

TRANSPARENCY AND DEFENSE IN MONTENEGRO

February 2015



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THE REPORT

**TRANSPARENCY AND DEFENSE
IN MONTENEGRO**

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The report “Transparency and Defense” encompasses a comprehensive analysis of the degree of transparency in the work of state institutions within defense sector in Montenegro. The report was prepared by a research team of the CeMI’s Department for Public Policy Research, and it represents one of the key results of the project “Raising Integrity, Transparency and Accountability in the Defense Sector” which was conducted by the Centre for Monitoring and Research in the period from December 1st, 2014 to February 28th, 2015, with financial support of the Canadian Fund through Canadian Embassy in Belgrade. This project is aimed at decreasing risks of corruption and raising integrity, accountability and transparency of state institutions within defense sector.

Transparency in the work of state institutions, the availability of information and adequate mechanisms of public control and supervision are of crucial importance for achievement higher efficiency of government bodies, and prevention of corruption. Within the report “Transparency and Defense” key concepts and categories of transparency were analyzed. Within the chapter of the general transparency of work of the defense sector, particular attention was paid to implementation of the right to free access to information, and the practice of the Ministry of Defense in this field. Within the chapter dedicated to financial transparency, the report particularly addresses the issue of transparency in the planning, execution and reporting of the defense budget, as well as the transparency of public and confidential procurement in the defense sector. Final chapter of the report is dedicated to conclusions and recommendations for improving the transparency of the work of institutions in this sector.

Creation of the report “Transparency and Defense” included a review and analysis of numerous documents and regulations related to issues of openness and transparency of the defense sector, the content analysis of the legislation, policy documents (strategies and action plans), internal rules and reports and analysis of stakeholders’ performance in the defense sector. Important contribution to research of these topics were interviews with representatives of state bodies and civil society organizations, as well as the replies from relevant institutions on the basis of the Law on Free Access to Information. The previously defined

criteria, in accordance with the developed systematic methodology for mapping and monitoring of the security sector, were used in analysis and assessment of transparency.¹

Unfortunately, in Montenegro there are not much available empirical and secondary sources, since the number of civil society organizations (NGOs, academic institutions, research centers, institutes, journalists) that explore the field of defense reform is very low. In this regard, the number of publications that deal with the issue of reform, public supervision and control of the defense sector, the question of general and financial transparency is very scarce.

1 See more in: Sonja Stojanovic, „Indeks reformisanosti sektora bezbednosti kao alatka za merenje napretka demokratizacije“, p. 241 in Group of authors „Almanac on Oversight of Security Sector in Western Balkans“, Belgrade Center for Security Policy, Belgrade, 2012

I Transparency of the Defense Sector in Montenegro

1.1 Transparency - key terms

One of the key criteria which are used to measure the “ideally reformed sector of defense and security”² according to the standards of the United Nations and regional European organizations (Organization for Security and Cooperation in Europe OSCE, Council of Europe, European Union, NATO) is transparency. Transparency of defense sector means to “respect the obligation to keep the public informed of significant circumstances and events in the defense sector.”³ Citizens have the right to request and receive any information of public importance from the defense sector, with sole exception of information with secrecy status.

The lack of transparency in the work of defense sector prevents raising confidence of citizens in the work of state institutions. In addition, implementation of defense reform only can't be effective and efficient if citizens and civil society organizations are excluded from the process. Also, state institutions are funded by taxpayers, thus they have the obligation to make their work more transparent, i.e. to make information about their work absolutely available to the general public.

If there is a political will to gain citizens' support and social legitimacy for reforms of state institutions, which are implemented within the fulfillment of international and European standards and recommendations, it is necessary to enable civil society organizations to actively participate in the democratic civil control of the reform of state institutions, as well as the defense sector. Although so-called “state-centric approach to security sector reform” (which includes focus on the reforms undertaken by state institutions solely - without the involvement of other factors, such as

- 2 The criteria are defined in accordance with the developed systematic methodology for mapping and monitoring of the security sector from the perspective of civil society organizations (CSOs). See more in: Sonja Stojanovic, „Indeks reformisanosti sektora bezbednosti kao alatka za merenje napretka demokratizacije“, p. 241 in Group of authors „Almanac on Oversight of Security Sector in Western Balkans“, Belgrade Center for Security Policy, Belgrade, 2012
- 3 Atanasovic Zorana, „Javni nadzor politike bezbednosti“, Center for Civil-Military Relations, Belgrade, p. 4

media, civil society or the economy) is very common, “comprehensive approach to the reforms” - which notes that civil society is an important pillar of good governance and that it should participate in this process - is much more important and more necessary.⁴

General and financial transparency in the work of state institutions of the defense sector, the availability of information and adequate mechanisms of public control and supervision are of crucial importance for achievement higher efficiency of government bodies, and prevention of corruption. That is why general transparency of the work in the defense sector, with emphasis on implementation of the right to free access to information, as well as the protection of confidentiality, is in the very focus of the report “Transparency and Defense”. In the chapter on financial transparency, the report specifically addresses the issue of transparency in the planning, execution and reporting of the defense budget and transparency of public procurement.

1.2 Why is transparency in defense sector important?

When it comes to transparency of state institutions, mechanisms of public oversight of defense and security sector are essential. Public oversight involves “public monitoring and evaluation of activities of armed forces and institutions that participate in politics.”⁵ Nowadays the issue of security and defense is a public good, which is why this sector should be accountable to citizens and society. The issues of security and defense need to be discussed publicly, the public should be fully informed, actively involved in discussions and enabled to estimate correctness of decisions made on all issues that are important to defense sector. That is why it is important that state institutions accept public oversight mechanism as the best way to establish and develop good and open cooperation with public, but also as a mechanism to protect defense sector from possible abuses, violations of laws and other manipulations.

4 Sonja Stojanovic, „Indeks reformisanosti sektora bezbednosti kao alatka za merenje napretka demokratizacije“, p. 241 in Group of authors, „Almanac on Oversight of Security Sector in Western Balkans“, Belgrade Center for Security Policy, Belgrade, 2012

5 Atanasovic Zorana, *Javni nadzor politike bezbednosti*, Center for Civil-Military Relations, Belgrade, p. 2

Civil society organizations (NGOs, research centers and institutes, media, trade unions, as well as the citizens themselves) have a major role in establishing and strengthening public oversight and transparency in defense sector. Their active participation in democratic control of defense sector is best indicator of transparency and accountability of state institutions. Examples of active participation of civil society in the reform of defense sector are numerous, ranging from implementation of various research and expert analysis, public debate on sensitive issues, to involvement of wider professional, academic community and public in finding best solutions, initiating adoption of appropriate legal or institutional solutions, organizing workshops and trainings for decision-makers. In this way, civil society with its mechanisms of independent and impartial monitoring exercises democratic control, enhances openness and transparency of state institutions, and “contributes to increasing the accountability of state institutions of defense and security.”⁶ In addition, civil society significantly contributes to raising awareness of general public on activities and provides appropriate feedback on public reaction to implemented policy for defense sector. Since civil society organizations often initiate adoption or discussion on specific policies, institutional arrangements, etc., the authorities should consult civil sector in creation of public policy, in order to observe values and principles protected by civil society in these matters. Also, during the implementation of policies, state actors should consult civil society in order to achieve successful implementation of the policy. Finally, the constant consultation and cooperation of state institutions within defense sector with civil society organizations is crucial for “keeping track of” attitude and mood of the electorate, which needs to be taken into account constantly, since the voters also vote for appropriate defense and security sector policy.

