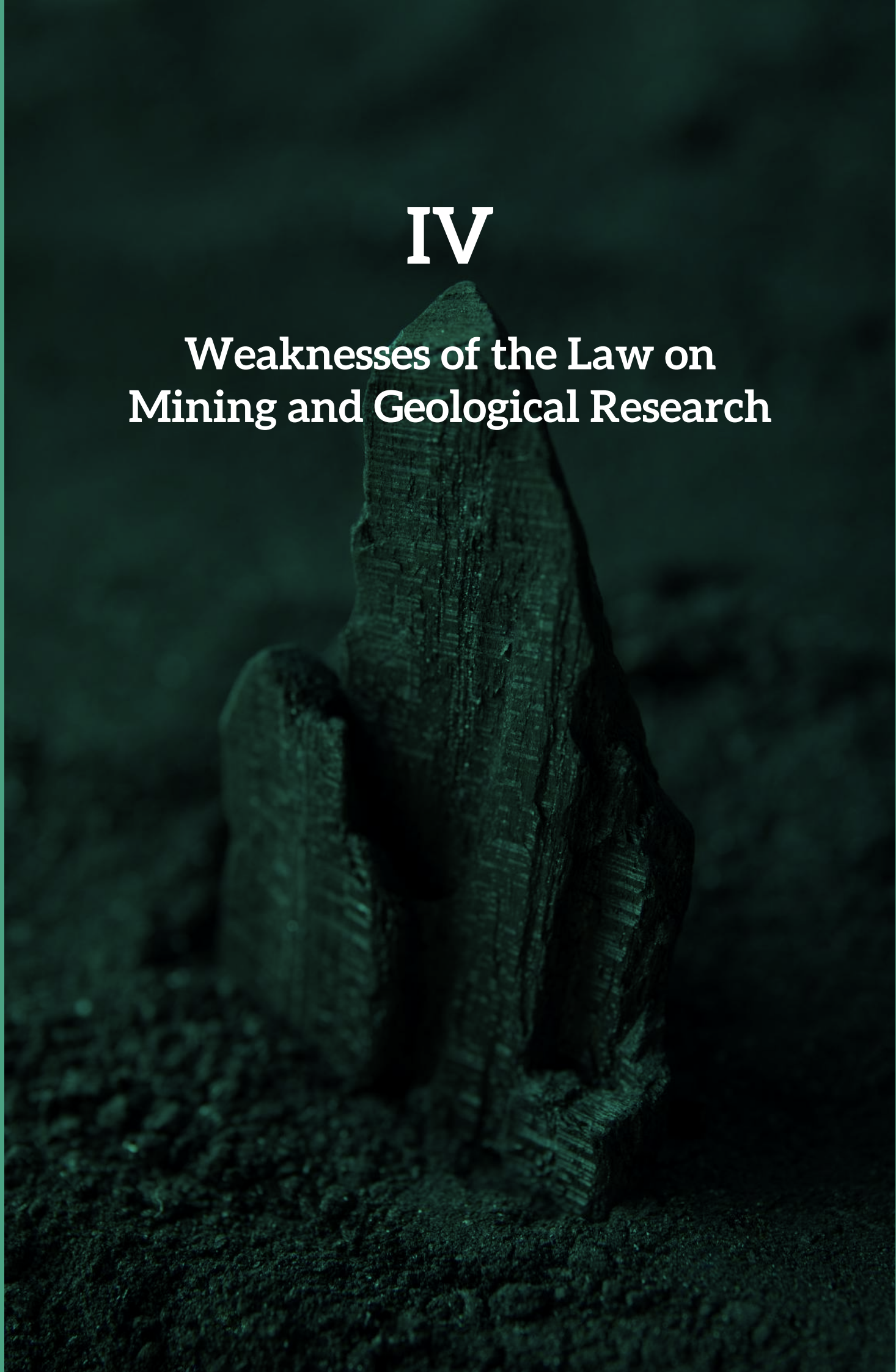
The negotiating procedure under the Law on Public Procurement allows the submission of bids without public call. [32] In practice, it is possible that in an open or restrictive procurement, a contracting authority may not receive any bids or that all bids are inadequate. It is also possible that the 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. Addressing these issues requires a commitment from the government and relevant stakeholders to implement reforms that promote transparency, competition and sustainability in the energy sector's procurement procedures. Regular monitoring and evaluation of the procurement process can help identify areas for improvement and ensure that public funds are spent efficiently and responsibly on energy infrastructure projects.

