

# **Correlation of (non) applicability of the Penal Provisions to the Law on Public Procurement in procedures for Concessions and Public Private Partnership In the Republic of Macedonia**

**Nikola TUPANCHESKI**

**e-mail: [tupanceski@yahoo.com](mailto:tupanceski@yahoo.com)**

**Violeta SHAKLEVA**

**e-mail: [violeta.sakleva@ugd.edu.mk](mailto:violeta.sakleva@ugd.edu.mk)**

## **Abstract**

*Public private partnership in the Republic of Macedonia is regulated by the Law on concessions and public-private partnership. But under this Act during the procedures for public-private partnership shall apply the provisions of the Law on Public Procurement. Thus, the provisions of the Public Procurement Law relating to procedures for the award of public works contracts and public service shall apply the procedures for awarding contracts for the establishment of public-private partnerships. The procedures for awarding contracts to establish public-private partnership, the public partner implements as an open procedure, restricted procedure, negotiated procedure with prior publication of a contract notice, or a competitive dialogue, in accordance with the terms and in the manner provided in the Law on Public Procurement. This means that the provision of the Public Procurement Act is mandatory when performing procedures for public-private partnership.*

*The Law on Public Procurement has changed several times .Recent amendments to the public procurement led to the introduction of penal provisions. For some incriminations are predicted sentence of 6 months to 5 years. By introducing these new criminal provisions, no attention was paid to whether these incriminations can be applicable in relation to the procedures for public-private partnerships that are conducted in accordance with the public procurement rules.*

*Neither the laws nor regulations or in theory and practice there is no distinction as to which provisions of the*

*Public Procurement Act is inapplicable in the public private partnership. It is necessary to make such a distinction for reasons that procedures for public-private partnership are implemented by the Public Procurement Act, but certain provisions of the Public Procurement Act are not applicable in the public private partnership implemented under this law.*

*Some of the provisions that are inapplicable are the penalty provisions (significant portion of the penalty provisions). The purpose of this paper is to show that most of the penal provisions (provided in the Public Procurement Law) are applicable in procedures for public-private partnerships (which are implemented according to the Law on Public Procurement), that is required by the Law on Public Procurement to specify exceptions for the use of certain provisions in the procedures for public-private partnership. From the paper in conclusion follows that the penal provisions contained in the Criminal Code of the Republic of Macedonia and procedures applicable to public procurement procedures for Public Private Partnership, leaving the application of this law as *lex generalis* whether to clear all legal dilemmas and implement the necessary exceptions.*

**Key words:** *correlation, penal provisions, concessions, Public Private Partnership*

### **The notion of Public Private Partnership in Republic of Macedonia**

The term concessions and Public Private Partnership, types, method, and procedure for awarding concessions for Public Private Partnership in Republic of Macedonia has been regulated by the Law of Concessions and Public Private Partnership (Official Gazette of Republic of Macedonia, No.57/12).

The previous Law<sup>1</sup> was primarily designed to meet the European integrative processes, the need to create a legal framework or legal

---

<sup>1</sup>Law on Concessions and other Public Private Partnership (OfficialGazette No.7/08)

legislation, which mainly would allow entering of the private capital into construction of infrastructure facilities, as well as into the public sector, in order to ensure better public services. The law was amended several times, in 2008, 2009 and 2010<sup>2</sup>. These amendments introduced a transitive article of application of these laws, to regulate and specify the matter further. To achieve a satisfactory level of compliance with the European legislation in the area of concessions and PPP (hereafter PPP), a new law was drafted, and the Directive 2004/18 of the European Community was appropriately implemented, the European Parliament and the Council of the 31<sup>st</sup> March 2004 and for coordination of the procedures for granting agreements for public services, some new solutions were proposed which were improved and adjusted with the Directive.

The Law on Concessions and Public Private Partnership which is in force in the Republic of Macedonia, unlike the previous one, has no definition of the term **Public Private Partnership**, but only stipulates that "Public Private Partnership" has significance, as it is further described in the law.

This condition is also a result of EU not defining it, in their PPP Law.