The significance of inclusion of the civil society in fight against corruption has been recognized by the United Nations as well, which resulted in UN Convention Against Corruption which foresees obligation of each party „take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to

6 Sonja Stojanovic, *Indeks reformisanosti sektora bezbednosti kao alatka za merenje napretka demokratizacije*, p. 241 in: “Almanac on Oversight of Security Sector in Western Balkans”, Belgrade Center for Security Policy, Belgrade, 2012

raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.⁷ The same article foresees the following measures that can contribute raising level of civil society participation in fight against corruption: a. enhancing the transparency of and promoting the contribution of the public to decision-making processes; b. ensuring that the public has effective access to information; c. undertaking public information activities that contribute to zero-tolerance of corruption, as well as public education programs, including school and university curricula; d. respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption.

In order to achieve productive performance of non-governmental organizations in this field, it is necessary to make work of relevant state institutions available to the public and to provide adequate human and material resources, as well as expertise and training for members of civil society. When it comes to Montenegro, it cannot yet be said that the civil society takes part in the process, or that the political will for it exists, even though significant step forward is visible in the field of inclusion of civil sector, NGOs, media and especially academic community. It is, however, true that nature of the defense and security sector made it less open for public surveillance and control in the most developed democratic societies as well, leaving state institutions with a monopoly over decision making and policy formulation. Nevertheless, Montenegro and other Western Balkans countries are specific due to their post-socialist tradition and post-conflict heritage⁸, which have contributed to addressing defense and security issues from a collective and ethno-nationalistic perspective.⁹ In post-socialist societies, data on jurisdiction of different security actors, their powers, control and budget are unavailable to the public, which impedes national oversight of defense and security and makes trust-building in state institutions hardly possible.¹⁰

Unfortunately, Montenegro does not have tradition of citizens' participation in control and monitoring over security and defense policies. Up to beginning

7 United Nations Convention against Corruption, United Nations Office on drugs and crime.

8 Despite such heritage, it is interesting that military institution in Montenegro, but in other regional and European countries as well, has very high level of citizens' trust.

9 Sonja Stojanović, *Indeks reformisanosti sektora bezbednosti kao alatka za merenje napretka demokratizacije*, page 264. in: „Almanac on Oversight of Security Sector in Western Balkans“, Center for Security Policy, Belgrade, 2012, page 264

10 *Ibid*, page 264.

of XXI century, the cooperation of authorities and organizations of civil society was negligible. All issues, related to defense and security, were dealt with on the level of institutions of executive branch of power, without adequate mechanisms of internal and external control, without any mentioning of civil society participation. The situation is hardly better today. Namely, despite significant interest of institutions from the defense and security sector to initiate a more comprehensive cooperation with civil society, the problem lays in the fact that very few civil society organizations deal with reform of the defense sector. This issue is mostly subject to activism of NGOs that deal with advocacy, research and public policies proposals, but their number is very low in Montenegro (most of them are engaged in education and informing citizens about Montenegro's membership in NATO, but not in advocacy and policy proposals). Furthermore, the interest of the state to initiate cooperation in this field with greater number of organizations is still limited, which is proven by rare examples of consultations or inclusion of civil society during formulation of public policies, creation of strategic documents or public policy implementation.¹¹ On the other hand, there are no institutional, precise and sustainable mechanisms for providing higher level of participation of civil society in defense and security sector policies. Therefore, we can conclude that little attention is paid on development of civil society and its capacities to be unbiased and independent controller of state institutions, and to initiate strengthening of accountability of the authorities.

In this context, it is very important to dedicate more attention to definition of efficient mechanisms for strengthening capacities of civil society organizations in Montenegro, in order to make it able to exercise democratic control and oversight of defense sector institutions' work and in that manner, to contribute to raising its accountability, transparency and openness to all citizens. Nevertheless, the fact that, the Plan of Integrity for Ministry of Defense and Army of Montenegro for period from 2014 to 2016 envisages development cooperation of those institutions with civil sector and the media, is very encouraging.

11 In practice, examples of invitation of civil society members to participate in creation of strategic documents or public policies were very rare. CeMI's members were invited on several occasions after a document had already been created, in order to be present at its presentation to NGOs, prior to publishing. In such cases, activism of civil society organizations was not possible, for it would not have any results (case of presentation of Strategic Overview of the Defense).

2.1 Implementation of the Right to Free Access to Information in the Defense Sector

In Montenegro, the new Law on Free Access to Information¹² is being implemented since 17 January 2013 (adopted on 26 July 2012) and is a very important mechanism for civic control of governance. Although it has brought many improvements in comparison to the previous law, this Law also contains shortcomings which CeMI pointed out in a number of reports on the implementation of anti-corruption policies in Montenegro.¹³

One of the problems is related to limitation of information access which is stipulated with this Law: Namely, right to access to the information can be limited in the **interests of security, defense, foreign affairs, monetary and economic policy of Montenegro**. During the preparation of the Law on Free Access to Information and the Data Secrecy Act, many experts pointed out that “the harm to economic interests” is not valid reason enough for restricting access to the information. However, these recommendations were refused by the proponents of the legislation. The Law specifically states situations in which state entities have the right to limit access to information, and defines the duration of the limit and the test of harmfulness of providing information. Namely, deviations in the right to access to information should be clearly defined so that public and private interests are protected as well as privacy. Such legal solutions allow government entity to consider which interest prevails, which does ensure objectively assessment of the public interest.

The principle of the urgency is omitted while the deadline for response upon request has been extended from 8 to 15 days. Such a solution can be understandable in the case when the information to be submitted

12 Law on Free Access to Information (“Official Gazette of Montenegro, No. 44/2012” from 9.8.2012.) taken from the website of Official Gazette <http://www.sluzbenilist.me/PravniAktDetalji.aspx?tag=%7B4E05F2A9-6EF6-43F9-B168-396AF8619892%7D>

13 “Analysis of the effects of anti-corruption policies in Montenegro and proposals for their improvement”, 2011/2012; 2012/2013; 2013/2014

is extensive or comprehensive, but it does not help the applicant of the request in cases when the applicant needs the information urgently

When it comes to the proactive disclosure of information, the Ministry of Defense and the Army are publishing annual reports and annual work plans on their websites, but these data are not regularly updated (Last published annual work plan for the Ministry of Defense dates from 2013, and the last report on the situation in the Army dates from 2012)¹⁴.

Proactive disclosure of financial data - As we will explain in following chapter, according to the Article 7 of the Defense Strategy of Montenegro, Ministry of Defense makes a request for budget funds for each year on the basis of needs assessment and guidelines issued by the Ministry of Finance. According to available reports of the relevant institutions, the Ministry of Defense, in legal deadlines, regularly prepares and submits financial plan. However, it is not publicly available on the website of the Ministry. Reports contain very scarce data on expenditure of Ministry and the Army and the manner in which the funds were spent.