[32] Article 61 of the Law on Public Procurement.

In its yearly report for 2022, the State Audit Institution has reported that it identified 504 cases of procurement of goods, services and works, worth RSD 28.22 billion, that are in violation of the Law on Public Procurement. The identified irregularities refer to the following: the public procurement procedure was not carried out although the conditions for the exemption for the procedure prescribed by the Law on Public Procurement were not fulfilled (RSD 319.86 million); public procurements carried out without any act that closer regulates the procedure, or with no planned or allocated funds, or such documents were not published (RSD 522.5 million); irregularities during the implementation of the public procurement procedure (RSD 21,57 million); irregularities during the negotiating the contract (RSD 4.03 million); irregularities during the contract implementation (RSD 1.77 million).



Source: Annual report by State Audit Institution for 2022"



IV

Weaknesses of the Law on Mining and Geological Research

Constitution of the Republic of Serbia guarantees peaceful tenure of a person's own property and other property rights acquired by the law.[33] The right of property may be revoked or restricted only in public interest established by the law and with compensation which can not be less than market value. [34] The Constitution, furthermore, stipulates that private, cooperative and public assets shall be guaranteed and all types of assets shall have equal legal protection.[35] Therefore, the Constitution has undoubtedly set possibilities for confiscation or limitation of property rights only in public interest.

In accordance with the Law on Expropriation,[36] immovable property may be expropriated only in the public interest determined on the basis of the law, against compensation which may not be lower than the market price. The public interest for expropriation of immovable property is determined by the law or a decision of the Government rendered in conformity with the Law on Expropriation.

However, the Serbian legal framework does not only allow expropriation to the public entities, but expropriation is possible to private companies for private purposes, allowing companies to make a profit because they are exploiting the minerals which are deemed to be of public interest. Namely, according to the Law on Mining and Geological Research immovable property may be expropriated for the needs of a business entity, either in private or public ownership, which is the entity in charge of the exploration and/or in charge of exploitation of the mineral raw materials of strategic importance for the Republic of Serbia.[37] Based on the law, geological research and exploitation of mineral raw materials shall be considered as the public interest.[38] The provision of the Law on Mining and Geological Research allowing the expropriation of the land in private interest is directly opposed to provision 8 of the Law on Expropriation, and is contrary to the purpose of expropriation, which shall only be allowed in the public interest.

[33] Article 58 of the Constitution of the Republic of Serbia ("*Official Gazette of RS*" nos. 98/06 and 16/22) ("Constitution").
[34] *Ibid.*
[35] Article 86 of the Constitution.
[36] Law on Expropriation ("*Official Gazette of RS*" no. 53/95, "*Official Gazette of SRJ*", no. 16/01 and "*Official Gazette of RS*", nos. 20/09, 55/13 and 106/16).
[37] Article 4, paragraph 5 of the Law on Mining and Geological Research.
[38] Article 4, Paragraph 3 of the Law on Mining and Geological Research.