But still CPPPL defines PPP as a **form of contract regulating, long-term cooperation between the public partner and the private partner**. This states that:

- A relationship is being established between the public<sup>3</sup> and the private<sup>4</sup> partner

---

<sup>2</sup>Law on Amendments and Modifications Law on Concessions and other Public Private Partnership (Official Gazette of the RM No.139/08, 64/09 and 52/10)

<sup>3</sup>CPPPL defined the term „Public Partner“ shall be a legal entity that awards a contract establishing a PPP

<sup>4</sup>CPPPL defined the term „Private Partner“ shall be a domestic or foreign legal entity or natural person or consortium which concludes a contract establishing a PPP with the public partner or which, for that purpose, establishes a Special Purpose Company. This means that CPPPL allows one or more legal persons (consortia) to appear as a private partner. But when it comes to the person he used the term in the singular. Precisely this notion of commitment precludes more individuals to appear as a private partner, or an informal group of individuals to appear in the role of the private partner.

- PPP is always established through certain form
- PPP is regulated by a specific agreement or regular cooperation
- PPP is based on long-term agreement (up to 35 years from the date of conclusion of the contract or the date of entry into force of the contract, if this date is different from the previous one, or if it is by special law otherwise provided)

The main objective of the PPP is the inclusion of the private sector in providing public services, with the result that the role of the public sector changes from an owner towards a buyer and a guardian of public interests. This is driven by the belief that the public sector should focus on its basic functions, leaving the private sector to perform its own function efficiently and effectively. One of the key policy guidelines behind the concept of PPP is the desire to improve national infrastructure in the country and to support public services, without burdening public funds and without the need to increase the taxes.

CPPPL determines an obligation which is undertaken by the private partner, according to PPP:

- The private partner undertakes the obligation to provide the necessary requirements for public services to the ultimate users
- The private partner assumes the obligation to provide activities which are under its jurisdiction

### **Modalities of PPP in the Republic of Macedonia**

In order to achieve the fundamental obligation to provide public services to the ultimate user in the area of competence of the public partner, and/or the obligation to provide the necessary requirements for the public partner for public services to the ultimate users, and/or activities in its jurisdiction, the private partner can:

1. Finance, design, build and reconstruct an object of public infrastructure;
2. Design, build and reconstruct / renovate facility of public infrastructure;

3. Build and maintain new objects and/or reconstructed / renovated facilities of public infrastructure;
4. Use, manage and maintain an existing public facility;
5. Any of the above combinations, as long as the combination of these obligations is aiming to fulfill the basic obligation of the private partner.

PPP can be defined as collaboration between the public sector (central or local authority) and the private sector in order to provide financing, construction (reconstruction), and maintenance of public infrastructure and/or the provision of public services that are "exclusive" to the public partner.

#### **The forms of PPP in Republic of Macedonia**

Depending on the means of remuneration by the public partner for the provided public works and/or public services, as well as allocation of key inherent risks, a PPP can be established either as:

1. Public works concession, or
2. Public service concession or
3. Public works contract, or
4. Public service contract

Regarding the forms of PPP given in items 3 and 4, contracts for public works and services, CPPPL differs from classical contracts of works and services of The Law on Public Procurement in terms of implementation of the agreement by the operator. In the first case follows the payment by the contracting authority, and the second establishes a long-term partnership between the public and private partners that the public partner carries certain rights and obligations of the private partner in the use, maintenance and management facility or service performance, and that the private partner provides venture funding for the effective performance of work or service for a specified period of time.

### ***The concessions in terms of CPPPL***

First it is necessary to distinguish between the terms "Public works concession", "Public service concession" on the one hand, the term "Concession for Goods of General Interest", on the other hand. This is necessary primarily because the term "concession" is used differently in all three concepts. CPPPL made delineation of these concepts still in the definitions and further regulation of concessions items of general interest in a separate chapter<sup>5</sup>. But precisely because of the need to distinguish these concepts, the forms of concession for works and service concessions will be given more special detailed observations.

The concession is defined in the Procurement Directives (2004/18 EC and 2004/17 EC). Public works concession and Public service concession are treated differently in the directives. Subject of editing is only the concession to things, in so-called Classical Directive 2004/18 EC on issues relating to the granting of the same.

### **Whether a project falls under the definition of concession depends on several key factors :**

- Public service gives (performs) the private partner : the concessionaire;
- Fees paid by end- users of public services (citizens and legal persons);
- The risk of performing public service, primarily commercial risk, and the risk of providing quality service taken by the concessionaire. The concessionaire accepts in principle the cost of governance and funding of public services, in return for the ability to generate revenue through the management or exploitation of the work or service;
- Concessionaire usually pays a fee to the grantor;
- The infrastructure built by the private partner, after the expiration of the contract, transmits / remains the property of the public partner.