Proactive disclosure of information in the field of procurement - In addition to a large number of published contracts that Ministry of Defense concluded, on the website of the Ministry of Defense there is also a link to the Public Procurement Portal that contains all data related to public procurement. However, access to data from portal is granted only to companies that are registered as bidders or institutions carrying out public procurement. As we have already mentioned in the previous section the Law on Public Procurement identifies public and confidential procurements.¹⁵ Public procurement is carried out in accordance with the Law on Public Procurement and is subject to institutional and public control. On the other hand, confidential procurements are exempt from the application of the law, and thus from public and institutional control. However, it is interesting that in 2013, The Ministry of Defense has amended three times the Procurement Plan, previously approved by the Ministry of Finance. Performing frequent changes of the Public Procurement Plan, as well as major differences in the planned and realized budget for procurement, indicate that there is an inadequate planning of process of public procurement.

14 Ministry of Defense website

15 *Ibid*, Article 3, paragraph 5

Proactive publishing of data related to employment, recruiting, rewarding - Public announcements for training, peacekeeping, employment are available on the website of the Ministry of Defense, however, list of candidates and the composition of the committees that decide on the candidates, are not available to the public.

Reviewing the website of the Ministry of Defense, we made a tabular display of proactive disclosure of information in accordance with the Law on Free Access to Information:

Information that must be published in accordance with the Law on Free Access to Information	<i>Availability on the website of the Ministry of Defense</i>	Updated
Guideline for information access	<i>Available</i>	<u>It is not in the place envisaged for the guideline</u>
Public registers and public records	<i>Not available</i>	
Programs and work plans	<i>Available</i>	<u>No</u>
Reports and other documents on work and condition in the areas under the jurisdiction of Ministry of Defense	<i>Available</i>	<u>Yes</u>
Drafts, propositions and final texts of strategic documents and plans and programs for their implementation	<i>Available</i>	<u>No</u>
Drafts, law proposals and other acts proposals and expert opinions regarding these regulations	<i>Available</i>	<u>No</u>

Individual acts and contracts on allocation of financial resources from public funds and state property	<i>Not available</i>	<u>No</u>
List of state officials with their ranks	<i>Not available</i>	<u>No</u>
List of public officials and lists with calculations of their earnings and other incomes related to performance of public decisions and other individual acts important for rights, obligations and interests of third parties	<i>Available</i>	<u>Yes</u>
Information to which access has been approved in accordance with the request	<i>Not available</i>	<u>No</u>

In the previous two years, a total of four decisions have been made by Agency for the Protection of Personal Data and the Free Access to Information related to the Ministry of Defense. All applications have been submitted by MANS, and were based on non-compliance with the Law on Free Access to Information by the Ministry of Defense.

Complaints were related to the withholding of information on¹⁶:

- Expenditures of the Ministry of Defense from January to October 2013
- Expenditures of the Ministry of Defense in the period from 01.11. 2013 to 31.12. 2013
- Financial statements of the Ministry of Defense in October, November and December 2012; January and February 2013
- Financial report for the Naval, Technical and Repair Institute “Sava Kovacevic” in October, November and December 2012.

¹⁶ Decisions of the Agency for Free Access to Information: 1230/13, 15.05.2013 .; 1908/13, 18.06.2013 .; 226 / 14,17.01.2014 .; 2755/14, 09.04.2014.

All complaints were adopted and sent back to the Ministry of Defense to a repeated procedure.

The Ministry received 30 requests for access to information in 2013, and in 2014 there were 109 requests. Of 109 requests received, in 44 cases access to information was approved, and in 23 cases it was rejected. There were no requests for access to classified information, while the level of confidentiality “INTERNAL” was removed from the annual work program of the Ministry of Defense in 2011 and 2012, as well as PARP for the period 2008-2013. There are ongoing activities within Ministry regarding declassification of 291,062 documents from the period 1962-2006, as well as documents on the work during the period November 2006 - January 2010.¹⁷

2.2 Protection of the classified information

Information Secrecy Act (“Official Gazette of the Republic of Montenegro” No. 14/13) prescribes a unique system for classification of data, access to classified data, storage, usage, and protection of classified information. This matter is precisely defined by the following acts: Regulation on the Manner and Procedure Data Confidentiality Labeling, the Regulation on Detailed Conditions and Manner of Implementation of Measures of protection of Classified Information, the Regulation on Special Measures for the Protection of Classified Information Important to National Defense, Regulation on the Exercise and Content of Internal Control over the Implementation Of Measures of Protection of Classified Information, the Regulation on Conditions and the Manner of Implementation of IT Measures for the Protection of Classified Information, the Regulation on Records of Classified Data and the Rulebook on the Content and Form of License for Access to Classified Data. All by-laws were adopted prior to the recent changes of the Law. The Law does not define a detailed list of categories of information which determines the level of confidentiality. Law designed the Government to conduct that task, through by-laws, but it still was not done.

¹⁷ The Ministry of Defense Response to Request for free access to Information no. 813-369 / 15, Podgorica 19.02.2014.

Classified data are marked with levels of confidentiality “INTERNAL”, “CONFIDENTIAL” “SECRET” and “TOP SECRET”. Each of these levels of confidentiality has certain duration of confidentiality (internal - 2 years, confidential - 5 years, secret - 15 years and top secret - 30 years). Revising the level of confidentiality is performed annually for data marked as INTERNAL and on each three years for documents marked with all other levels of confidentiality. The recommendation of the Venice Commission to shorten the duration of the secrecy status, were rejected. In the provisions regulating extension of the expiration of secrecy, the Act does not clearly define the criteria for extension of the period of secrecy, and the person authorized to determine the level of confidentiality is given the opportunity to extend the period of secrecy for the “reasons concerning security”¹⁸, for the same period of time that is prescribed for the first time. It is not defined how many times the period of secrecy can be extended. The recommendation of the OSCE that persons who determine the level of confidentiality should not decide on the extension of this period has been ignored.¹⁹

Especially important for anti-corruption policies is Article 4 of the Law on the Protection of Classified Information, which stipulates: “Data protection cannot be determined in order to conceal a crime, threats to the environment, restricting competition, exceeding or abuse of authority, illegal acts and conduct or administrative error of organs.” However, the way this Article is formulated allows protection for information that point to a criminal offense and listed abuse, if the data are not protected **only for reasons** of concealment of these crimes, but for the reasons stated in this Act. In favor of this interpretation of the Act, the refusal of recommendation of the Venice Commission to introduce a provision in the law that would protect from liability persons who don’t label secret information which conceal corruption.²⁰

18 Law on Data Confidentiality (“Off. Gazette of Montenegro” No. 14/13), Article 19a

19 Report of the public debate on the representation of the Law on Data Confidentiality

20 Report of the public debate on the representation of the Law on Data Confidentiality

3.1 Transparency of budget planning, implementation and reporting

The existence of a transparent budget implies that public funds are distributed in advance with clearly defined purpose, and that they will be spent responsibly, and that institutions that supervise, will be promptly and fully informed about this. Similarly as in the case of a general, and in the case of financial transparency, it is very important that the public has the ability to monitor and control. Adequate access to data and information on the financial activities of the actors in the defense sector will lead to increased government control, which enhances transparency and accountability of state institutions to citizens. "Poor planning, separation of process formulation policy from the budgeting process and poor expenditure control undermine the effect of the good actions in the sector of defense and security."²¹

The Defense Strategy of Montenegro²² states that the financial transparency of the defense sector is achieved "in the procedure of proposing, preparation and adoption of the budget, by indicating the objectives, programs and tasks which require adequate financial resources, as well as in the process of executing and reporting on completed expenditures in purposes for which these funds were assigned."