The Constitutional Court of the Republic of Serbia in 2023 issued a decision rejecting initiatives for assessing the constitutionality and legality of the provisions of the Law on Mining and Geological Research allowing expropriation for the needs of a privately owned business entity.[39] The Court declared itself non competent to assess the conformity of general legal acts of the above legal acts, i.e. Law on Mining and Geological Research and Law on Expropriation. Bearing in mind that there is no national legal remedy for such a decision of the Constitutional Court, the question is which court in the Republic of Serbia decides on such legal issues. However, the Constitutional Court specifies that the exploitation of mineral resources is an activity of public interest which is the basis for the expropriation to be carried out for the benefit of private entities which companies are in charge of the research and/or in charge of exploitation of the mineral raw materials of strategic importance for the Republic of Serbia.

When discussing the possibility of expropriation in favour of private companies in comparative legislation, it should be noted that in the Republic of Montenegro expropriation can be carried out exclusively for the needs of the state, municipality, state funds and companies majority-owned by the state, which, in accordance with the Law, perform activities of public interest.[40] In the Federation of Bosnia and Herzegovina expropriation can be carried out for the needs of the Federation, cantons, cities, municipalities, public companies, their subsidiaries in their 100% ownership and public institutions, while Law of Republic of Srpska envisages expropriation for the needs of the Republic and local governments.[41] Both laws leave the possibility to be otherwise regulated by the Law.

[39] Decision of the Constitutional Court no. I Uz -29/2021 from 25 April 2023.

[40] Article 7, Paragraph 1 of the Law on Expropriation ("*Official* Gazette of RCG", nos. 55/00, 12/02, 28/06 and "Official Gazette of CG", nos. 21/08, 30/17 and 75/18).

[41] Article 6, Paragraph 1 of the Law on Expropriation of the Federation of Bosnia and Herzegovina ("*Official Gazette of FBiH",* nos. 70/07, 36/10, 25/12, 8/15 and 34/16) and Article 6, Paragraph 1 of the Law on Expropriation of the Republic of Srpska ("*Official Gazette of RS*", nos. 112/06, 37/07, 66/08, 110/08, 106/10, 121/10, 2/15 and 79/15).

The Law on the Use of Renewable Energy Sources, which was adopted in 2021 introduced the provision similar to one in the Law of Mining and Geological Research and proclaimed that *the use of energy from renewable sources is in the public interest of the Republic of Serbia and is of particular importance for the Republic of Serbia.* [42] Having in mind risks related to the abuses of the possibility of expropriation in cases that the Law stipulates that something is deemed to be in the public interest, it seems that there is no rational justification for declaring the existence of public interest in the use of renewable energy sources, especially since the Law does not define what is to be considered as use and therefore it is not clear what shall be considered to be in public interest. This kind of regulation opens up space for abuses and violations of basic human rights, all under the pretext of public interest.

In this regard, for the needs of a business entity, either privately or publicly owned, which is in charge of the research and/or exploitation of the mineral raw materials listed as the raw materials of strategic importance for the Republic of Serbia, immovable property may be expropriated.[43] However, there is no precise definition of what exactly constitutes public interest in specific cases, excluding public participation in decision making and shifting the powers from legislative to executive power. For example, most of the extracted copper, both mineral and refined, is being exported to China, bearing in mind that the copper is declared to be a critical raw material in China, keeping it unclear what constitutes public interest in specific cases.

