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The integrity of decision-making: Systemic omissions in the ‘‘Bechtel Enka’’ case

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Corruption is defined by three main elements.[1] The first element is monopoly, that is, the situation in which the right to adopt a specific act – from a general policy to an individual decision –is concentrated. Concentration can mean a person, a group, an institution or a consortium of institutions. The larger the monopoly, the more likely that the entrusted power can be abused. The second element is discretion, that is, the degree of arbitrariness within which the elements of the particular act can vary. The greater the possibility of arbitrariness, the more likely it is that a decision can be made in favor of a particular private interest. The third element is accountability, that is, the mechanisms that are set up to account to third parties in situations in which the previous two elements – monopoly and discretion – exist. The stronger the accountability mechanisms, the less likely corruption is to influence a certain decision – for example issuing a permit, or creating a law or policy.

This framework is useful for analyzing the 'Bechtel Enka' case, that is, the construction of highway sections of Corridors 8 and 10-d, and helps to understand the failure of the safeguard mechanisms aimed at preventing or reducing the risks of corruption that it entails. The exploitation of monopoly and discretion in decision-making can be observed through a series of stages – from the initial idea to the adoption of the special law for 'Bechtel Enka' – and the further changes to the accompanying regulation, neglecting the existing mechanisms that, via the accountability process, should curb the risks that arise in the decision-making. This paper will present the key control points that were somehow bypassed by the entire process.

The adopted Law allows the Government to enter into a direct contract with the 'Bechtel Enka' Consortium, contrary to the general rules for public procurement, according to which, given the size of the costs, an international tender would have to be announced and the best bidder selected. Special laws, that bypass the general rules, are considered to be inherently fraught with the risk of corruption, as they allow privileged access to resources without following the principles of competition in the awarding of public contracts. In order to explain the risk, one does not have to go beyond the borders of the country, because the Republic of North Macedonia already has such a case related to the "Kichevo-Ohrid" highway, where several leaders of the VMRO-DPMNE Government have been brought to court, including Nikola Gruevski, charged with abuse of office.

Lobbying

According to the statements of Government officials, at some point before the signing of the Memorandum on March 31, 2021, representatives of the 'Bechtel-Enka' Consortium approached the Government with the idea of building the corridors on a turnkey basis.[2] Without the details of the negotiations being known, their product is the Memorandum of Cooperation which determines the intention for a direct agreement between the Government and a private person – in this case the Consortium. A product of this Memorandum is also the Law on Determining the Public Interest and nominating a strategic partner for implementation of the project for construction of the infrastructure Corridor 8 (Section: Tetovo - Gostivar - Bukojchani and the project for the Trebenishta - Struga - Qafasan highway) and Corridor 10-d (Section of the Prilep-Bitola highway) (hereinafter: Law on Corridors 8 and 10-d) in the Republic of North Macedonia.[3] The Law can be considered as indirect product of the Memorandum, because it was adopted on the proposal of the MPs, but it is logical to assume that the text itself was prepared within the Government.

[1]Robert Klitgaard. Controlling Corruption. 1988

[2]https://prizma.mk/rekonstruktsija-na-sluchaj-od-behtel-i-enka-do-ird/

[3]Official Gazette 163/2021, July 16, 2021

Since product of these contacts are two decisions – a Memorandum (until the draft text from the Government enters the Parliamentary procedure) and a law – the actions of "Bechtel-Enka" in the contacts with the Government can be considered lobbying. According to the then valid Law on Lobbying,[4] lobbying is considered "an activity aimed at the legislative and executive authorities at the central level, as well as at the local authorities, for the purpose of realizing certain interests in the process of enacting laws and other regulations."[5]

Both parties were required to inform the State Commission for Prevention of Corruption about this process. According to Article 22, the lobbyist had to submit an annual report to the State Commission for Prevention of Corruption about this activity. At the same time, considering that there are no registered lobbyists in the country, according to Article 24, the officials in the Government had to report this activity to the State Commission for Prevention of Corruption. There is no record in the State Commission for Prevention of Corruption that something like this was done. Thus, the protective mechanism that limits the lobbying was not used, and it did not regulate and limit the influence of the private interest in the decision-making.

Regulatory impact assessment and public consultations

It is also not known how the other stakeholders were consulted in the process of preparing the draft Law. As a draft text, it was never published on the Single National Register of Regulations (ENER), although in 2021 there were several statements in the media by the Minister of Transport, Mr. Bochvarski, who announced that teams from the ministries would prepare the text, which would be followed by debates.[6]

According to the Rules of Procedure of the Government, when preparing legal solutions, the ministries are required to carry out an impact assessment of the regulation.[7] This assessment aims to frame the inherent discretion in the policy making and to add data in order to reduce the adverse effects of such inherent discretion through a process of analysis and consultations. At the same time, the PVR establishes rules for early announcement of the preparation of laws, with which the concerned public can have an insight into the plans and dynamics of the policy making. In short, the PVR creates opportunities for data-based predictive decision-making.