Pursuant to the Article 36 of the Law on Defense²³, the Ministry of Defense defines planning, programming, budgeting and implementation of the budget. Resources for financing the defense are provided in the budget of Montenegro, according to the Article 57 of the Law on Defense. In 2013, Ministry of Defense was approved 35.954.804,39€ from the state budget.

21 More on key findings and mechanisms of financial transparency can be found at : <http://reforma.bezbednost.org/>

22 Strategy of Defense in Montenegro (Official Gazette of Montenegro, No. 79/08 of 23.12.2008)

23 Law on Defense (Off. Gazette RCG, No. . 47/07 of 07.08.2007, Official Gazette of Montenegro, No. 86/09 of 25.12.2009, 88/09 of 31.12.2009, 25/10 of 05.05.2010, 40/11 of 08.08.2011, 14/12 of 07.03.2012)

This amount forms 1.09% of the estimated GDP in 2013 and it is on the level of funds incurred in the previous year.²⁴ All financial resources had been spent according to the planned activities and approved amounts of financial resources, as stated in Report on Ministry of Defense.

When it comes to budget planning, according to the Law on Budget, all budget users have obligation to prepare estimation of their expenditures and the so-called financial plan – which contains detailed description of all expenditures planned to be incurred in the following year.²⁵ Pursuant to the Article 7 of the Strategy of Defense in Montenegro, the Ministry of Defense formulates request for budgetary resources based on the annual needs assessment, and on directives given by the the Ministry of Finance. Available reports of relevant authorities are showing that the Ministry regularly creates and submits financial plan, within timeframe suggested by the Law. However, the financial plan is not available on the web page of the Ministry of Defense.

In the field of implementation of the budget, the Parliament has very significant powers and possibilities to monitor and supervise use of budgetary resources, in order to make it rational, efficient and in line with the plan. According to provisions of the Strategy of Defense, control over use of financial resources for defense is conducted by the Parliament of Montenegro and other relevant institutions according with laws and the Constitution. Therefore, parliamentary control of the defense sector is, to a great extent dedicated to control of its budget and spending of particular resources. It should be emphasized here that the Law on Parliamentary Oversight of Security and Defense Sector significantly expanded powers of the Committee for Security and Defense and strengthened its independency. Prior to adoption of this Law, the functioning of the Committee was regulated by Rulebook of the Parliament of Montenegro. According to the Law on Parliamentary Oversight of Security and Defense Sector, the Committee provides opinion and suggestions in process of creation of draft Law on Budget, in part that refers to security and defense.²⁶ Moreover,

24 Report on work and situation in administrative areas under jurisdiction of Ministry of Defense for 2013, Podgorica, 2014

25 The Defense and Security Committee often criticised Ministry of Defense (2009) because „proposal on Law on Budget should comprise a more detailed analysis, so that MPs could have better insight into expenses“.

26 Law on Parliamentary Oversight of Security and Defense Sector (Official Gazette of Montenegro, No. 80/10 of 31.12.2010), article 7, par. 12.

it has authority to consider information on budget implementation²⁷, annually or more often if necessary.²⁸ Annual reports on performance of the Ministry of Defense and Army of Montenegro are also subject to Committee's consideration, as are reports of the State Audit Institution on finances of the Ministry and Army of Montenegro²⁹. These powers strengthen accountability of the state institutions in the defense sector. According to the Annual Report about work of Committee for Security and Defense, during the 2013, the Committee revised Proposal of Law on Final Account of Budget of Montenegro, Report on Audit of the Final Account of Budget for 2012, part that refers to Ministry of Defense, and Draft Law on Budget of Montenegro for 2014, also part that refers to the sectors of security and defense.

Even though the Committee for Security and Defense was provided with significant powers by Law on Parliamentary Oversight of Security and Defense Sector, its performance is often subject to criticism of structures that monitor its work.³⁰ It is often considered that members of the Committee, especially those coming from the ruling parties, do not exercise their powers entirely and let partisan interests govern their work, which leads to limited use of Committee's authorities.³¹ For example, the key obstacle to higher level of financial transparency of the budget is that the Committee does not inform the public on whether the Ministry of Defense uses its budgetary resources appropriately. Even though Annual Reports on Committee's work are available online, along with minutes from meetings - they do not contain such information. Thus, it is necessary to further strengthen authorities of the Committee in order to make it

27 According to its legal powers, The Defense and Security Committee defined obligation to consider information on implementation of budget for 2012 in the defense sector, as well as SAI report on their financial affairs, within its Plan of Parliamentary Oversight for 2013. More can be found in: Plan of Parliamentary Oversight for 2013, The Defense and Security Committee, available at web page of the Parliament of Montenegro: http://www.skupstina.me/~skupcpg/skupstina//cms/site_data/Plan%20rada%202013g,%20FINAL%281%29.pdf

28 Law on Parliamentary Oversight of Security and Defense Sector (Official Gazette of Montenegro, No. 80/10 of 31.12.2010), article 7, par. 9.

29 *Ibid*, article 7, par. 3 and par. 11.

30 The good recent practice is that work of the Committee has continuously been followed by NGOs and the media over the past few years.

31 Up to 2011, the Committee did not exercise control over budget planning and expenditures of institutions in the field of security. More can be found in: Almanac on Security Sector Oversight in the Western Balkans“, Belgrade Center for Security Policy, Belgrade, 2012, page 167.

able not only to have insight into report of particular institutions, but also to estimate, question and investigate financial affairs.

The role of the State Audit Institution is particularly important for the issue of financial transparency of the defense sector. SAI conducts its Constitution-provided powers to control use of state budget. According to the Law on State Audit Institution³², SAI's work is aimed at getting information on administering budget and lawful performance of users of budgetary resources. As part of its activities, SAI estimates whether amounts from the final account of the budget match those previously determined and if revenues, expenditures and property were controlled and properly documented in accordance with legislation and general standards. The SAI also detects cases where lack of compliance with laws and regulations on budgetary and economic affairs of the state were noted. That way, Law on State Audit Institution creates necessary preconditions for efficient external supervision over financial management in the defense sector, at the same time making all SAI report public and available on its web page.

The general impression is that Montenegro has improved financial transparency in the defense sector significantly over the past few years, given the adequate legal framework and mechanisms of surveillance and control. However, in spite of increased financial transparency in the defense sector, procedures of planning, implementation and reporting on budget are still far from public control and surveillance. That is why it is recommended to introduce international standards which would make budgeting process closer to citizens (i.e. introduction of so called Budget of the citizens).

3.2 Transparency of the Public Procurement

Very often opposition MPs, the media, NGOs and international organizations perceive public procurement as “places of systematic corruption”³³, not only in Montenegro, but in other countries in Western Balkans as well.

