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# The Mess of Redress in the Croatian Public Procurement System

## About Ema

- Commercial and corporate lawyer with a background in EU law and regulated industries;
- Co-Managing Partner at DTB, a full service law firm;
- Lecturer at the Algebra University in Zagreb (legal tech, digital, intl. law, cybersecurity & privacy);
- PhD in commercial and company law; thesis „The Contractual Relationship Between Lawyer and Client”;
- Chair of local AmCham Public Procurement Committee, informal member of the Ministry of Economy’s working group on the Croatian Public Procurement Act (“PPA”).

# LAWYERS



What my Mom thinks I do.



What my friends think I do.



What I think I do.



What I actually do.

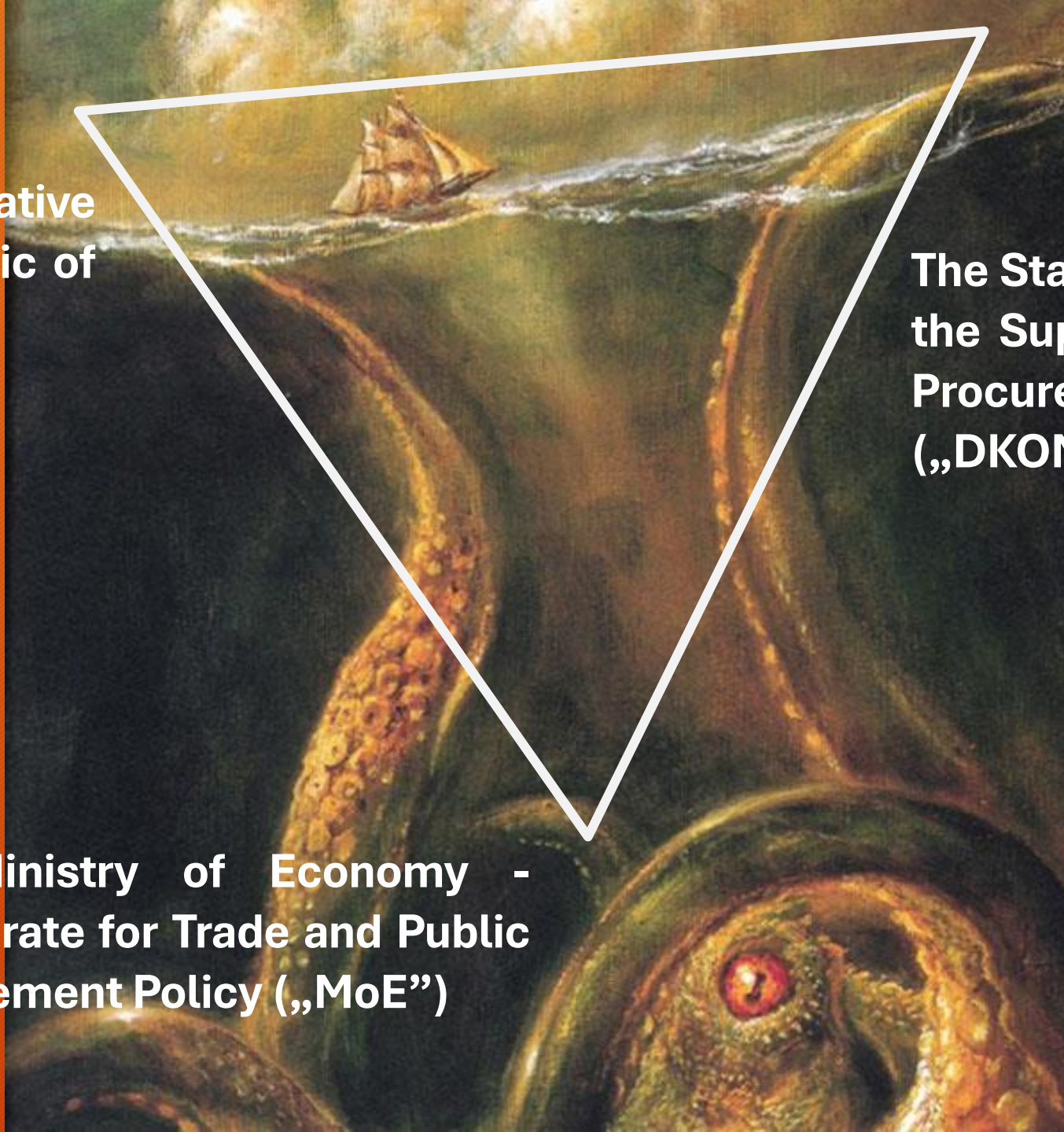
THE  
BERMUDA  
TRIANGLE



**The High Administrative  
court of the Republic of  
Croatia („HAC”)**

**The State Commission for  
the Supervision of Public  
Procurement Procedures  
(„DKOM”)**

**The Ministry of Economy -  
Directorate for Trade and Public  
Procurement Policy („MoE”)**



# Ministry of Economy - Directorate for Trade and Public Procurement Policy: role and competencies

- Implementing measures for the development and improvement of the PP system;
- **Supervising the implementation of the PPA and regulations in the field of public procurement;**
- Collecting, recording, processing and analyzing irregularities to achieve proper and uniform application of PPA;
- **Providing expert assistance in the application of PPA and implementing regulations with the aim of acting uniformly in the conduct of public procurement procedures;**
- Conducting training in PP and maintaining the Public Procurement Portal;
- **Cooperating with other state bodies to achieve a uniform interpretation and correct application of legislation;**
- Monitoring activities in PP in other EU MS, and also with other international and European organizations (WTO, OECD);
- **Proposing, preparing and coordinating the drafting of draft laws and proposals of other regulations in the field of public procurement;**
- Monitoring the development of the PP system, collecting, recording, processing and analyzing data on PP and preparing statistical reports.

- Opinions and clarifications provided on an-ad hoc basis and not binding in general - especially not on authorities (in 2023 243 opinions were made, while 1617 inquiries were replied to via email);
- Little to no cooperation with other state bodies in achieving a uniform interpretation and correct application of the PPA and its regulations;
- No supervision in practice - the MoE (and State Attorney's Office) in the last 10 years have not used their authority to initiate an appeals procedure nor do they attempt to initiate misdemeanor/criminal proceedings;
