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**WORK REPORT**

# CONTENTS

## INTRODUCTION

- .....2
- 1. ABOUT THE STATE COMMISSION .....4
  - 1.1. The Structure and Organization of the State Commission .....4
  - 1.2. The Financial Performance Indicators of the State Commission .....5
  - 1.3. Human Resources .....6
  - 1.4. The Anti-Corruption Activities of the State Commission .....9
  - 1.5. The Public Nature of the Work of the State Commission .....10
  - 1.6. Other Activities of the State Commission (Bilateral and Multilateral) .....11
- 2. STATISTICAL INDICATORS OF THE WORK OF THE STATE COMMISSION 13
  - 2.1. Pending Cases.....13
    - 2.1.1. The Total Number of Appellate Cases Pending .....14
    - 2.1.2. The Number of Appeals Received .....14
    - 2.1.3. Comparison of the Number of Published Procedures and the Number of  
Procedures in which an Appeal was Lodged .....14
    - 2.1.4. Comparison of the Number of Cases Received from 2014 to 2019 .....15
  - 2.2. The Number of Appeals Received, by Stage of the Procedure .....17
  - 2.3. The Number of Unresolved Cases .....18
  - 2.4. The Structure of Decisions in Appellate Cases .....18
  - 2.5. The Structure of Annulments (Decisions, Procedures and Actions of Contracting  
Authorities Affected by Unlawfulness) .....20
  - 2.6. The Structure of Dismissals .....20
  - 2.7. The Structure of Decisions in the Stages of Publication, Procurement  
Documentation and Modifications of Procurement Documentation .....22
  - 2.8. Analysis of Ex Officio Conduct - Application of the PPA 2016 .....24
    - 2.8.1. The Number of Decisions Finding a Particularly Essential Violation with  
regard to the Subject of the Appeal (Stages) .....24
    - 2.8.2. The Number and Structure of Particularly Essential Violations Found .....25
  - 2.9. Annulment of Public Procurement Contracts or Framework Agreements .....27
  - 2.10. Decisions on Proposals for Issuing An Interim Measure .....28
  - 2.11. Decisions on Requests for Approval of the Continuation of Procedures and / or  
Conclusion of a Public Procurement Contract .....28

2.12. Fines.....	29
2.13. Oral Hearings.....	29
2.14. The Length of Appellate Procedures .....	30
2.15. The List of Contracting Authorities with five or More Appellate Procedures..	31
2.16. Appellants with 6 or More Appellate Procedures .....	39
2.17. The Most Frequent Reasons for Lodging an Appeal and the most Frequent Irregularities Identified by the State Commission.....	41
2.17.1. Specific Bidder Errors: .....	42
2.17.2. Specific Contracting Authority Errors: .....	43
2.17.3. The Most Frequent Appeal Allegations .....	43
2.17.3.1. The Most Frequent Appellate Allegations Relating to Procurement Documentation.....	43
2.17.3.2. The Most Frequent Appellate Allegations Relating to Award Decisions.....	44
2.18. The Number of Motions to Indict.....	44
2.19. Total Fees Paid for Initiating Appellate Procedures.....	45
2.19.1. Revenues from the Administrative Fee for Initiating Appellate Procedures before the State Commission.....	46
2.20. Other Relevant Indicators in Appellate Cases .....	46
2.20.1. Lodging an Appeal Electronically in Public Procurement .....	46
2.20.1.1. The Number of e-Appeals Received in 2019 .....	47
2.20.1.2. The Length of Appellate Procedures Initiated by an e-Appeal .....	42
2.20.1.3. The Structure of Decisions in Cases in which an e-Appeal was Received.....	48
2.20.2. The Characteristics of Public Procurement Cases Financed from EU funds.....	49
2.20.2.1. The Length of Public Procurement Cases Financed from EU Funds .....	50
2.20.2.2. The Structure of Appellate Cases Financed from EU funds .....	50
2.20.2.3. Annulment Structure (the decisions, procedures and actions of contracting authorities affected by unlawfulness) .....	45
3. ADMINISTRATIVE DISPUTES AGAINST DECISIONS BY THE STATE COMMISSION .....	52