32 Law on State Audit Institution (Official Gazette of Montenegro No. 28/04 of 29.04.2004)

33 Pejovic Danilo, *Nabavke u sektoru bezbednosti*, Belgrade Center for Security Policy, Belgrade, 2012, page 6.

Reasons for that are usually found in inadequate legal and institutional framework³⁴, shortcomings during planning and collecting of tender documentation, as well as “overpayment of services, goods and work due to inappropriate objects of procurement which cannot achieve their purpose, choice of inappropriate bidder, etc.”³⁵

Law on Public Procurement³⁶ determines conditions and procedure of procurement of goods, services and concession, protection of rights in public procurement procedures, as well as other issues that might be important for public procurement. This law applies to state institutions, local administration, public services, companies, legal persons, private entrepreneurs and individuals which are financed by over 50% of funds from budget of Montenegro. However, procurement of weapons, ammunition and other items necessary for defense of Montenegro are exempt from application of this Law.³⁷

Principle of public procurement transparency³⁸ is the most important principle that comprises other principles of public procurement, such as principle of efficiency of use of public funds, competitiveness and equality of bidders, etc. Adequate level of transparency of public procurement procedure leads to higher level of competitiveness, lower prices, better conditions, control over contract conclusion and getting best value for the money. Principle of transparency of public procurement procedure is achieved through publishing of the public procurement plan, call for public competition, decision on qualification of the candidate, decision on choice of the most economical offer, decision on cancellation of public procurement procedure, decision on annulment of public procurement procedure, public procurement contract, additions to the original plan, call, decision and contract. According to the Law, all participants

34 Legal framework in the field of public procurement is consisted of: Law on Public Procurement (adopted on 29th of July 2011, entered into force on 01.01.2012); Rulebook on methodology for displaying sub-criteria in appropriate score, estimation procedure and bids comparison; Rulebook on patterns in public procurement; Rulebook on administration and content of registry of anti-corruption rules' breaches; Rulebook on registry of public procurement; Rulebook on content and manner of public procurement electronic procedures; Rulebook on programme and manner of taking expert exam for work in the public procurement affairs.

35 Pejovic Danilo, Nabavke u sektoru bezbednosti, Belgrade Center for Security Policy, Belgrade, 2012, page 6.

36 Law on Public Procurement (Official Gazette of Montenegro No. 42/11 of 15.08.2011)

37 *Ibid*, article 3, par. 6.

38 *Ibid*, article 7.

in public procurement procedure are obliged to take up efficient and effective measures that prevent corruption, abuse of office, conclusion of agreements for the purpose of deceiving a third party, giving false information during submission of the offer, conflict of interests, lack of independency and transparency in public procurement procedure, which leads to improvement of standards of transparency, efficient system of internal audit, open public competition and setting objective criteria for choice and decision making. However, financial transparency of the defense sector is limited by the fact that procurement of arms, ammunition and other items necessary for defense system of Montenegro are exempt from application of Law on Public Procurement.³⁹

Procurement procedures in the defense sector have several crucial characteristics. The Law on Public Procurement differentiates between public and confidential procurement.⁴⁰ Public procurement procedures are carried out in accordance with the Law on Public Procurement and are subject to institutional and public control. On the other hand, confidential procurement are exempt from application of the above law and, thus, from public and institutional control. This type of legal regulation disables any insight of the public into the procurement procedure. But, „the rule is to interpret exceptions of application of the Law on Public Procurement very restrictively, so the purchaser is obliged to address Commission for Control of Public Procurement Procedures if and when s/he considers some procurement should be exempt from application of the Law, with request for defining legal grounds.“⁴¹ How does it happen in practice? Creators of the Law on Public Procurement considered that all cases exempted from application of the Law, were in accordance with legal regulations and practice of the European Union (Directive 2004/18).

They explained it in the following way:

1. Law on Public Procurement does not apply to procedures of procurement of weapons, ammunition and other items necessary for defense and security of Montenegro, which are declared confidential and whose implementation is monitored with special security measures. This exception is known to all EU member countries and was established with purpose of securing

39 *Ibid*, article 3, par. 6.

40 *Ibid*, article 3, par. 5

41 Radović Katarina, Krkeljić Ivan, Zakon o javnim nabavkama sa komentarom, Public Procurement Directorate and Commission for Control of Public Procurement Procedures, Podgorica, 2008

confidentiality of procurement important for security and defense of the country. In this case, it refers only to procurement of weapons, ammunition and other items significant for defense and security of Montenegro, which means that it applies only to the defense sector which functions according to special defense regulations. These procurements were declared confidential (secret) according to the above Law and are conducted with special security measures and regulations.

When it comes to public procurement procedures with regard to the EU legislation in the field of defense, the specific character of the defense sector has been recognized since the establishing of the European Community through exemption system set up by Article 296 of the Treaty established the European Community. The directive 2004/18 states that rules of public procurement of the EC refer to contracts awarded in the defense sector, in compliance with the exemption system defined in Article 296 of the Treaty Establishing European Community. Pursuant to this article, each member state can take up measures it finds necessary for protection of crucial interests of its security, which are related to production or trade of weapons, ammunition and war materials..." The article also states that such measures should not negatively affect competition on the single market, when it comes to products that do not have only military purposes". This formulation defines clear distinction between products with pure military purposes and those which are not military in their nature, but have double purposes (i.e. computers, food, medicines – which can be used for both civil and defense purposes).⁴²

2. Law on Public Procurement is not applicable to procurements conducted on the basis of international agreements or contracts between Montenegro and one or more states or international organizations. Such procurements refer to posting and deploying of armed forces. In this case, the grounds for exemption is an international agreement, which foresees joint implementation and exploitation of the project – participation of at least two states or Montenegro and international organizations, that have previously concluded such agreement.⁴³

42 *Ibid*

43 *Ibid*

Having been exempt of application of the Law on Public Procurement, confidential procurements in the defense sector are regulated by the Regulation on Foreign Trade with Items for Special Purposes.⁴⁴ Namely, the Regulation precisely defines foreign trade with items for special purposes, for the needs of authorities, and prescribes manner and procedure for procurement and deprivation of such means. According to the Regulation, contracts about public procurement of weapons, military and police equipment, as well as military and police materials listed in the Decision on National Armament and Military Equipment Control List and Decision on National Control List of Goods with Double Purpose, are concluded in accordance with this Regulations, instead of Law on Public Procurement, should the beneficiary find it necessary. Adoption of this Regulation cancelled the previous Regulation on Confidential Procurement of Items and Services with Special Significance for the Defense, which used to regulate this field.⁴⁵ The previous Regulation also foreseen application of special measures in procurement procedures in the defense sector. However, the current Regulation was adopted on the basis of Law on Public Procurement from 2007, and has not been harmonized with the Law on Public Procurement adopted in 2011.

Thus, procurement of „special technical equipment, armament and items used for needs of security and defense“ do not have to comply with the principle of obligatory public announcement, according to the above mentioned legal provisions. These regulations disable any public insight into the procurement procedures in the field of defense. Therefore, we should bear in mind that „prevention of any public or institutional control, leads to significant risk of procurement of inadequate item and that choice of inappropriate bidder might cause not just loss of time and money, but increased security risks and even loss of human lifes.“⁴⁶ Key problem lies in the fact that Regulation on Foreign Trade of Items for Specific Purposes, as only document which regulates confidential procurement in defense sector, does not clearly prescribe what can be classified as confidential procurement. Law on Public Procurement, in Article 3 stipulates that, but on the other hand, Regulation on Foreign

44 Regulation on Foreign Trade with Items for Special Purposes (Official Gazette of Montenegro, No. 66/10 of 19.11.2010)

45 Regulation of Confidential Procurement of Items and Services with Special Significance for the Defense (Official Gazette of Montenegro, No. 26/08 of 20.03.2008)