- Out of 30.972 tenders published, the administration has filed just 5 charges for irregularities, conducted 163 supervisions (by reviewing the online tender webpage for Croatia) and in 5 of those „provided instructions to contracting authorities”. A total of 78 requests for conducting supervision were received, but no info on how many were actually conducted;
- Lacking guidance and info from practitioners vital for the drafting of draft laws and proposals of other regulations in the field of public procurement.

**Ministry of Economy: pain points**



# State Commission for the Supervision of Public Procurement Procedures: role and competencies

- Independent quasi-judicial body in accordance with Directive 89/665/EEC, Directive 92/13/EEC and Directive 2007/66 / EC;
- **Handles all legal disputes (in the first instance)** regarding not just PP, but also concessions and public-private partnerships - a state body *sui generis* with strong characteristics of the court;
- Overwhelming degree of PP legal practice formed through its decisions since all are published on its website together with second instance decisions which may have been later rendered;
- **Procedure conducted fully in Croatian, decisions need to be rendered within 30 days and are rendered in non-public council sessions;**
- **Decides on not only the merits, but also costs of the procedure;**
- Cannot initiate appellate procedures ex officio but relies on market participants in that respect (ie acts within the limits of the appellate allegations) – **however, officially considers procedural requirements and substantive violations listed in the PPA;**
- **Can initiate misdemeanor proceedings before competent misdemeanor courts when irregularities and/or illegalities occur in practice.**

- All members appointed by the Croatian Parliament at the Government's proposal, and remain accountable to the Parliament for their work;
- Since 2020 number of procedures before the Commission is continuously dropping (in 2023 only 3,58% of tenders were scrutinized – almost 20% drop from earlier years);
- no protection via an appellate procedure for "simple procurement" procedures (value below 26,540 euros for good and services and 66,630 euros for work);
- Procedures very covert – in 2023, not one out of 18 requests for an oral hearing was adopted;
- Procedural costs a deterrent: (i) appellate fees depend on tender value (between 1.320€ and 66.360€), (ii) attorney costs used to be unjustified and legally limited to cca 100€, current Tariff relates costs to tender value (between 1000 and 15,000 euros);
- Ex offo substantive violations found only in 11 procedures (out of 773);
- No misdemeanor proceedings initiated for illegalities occurring in practice.