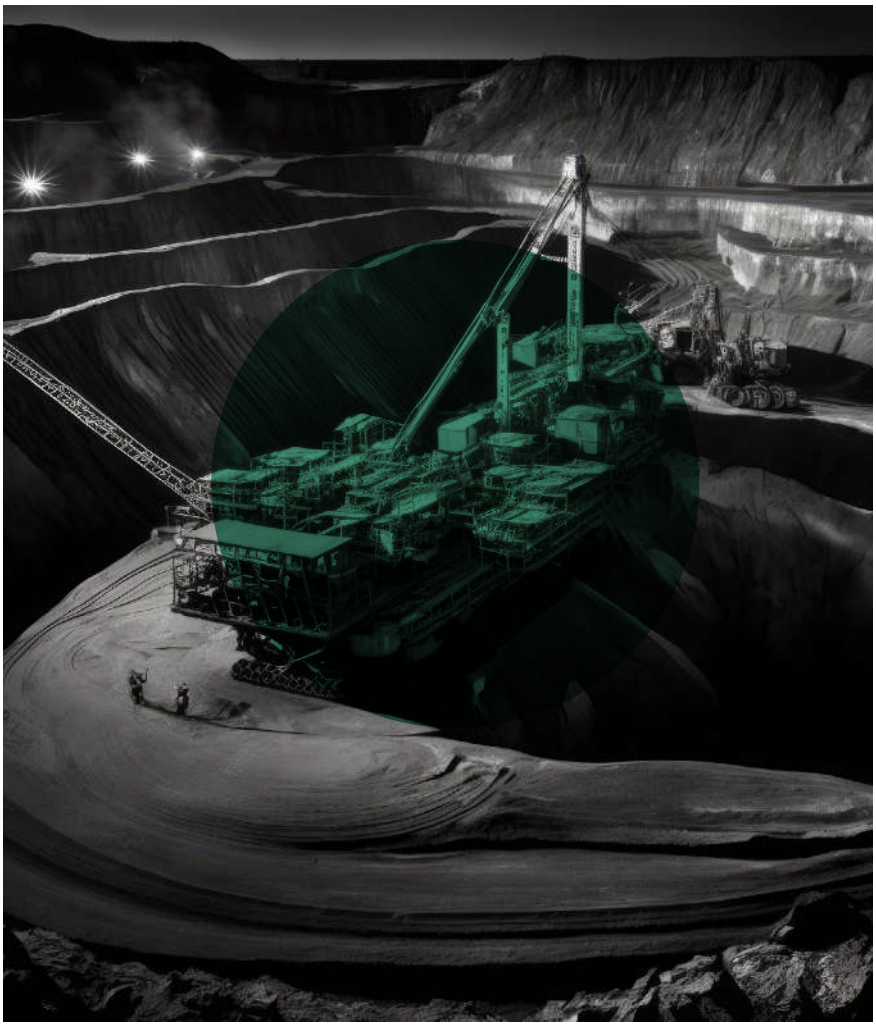
The list of mineral resources, i.e., mineral raw materials of strategic importance for the Republic of Serbia is not exhaustive, namely it includes oil and natural gas, coal, copper and gold ores, lead and zinc ores, boron and lithium ores, oil shale (oil slates i.e. shale) as well as any other mineral raw materials, as determined by a special act of the Government upon proposal by the Ministry of Mining and Energy, allowing for high discretionary powers of the Government.[44] Such an extensive legal solution leaves the possibility for the Government to issue a decision declaring the exploitation of any mineral raw material to be strategically important, and as such in the public interest of the Republic of Serbia, without justifying it.

[42] Article 2, paragraph 1 of the Law on the Use of Renewable Energy Sources *("Official Gazette of RS"* nos. 4/21 and 35/23).

[43] Article 4, Paragraph 5 of the Law on Mining and Geological Research.

[44] Article 4, Paragraph 2 (7) of the Law on Mining and Geological Research.

There is also a question of constitutionality and legality of the provision of the Law on Expropriation that allows the beneficiary of expropriation to be handed over the immovable property before the decision on compensation for expropriated immovable property [45] becomes final, i.e. before the day of conclusion of the agreement on compensation for the expropriated immovable property.[46] In accordance with the Law on Expropriation, the beneficiary of expropriation gains the right to take possession of the expropriated immovable property on the day when the decision on compensation becomes final, i.e. on the day of conclusion of the agreement on compensation for the expropriated immovable property. However, at the request of the beneficiary of expropriation, the Ministry in charge of finance may decide to hand over the possession of immovable property to the beneficiary of expropriation before the decision on compensation for expropriated immovable property becomes final, i.e. before the day of conclusion of the agreement on compensation for the expropriated immovable property, if it finds that this is necessary because of urgency to construct a certain building or to execute some works. However, in most cases there is no clear explanation as to what constitutes urgency when it comes to the example of expanding mines by private companies.