46 Pejovic Danilo, *Nabavke u sektoru bezbednosti*, Belgrade Center for Security Policy, Belgrade, 2012

Trade Items for Specific Purposes is not compatible with current Law on Public Procurement. There are significant opportunities for abuse of public procurement funds, which are not in category of confidential procurement but are falsely claimed to be of such a nature, to appear. In addition, the funds allocated for confidential procurements are not negligible. Total value of Plan of confidential procurement in 2013 amounted € 4,617,630.00, and total value of public procurement amounted € 3,643,850.00. In accordance with the Regulation on Foreign Trade Items for Special Purposes,⁴⁷ total contracted value of confidential procurement, in 2013, amounted € 1,288,228.1 €. Funding for implementation of these procurements was provided from budget of the Ministry of Defense for 2013 and revenues from the sale of arms and military equipment in 2013.⁴⁸

The EU Directive 2004/18 sets out rules on public procurement in defense sector, which involve confidentiality of procurement in this area, as many candidates and members of the European Union took over as their national legal solutions. However, this does not mean that legislative solutions that Montenegro has in this area are complied with European and international standards of confidential procurement. Namely, Directive 2009/81/EC, which regulates allocation of individual contracts in the fields of defense and security, is not fully implemented within existing legislative framework of Montenegro.⁴⁹ In Report of the European Commission on the Progress of Montenegro for 2013,⁵⁰ it is stated that Montenegro is still at an early stage when it comes to the harmonization of national legislation with the EU acquis in the field of the public procurement in defense sector, which was the main reason why the European Union has insisted to dedicate special attention to the process of harmonization of Montenegrin legislation with the EU

47 Statute about Foreign Trade Items for Special Purposes (“Official Gazette of Montenegro”, No. 66/10 from 19.11.2010.)

48 Report on work and situation in administrative areas within jurisdiction of the Ministry of Defense in 2013, Podgorica, 2014, p. 42

49 Annual report about Public Procurement in Montenegro in 2013, Public Procurement Administration, available at <http://www.ujn.gov.me/2014/06/godisnji-izvjestaj-o-javnim-nabavkama-u-crnoj-gori-za-2013-godinu>.

50 Progress Report for Montenegro, which accompanies the Communication of Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, ““Enlargement Strategy and Main Challenges 2013-2014”, Chapter 5 - Public Procurement.

acquis in this area.⁵¹ In last Progress Report for Montenegro for 2014⁵² it is stated that there has been “limited” progress in the area of public procurement, and that is necessary to continue with efforts directed towards the harmonization of national legislation with the European Union acquis in the field of defense. In the report it is added that existing legal provisions, concerning public procurement in defense sector, should be harmonized with EU regulations or European Commission Directive 2009/81/EC⁵³, which regulates assignment of certain contracts in the fields of defense and security.

Law on Amendments to the Law on Public Procurement, whose adoption was scheduled for the fourth quarter of 2013, was adopted in December 2014. Amendments to the Law on Public Procurement were partly adopted with Program of the Government of Montenegro for 2013 with aim of improving certain normative solutions when it comes to the procurement of defense and full incorporation of Directive 2009/81, which governs the assignment of contracts in the field of defense and security. Thus, Article 61 of Law on Amendments to the Law on Public Procurement, after Article 116 of Law on Public Procurement, introduces a new chapter “Procurement in the field of defense and security” with nine new articles which are obviously trying to correct shortcomings of the existing Law, which the European Union indicated. New articles only apply to the procurement of military equipment; security of sensitive equipment, services or works; as well as goods, services or works to be used exclusively for military purposes. According to these provisions, in procurement in the field of defense and security purchaser may use the restricted procedure, negotiating procedure with prior publication of the invitation to tender and negotiating procedure without prior publication of a contract notice.

51 Conclusion of the European Commission on the progress of Montenegro: “There has been some progress in the area of public procurement. Montenegro is still at an early stage when it comes to the harmonization of public procurement in utilities, concessions and public procurement in defense sector with the EU acquis and it is required to strengthen law enforcement at all levels. When viewed as a whole, preparations in the area of public procurement are moderately advanced. “

52 Progress Report for Montenegro, which accompanies the Communication of Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ““Enlargement Strategy and Main Challenges 2014-2015”, COM(2014) 700, Chapter 5 – Public Procurement, page 27.

53 Directive 2009/81 / EC of the European Parliament and Council from 13 July 2009 on the coordination of procedures for procurement of certain work contracts, contracts on procurement of goods and services, contracts by public purchasers or purchasers in the field of defense and security.

Law on Amendments to the Law on Public Procurement also allows purchasers to define special conditions in tender documents relating to the execution of public procurement contracts, such as confidentiality or data protection and security of goods. Also, if a public procurement contract contains classified information, purchaser shall determine the necessary measures to ensure the confidentiality of information, in accordance with the Law on Data Confidentiality.

With the entry into force of the Law on Amendments to the Law on Public Procurement in May 2015, Regulation on Foreign Trade with Items for Special Purposes will be repealed. At the same time, Regulation which will define confidential purchases will be adopted subsequently.⁵⁴

One of the fundamental steps to be taken to strengthen financial transparency in the defense sector and fight against corruption in public procurement is adequate procurement planning, which should include a list of needed goods and services, available resources, and planned procedures for the procurement and deadline for the implementation of the process. However, if we observe data from the Annual Report of the Public Procurement Administration of Montenegro, among purchasers with greatest difference between planned and contracted public procurement, the Ministry of Defense is in tenth position of all purchasers with planned 2,961,500.00 € for the 2012, while the final contracted value was 2,436,286.34 €. Data for 2013 are much worse: the total funds allocated for the implementation of public and confidential procurement in 2013 amounted € 8,261,480.00, while the total contracted value amounted € 4,205,943.01, which is 4055536 99 € less than the total estimated value of the procurement (or 49.09%).⁵⁵ The total contract value of public procurement was € 2,917,714.86, which is € 726,135.14 less than the total estimated value of the procurement (or 19.93%).⁵⁶

54 The work program of the Public Procurement Administration of Montenegro for 2014 and 2015, available on the official website of the Public Procurement Administration of Montenegro <http://www.ujn.gov.me/>

55 Report on work and situation in administrative areas within jurisdiction of the Ministry of Defense in 2013, Podgorica, 2014, p. 10

56 For direct agreements (contracts of small value to the amount of € 5,000) were realized in total amount of € 169,885.88. Transferred obligations under the contract of 2012, amounted € 73,000.00. Total contract value of confidential procurement, in 2013, amounted € 1,288,228.15, which is € 3,329,401.85 less, compared to the approved Plan of confidential procurement (or 72.10%). See more: Report on work and situation in administrative areas within jurisdiction of the Ministry of Defence in 2013, Podgorica, 2014, p. 10

These data suggest that while planning the procurement cost assessment based on a more detailed examination of the market is not fully defined, and that planned amounts are defined approximately. At the same time, public procurement plans often do not contain clearly defined time frames and material for their implementation.