**State Commission: pain points**





# High Administrative Court of the Republic of Croatia: role and competencies

- **Highest administrative court in Croatia - generally acts as a second instance review body to the four general competence administrative courts in Croatia, with the option of additional competencies if mandated by law;**
- **As of 2017, acts as a second instance body in PP procedures, when the revised PPA removed the competence from the 4 administrative courts to the HAC - since appeals are not allowed against the decision of the State Commission, an administrative dispute can be initiated before HAC;**
- **The decision in the administrative dispute so initiated should be made within 30 days from the date of submission of the lawsuit;**
- **If the HAC cancels the decision of the State Commission, it must also decide on the merits of the procedure with its verdict;**
- **The decision in the administrative dispute must be published by the State Commission on their website without anonymization.**

- In 2017, HAC requested the scrutiny of constitutionality of the PPA provision highlighting its authority before the Croatian Constitutional court, objecting to all items of its new competence;
- Silent resistance remains - administrative lawsuits are initiated against less and less procedures every year: in 2023, 109 procedures aka 15,24% of State Commission decisions;
- The 30-day deadline for the rendering of decisions is not abided by – procedures last up to several months and HAC resolves less cases each year;
- Confirmations of State Commission decisions occur in 86,91% of cases – in all these the lawsuits were either rejected or refused, only 1,11% of the State Commission's decisions were annulled on arguments regarding merits;
- The attorney Tariff now providing for a higher fee to be paid to lawyers for PP appeals is again under scrutiny from HAC, and the jury is still out.

## High Administrative Court: pain points



# Surviving the storm?

- No strategic approach - lacking capabilities and resources;
- Virtually all control vested with market participants; bidders expected to bear the full load of system irregularities, inefficiencies and illegalities;
- Most new measures proposed for system efficiency increases turned down by the MoE as an „administrative burden to contracting authorities”;
- PP is 19,98% of our GDP - second largest share in the Croatian GDP, the first one being trade in general and the third one being tourism;
- Croatian bidders won 86,96% of all tenders in 2023; remaining mainly from the EU (largely from neighboring Slovenia).



# THANK YOU FOR YOUR ATTENTION!

FOR ANY ADDITIONAL INFO OR COMMENTS, DON'T  
HESITATE TO REACH OUT.

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# Most significant sources used:

- The Croatian Public Procurement Act (OG no. 114/22) and relevant bylaws;
- The Croatian Administrative Disputes Act (OG no. 36/24) and relevant bylaws;
- The Croatian Act on the State Commission for the Supervision of Public Procurement Procedures (OG nos. 18/2013, 127/2013, 74/2014, 98/2019, 41/2021);
- The Croatian Attorney's Tariff (OG no. 138/23);
- State Commission webpages [www.dkom.hr](http://www.dkom.hr);
- MoE PP Directorate webpages [www.javnabava.hr](http://www.javnabava.hr);
- Supreme Court webpages <https://www.vsrh.hr/izvjesca-o-stanju-sudbene-vlasti.aspx>;
- Constitutional court webpages <https://sljeme.usud.hr/usud/praksaw.nsf>;
  
- [https://twitter.com/Charles\\_Lew/status/780787356177616896](https://twitter.com/Charles_Lew/status/780787356177616896);
- <https://www.boaterexam.com/blog/great-sea-monsters/>;
- <https://www.vectorstock.com/royalty-free-vector/tentacles-banner-octopus-tentacle-sketch-element-vector-39459629>;
- <https://www.deviantart.com/odysseyorigins/art/Mariner-s-Odyssey-Sailing-through-the-Storm-968629874>.

All websites last accessed on 11/11/24.