When the draft text was in the Ministry, it was not made available to the public for insight, nor was it announced on the Single National Register (ENER), as required by the Rules of Procedure of the Government via the PVR process. In that way, the citizens have not been given the opportunity, outside of the standard consultations in working groups and public hearings, to either comment on it, nor to organize an independent process in which they will give their views on the issue in a timely manner. However, there are no indications that the text of the draft law, while it was in the Ministry, was consulted with external stakeholders. Consultations regarding this Law are extremely important, because the text itself assumes possibilities for excluding the validity of other laws, so it was necessary to consult experts and representatives of groups that would be, or could have been, affected by the construction of the

[4]Official Gazette 106/2008, August 27, 2008

[5]Article 2.

[6]https://360stepeni.mk/shto-sodrzhi-Memorandumot-na-vladata-so-behtel-i-enka-za-izgradba-na-avtopati/

[7]https://www.mioa.gov.mk/sites/default/files/pbl_files/documents/Akti_PVR_1mk.pdf

highways. On the contrary, the public debate related to the Law took place informally and as a reaction to events and media statements of the officials.

However, the draft law enters the Parliament in 2021 on the proposal of the MPs. In that case, there is no obligation to carry out a regulatory impact assessment. In this way, the possibility of using PVR as a protective mechanism in the decision-making process is bypassed.

Compared to the standards set by the PVR, the rationale attached in the text of the proposed Law does not sufficiently explain the reasons for the chosen model and is lacking an analytical comparison with the option of conducting the entire construction project via the Law on Public Procurement. The rationale includes argument that the new approach solves the initially identified issues in the execution of similar projects, although there is already a case where a court proceeding for abuse of official position is being conducted for the same model of a directly concluded contract.

At the same time, a public hearing was not held in the Parliament, with which the MPs could consult experts in order to see the weaknesses and opportunities for improvement. Although it is a Law that establishes a major infrastructure project in public transport, the proponents do not see the need for wider consultation before the Law enters into force. For example, in their presentations, the officials explain the new approach through the application of the so-called FIDIC contracts, although neither the red, the yellow, nor the silver FIDIC contract excludes public procurement as an option – on the contrary, they offer templates for tender documentation. With a public hearing, the MPs could be properly advised and improve the legal text with amendments.

Two years after the adoption of the Law, in 2023 it turns out that it is necessary to change a number of laws in order to achieve harmonization. For example, amendments have been proposed to the Law on Labor Relations, the Law on Construction, the Law on Urban Planning, the Law on Expropriation and an additional amendment to the Law on Corridors 8 and 10-d. After public reactions, the proposals were withdrawn and were again proposed, for second time, by the respective Ministries. In none of the cases were these changes subjected to a regulatory impact assessment although, considering the significance of the changes, the Government should apply the PVR methodology when drafting the changes.

Regulatory impact assessment is an important part of the system of ensuring integrity in decision-making that establishes the use of consultation, analysis and comparison in order to choose the best solution and identify and reduce the potential impacts on the private interest. In the case of the Law on Corridors 8 and 10-d, but also with the additional laws that are amended for the purpose of harmonization, the bypassing of the assessment allowed decisions to be made without taking into account multiple analyzes that would limit the possibilities of discretionary and arbitrary decision-making. The same also applies to the parliamentary procedure which does not have formal obligation to apply the PVR methodology when making the policies but is bound to the principles of transparency and consultation of various stakeholders via public hearings. Contrary to this, both in Government and in Parliamentary procedure, the failure to implement the standards for evidence-based decision making created a ‘wall’ that protected the original initiative of direct negotiation between the Government and the Consortium – from an idea to an adopted Law.

The European flag option

Faced with a potential blockage in the Parliament and after proposals were submitted for amendments to several laws in 2023, in order to comply with the Law on Corridors 8 and 10-d, the Government made a decision to use a European flag for these proposals. This modality is used to harmonize the domestic legislation with EU rules, and enables a fast track procedure in the Parliament. The basis for this is the fact that it is about harmonization, so the space for deviation from the European legislation is smaller,

and therefore the Parliament can largely discuss between rejecting and accepting the harmonization, and to a much lesser extent about amending the rules.