In addition, it is interesting to mention that only in 2013, the Ministry of Defense has committed three amendments to the Public Procurement Plan, previously approved by the Ministry of Finance. Performing frequent changes of Public Procurement Plan, caused State Audit Institution to make conclusion, contained in the Report on revision of system of internal financial control and procurement system of the Ministry of Defense,⁵⁷ that the Ministry of Defense procurement plans are not made on the basis of realistically estimated real needs of final users.⁵⁸

Since around half a million euros of confidential procurement was directed from Confidential Procurement Plan to the Public Procurement Plan in 2013, the State Audit Institution in the report stated that there is no clear demarcation between public and confidential procurement.⁵⁹ Particularly interesting is the fact that only the Ministry of Defense in some way recognizes that there is “very often a problem in the demarcation of public and confidential procurement or” transferring certain procurements from confidential to the public.” In so-called Plea of Ministry of Defense on State Audit Institution report, the Ministry explains these amendments with changes in priorities of the Army of Montenegro, which are caused by “new” requirements in terms of equipping units of the Army of Montenegro according to NATO standards, but also by the impossibility of achieving planned revenues from sale of surplus weapons and military equipment. The State Audit Institution, for audit purposes, included in sample several

57 State Audit Institution Report on audit of system of internal financial control and procurement system of the Ministry of Defense, Podgorica, December 2014, p. 19

58 State Audit Institution report states that procurement of service of English language course, which is planned by Amendment II to the Public Procurement Plan, could be planned in procurement plan, which is adopted at the beginning of the year, bearing in mind that the above procurement was envisaged in work program of the Ministry of Defence for 2013. Planning has led to the fact that implementation of contract has not started in 2013 thus the obligation is transferred to the next year at the expense of funds planned by the Budget Law for 2014. See more in: State Audit Institution Report on audit of system of internal financial control and procurement system of the Ministry of Defense Podgorica, December 2014, p. 22

59 *Ibid*, p. 20

public procurement procedures that were implemented during 2013, while in several cases concluded that procedures were not carried out in accordance with the Law on Public Procurement.

During 2013, the State Commission for Control of Public Procurement was submitted two appeals by bidder, where in both cases the Commission has assessed the complaint as valid and made a decision on canceling the decision on selection of most favorable offer in these cases. Key omissions of the Ministry of Defense in these cases were “non-compliance of tender and other documents for tendering with the Law, discrimination of bidders, restrictions of competition, non-compliance of tender documents with invitation to tender, flaws in the process of examination, evaluation, comparison and evaluation of bids, and lack of reasons and evidence upon which the decision was made, which implies a substantial violation of the Law on Public Procurement.”⁶⁰

When it comes to confidential procurement, State Audit Institution performed audit of the Ministry of Defense under the Regulation on Foreign Trade with Resources for Specific Purposes in the Field of Confidential Procurement. As we have already explained in the text, procurement of funds for specific purposes is made on the basis of this Regulation and is not subject to public control, which significantly affects the lack of financial transparency in the work of defense sector. All documents in the proceedings of confidential procurement in the Ministry of Defense are marked with the level of confidentiality “internal”, in accordance with the Law on Data Confidentiality and the Regulation on conditions and manner of implementation of measures for protection of classified information.⁶¹ Given that any public control or oversight, in case of confidential procurement as well as those that are designated as confidential, is impossible, the conclusions are based on the State Audit Institution report on audit of the Ministry of Defense in 2013, which included granting of conditional opinion on confidential procurement. Similarly as in the case of public procurement plan, the Ministry of Defense submits amendments to the annual confidential procurement plans. State Audit Institution audit has found that data on total contracted value of confidential procurement in 2013, which are available in the Report on confidential procurement of Ministry of Defense that was submitted to

60 State Audit Institution Report on audit of system of internal financial control and procurement system of the Ministry of Defense Podgorica, December 2014, p. 23

61 Regulation on conditions and manner of implementation of measures to protect classified information, (Official Gazette of Montenegro, No. 72/08)

the Government, does not coincide with the data listed in the Report of the Ministry of Defense in 2013. The difference amounts € 485,519.21.⁶² In addition, as a result of an audit of number of confidential procurement of the Ministry of Defense, the State Audit Institution in several cases found a violation of the Regulation on Foreign Trade with Funds for Specific Purposes in the implementation process.

Conclusions of audit procedures of confidential procurement imply that:

- There are no internal rules and procedures that regulate process of implementation of confidential procurement;
- Deadlines for making decisions about the initiation of confidential procurement proceedings are set arbitrarily;
- Selection of potential bidders is not explained;
- Deadlines for implementation of contracts are not defined;
- Rights of dissatisfied bidders are not protected, possibility of appeal is not provided, etc.⁶³

The Ministry of Defense, in response to evaluations of work of the Ministry of Defense when it comes to enforcement of proceedings of confidential procurement, stated that all comments and recommendations of the State Audit Institution, i.e. shortcomings of previous methods of operation will be solved upon the entry into force of the Law on Amendments to the Law on Public Procurement.

It is obvious that there are significant opportunities for occurrence of abuse of funds with public procurement which are not in category of confidential procurement, but which are falsely claimed to be of such a nature. On the other hand, cases in which the State Audit Institution, Public Procurement Commission or the Police launch investigation on possible abuse of official position in the procurement process are very rare. Even in cases of criminal charges, information on court decisions in these cases are not available to the public.

Competitiveness and transparency are dominant characteristics of procurement. However, confidential procurement is not characterized by transparency. Lack of transparency must affect the restriction of

62 See more in: State Audit Institution Report on audit of system of internal financial control and procurement system of the Ministry of Defense Podgorica, December 2014, p. 29

63 *Ibid*, p. 31

competition, considering that object of the procurement, its characteristics and required amounts are not known to a wider circle of potential bidders.⁶⁴ Considering that the interest of data protection is stronger than the public's right to know during confidential procurement, there are obvious risks of corruption in this area.

In Montenegro, public procurement system, although improved, still has a number of deficiencies related to the "untimely and unrealistic planning, lack of harmonization of procurement contracts and tender requirements, changes in the conditions of public procurement, and lack of control of implementation of contracts".⁶⁵

It can be concluded that the procurement procedures in defense sector have same disadvantages as procurement procedures in other parts of public sector. The fact that number of legal provisions are not completed yet, that the public does not have access to activities in defense sector (despite the reports and recommendations of the State Audit Institution) we cannot speak of a satisfactory financial transparency in defense sector. In planning stages there are visible defects, since the assessment of value of procurement is not perform by examining needs of the market, while time frames for implementation of procurement are not determined in relation to the needs of institution. If there is a significant improvement in this area, as promised with coming into force of the Law on Amendments to the Law on Public Procurement, financial transparency in the defense sector would be increased to a large degree, but possibilities for the occurrence of acts of corruption in procedures of public or confidential procurement would be narrowed.

It is especially important that confidential procurement procedures, to which the Law on Public Procurement does not apply, are standardized in order to clearly define boundaries between public and confidential procurement. In order to provide more precise definition of what confidential procurement is, drafting of appropriate guidance on implementation of rules of procedure, precisely defining which persons have access to confidential data on procurement, adequate protection for bidders, and similar measures would be of great help. It is also necessary to

64 Pejovic Danilo, *Nabavke u sektoru bezbednosti*, Belgrade Center for Security Policy, Belgrade, 2012, p. 6

65 Group of Authors, *Almanac on Oversight of Security Sector in Western Balkans*, Belgrade Center for Security Policy, Belgrade, 2012, p. 159-181

strengthen aspects of control mechanisms, both internal (organs of internal audit and internal control) and external audit (the work of the State Audit Institution). Strengthening of control mechanisms should play a role of preventing abuse of power or violation of the law during the implementation of procurement procedures, in all stages of the proceedings, not only in control after the completion of the procedure, when it often happens that damage has already occurred. Such measures would strengthen citizens' confidence in the procurement procedures and, thus, lead to increased competition with optimal conditions for the procurement procedure.

Conclusion – How to make defense responsible to the citizens?