### **Characteristics of PPP**

Other features of PPP in Republic of Macedonia arising from CPPPL are:

---

<sup>5</sup>Chapter II, CPPPL

- Relatively long period of duration of the partnership;
- Complete or partial provision of funds by the private partner (equity and loans);
- Allocation of risk / risk allocation to the partner that will better manage it;
- The interest of the public partner is improving infrastructure and providing better and more efficient delivery of public services;
- The interest of the private partner's profit;
- Management of the terms and conditions of activity (public services) remains the right and obligation of the public partner;
- Public partner prescribe standards for the provision of public services;
- Innovation, particularly through output specifications, service levels and payment mechanisms describing the services to be provided;
- Control (supervision) over the way of providing public services performed by public partner;
- Public partner has a subsidiary responsible for the way the activity is performed and the quality of provision of public services.

### **Implementation PPP in Republic of Macedonia**

#### ***Implementation specifics***

- The structure of the PPP may be contractual or institutional. Contractual PPP is accomplished by signing an agreement between public and private partners;
- For the implementation of contractual PPP, the private partner may establish a Special Purpose Company;
- Institutional PPP implies mixed company which will be responsible for implementation of the PPP project, or to perform the public service;
- The mixed company can be a new company or through corporatization of an existing public company with private venture capital.

***Plan for implementation of the project as a PPP life cycle***

During the implementation of a project for PPP as life cycle (from idea, implementation and successful completion), you need to make a good plan in which given deadlines in some stages can be flexible, though others will be legally set and must be respected. Planning should include a specific team of professionals and experts in certain areas, which can respond to the tasks at different stages and that will take a long-term participation in the implementation of a specific project for the PPP.

What emerges as a key factor is the coordination of those involved in the implementation of a specific project, their intense mutual cooperation, resolving all doubts and startup problems, especially with referenceto the expertise of each of the experts involved. It is necessary that the project be based on professionalism right from the start, professionalismthat will continue to follow the project's successful implementation.

When thinking of implementation, it is necessary to plan for resource allocation. The total amount of funds for which the public partner can assume liabilities in a given year with agreements related to the establishment of the PPP should be determined by the budget of the public partner.

The preparatory phase is the basis of life of the entire project. If this phase works well, The rest of the procedure can be considered. The significance has other stages of a specific project for PPP can then be implemented.

*The preparatory phase includes the following segments :*

1. Forming a committee to implement the procedure for awarding the concession items of general interest or contract for the establishment of the PPP;
2. Preparation of the preliminary analysis of the basic elements of the project that are indicative of the nature of the contract to be signed in order to establish the PPP, taking into account the definition of the PPP law;
3. Preparation of a feasibility study to justify the granting of the concession items of general interest or contract for the establishment of the PPP;



4. Assessment of the environmental impact of the concession items of public interest or public -private partnerships and
5. Other activities necessary for conducting the procedure.

*The first stage comprises of :*

1. Initiation of proceedings or decision of the competent authority to initiate the procedure for awarding the contract to establish a PPP;
2. Announcing the decision at the appropriate public document;
3. Preparation of tender documentation for PPP model agreement and approval by the competent authority for PPP;
4. Announcing the PPP and implementation of selected procedures (open , restricted , competitive dialogue or negotiated procedure with publication of a contract notice);
5. Evaluation of bids or the selection of bidders and reports conducted for the proposed procedure for selecting the best bid or cancellation.

*The second phase includes :*

1. The decision of the competent authority for PPP for a Tender Offer
2. Authorization of competent person to sign the contract

*The third phase includes:*

This phase is one of the most important in the life cycle of PPP and consists of oversight of contract performance. Supervision covers all aspects of the implementation of the agreement, legal, financial, technical , construction , maintenance , etc. depending on the anticipated contract.

#### **Mutual reference to the application of provisions between The Law on Concessions and Public Private Partnership and The Law on Public Procurement**

The Law on Concessions and PPP refers to provisions in the Law on Public Procurement concerning award procedures for public works contracts and public service contracts and requires that these provisions be adequately applied.