The Law on Expropriation stipulates that compensation for expropriated agricultural land and construction land is determined in money according to the market price of such land, unless otherwise prescribed by the Law. [47] Although the price determined by the tax administration office represents the lowest amount of compensation for expropriated immovable property,[48] in practice the mining companies offer a significantly lower price to immovable property owners expecting that they would be discouraged by the long lasting procedures before courts and legal uncertainty regarding the final decision.

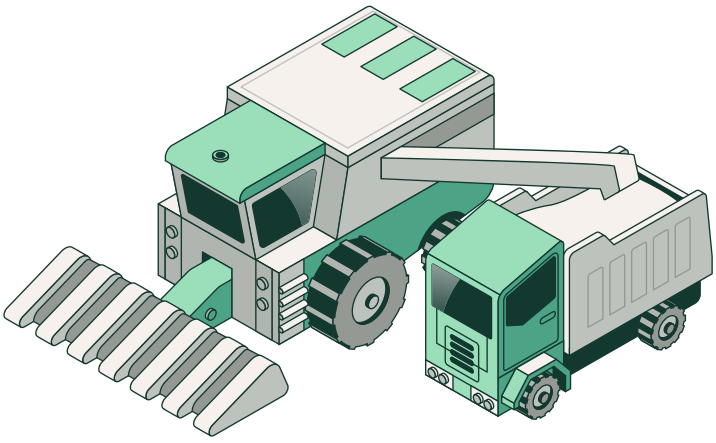
[45] Article 35 of the Law on Expropriation.

[46] Article 34 of the Law on Expropriation.

[47] Article 42 of the Law on Expropriation.

[48] Judgment Rev 781/2017 of the Supreme Court of Cassation, Judgment Rev 4540/2019 of the Supreme Court of Cassation, and Judgment Rev 4052/2019 of the Supreme Court of Cassation.

The Law on Agricultural Land introduced yet another advantage for the beneficiaries of expropriation in the form of reduction of value of the expropriated land. Namely, Law on Agricultural Land prescribes an exception from the rule that agricultural land can only be used in agricultural purposes - it can be used for the exploitation of mineral raw materials, i.e. carrying out works on the disposal of tailings, ash, slag and other dangerous and harmful substances on arable agricultural land.[49] In addition, latest amendments to the Law on Planning and Construction introduced one more exception prescribing that the compensation for expropriation is determined as compensation for agricultural land , i.e. forest and forest land, until the application for issuing a construction permit is submitted, in the event that the procedure is initiated for the purposes of constructing a linear infrastructure facility that has been determined to be of special importance for the Republic of Serbia.[50] It shall be noted that the submission of the request for the issuance of a construction permit depends solely on the decision of the beneficiary of expropriation, and the purpose of this paragraph is solely to provide the beneficiary of expropriation a legal opportunity to avoid paying the compensation in accordance with the market value for the construction land, but exclusively several times lower compensation, in accordance with the value for agricultural land.



[49] Article 23, par 1 (2) of the Law on Agricultural Land ("Official Gazette of RS" nos. 62/06, 65/08, 41/09, 112/15, 80/17 and 95/18).

[50] Article 88, paragraph 10 of the Law on Planning and Construction ("Official Gazette of RS" nos. br. 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, 52/21 and 62/23).

