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MINISTRY OF FINANCE
P O D G O R I C A

COMMENTS BY NGO MANS ON THE DRAFT LAW ON PUBLIC-PRIVATE PARTNERSHIP

1. **Subject of the public-private partnership needs to be redefined because it is too broad and in practice it will enable implementation of projects in a number of new areas, where there are risks of their inefficiency or gushing of the profit of private investors to public finances of the state and end users of services.**

Article 6 refers to the "Subject of the public-private partnership" and includes a large number of areas in which projects can be implemented. However, the implementation of such projects should be approached very carefully, especially given the sensitivity of public finances and the lack of experience in applying them in a range of newly proposed areas.

Also, the proposer of the law should carefully consider numerous negative experiences in the application of public-private partnership projects in the region, as well as the countries of Western Europe, especially the United Kingdom, which is the "cradle" of the public-private partnership model, in which a good part of the risk and enormous profit of private investors "gushed" to the budget and taxpayers. It is the experience from the Western Europe that has shown that public-private partnerships should not be used in certain sectors due to difficult monitoring of business and threats to declining quality of services due to cost reduction, such as health care, education, prisons, public water supply, railways.

It is therefore necessary to take into account all potential risks and redefine the subject of public-private partnership in order to anticipate only those areas where it is estimated that the public-private partnership projects could be effective and without a high risk to public finances of the state and end users of services.

2. **It is unclear why the value of small public-private partnership projects is expressed without the value added tax.**

Article 12 (Terms), Paragraph 1, Item 6 states: "Small public-private partnership project shall be a project whose value is equal to or less than € 5,000,000, excluding the value added tax."

It is unclear why the value of a small public-private partnership project is shown without value added tax, as its calculation would exceed the envisaged amount of € 5,000,000. Therefore, it is necessary to clearly specify this.

3. **According to the proposed solutions, Montenegrin Investment Promotion Agency as a new authority will have enormous powers, but it is unacceptable that among the competences it is legally stipulated that it can provide professional assistance to foreign investors for investing in specific areas and sectors of the economy, as this may lead to favouring of certain bidders and jeopardize the principle of competitiveness.**

Article 14 (Agency's tasks) under paragraph 1, item 1 stipulates that the Agency shall perform the following tasks: "carry out professional tasks to promote investment opportunities in Montenegro, in accordance with the Strategy and the Agency's annual work programme that specifically relates to: preparation, development and presentation of information on business opportunities in investing in Montenegro; providing technical assistance to foreign investors for investments in certain areas and sectors of the economy; arranging for direct contacts between foreign and domestic enterprises; boosting cooperation with relevant international institutions to promote foreign investment."

It is unacceptable that the law stipulates that Montenegrin Investment Promotion Agency provides professional assistance to foreign investors for investing in specific areas and sectors, as this may in practice lead to favouring of certain bidders and jeopardize competitiveness as one of the basic principles of the public-private partnership.

4. **The Law on Public-Private Partnership should stipulate that the Montenegrin Investment Promotion Agency must organize a public debate when proposing modalities of valorisation of developmental resources.**

Article 14 (Agency's tasks) under paragraph 1, item 10 stipulates that the Agency "shall propose modalities of valorisation of developmental resources."

In order to involve the entire public and stakeholders more intensively, and get the best suggestions for valorisation of developmental resources, and in order for Montenegrin Investment Promotion Agency not to have exclusive monopoly and right to be the only one to propose models of valorisation of developmental resources, it is necessary to prescribe that the Agency proposals are made only after extensive public consultations and public hearings.

5. **Members of the Governing Board of the Montenegrin Investment Promotion Agency should be appointed and dismissed by the Parliament of Montenegro, with one member nominated by the Parliament of Montenegro, one by the Government of Montenegro and one by the University of Montenegro**

Article 16 (the Governing Board) stipulates that the Governing Board shall be appointed and dismissed by the Government, at the proposal of the minister in charge of finance, one member upon proposal of the minister in charge of economy and one member upon proposal of the minister responsible for sustainable development and tourism, while the members of the Governing Board report to the Government on their work.

In practice, the proposed solution would mean complete centralization of the Governing Board by the Government, which is not the best solution. Therefore, the proposed paragraphs need to be changed in a way that the members of the Governing Board are appointed and dismissed by the Parliament of Montenegro, one member being elected at the proposal of the Parliament, one at the proposal of the Government of

Montenegro, and one at the proposal of the University of Montenegro. In addition, members of the Governing Board should report for their work to the Parliament of Montenegro, through submitting annual report on its work.

This is because, due to enormous powers and importance of the tasks that will be performed by the future Montenegrin Investment Promotion Agency, and because of the higher control function, its Governing Board should be elected by the Parliament, instead of being centralized and under full control of the Government of Montenegro.

6. **The Director of Montenegrin Investment Promotion Agency should be elected by the Board of Directors of Montenegrin Investment Promotion Agency, in accordance with a public competition.**

Article 17 (Director of the Agency) prescribes that the Director of Montenegrin Investment Promotion Agency shall be appointed by the Government in accordance with a public competition, and shall submit a report on its work to the Government of Montenegro.

The proposed provision should be amended and it should be stipulated that the Director shall be elected by the Governing Board of Montenegrin Investment Promotion Agency, in accordance with a public competition, and that he/she shall submit a report on his/her work to the Governing Board as well.