The provisions of this Law, as well as the provisions of the special laws shall apply to the award procedures for concessions for goods of general interest with a compulsorily adherence to the basic norms and principles - principles of transparency, non-discrimination, proportionality, efficiency, equal treatment and mutual recognition. One option is the use of an e-auction. The duty to use an e-auction is not obligatory. The public partner may opt not to use an electronic auction in awarding a contract establishing a PPP. The CPPPL indicates that the procedures for awarding contracts under this law provides legal protection in accordance with the Law on Public Procurement.

The Law on Public Procurement correlates with the terms of public private partnership in the following :

1. Article 1 - Scope of the Law stipulates that this Law, among other things, regulates the legal protection in the procedures for awarding public contracts, as well as for concessions and public private partnership;

2. Article 37 – As an exception to the obligation of availability of bidding documents in electronic form through the ESPP (Electronic system for public procurement), the „contracting authority shall make the tender documentation available in hard copy or by using magnetic medium for all economic operators that have submitted a request thereon, or the ones that have been sent an invitation to submit a tender“;

3. Article 145 - In determining the personal status of each economic operator it is obligatory that the Register submission certificate of legal entities have convictions for crimes that would prohibit participation in open call procedures, awarding public procurement contracts and contracts for PPP;

4. Article 200 declares one of the responsibilities of the State Appeals Commission to be solving appeals in the procedures for awarding contracts for concessions and PPP and the provisions of Chapter X shall accordingly apply in the provision of legal protection in the contract award procedures for concessions and PPP.

### **(No) Applicability of Penal Provisions of the Law on Public Procurement**

Considering all that has been said above for PPP on the one hand, and the establishment of Penal Provisions in the last three<sup>6</sup> changes to The Law on Public Procurement on the other hand, there is a need to determine the applicability or inapplicability of the penal provisions of this law to the establishment of a PPP (open, restricted, competitive dialogue and negotiated procedure without prior publication of a contract notice). This is the reason that there is no distinction of certain imperative norms, whether applicable to procedures for PPP (unless an exception specified in Article 37). It is this mismatch that creates a legal void as to whether those penalty provisions of Chapter XI- and related procedures for PPP take into account the specifics of this type of procedures.

Thus, paragraph 1 from Article 232 of The Law on Public Procurement provides that if the legal entity involved in the PPP consciously forms the subject of procurement, which is composed of multiple items in such a manner as to limit the competition to only one economic operator contrary to Article 15 Paragraph (6) of this Act<sup>7</sup> be that yourself or someone else, so that you will achieve greater benefits, or will cause more damage, you shall be punished with imprisonment up to one year.

Bearing in mind the essence of PPP, unenforceable penalty provisions are provided in the following article :

Penal Provisions<sup>8</sup> relating to procurement of drugs, medical devices and/or medical disposables are inapplicable in proceedings for PPP because PPP Law provides that PPP can be established only as a concession for public works, public service concession, contract public procurement contract for work or public service, which means you cannot establish a PPP

---

<sup>6</sup>Chapter XI-a The Law on Amendments and Modifications to the Law on Public Procurement ("Official Gazette of the Republic of Macedonia" No. 148/13, 28/14 and 43/14)

<sup>7</sup>If the subject of procurement is composed of multiple items within a section, the contracting authority shall not be part of the established way to limit the competition to only one economic operator, whether the subject of the contract is formed in one or more parts.

<sup>8</sup>Article 232-b и 232-c The Law on Amendments and Modifications to the Law on Public Procurement ("Official Gazette of the Republic of Macedonia" No. 148/13)

procurement of any goods, including procurement of medicines and other supplies .

It's an inapplicable penal provision<sup>9</sup> under which the concessionaire consciously acts contrary to the law or knowingly fails to take actions that he was obliged to take under this law because it is published procedure for awarding a public contract without the consent of the Council in cases where there is at least five producers / economic operators that can meet the requirements of the technical specifications for individual paragraphpart or whole violation of Article 36 and Paragraph (1) of this Act<sup>10</sup> and with it yourself or someoneelse will achieve greater benefits, or cause more damage, shall be punished with imprisonment up to one year .

First, the mismatch is in terms thatwhen making provisions which establish fulfillment of certain conditions and for which an application is made to the Council on public procurement,that there are noexceptions in procedures for PPP. If exceptions have been provided, then it would be clear that the penalty provisions do not apply to those exceptions .

In this way the current reference solutions of each of the provisions in both laws<sup>11</sup>really becomes unclear as to when and whether to consent to procedures for PPP. This is because it is quite logical that there should be approval from the procurement of these procedures, but on the other hand, none of these are legal, nor do the laws are give exceptions.