Photographer: Oliver Bunic/Bloomberg

Currently, the village of Krivelj (around 400 households), must be relocated to a new location due to the expansion of the Veliki Krivelj mine

Serbian mining companies, especially Serbia Zijin Mining and Serbia Zijin Copper, are heavily benefiting from the unconstitutional and unlawful provisions of the Law on Mining and Geological Research which are unfavourable to the local communities and are continuously abusing legal provisions in the proceedings of expropriation, jeopardising the full enjoyment of the right to property, right to housing, right to private and family life, as well as the right to food and nutrition of the local communities. Due to the expansion of the Zijin mines, massive population movements and multiple displacements are already taking place. Currently, the village of Krivelj (around 400 households), must be relocated to a new location due to the expansion of the Veliki Krivelj mine. According to the draft Spatial Plan of the Republic of Serbia from 2021 until 2035, the most dramatic loss of population by 2035 the most dramatic loss of population by 2035 is predicted in the Bor district where the population is expected to be reduced by almost half, signalling a massive relocation ahead.


photo: CINS

Miodrag Živković is one of the local residents from the village of Slatina, whose immovable property was confiscated and handed over to Zijin Mining company. His family was initially offered an unacceptably low price for the purchase of their immovable property. When they rejected the offer, they were expressly deprived of the land they cultivated, and their property was given to Zijin Mining.

Miodrag Živković describes that there is an atmosphere of fear in society. People accept the company's lowest offers for expropriation of their property because they are aware that their property will be confiscated anyway, and that they will not have basic existential conditions, houses in which they live, or the land they cultivate. He explains that without the land, they cannot earn from agriculture anymore, and they are not yet paid for the expropriated property. Miodrag's property was confiscated in an urgent procedure, for the purpose of disposal of flotation tailings. However, the decision of the competent authority doesn't give any reason as well as explanation for urgent confiscation of the property.

Also, it should be noted that Miodrag's property is agricultural land, but that, in accordance with the Law on Agricultural Land , his land can be permanently used for the disposal of tailings. The unfavourable provision of the Law on Agricultural Land is harmful for the owner, because the market value of agricultural land is much lower than the market value of construction land.

It is particularly worrisome that the court proceedings usually take an unreasonably long time, during which the owner is deprived of property and evicted from the family house and cultivated land. According to Miodrag Živković, "The Court proceedings for determining the compensation for their expropriated property are lasting more than two years. The end of the process is not expected in the near future".

V

Ineffective preventive measures - inspection surveillance

The aim of inspection surveillance is to achieve legal and safe operations of the supervised entities and to prevent or eliminate harmful consequences to legally guaranteed rights and interests, human life, health and environment.

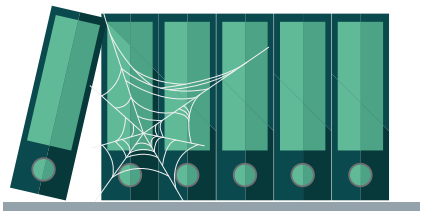
The system of inspection surveillance and organisation of inspection authorities represent one of the main elements of the rule of law and the application of preventive measures prescribed within the regulations. Efficient and effective work of inspection authorities is essential for environmental protection. However, the functioning of inspection authorities is one of the weakest elements in the environmental protection system.

Inspection surveillance authorities are of high importance for the implementation and enforcement of the environmental, urban planning and construction laws and regulations. The aim of inspection surveillance is to achieve legal and safe operations of the supervised entities and to prevent or eliminate harmful consequences to legally guaranteed rights and interests, human life, health and environment. Proper inspection surveillance prevents corruption since it can identify misuse of entrusted authorities, or breaching of the laws by investors and project developers. Preventive action, i.e., the observation of illegal actions and activities of supervised entities, is the basic mechanism of environmental protection. Therefore, it is of the utmost importance to secure adequate expertise which would provide for the proper interpretation of legal norms, reasoning and proper application of the power of discretionary assessment by inspectors, as well as professional integrity of inspectors. In the Republic of Serbia, the inspection system is regulated by the basic law (Law on Inspection Surveillance) and special laws which comprehensively prescribe and regulate the area of inspection supervision, duties and rights of inspection bodies, depending on the specific protective object and area of operation (Law on Construction and Planning, Law on the Use of Renewable

Energy Sources, Law on Mining and Geological Research, Law on Environmental Protection, Law on Air Protection, Water Law etc.).