7. **In the part of the selection criteria for the members of the Governing Board and the Director of Montenegrin Investment Promotion Agency, the part requiring the experience regarding public-private partnership should be deleted.**

Article 20 (Criteria for selection of bodies of the Agency), paragraph 1, item 2, prescribes that for a member of the Governing Board may be appointed a person who has "at least five years of working experience in performing tasks related to management, preparation, implementation or monitoring of investments, strategies and/or programs, i.e. public-private partnerships."

Same article, paragraph 2, item 2 prescribes that a person with "at least five years of experience in management, and work experience in performing tasks related to the management, preparation, implementation or monitoring of investments, i.e. public-private partnership“ may be appointed Director of the Agency.

From the aforementioned items it is necessary to delete the words "i.e. public-private partnership", because the choice of members of the Governing Board or the Director should not be conditioned by experience in public-private partnerships, since Montenegro did not have such law and has limited implementation of projects according to this investment model.

8. **In the part of limitations for the election of members of the Governing Board and the Director of Montenegrin Investment Promotion Agency, the part with condition that a person must not be convicted of a criminal offense bound only for the period of duration of legal consequences of conviction should be deleted.**

Article 21 (Limitation for the selection of bodies of the Agency), paragraph 1, item 4 stipulates that "a person who has been convicted of the criminal offense prosecuted ex officio, regardless of the sanction imposed, or has been legally convicted of another criminal offense for a term of imprisonment of more than six months, in the period of the legal consequences of the conviction" cannot be appointed member of the Governing Board and Director of the Agency.

From the aforementioned item it is necessary to delete the words "in the period of duration of legal consequences of the conviction", because the conviction should not be tied to the period of the legal consequences of the conviction since a final conviction for the criminal offense itself is sufficient reason for the person to be unworthy of performing the given function.

9. **The procedure for dismissal of the members of the Governing Board of the Montenegrin Investment Promotion Agency should be carried out by the Parliament of Montenegro, and it is also necessary to submit an annual work report to the Parliament.**

Article 22 (Dismissal of a member of the Governing Board and the Director of the Agency) needs to be changed in such way that the procedure for dismissal is carried out by the Parliament of Montenegro for the members of the Governing Board, and according to the aforementioned proposed decision that the election of the members of the Governing Board should be carried out by the Parliament of Montenegro.

Similarly, it is necessary to amend the Article 25 (Annual Reports) in the manner that the Montenegrin Investment Promotion Agency shall submit the annual report on the work to the Parliament of Montenegro.

10. **The Government should not approve the Statute of the Montenegrin Investment Promotion Agency.**

Article 23 (Statute of the Agency) stipulates that "the Statute of the Agency shall be approved by the Government." This paragraph should be deleted, and in accordance with the proposed resolutions the members of the Governing Board should be elected by the Parliament of Montenegro, to which the annual reports on the work are submitted.

11. **Private partner should fully take on the risks of availability and offer.**

Article 32 (Types of Risks), paragraph 3, item 2 stipulates that in the public-private partnership contracts that are not related to the concession, the private partner assumes "in whole or in part the risk of availability and /or risk of supply or demand in accordance with that contract."

"In whole or in part" should be deleted from the aforementioned item since the private partner should fully take on the risks of availability and offers.

12. **Members of the consortium participating in the process of implementing the public-private partnership project should be unlimitedly jointly and severally liable for the execution of the contract.**

Article 36 (Liability of consortium members), paragraph 1, stipulates that "members of a consortium shall be unlimitedly jointly and severally liable for the execution of a public-private partnership contract, unless otherwise provided by the public-private partnership contract."

From the quoted paragraph it is necessary to delete "unless otherwise regulated by the public-private partnership contract", because the entities which as members of the consortium participate in the process of implementation of the public-private partnership project should be unlimitedly jointly and severally liable for the execution of the contract on public-private partnership.

Otherwise, it opens the possibility for certain entities to appear on tenders only formally to ensure the success of the consortium in the process of obtaining a contract, without real intent to participate in the implementation of the public-private partnership project.

13. **Law on Public Private Partnership should prescribe the obligation for the annual budgets of Montenegro and local self-governments to define the amount of money from the budget that can be allocated for projects of public-private partnerships.**

Bearing in mind the excessive indebtedness of the central and local governments' budgets, and in order to avoid over-indebtedness of public funds, it is necessary to prescribe the permitted limits for public-private partnership projects.

14. **The Law on Public-Private Partnership should define the obligation of the public purchaser to make an analysis that will show the project costs if implemented by the public sector before the implementation of preparatory actions for the approval of the public-private partnership project, which will also offer the possibility of alternative solutions.**

In order to avoid excessive acquisition of private sector profits at the expense of the public sector, the Law on Public-Private Partnership should prescribe the obligation of a public contracting authority to develop a professional analysis of the cost of a public-private partnership project when it is implemented by the public sector.

This is especially because public-private partnership projects will be paid by the taxpayers over a long period of time, especially given the experience of Western European countries, the United Kingdom in particular, where the concept of public-private partnership as an investment mechanism is significantly discredited, and where many projects in practice have led to numerous problems, such as delays in the implementation or rapid increase in costs.

Therefore, it is necessary to make a professional analysis which should show whether the implementation of the project would have better or worse results through the public sector, and which would also offer alternative solutions. It would be necessary to include all interested stakeholders in this which, with their remarks, comments and suggestions, could contribute to the implementation of only those projects that are in the best interests of the state.