The foregoing applies to the penal provision<sup>12</sup> that the „concessionaire knowingly acted contrary to the law or knowingly failed to take the actions that he was obliged to take, because it is published procedure for awarding a public contract,without the consent of the Council in cases where provided qualification criteria that can meet less than the

---

<sup>9</sup>Article 232-dLaw on Amendments to The Law on Public Procurement (Official Gazette of the Republic of Macedonia "No.148/13)

<sup>10</sup>The contracting authority shall require the consent of the Council before announcing the contract procurement and supply adequate explanation of the need for procurement which has at least five manufacturers / economic operators that can meet the requirements of the technical specifications for a single item or entire part

<sup>11</sup>The CPPPL, andThe Law on Public Procurement

<sup>12</sup>Article 232-d, The Law on Amendments and Modificationsto the Law on Public Procurement (Official GazetteNo.148/13)

minimum number of economic operators<sup>13</sup> and thus for yourself or another will have greater benefits, or will cause more damage, shall be punished with imprisonment up to one year“.

It is necessary to make intervention in The Law on Public Procurement which provides an exception to the application of the provisions of Article 36 and the procedures for PPP to decide whether it is justified initiation of PPP. To do this a feasibility study should be developed. This study should include, financial and legal analysis. This all means that there are many other important elements that need to be determined in the preparatory phase of the public private partnership, and it is illogical to require consent if there are at least five manufacturers/economic operators that can meet the requirements of the technical specifications for the individual item or the whole section.

In procedures for PPP, the penalty<sup>14</sup> following penalty does not apply. According to Article 160, Paragraph 3, if the concessionaire knowingly acted contrary to the Law on Public Procurement or knowingly failed to take the actions that he was obliged to take under this law because it is published procedure for awarding a public contract without the consent of the Council that used most economically favorable criteria are used for the tender<sup>15</sup> and with it yourself or someone else you will achieve greater benefits, or will cause more damage, shall be punished with imprisonment up to one year.

Law on public procurement<sup>16</sup> as a mandatory criterion for the selection of the winning bid provides the lowest price criterion, using the economically most favorable tender, which is even mandatory for competitive dialogue procedure. What is problematic is that whenever you use this criteria, it should be required approval from the procurement

---

<sup>13</sup>Certain minimum depending on the type of procedure in Article 36 and paragraph 2, line 3 five or less than five economic operators in the open procedure, restricted procedure, the negotiated procedure with prior publication of a contract notice and in the competitive dialogue

<sup>14</sup>Article 232-f, The Law on Amendments and Modification to the Law on Public Procurement (Official Gazette No. 148/13)

<sup>15</sup>The contracting authority must ask for permission from the council to publish the contract notice if they anticipate using the criterion economically most favorable tender, except when shall organize competitive dialogue procedure or accepts submission alternative tenders.

<sup>16</sup>Article 160 to the Law

Council. The arguments against the requirement of consent of the Council in the case of PPP are listed above.

Non-applicability of certain penal provisions based on the facts of the possibility to seek approval from the procurement applies to the provision<sup>17</sup>, „when contracting authority has requested approval from the Council in accordance with the terms of this law , and the Council has responded to the request within the time limits established by law when“it is considered that given line , and later determines that the conditions for its provision is due to damage caused members of the Council shall be punished with imprisonment of one to five years .

The CPPL determines rules<sup>18</sup> for the award of additional works and services concessionaires and of public works concessionaires and public service. The PPP agreement concluded between public and private partners, or between concession grantor and concessionaire, defines all details about how the allocation of additional works or services and is illustrative to seek approval from the Council of PPB. This makes inapplicable<sup>19</sup> a provision under which „a person who consciously awarded contract for procurement of additional work in the negotiated procedure without prior publication of a contract notice without the consent of the Council of the Law and therefore for himself or another will have greater benefits, or will cause more damage, shall be punished with imprisonment up to one year“.

Applicable penal provisions of the Law on Public Procurement in terms of procedures for PPP would be the following:

During the preparation of the tender documentation is applicable penalty provision of The Law on Public Procurement<sup>20</sup> that „he would not knowingly put all items in the tender documents which are provided in the case of the revised project for the works contrary to Article 18 paragraph (3) of this Act and thus for yourself or another will have greater benefits, or will cause more damage, shall be punished with imprisonment up to one year“.