The process of reform of the defense sector is not effective and efficient if it does not include public supervision and control of citizens and civil society organizations. The issues of security and defense should be discussed publicly. The public should be fully informed, actively participate in discussions and assess the correctness of decisions made on all issues that are important for the defense sector. Strengthening of transparency of the defense sector affects building confidence of citizens in the work of state institutions.

Even though there is a notable progress in the involvement of civil sector, especially academic community, non-governmental organizations and competent journalists in the process of reforming the defense sector, it cannot be said that the civil society in Montenegro is appropriately included in the process. But, it cannot be concluded that there is not sufficient political will to do so. On the other hand, although in certain segments there is a significant interest and readiness of state actors in the defense sector for substantial cooperation with civil society, the second problem lies in a very small number of organizations dealing with the reform of the defense sector. In Montenegro, enough attention is not paid to the development of civil society and its ability to be impartial and independent controller of state institutions, the initiator of empowerment of accountability of state administration. One gets the impression that progress in strengthening the transparency of the work of the defense sector depends on pressure from the international community just like the key features of the reform which are implemented in all areas of social life in Montenegro in the context of meeting the necessary criteria for full membership in the EU and NATO.

That is why, in the area of strengthening the overall transparency of the defense sector, it is necessary that:

- The state institutions enable civil society organizations to actively participate in the democratic civil control of reforms of state institutions;

- The state institutions accept public oversight mechanism as the best way to establish and develop good and open cooperation with the public, but also as a mechanism for protection of defense sector against possible abuses, violations of the laws and other manipulation;
- To define effective mechanisms to strengthen the capacity of civil society organizations that would adequately perform democratic control and supervision of the work of institutions within the defense sector, thus contributing to the increase of their responsibilities, transparency and openness to all citizens.

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In order to improve the transparency of the defense sector, within legal limits, it is necessary:

- ✓ To enable greater transparency in financial management of Ministry of Defense, through the publication of detailed annual reports on the implementation of the budget plan;
- ✓ To introduce the principle of urgency in the Law on Free Access to Information ;
- ✓ To regularly update the website of the Ministry of Defense regarding regular publication of annual plans and reports on the work;
- ✓ To publish rankings of candidates for training and employment, as well as the composition of the commissions involved in the selection of candidates and rewarding employees;
- ✓ To amend Law on Data Confidentiality in accordance with the recommendations of the Venice Commission and the OSCE:
 - ✓ To abolish a provision that allows data protection “In the economic interest of the state”
 - ✓ To adopt appropriate bylaws that provide detailed categories of documents whose level of secrecy is defined
 - ✓ To shorten the duration of data confidentiality
 - ✓ To stipulate that person determining the level of confidentiality cannot be the person reviewing the level of secrecy
 - ✓ To prevent the concealment of criminal offenses and corruption by defining certain data as secret

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In order to achieve adequate financial transparency of the defense sector, it is necessary to make planning, execution and reporting of the budget public. The general impression is that Montenegro has significantly improved its financial transparency of the defense sector in last few years, particularly regarding the improvement of the legal framework and mechanisms of control and supervision. However, planning, implementation and reporting on the defense budget is still far from adequate controls and surveillance of citizens.

Law on Parliamentary Supervision in Security and Defense Area gave a considerable competence to the Committee on Security and Defense especially when it comes to spending budget and reporting. However, it is often the case that the members of the Committee do not fully use their powers, guided to their party interests and political agendas. On the other hand, The Law on State Audit Institution created the necessary conditions for efficient external oversight of financial management in the defense sector.

In the area of strengthening the transparency of the defense budget, following is recommended:

- ✓ It is necessary to initiate the definition of mechanisms of control and accountability of Committee on Security and Defense, in order to exclude the members of Committee from political interests and pressures. At the same time, it is necessary to strengthen the competence of the Committee, thus having the possibility, not only to have access to reports on the work of relevant institutions of defense sector, which are delivered, but also to evaluate reports, checks, as well as to conduct investigations in the field of finance;
- ✓ Despite strengthened financial transparency of the defense sector, planning, implementation and reporting of the budget is still far away from the control and surveillance of citizens. Therefore, it is recommended to introduce international standards to bring budgeting process as close as possible to ordinary citizens (i.e. the introduction of Budget of citizens)

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Financial transparency of the defense sector is largely limited by the fact that the procurement of arms, ammunition and other items necessary for the defense and security of Montenegro are exempt from the application of Law on Public Procurement. Special Regulation on Foreign Trade covers the area related to procurement in the defense sector with funds for special purposes. In accordance with the provisions of Regulation, purchase of “special technical equipment, weapons and objects used for the purposes of defense and security sector“ are not subject to mandatory principles of public announcement. Thus, confidential procurement is exempted from the application of the law, and even from public and institutional control, which prevents any public access to many purchases.

Considering the fact that in procurement the interest of confidential data protection is more emphasized the public’s right to know, there are obvious risks of corruption in this area. This is particularly worrying in those cases in which the procurement is wrongly categorized as public. In fact, there are significant possibilities for misuses of funds for public procurement that are not in the category of confidential procurement, and which are incorrectly claimed to be of such a nature.

Legal solutions in this area do not meet the European international standards of confidential procurement. In the latest report on Montenegro’s progress it is stated that the existing legal provisions, which concerning public procurement in the field of defense, need to be harmonized with the regulations of the Union (European Commission Directive 2009/81/EC, which regulates the allocation of individual contracts in the fields of defense and security).

State institutions of the defense sector do not plan procurement appropriately. When planning, cost estimates are not based on a detailed examination of the market, real needs of users, while planned amounts are often defined approximately. The biggest problem, when the transparency of procedures public procurement is concerned, is that there is no clear demarcation between public and confidential procurement, “there are no internal rules and procedures that closely regulate the flow and the process of implementation of confidential procurement, deadlines to make decisions about the initiation of proceedings confidential procurement is carried out arbitrary, selection of potential bidders is not explained, and deadlines for implementation of the contract are not defined”.⁶⁶

66 See more at: Report on audit of the system of internal financial controls and

It can be concluded that the statutory provisions when it comes to public procurement in the defense sector, are not complete, that the public does not have access to the activities in the defense sector, which is why there is not satisfactory financial transparency in the defense sector.

In the area of strengthening the transparency of procurement in the defense sector, following is recommended:

- One of the fundamental steps to be taken in order to strengthen financial transparency in the defense sector, and fight against corruption in public procurement, is adequate procurement planning, which should contain list of needed goods and services, available resources, and planning procedures for the procurement and deadline for the implementation of the proceedings;
- It is necessary to strengthen the competencies of the State Audit Institution and Procurement Commission in the area of investigation regarding possible abuses in the procurement process of the defense sector;
- It is necessary to standardize confidential procurement procedures, to which the Law on Public Procurement is not applied, in order to clearly define the boundaries between public and confidential procurement. While precisely defining what belongs to confidential procurement, development of relevant guidance on the implementation of the rules of procedures, precise definition of which persons have access to information on confidential procurement, adequate protection for bidders, and similar measures would be of great help.
- It is necessary to strengthen aspects of the control mechanisms, both internal (organs of internal audit and internal control), and external audit (the work of the State Audit Institution). Strengthening of control mechanisms should play a role of preventing abuse of position or violations of the law during the implementation procurement procedures, in all stages of the proceedings, and not only control after the completion of the procedure for it often happens that damage has already occurred.

system of the procurement of the Ministry of Defense and State Audit Institution, Podgorica, December 2014, p. 31

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