15. **Public contracting authority should conduct a public hearing procedure and publish on its website analysis of the justifiability of a public-private partnership and a draft contract, to which stakeholders will be entitled to submit comments, remarks and suggestions.**

Article 37 (Contents of preparatory actions) paragraph 1 stipulates: "In order to approve the project of public-private partnership and conclude a contract in accordance with this law, the public contracting authority shall be obliged to carry out the following preparatory actions in particular: 1) identify potential public-private partnership projects; 2) prepare a proposal for a public-private partnership project that includes: - the analysis of the justifiability of the public-private partnership, - the draft public-private partnership contract; 3) submit the proposal of the public-private partnership project to the Agency for opinion. "

In order to ensure transparency and make the best decisions on public-private partnership projects, the public contracting authority should conduct a public hearing procedure and publish on its website analysis of the justifiability of a public-private partnership, as well as a draft public-private partnership contract.

After publication of the aforementioned documents, the public contracting authority should leave the deadline for the public to submit comments, remarks and suggestions, carefully consider a good businessman, then amend the feasibility analysis and the draft contract, and only then send them to the Montenegrin Investment Promotion Agency for an opinion.

This is especially important because citizens are the ones who will pay all public-private partnership projects and therefore must have full insight into all relevant information as well as the possibility to make remarks and propose solutions in order to enable the implementation of only the projects that are sustainable, but at the same time to avoid the danger of securing the private investor the acquisition of excessive profits at the expense of citizens.

16. **It is unclear why the Draft Law on Public-Private Partnership prescribes that a public contracting authority may authorize another public contracting authority to conduct preparatory actions to identify potential projects and their preparations.**

Article 37 (Contents of preparatory actions) stipulates: "A public contracting authority may authorize another public contracting authority to carry out preparatory actions referred to in paragraph 1 of this article."

The intention of the public contracting authority to leave the possibility of transferring complete preparation of the public-private partnership project to another public procurement contractor is unclear, especially since the original public contracting authority has most data on the works or services that should be the subject of the public-private partnership project.

Also, this in practice can lead to the centralization of projects by government ministries, which would determine the list of public-private partnership projects and prepare their proposals.

17. **Law on Public-Private Partnership should prescribe that the advisor shall be engaged in the procedure prescribed by the Law on Public Procurement.**

Article 38 (Engagement of an advisor) stipulates that a public contracting authority may hire a consultant to provide expert support in preparatory actions, in contracting of a public-private partnership as well as in the implementation of a public-private partnership contract.

In order to avoid any suspicion and misuse in practice when engaging counsellors, this Article should have a special paragraph stipulating that the advisor is engaged in the procedure envisaged by the Law on Public Procurement.

18. **Article 39 of the Draft Public-Private Partnership Law, which refers to the self-initiative proposal of a stakeholder, should be deleted.**

Article 39 (Self-initiative proposal) stipulates that preparatory actions may be conducted by a public contracting authority on the initiative of a stakeholder, accompanied by a proposal for a public-private partnership project. It is further stated that the proposal can be accepted, and that the initiator can participate in the process of awarding contract, in which there will be no privileged treatment, and that the public contracting authority shall compensate for the cost of making a feasibility analysis of the public-private partnership project if it is not selected in the process of awarding contracts.

In order to avoid possible misuse in practice, favouring of certain bidders and, in particular, the need for a public purchaser to be the first to determine the feasibility of the need for implementation of a particular project, this article should be completely deleted.

Otherwise, in practice, private investors may be the ones with a dominant initiative in proposing public-private partnership projects, which can often be unjustified and without proper expert analysis, which favour the creation of private profit to the detriment of taxpayers' interests.

19. **It is unacceptable to legally leave the possibility for the difference in the estimated value of the public-private partnership project and the value of the concluded contract to be higher by as much as 20 %.**

Article 40 (Calculation of the value of the public-private partnership project) stipulates: "If the value of the public-private partnership project at the time of awarding the contract is greater than 20 % of the estimated value, the value of the project shall be determined according to the value at the time of awarding the contract."

This paragraph needs to be deleted because it actually opens up space for abuse in practice and increases the value of contracts concluded by as much as 20 % in relation to the estimated value of projects in the feasibility analysis and/or tender documentation. If the feasibility analysis and the tender documentation are well done, the question arises as to why it is legally possible to open the possibility of increasing the value of concluded contracts by as much as 20 %. This is particularly bearing in mind that public-private partnership projects can be worth tens of millions of Euros, so a threshold of 20 % on such contracts would be enormous.

20. **Criteria for calculating the estimated value of the public-private partnership project are too broad and need to be redefined.**

In Article 41 (Methods for calculating the estimated value of a public-private partnership project) in paragraph 2, which refers to the criteria for evaluating the value of the public-private partnership project, it is necessary to delete the words "if possible". This is because in practice it allows public authority contractors to avoid the application of some of the proposed criteria when calculating the value of the projects.

Also, from paragraph 2, item 4, the words "and subsidizing investment costs" should be deleted, as well the item 8 "rewards or other payments to a private partner." This is because such prescribing of the criteria is widely set and in practice would create the possibility for private investors to be unjustifiably subsidized investment costs, awarded prizes or given various other payments through projects of public-private partnership, for which it is not listed what they may be.

21. **Feasibility analysis of a public-private partnership project should not include an assessment of the capacity of the public contracting authority and the public sector for preparation and implementation of the project proposal.**

Article 42 (Feasibility Analysis), paragraph 2, item 15 stipulates that the feasibility analysis shall in particular contain "an assessment of the capacity of the public contracting authority and the public sector in general for preparation and implementation of the project proposal."

The above mentioned item needs to be deleted because it can be an excuse to implement a series of public-private partnership projects, although there is no prevailing public interest for their implementation, especially considering that these projects will ultimately be paid by taxpayers and the public sector.

It should also be noted that if the public sector cannot implement a project, then it certainly cannot be implemented by the private sector.