However, the submitted draft laws were not about specific harmonization with the European regulation in the respective area. All proposed amendments to laws refer to the Regulation of the European Parliament 1315/2013 and its amendment, which establishes definitions and standards for transport infrastructure in the EU, as well as definitions of the corridors to be worked on. In the indicated regulation there is no content that governs areas of labor relations, construction and urban planning and environmental protection. With this, the Government referred to an irrelevant European regulation by tagging the proposed amendments with a European flag.

By accepting the proposals and allowing them to enter the Parliamentary procedure, Article 136 of the Rules of Procedure of the Parliament was violated. According to that Article, the President of the Parliament should return the text for revision, if it does not comply with the necessary descriptions and references (from Article 135) that describe what the proposed Law should include in order to ensure that it refers to compliance with the EU rules. The President of the Commission for European Affairs has not done the same either.

Suspensive veto

The next step in protecting the integrity of the decision-making is the possibility that the President of the Republic of North Macedonia will not sign a law passed in the Parliament, referring to the possibility given by Article 75 of the Constitution. This right is given to the President as a possibility, if he/she considers that a passed law would be harmful.

Despite the request from the State Commission for Prevention of Corruption, the President signed the Law on Corridors 8 and 10-d in 2021, on the grounds that no MP in the Parliament voted against it. Although this is factually correct, in the Constitution the right of suspensive veto is limited only by a repeated vote in the Parliament, after it has already been used once. Furthermore, 55 MPs voted in favor of the Law, so it is not clear on which principle the President built his argument.

The President should have also considered all the previous omissions, the lack of transparency, the absence of consultations and the fast-track procedures, both when the Law on Corridors 8 and 10-d was adopted and when the amendments to the above-mentioned laws were made in 2023 for the purpose of harmonization. The power vested in him/her by Article 75 of the Constitution is, with the treat of a veto, to force the previous instances to use their own procedures to protect the integrity of the decision-making process, in order to reduce the potential damages from the respective legal solutions.

Discussion and conclusions

Stopping and controlling the influence of the private interest in the law making process is an essential objective of the notion of integrity in the decision-making process. Unfavorable influence in the law making process can legalize corruption and thereby enable impunity. The commonly called "legislative capture" threatens to spread as a practice, as corrupt actors look for ways to circumvent the rules.

Abuses in public procurement and finances and the failure to implement the rules are easier to detect and they expose the corrupt actors to risk due to the improvement of transparency, which is conditioned by the domestic pressure and the ambitions to enter the EU. Exposed to that risk, the corrupt actors

resort to legalizing corrupt practices in order to ensure that even with an unpredictable future, they will avoid justice. In short, the corruption moves from the abuse of the established rules into the realm of rule-making.

The case with the adoption of the Law on Corridors 8 and 10-d shows how the four control points in the process subsequently fail to ensure integrity in the decision-making. The private interest of the Consortium enters unhindered into the decision-making process in the Government, where both laws and Rules of Procedure are neglected. The Parliament does not fulfill its control and consultative role, but by neglecting its own rules of procedure, it enables essential omissions to happen in the adoption of the discussed laws. The last point on the way before the law enters into force – the President – ignores all accumulated omissions and he is not using his role as a counterweight in the decision-making process.

All this points to the need to expand the scope of control in the future, including the judicial authority, in assessing the decision-making process. However, this requires from the social actors to identify how the special laws, and especially the violations of the internal procedures in the Government and the Parliament, have violated their rights, and initiate proceedings about that before the Constitutional and Administrative Court. In that way, the entire system will be tested, in terms of how ready it is to protect the public interest in the rule-making domain.

About the project

The project includes activities for research and advocacy in order to support the reform process in North Macedonia by strengthening the reform agenda in the area of the rule of law. For achievement of this objective, the project foresees cooperation and consultation with all relevant stakeholders in the fight against corruption.

The project aims, together with the anti-corruption institutions, to establish a strategic and long-term vision for development of the institutions in order to intercept future processes and forms of corruption. Through the project, the institutions and the Institute for Democracy will work on overview of the key social processes that will influence the fight against corruption until 2030, and based on that, plans will be drawn up for the institutions to cope with the modern challenges brought about by the fight against the corruption.

By enabling political dialogue between anti-corruption institutions, the Parliament and the civil society, the project aims to achieve three specific objectives:

- Supporting the improvement of the policy-making process, referring to the long-term visions of corruption risks and identified shortcomings;
- Informing long-term plans for institutional development, based on strategic thinking and forward-looking analyses
- Educating the public and creating public demand for improved anti-corruption planning by the authorities.

About IDSCS

IDSCS is think tank organization which researches the development of the good governance, the rule of law and the European integrations on North Macedonia. IDSCS has a mission to assist the civil involvement in the adoption of decisions and to strengthen the participatory political culture. By strengthening the libertarian values, IDSCS contributes to coexistence between diversities.

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