Through its comprehensive legal practice, RERI identified that inspection often fails to conduct inspection surveillance upon request of an interested party and even when conducting inspection surveillance and determining irregularities, it avoids utilising its powers proportionally, in relation to the danger, damage or endangerment of the rights of individuals and local communities. Inspection often unlawfully declares its non competence to act in certain legal matters and rejects or fails to decide upon request of the interested party to have legal standing in the inspection surveillance procedure (have procedural rights in order to effectively monitor and participate in the procedure).

In more than half inspection surveillance procedures (13) initiated by RERI requesting from the inspection to conduct inspection surveillance over Zijin Bor Copper, inspection did not act upon the request before submission of the letters and complaints (in 6 of 13 cases inspectors did not act at all). Inspections declared themselves incompetent to act in the matter in 7 procedures, despite clear legal ground for their jurisdiction. Although the inspection determined illegalities in numerous cases, none of them initiated criminal proceedings against Zijin. In 6 of 24 proceedings inspection rejected RERI's request to be a party in the proceedings, which is of particular importance having in mind previous practice and the manner of the inspection to avoid using its powers, thus disabling monitoring of the procedure.



6 of 13

In **6 of 13** cases inspectors did not act at all

7 inspections declared themselves incompetent to act

6 of 24 proceedings inspection rejected RERI's request to be a party in the proceeding

Inspectors often abuse their discretionary powers, and fail to punish the legal entities for identified illegalities or, in cases of the commission of a criminal offence, do not file the criminal complaint before the public prosecutors. In absence of adequate response from the state, crimes against the environment go unpunished or companies and investors are sanctioned with insignificant penalties through commercial offence procedures.[51] Also, it should be noted that neither the inspectors nor the prosecutors apply the Law on Liability of Legal Entities for Criminal Offences, which is particularly important for prosecuting the criminal liability of companies in the field of environment. [52]

[51] Pursuant to Article 42 of the Law on Inspection Surveillance ("*Official Gazette of RS*" nos. 36/15, 44/18 and 95/18), if an inspector discovers an illegality punishable by law or other regulation he shall file a criminal complaint in front of the competent judicial authority (competent public prosecutor's office).

[52] Law on Liability of Legal Entities for Criminal Offences ("*Official Gazette of RS*" no. 97/08).

Case study Bor

RERI initiated inspection surveillance procedure in August 2021 requesting from the inspection within the Ministry of Construction, Transport and Infrastructure to determine whether Zijin Bor Copper commenced with construction works on the reconstruction of the old smelter, increasing its capacities from 80.000 t/year to 200.000 t/year, prior to obtaining construction permits. From the site it was clear that the company almost finalised numerous works without necessary permits and RERI shared the photos supporting its allegations. One month later the acting inspector informed RERI that there is not enough evidence submitted and that there is a need for inspection surveillance on the field. After numerous activities (submission of the urgency letter, complaint on the work of the inspector and appeal) the inspector informed RERI only in May 2022 that there is new agreement on assuming local jurisdiction and therefore he is not competent to act in this matter anymore. After continuous pressure from RERI to act in this matter, the new acting inspector informed RERI that the inspector conducted inspection surveillance only in June 2022 and that it was determined that Zijin was constructing illegally. The inspector ordered the seizure of cessation and removal of works only in October 2022. The inspector never enforced the decisions and waited for seven months for the company to finalise the works and obtain construction permit only to issue a decision on suspension of the procedure in February 2023. The inspector never initiated any criminal procedure against the company. RERI initiated criminal proceedings against both the company and inspectors.

Zijin Bor Copper commenced with construction works on the reconstruction of the old smelter, increasing its capacities from 80.000 t/year to 200.000 t/year, prior to obtaining construction permits.

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