22. Methodology for assessing the value of the public-private partnership project in relation to the invested funds should be based on the best international standards and practices, and should be determined after a public hearing has been conducted

Article 42 (Feasibility Analysis) stipulates: "The methodology for assessing the earned value in relation to the invested assets referred to in paragraph 2, item 2 of this Article is determined by the Agency." Paragraph 2, item 2 provides that the feasibility analysis shall in particular contain "business plan, cost estimate and value-for-money analysis, funding, asset availability and risk sharing."

Paragraph 3 of the Article 42 needs to be amended in such way as to prescribe that the methodology is determined using the best international standards, principles and practices. In addition, it is necessary to especially stipulate the obligation of the Montenegrin Investment Promotion Agency to put the draft methodology on for a public hearing of at least 30 days in order for the expert and interested public to give their opinion on the solutions offered and to make appropriate remarks, comments and suggestions, since this is a very important document, which should evaluate the value of the project.

23. It is unacceptable that small-value public-private partnership projects do not have to apply all the criteria contained by a feasibility analysis.

Article 42 (Feasibility Analysis) stipulates: "The feasibility analysis for small-value public-private partnership projects may be prepared in such way that it does not include the elements referred to in paragraph 2 of this Article, explaining the reason for the inability to define certain aspects of the analysis referred to in paragraph 2 of this Article. "

This paragraph should be deleted because it is unacceptable that small value projects, up to five million Euros, are exempt from the application of the necessary criteria, which must contain a feasibility analysis, especially considering that in practice a large number of small-value projects can be implemented, mostly locally. This leads to risk of entering projects without quality analyses, which can later increase the costs of these projects, as well as the favourable position of private partners in small value projects.

24. Proposed 20-day deadline for approving public-private partnership projects from Montenegrin Investment Promotion Agency and the competent Ministry is too short and should be increased to 60 days.

Article 43 (Approval of the public-private partnership project) stipulates: "The Agency shall be obliged to give the opinion referred to in paragraph 1 of this Article within 20 days from the date of submission of the public-private partnership project proposal"; paragraph 4 stipulates: "The public contracting authority shall submit the project proposals with the opinion of the Agency to the Ministry for the purpose of giving opinion"; Paragraph 5 stipulates: "In the process of giving the opinion referred to in paragraph 4 of this Article, the Ministry shall in particular evaluate the fiscal effects of the public-private partnership, fiscal availability, sustainability and feasibility, i.e. direct and indirect fiscal effects and risks, and shall be obliged to deliver the opinion to the public contracting authority and the Agency within 20 days from the date of receipt of the public-private partnership project proposal".

The proposed deadline of 20 days for giving opinion is too short to seriously analyze the necessary documentation on a specific project, in particular the feasibility analysis and accompanying documentation,

which is why it should be increased to at least 60 days from the date of submission of the public-private partnership project proposal.

25. **The Law on Public Private Partnership requires that the Register of approved projects publish all relevant documentation related to specific public-private partnership projects.**

Article 45 (Register of approved projects) stipulates: "The content and manner of keeping the Register of Project is determined by the Agency."

In order to achieve complete transparency, it is necessary to define that, with each approved public-private partnership project, the Agency publishes all accompanying documentation related to it.

26. **In the part of engaging of experts (financial, legal and technical) to assist the tender commission, it is necessary to specify the legal procedure for their engagement.**

Article 50 (Commission Affairs) stipulates: "The Commission may engage experts (financial, legal and technical professions) for performing professional activities and providing assistance in performing tasks referred to in paragraph 1 of this Article."

In order to avoid unlawful hiring of experts, or those on whose side there may be a potential conflict of interest, it is necessary to specify a clear legal and transparent procedure for the selection of experts.

27. **The provision on a public call for the award of a public-private partnership contract needs to be redefined in such way as to exclude the possibility of modifying the conditions for participation, criteria or sub-criteria by amending the invitation.**

Article 51 refers to a public call for the award of a public-private partnership contract and provides for the possibility of amending a call that changes the conditions for participation, criteria or sub-criteria.

This should be redefined in such way as to exclude the possibility of amending a public invitation that may change the conditions for participation, criteria or sub-criteria, in order to avoid situations in which interested participants in the tender would ask the public contracting authority to change the conditions and for the public call to be adjusted to their demands and interests, which would undoubtedly favour and thus distort the competition.

28. **From the Draft Public Private Partnership Law, in the part of the content of the tender documentation, it is necessary to delete the paragraph that the feasibility analysis for small value projects should not contain all elements foreseen by the tender documentation.**

Article 53 (Content of Tender Documents) stipulates: "A feasibility analysis for a small-value public-private partnership projects may be prepared in such way that it does not include the elements referred to in paragraph 1 of this Article, explaining the reason for the inability to define certain aspects of the analysis."

This paragraph should be deleted because it is unacceptable that small value public-private partnership projects, for which a threshold of up to € 5,000,000 is prescribed, allows the analysis not to include all the necessary elements that would confirm the sustainability of the project and feasibility of the public interest.

29. **The Draft Public Private Partnership Law, in the part of the content of the tender documentation, should change the paragraph that the Government is envisaged to approve the tender documentation, and instead it should be done by the Montenegrin Investment Promotion Agency.**

Article 53 (Contents of tender documents) stipulates: "The approval of the tender documentation on the public-private partnership project shall be given by the Government, or the competent local government body in the public-private partnership contracts in which the public partner is a local self-government."

This paragraph should be amended in such way that it is stipulated that the Montenegrin Investment Promotion Agency shall approve the tender documentation on the public-private partnership project.