---

<sup>17</sup>Article 232-h of The Law on Amendments and Modifications to the Law on Public Procurement (Official Gazette No.148/13)

<sup>18</sup>Article 47 of The Law

<sup>19</sup>Article 232-k of the Law on Amendments and Modifications to the Law on Public Procurement (Official Gazette No.28/14)

<sup>20</sup>Article 232-j

Furthermore, given that the review procedures for PPP exercised under the provisions of the Public Procurement Law, applicable to a provision<sup>21</sup> that the concessionaire not act upon the decision of the State Commission, which decides on the appeal shall be punished with imprisonment of one to five years.

In accordance with the foregoing terms of legal protection, an applicable penalty provision<sup>22</sup> includes that the concessionaire will not complete the re-evaluation after the decision of the State Commission that the procedure returns the re-evaluation within five working days contrary to the "Article 140 paragraph ( 11 )" <sup>23</sup> with the intention of expiration of the validity of the bids, cannot be selected as the winning bid, either himself or herself or another to achieve greater benefits, or will cause more damage, shall be punished with imprisonment of up to one year. This penalty provision applies not only with respect to the primary work, but also in terms of qualified forms of work, which, depending on whether the offender to perform basic work accomplished for himself or for another significant property" interest, or caused significant damage, earned for himself or for another property benefits from greater scale, or damage caused by large - scale, shall be punished with imprisonment of one to three, or three to five years. And negligence is punishable in this work.

The latest amendments to The Law on Public Procurement<sup>24</sup> introduce liability if the estimated value of the contract excluding VAT over 50,000 euro for goods and services, or. over 200,000 euros for works, and indicating that the announcement of awarding a public procurement must be published in the Official Journal of the European Union. The contracting authority may publish notice of this paragraph in a proper business publication or technical or professional journal that is available to the public.

Bearing in mind that a PPP is usually set for larger amounts, and on the other side because there is no exception for procedures PPP, applicability

---

<sup>21</sup>Article 232-g

<sup>22</sup>Article 232-l

<sup>23</sup>If the re-evaluation is not completed within five working days of receipt of the decision by filing a motion to elect or annul the procedure to the responsible person, not counting the days to implement the electronic auction.

<sup>24</sup>Law on Amendments and Modifications to the Law on Public Procurement (Official Gazette No.43/14)

of a recent provision<sup>25</sup> which is establishes precisely those changes that he who consciously did not publish the contract notice and was obliged to do so “shall be punished with imprisonment up to one year. This penalty provision applies not only with respect to the primary work, but also in terms of qualified forms of work, which, depending on whether the offender performs basic work accomplished for himself or for another significant property gain, or cause substantial damage, earned for himself or for another property benefits from greater scale ,or damage caused by large-scale, shall be punished with imprisonment of one to three, or three to five years. And in this offense is punishable negligence in this case”.

### **Applicability of penal provisions of the Criminal Code of the Republic of Macedonia**

The Criminal Code<sup>26</sup> in Article 353 “is given a general provision under which the abuse of power, in its basic form, consists in the fact that an official who, by using his official position or authority, misused his official authority or failure of its duty to obtain for himself or for any other benefit or otherwise will cause damage, and shall be punished with imprisonment from six months to three years ”.

One of qualified forms<sup>27</sup> of this offense in paragraph 5 is if the offense is committed while performing procurement or damage of funds from the budget of the Republic of public funds or other funds of the state, then the offender shall be punished with imprisonment of at least five years .

The Article 353 to the Criminal Code, is systematized in the specific part of the Code, which covers acts that attack duty, actions that violate the lawful and proper execution of the scope or responsibilities and powers of public authorities and other entities with public authorities. Subject to the works of this Chapter is primarily office, but " in real time and represent a serious economic problem offenses. Shift some of them to the head of

---

<sup>25</sup>Article 232-m

<sup>26</sup>Law on Amendments and Modifications to the Criminal Code (Official Gazette No.19/04)

<sup>27</sup>Article 353 paragraph 5, Law on Amendments and Modifications to the Criminal Code ((Official Gazette No.19/04)



criminal offenses against official duty (Chapter XXX) is a relic from past legal system ."<sup>28</sup>

In Article 275-c<sup>29</sup> specifies a criminal offense relating to abuses that can be performed by a private partnership or the grantor during the procedure concession or PPP. Thus, the basic form work „he has done it consciously violate the regulations on the procedure for public notice, awarding a public contract or a public-private partnership by filing false documents, negotiating with other potential participants due to delay of the procedure for granting public contract, by not performing the obligations of the contract intended it to be played or otherwise intentionally violates the rules of this procedure and for it yourself or else you will achieve greater benefits, or will cause more damage. And if it has elements of being another difficult work, in which case the perpetrator shall be punished with the punishment provided for that offense. The perpetrator who committed the offense in its native form, or in any of the previously mentioned severe form of the offender, the court may impose a prohibition on performing a profession, activity or duty under the conditions stipulated in the Criminal Code“.