30. **Technical characteristics or specifications must be a mandatory part of the tender documentation.**

Article 54 (Technical characteristics or specifications) paragraph 1 stipulates: "Technical and functional characteristics, or specifications in accordance with the subject of public-private partnership, are obligatory part of the tender documentation, unless regulated otherwise by a special law regulating the field of public-private partnership."

It is necessary to delete "unless regulated otherwise by a special law regulating the field of public-private partnership ", because the technical characteristics or specifications must be a mandatory part of the technical documentation, and not to leave the space in practice to interpret it arbitrarily.

31. **List of situations in which a negotiated procedure can be conducted without prior publication of a call should be narrowed down in order to avoid potential abuses.**

Article 60 (Negotiating procedure without prior publication of a call), paragraph 1, item 4 stipulates that the negotiated procedure without prior publication of the invitation shall be carried out by calling one or more stakeholders "if, due to extreme urgency in order to prevent endangering of health and life of citizens, and in other circumstances that the public contracting authority could not have influenced, deadlines in an open, limited or negotiated public-private partnership procedure with prior publication of the invitation cannot be applied", while the item 5 stipulates: "If the public invitation foresees that after the conducted open or limited procedure a negotiated procedure with a certain number of best bidders shall be conducted."

The aforementioned items need to be completely deleted, since they leave room for a broad and arbitrary interpretation of numerous situations in practice, which can be considered urgent, although they do not really have to be. And even if it is about the urgency, then these are situations in which public contracting authority must apply the Public Procurement Law. Also, it is necessary to exclude the possibility for the public contracting authority to open space for a certain number of bidders to continue the negotiation procedure without prior publication of the invitation, since in this way the individual bidders may be favoured and thus the competitiveness reduced, which consequently affects the higher cost of the project.

32. **The award of a public-private partnership contract for small-value projects as well as the award of contracts for higher value projects must be subject to the same procedure.**

Article 63 (Awarding of public-private partnership contracts for small-value public-private partnership projects), paragraph 1 stipulates: "The procedure for awarding public-private partnership contracts for small-value public-private partnership projects may be implemented in accordance with the Article 56 of this Law, or according to a special procedure established by the Government by a special legislation, respecting the principles of this law."

It is necessary to delete "or according to a special procedure established by the Government by a special legislation, respecting the principles of this law", since it is impermissible to create the possibility that small-value projects, up to € 5,000,000, are excluded from the application of the Law on Public-Private partnership.

33. **Article 64, related to confidentiality during the proceedings, should be deleted.**

Article 64 is entitled "Confidentiality during the proceedings". Paragraph 1 reads as follows: "The public procuring entity may not disclose the information that the bidder has indicated in the offer as a secret, unless otherwise provided by a special law", and paragraph 2 reads: "While awarding a public-private partnership contract, the bidder is obliged to provide protection of the confidentiality of the data in the procedure at the request of the public contracting authority."

This article needs to be deleted because public-private partnership projects must be transparent, and it is extremely unacceptable to leave it to the bidder to determine what is secret and what is not. The manner in which the aforementioned Article of the Draft Law on Public-Private Partnership is defined would leave a vast space for arbitrary interpretation of the confidentiality of data, which is completely unacceptable.

34. **From the procedure for awarding a public-private partnership contract, it is necessary to exclude bidders where the responsible person is legally convicted of the criminal offense of abuse in business.**

Article 67 refers to Ineligible Bidders. The list of crimes for which the public contracting authority is obligated to exclude a bidder from the procedure for awarding a public-private partnership contract should also be extended to the criminal offense of abuse in business.

35. **All notices, contracts and supporting documents must be submitted to the Montenegrin Investment Promotion Agency for publication on the website.**

Article 81 (Notice on the award of a public-private partnership contract) stipulates that a public contracting authority shall submit to the Montenegrin Investment Promotion Agency a notice on the award of a public-private partnership contract with the information from the contract award procedure, which will then be published on its website.

This needs to be redefined in the manner that it is stipulated that the Montenegrin Investment Promotion Agency will be provided with the concluded contract and all accompanying documentation, in order to achieve complete transparency and at the same time ensure that all public-private partnership documents are in one place.

36. **It is unacceptable that the Law on Public-Private Partnership opens the possibility for the contract on public-private partnership to provide compensation and offsetting of receivables, as well as prescribing provisions on business secrets and secrecy of data.**

Article 83 (Basic elements of the Public-Private Partnership Agreement), paragraph 1, item 11 stipulates: "Possibility and conditions for compensation and offsetting of receivables", and item 14 "Protection of intellectual property rights, business secrets and secrecy of data."

From the aforementioned items it is necessary to delete the complete item 11, and from item 14 words "business secrets and secrecy of the data." Namely, it is completely unacceptable for projects that should be in the public interest, and thus the public must have all relevant information, to open up the possibility of

compensation and offsetting of receivables, and prescribe provisions on business secrets and data confidentiality.

37. **The Law on Public-Private Partnership should prescribe that in case of refinancing, which reduces the cost of the project, the public partner receives at least 50% of the refinancing amount.**

Since Article 83 (Basic elements of the public-private partnership agreement) mentions the possibility of refinancing, it is necessary to prescribe a paragraph by which, in the case of refinancing, which reduces the cost of the project, at least 50 % of the refinancing fee is borne by the public partner.

38. **Deadlines for duration of public-private partnership projects are too long and it is unacceptable to last as long as 90 years, thus, they need to be significantly reduced.**

Article 84 (Duration of the public-private partnership contract) paragraph 1 stipulates: "The deadline for concluding a public-private partnership contract cannot be longer than 30 years when the decision on the award of the contract is made by the Government or the competent body of local self-government, or longer than 60 years when the decision on the award of the contract is made by the Parliament", and paragraph 2 stipulates: "The duration of a public-private partnership contract may be extended no earlier than six months before the expiration of the original contractual deadline, for a maximum of half the deadline specified in the original contract on public-private partnership, unless otherwise specified by a special law."

It is an unreasonably long deadline, which means that public-private partnership contracts can last for up to 90 years, which is a time period in which huge changes can occur on the market, and the circumstances can be significantly changed, so it is not only in the public interest, but also in the interest of service users for duration of the public-private partnership contract to be shorter. They should have a maximum time limit of 20 years on average.

39. **Deadline for the start of duration of the public-private partnership contract should only be linked to the date of signing the contract, but not other circumstances, in order to avoid arbitrary arrangements in practice.**

Article 84 (Duration of the public-private partnership contract) paragraph 8 stipulates: "The deadline for the public-private partnership contract referred to in paragraph one of this Article shall begin from the date of signature, unless otherwise stipulated in the public-private partnership contract or tender documentation."

In order to avoid arbitrary agreements in practice, the words "unless otherwise specified in a public-private partnership contract or tender documentation" should be deleted.

40. **The Law on Public-Private Partnership defines the minimum limits for the amount of the performance guarantee, but does not leave it to public contracting authorities to determine it by themselves.**

Article 85 of the Draft Law on Public-Private Partnership prescribes the standards for the performance guarantee, but no word states what is the minimum guarantee for good performance.

It is impermissible to leave room for public contracting authorities to determine, on a case-by-case basis, the minimum amounts of the performance guarantee, which is why it is necessary to prescribe that the private partner is obliged to deliver a performance guarantee corresponding to the amount of 50 % of the value of the project.

41. **It is impermissible to provide an opportunity for private partner to grant, pledge or burden with mortgage its right, that is, the obligation or subject of the public-private partnership contract, in order to provide funds for financing the public-private partnership project.**

Article 86 (Financing), paragraph 2 stipulates: "With the prior approval of a public partner, a private partner may allocate, pledge or burden with mortgage, within the period and scope determined by the public-private partnership contract in accordance with the law governing state property right or obligation from a public-private partnership contract in favour of a financial institution in order to secure the payment of the resulting or future receivables in connection with the construction and financing or refinancing of the public-private partnership project", while paragraph 3 stipulates: "Notwithstanding the paragraph 2 of this article, goods of general interest cannot be pledged, burdened with a mortgage or in any other way restricted. "

These paragraphs need to be completely deleted, since it is impermissible to give the possibility for a private partner to finance, or refinance the public-private partnership project by pledging its right, that is, the obligation or subject of the public-private partnership contract, and in that way provide funds for implementation of the project. If such possibility opens, then the question arises as to why the public contracting authority does not provide funds for financing the public service by being the one to burden the subject of the contract with a loan or mortgage.

42. **Number of cases in which the possibility of amending the public-private partnership agreement is completely unacceptable and should be excluded, since in practice they can lead to abuses.**

Article 87 (Amendments to the Public-Private Partnership Agreement), paragraph 1, point 3 stipulates that the contract may be amended without the implementation of a new award procedure if "additional works and services are necessary for the implementation of the public-private partnership, and the change of the private partner is not possible for economic or technical reasons, that would cause difficulties or a significant increase in costs to the public partner", item 4 if "national security and defence, environment or human health is endangered, or it is required by the public interest of Montenegro in case they are jeopardized by the Constitution of Montenegro and the rights guaranteed by the law" and item 6 if "a private partner is replaced by its legal successor which fulfils the same criteria as the private partner with whom the contract was concluded, provided that no other substantive changes to the public-private partnership contract are made."

The aforementioned items are not only broadly set, they are also completely unjustified and in practice they can lead to the misuse and modification of public-private partnership contracts, and when this is not appropriate or is at the expense of the public interest, which is why they need to be deleted.

43. **It is unacceptable to leave the possibility of as much as 10% increase in the value of a public-private partnership contract by amending the contract.**

Article 87 (Amendments to the Public Private Partnership Agreement) stipulates: "If the value of a public-private partnership contract can be expressed in cash, a public-private partnership contract regarding a public service concession or public works may be changed under condition that the value of the contract after the changes does not amount to more than 10 % of the net value of the original public-private partnership contract."

This paragraph should be deleted, because it is completely unacceptable for the law to leave the possibility for the value of the concluded public-private partnership contract to increase by as much as 10%, which would have a negative impact on public finances or end users, especially when it comes to multi-million dollar projects.

44. **Law on Public-Private Partnership requires that all amendments to the public-private partnership contract, with supporting documents, be publicly announced.**

In order to achieve full transparency and the public's interest to know, all amendments to the contract, accompanied by documentation, are also required to be publicly announced on the website of public contracting authorities, as well as on the website of the Montenegrin Investment Promotion Agency.

45. **It is unclear why the proposer of the Law on Public Private Partnership leaves the possibility of transferring public-private partnership contracts, without specifying the situation when this can be allowed.**

Article 88 refers to the Transfer of a contract and gives it a broad possibility that a public-private partnership contract may be transferred to a third party that meets the same conditions as a private partner, that is, fulfils the requirements foreseen by the public invitation and tender documentation for the award of the contract. However, apart from the fact that it primarily stipulates that the Transfer of contract requires the approval of the Montenegrin Investment Promotion Agency and that the transfer should not diminish the quality and impair the continuity of the execution of the contract, the situation in which the transfer of the public-private partnership contract can be granted is not defined at all.