The penal provisions of the Criminal Code covering all abuses of procedures for PPP may occur on the side of the public partner, or grantor, and are also implicated in abuses and all the procedures that PPP may occur on the part of the concessionaire .

---

<sup>28</sup>Tupancheski, N: Partial changes to the Criminal Code and their impact on the protection of the rights of citizens and legal entities - whether a integral new Criminal Code is required, Business Law No.29, Association of Lawyers of the Republic of Macedonia, Skopje 2013 p.23.(published inMacedonian language);

<sup>29</sup>Law on Amendments and Modifications to the Criminal Code (Official Gazette No 114/09)

## **Conclusion**

In The Law on Public Procurement there are exceptions missing from the application of certain provisions regarding procedures for PPP. These shortcomings create the existence of dilemma and in the application of this law in public procurement procedures, whether certain imperative norms from the Law of Public Procurement and the Criminal Code are usable or not at the procedures for PPP. The situation is further complicated when it comes to the applicability or inapplicability of the penal provisions of the Law on Public Procurement keeping in mind that there are exceptions to the application of these provisions in the procedures for PPP.

Therefore, having in mind that the Criminal Law of the Republic of Macedonia contains provisions that are applicable in Public Procurement procedures and the procedures for PPP, remains the application of this law as *lex generalis* whether to clear all legal dilemmas and will implement the necessary exceptions .

This means that instead of predicting penalty provisions in the Law of Public Procurement which won't be applicable to procedures for public-private partnership, it is necessary to bring article that refers to the application of the Penal Code as *lex generalis* in the Law of Concessions and Public-Private Partnership.

### **Bibliography**

Tupancheski, N: Partial changes to the Criminal Code and their impact on the protection of the rights of citizens and legal entities - whether a integral new Criminal Code is required, Business Law No.29, Association of Lawyers of the Republic of Macedonia, Skopje 2013 p.23,(published inMacedonian language);

*LAWS (“OfficialGazetteoftheRepublicofMacedonia”)*

Law on Concessions and PPP(OfficialGazetteNo. 6/2012)

LawonPublicProcurement(OfficialGazetteNo.136/07)

Law on Amendments and Modifications to the Criminal Code (Official Gazette No.19/04)

Law on Amendments and Modifications to the Criminal Code (Official Gazette No.19/04)

LawonAmendmentsandModificationstotheTheLawonPublicProcurement (OfficialGazetteNo.130/08, 97/10,53/11, 185/11,15/13)

LawonAmendmentsandModificationstotheTheLawonPublicProcurement (OfficialGazette No.148/13)

LawonAmendmentsandModificationstotheTheLawonPublicProcurement (OfficialGazette No.28/14)

LawonAmendmentsandModificationstotheTheLawonPublicProcurement (OfficialGazette No.43/14)

*BYLAWS (“OfficialGazetteoftheRepublicofMacedonia”)*

Ordinance for the content of the feasibility study for the justification of the concession for goods of general interest or of the public private partnership,(OfficialGazetteNo. 44/2012)

Ordinance on the content of the agreement for establishment of PPPand the agreement for concession of goods of common interest(OfficialGazetteNo. 44/2012)

- Ordinance on the form and content of the form for the intention of the private partner to grant agreement for the works to third parties(Official GazetteNo. 44/12)
- Ordinance for the form and the content of the announcement for awarding an agreement for establishment of PPPthat is realized as a concession for public work or as a concession for public service(OfficialGazetteNo. 44/2012)
- Ordinance on the form, content and manner of keeping the register of granted agreements for establishment of PPPand for the form and content of the form of data for the granted agreements for establishment of public private partnership (OfficialGazetteNo 44/2012)
- Ordinance on the form and content of the report for the started, but not completed procedure for granting of the agreement for establishment of public private partnership(OfficialGazetteNo. 44/2012)