This in practice can lead to arbitrary interpretations and frequent approvals of contract transfer, even when there are no justified reasons. Also, there is a special danger that a tender can be concluded with a private partner, which is essentially not interested in its implementation, instead it is a "cover" for another private partner. Therefore, Article 88 needs to be significantly redefined and the possibility of enabling the transfer of public-private partnership contracts foreseen only as an exception, and it is also necessary to prescribe the conditions in which this can happen.

46. **The paragraph stating that it is unclear that a public-private partnership agreement cannot be changed in the event of a market price change that may affect the implementation of the contract is unclear.**

Article 89 (Conditions under which the contract cannot be changed), paragraph 1, item 4 stipulates that a public-private partnership contract must not change if "there is a change in the prices on the market that can significantly affect the implementation of the contract whose risk of a private partner secured."

Aforementioned paragraph is unclear and needs to be redefined, especially because lowering of the price of services in the market can take place, which would be for the benefit of the end consumers, and because of the inability to change the contract, if the private partner secured the risk, they would be forced to pay more for certain service or works.

47. **The Law on Public Private Partnership, as one of the reasons for termination of the public-private partnership contract, requires a situation where a private partner does not provide a bank guarantee of a good performance.**

Article 92 (Termination of the contract) needs to be amended and stipulated that the public-private partnership contract is terminated by sending a notice if the private partner does not deliver the good performance guarantee.

48. **In cases of termination of a public-private partnership contract, in the part on the compensation for damages, it is necessary to prescribe that the private partner is obliged to compensate the**

damage to the public partner in accordance with the public-private partnership contract and the law governing the contractual relations.

Article 93 (Termination of a public-private partnership contract after a written warning) paragraph 4 stipulates: "In case of termination of the public-private partnership contract referred to in paragraph 1 of this Article or article 92 of this law, the private partner shall be obliged to compensate the damage to the public partner in accordance with the law that regulates the contractual relations."

This paragraph needs to be amended by defining that the private partner is obliged to compensate the public partner in accordance with the PPP and the law governing the contractual relations.

49. **The possibility that a private partner may perform certain tasks that serve to perform the activities of a public-private partnership to entrust to third parties should be provided as an exception rather than a rule.**

Article 94 (Subcontracting), paragraph 1 stipulates that: "In order to implement the contract on public-private partnership, a private partner may execute certain tasks that serve to perform the activity that is the subject of public-private partnership to entrust to third parties."

This paragraph needs to be amended in such way as to prescribe that it is an exception, not a rule, i.e. that the private partner can exceptionally entrust performing of certain tasks that serve to perform the activities of public-private partnership to third parties.

50. **The Law on Public-Private Partnership should stipulate that a private partner can conclude contracts with subcontractors i.e. subcontractors with the prior approval of the Montenegrin Investment Promotion Agency, and that all such contracts must be made public.**

Article 94 (Subcontracting) needs to be amended in such a way that it is defined that a private partner, which entrusts certain activities that serve to performing of the activity that is the subject of public-private partnership to third parties, can conclude a contract with the subcontractors only with the prior consent of the Montenegrin Investment Promotion Agency.

Also, the same article should provide that contracts with subcontractors, accompanied by documentation, shall be published on the website of public contractors, as well as on the website of the Montenegrin Investment Promotion Agency.

51. **It is unacceptable to exclude the public bidding procedure for granting concessions in cases where it is necessary to acquire the right to use natural resources, goods in general use or other goods of general interest in state ownership.**

Article 96 (Property rights and property management), paragraph 4 stipulates: "If for implementation of the subject of public-private partnership it is necessary to acquire the right to use natural resources, goods in general use or other goods of general interest in state ownership, in accordance with the law regulating the granting of concessions, the awarding of such right shall not be subject to the public tender procedure provided for by that law", while paragraph 5 stipulates: "Mutual rights and obligations of the public and private partners referred to in paragraph 4 of this Article shall be regulated by the public-private partnership contract.“

The aforementioned paragraphs need to be deleted because it is completely unacceptable to exclude the public tender procedure for granting concessions, especially when it comes to the right to use natural resources, which

at the same time would be in favour of the private partners with whom public-private partnership contracts have been concluded.

52. **When it comes to obligation of the private partner to provide proof of risk insurance, it should be clearly indicated that it is obliged to deliver such evidence for environmental pollution.**

Article 101 (Insurance costs), paragraph 2, item 2 provides that insurance is performed in particular for "potential environmental pollution in connection with the rights and obligations of the public-private partnership contract."

It is necessary to delete the word "potential" from this paragraph, because there should be no space in practice for different interpretations and assessments on whether the environmental pollution is potential or not.

53. **Regulation by the Government of Montenegro, which will determine the concession fee or other compensation under public-private partnership projects, must be put to a public hearing and enabled to stakeholders to present their views, remarks, suggestions and comments.**

Article 102 (Compensation), paragraph 1, stipulates: "The private partner is obliged to pay a concession fee or other compensation in accordance with the law in the amount and in the manner determined by the public-private partnership contract", while paragraph 4 stipulates: "The method of calculation and the criteria for determining the compensation referred to in paragraph 1 of this Article shall be determined by the regulation of the Government."

The aforementioned article has to be amended by requiring that the Government put the proposal on the rules on calculation and criteria for determining compensation in a public hearing, within at least 20 days, in order for the broad public to give comments, remarks and suggestions. This is with the aim to obtain the best solutions that will allow concessions and other fees to meet the public interest, since it is about the revenues of the state budget and the budget of local governments.

54. **It is unacceptable for the Law on Public-Private Partnership to define that the rights and obligations from the public-private partnership contract can standstill due to extraordinary events, and that no word is given on what are the possible situations.**

Article 104 (Standstill of rights and obligations under the contract) paragraph 1 provides that: "In case of force majeure or an extraordinary event that is prevented from the execution of a public-private partnership contract that could not have been foreseen at the time of the conclusion of the public-private partnership contract, the rights and obligations of the public-private partnership contract are standstill until the termination of the force majeure or extraordinary event", while paragraph 3 stipulates: "The decision on the suspension of the rights and obligations from the public-private partnership contract does not apply to the claims of the public partner due prior to emergence of force majeure or an extraordinary event."

The words "extraordinary event" should be deleted from the quoted paragraphs, in order to avoid a wider interpretation in practice, as well as those situations that are objectively not an extraordinary event. In relation to this, the paragraph of the proposers of the law is also problematic. It does not specify in any word the potential cases of extraordinary events, and this is because the paragraph 1 already states that the rights and obligations are standstill in case of force majeure, which is a legally sufficient determination as when it can really come to the standstill of rights and obligations under the public-private partnership contract.

55. The Law on Public Private Partnership requires the obligation of the private partner to provide a bank guarantee for the obligation to revitalize or recultivate areas and facilities degraded by performing the activities that are the subject of public-private partnership.

Article 105, which relates to revitalization and recultivation, needs to be amended in such way that the obligation of the private partner to submit a bank guarantee for obligation of revitalization, i.e. recultivation of areas and facilities degraded by performing of the activitiy that is the subject of public-private partnership, is provided.

This is because the public contracting authority must have the appropriate security means from which the obligation of revitalization or recultivation can be fulfilled, if the private partner does not fulfill this obligation. Otherwise, the costs of revitalization, or recultivation, may fall under the burden of the public sector.

56. The Law on Public-Private Partnership should prescribe that public-private partnership contracts and accompanying documentation are kept permanently

Article 106 (Record of concluded contracts), paragraph 3 stipulates: "The public contracting authority is obliged to keep documentation referring to a particular public-private partnership project, in accordance with the regulations governing the keeping of archival documents."

This paragraph needs to be revised and it should be stipulated that the contracts and accompanying documentation are kept permanently. This is especially because the regulations governing the preservation of archival documents leave the possibility for public contracting authorities to pass legislation on the deadlines for keeping records, and in order to avoid situations in which these storage periods could be too short, and given the enormous significance of the contract on public-private partnership, it should be foreseen to be kept permanently.

57. In the part of the article defining the content and manner of keeping the Registry, it is necessary to prescribe that contracts with all accompanying documentation are published on the website of the Montenegrin Investment Promotion Agency.

Article 107, which relates to the content and manner of keeping the Registry, should be amended in such way that it is stipulated that all public-private partnership contracts, together with all accompanying documentation, must be published on the website of the Montenegrin Investment Promotion Agency.

58. The Law on Public-Private Partnership should define the obligation to submit a report on performing obligations under the public-private partnership contract to the Parliament of Montenegro for consideration.

Article 108 (Monitoring of execution of the contract) paragraph 6 stipulates: "The Agency submits to the Government a report on performing of obligations under the public-private partnership contract by the end of the first month after the end of the annual quarter", while paragraph 7 stipulates: "Report from paragraph 6 of this Article is submitted by the Government to the Parliament for the purpose of informing."

It is necessary to amend this paragraph in such way that it is envisaged that the report be submitted to the Parliament for consideration, in order to influence a larger control role in the implementation of the public-private partnership.

59. **The Law on Public-Private Partnership should provide that the supervision of the legality and integrity of the work of the Montenegrin Investment Promotion Agency is carried out by the Government and the Parliament, in accordance with the law.**

Article 111 (Supervising bodies), paragraph 3, stipulates that "the supervision of the legality and integrity of the Agency's work shall be carried out by the Ministry in accordance with the law."

This paragraph needs to be redefined in such way that it is stipulated that the Government of Montenegro and the Parliament of Montenegro, in accordance with the law, are responsible for monitoring the legality and integrity of the work of the Investment Agency. This is aimed at strengthening the controlling function of the Montenegrin Investment Promotion Agency.

60. **The Law on Public-Private Partnership should prescribe the obligation of the Montenegrin Investment Promotion Agency to publish on its website all concession agreements with accompanying documentation.**

Article 122 prescribes that public contracting authorities are obliged, within six months from the date of entry into force of the law, to submit to the Montenegrin Investment Promotion Agency concession agreements with accompanying documents for entry into the Register.

The aforementioned article needs to be amended in such way that it is stipulated that the Montenegrin Investment Promotion Agency publishes all contracts with accompanying documentation on its website.

61. **The Law on Public Private Partnerships should stipulate a specific obligation that all payments for public-private partnership projects should be publicly disclosed in Government accounts.**

This solution is proposed because citizens need to have full information on paying annual fees and expenses on the basis of projects of public-private partnerships.

62. **The Law on Public-Private Partnership should provide for the obligation to evaluate public-private partnership projects, and the data on this should also be publicly available.**

In order to reduce potential financial risks, it is necessary to prescribe that following the completion of the initial financing, an evaluation of the PPP project will be carried out, while the next evaluation of the project will be carried out after five years, in order to determine the success of the business.

MANS INVESTIGATIVE CENTRE
Coordinator Ines Mrdović

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