3.1. The Number of Administrative Disputes against Decisions by the State Commission.....	53
3.2. The Number and Structure of Decisions in Administrative Disputes in 2019. ...	53
3.2.1. The Structure of Decisions by the High Administrative Court in the First Instance .....	47
3.2.2. The Structure of Decisions by Administrative Courts in the First Instance .....	48
3.2.3. The Structure of Decisions in the First Instance and a Comparative Presentation .....	<a href="#">49</a>
3.2.4. The Structure Of Decisions by the High Administrative Court in the Second Instance.....	51
3.2.5. Remedies .....	59
4. ASSESSMENT OF THE SITUATION IN REVIEW AND PUBLIC PROCUREMENT IN GENERAL .....	60
4.1. Assessment of the Situation in Public Procurement in General .....	60
4.1.1. Preparation and Planning in the Public Procurement System .....	55
4.1.2. Strengthening the Public Procurement Policy Directorate .....	56
4.2. Assessment of the Situation Regarding Review .....	63
4.2.1. The Increase in the Number of e-Appeals Filed.....	58
4.2.2. Appeals against Procurement Documentation.....	65
4.2.3. Appeals against Award Decisions .....	60
4.2.4. Administrative Court Review .....	65
4.3. The Institutional Framework .....	68

## INRODUCTION

The State Commission for the Supervision of Public Procurement Procedures (hereinafter: “the State Commission”) is a specific, independent and autonomous quasi-judicial state body providing review in public procurement procedures. The State Commission was established in 2003, in accordance with the *acquis communautaire*, and in compliance with the principles of protection of competition and the efficient spending of public funds. Therefore the independence of such an institution is a prerequisite for the unbiased application of the law.

In its many years of work, the State Commission has always strived to achieve three goals: transparency, efficiency and independence. Considering that the transparency of the body providing review is necessary in the area which is perceived by the public as the area where corruption is most present, the State Commission, on its own initiative, made the Register of Appellate Cases publicly accessible, and later, meeting a statutory obligation, it allowed the publication of all the decisions of the State Commission, which can thus be examined by the general public.

During its work, the State Commission has developed both as an institution and as an authority in the field of public procurement in step with the overall system. It has always tried to fulfil its responsibility with the least possible restrictions, avoiding the extensive length of public procurement procedures. This goal has sometimes been difficult to achieve, given that in some years there was a large increase in the number of appeals, with a simultaneous large-scale outflow of human resources, who are recognized and wanted as experts on the labour market. The efficiency of the work of State Commission is reflected in the small number of contested decisions before the administrative court, as well as in the high percentage of decisions upheld by the administrative court.

Independence is an ideal to be pursued through day-to-day work in each individual appellate case. The State Commission sought to maintain its assigned status of an autonomous and independent state body through the random assignment of appellate cases, the way in which the facts of the case are established, and by reporting on the established facts of the case and the decision-making process.

The importance of the State Commission is reflected not only in the quick and certain resolution of public procurement disputes, but also in the fact that most of the case law in public procurement has been formed through its decisions. In its work, the State Commission

interprets and applies public procurement law in the light of European law and the case law of the European Court of Justice. At the same time, the contribution of the members of the State Commission to the doctrine of public procurement law through professional papers, articles and participation in professional conferences should not be neglected.

This institution is highly esteemed in the Croatian general and professional public, as well as in the institutions of the European Commission, primarily in terms of its efficiency and legal consistency. According to the comparative indicators on review in the EU Member States, the effects of review in the Republic of Croatia are ranked highly.

## **1. ABOUT THE STATE COMMISSION**

The State Commission is an autonomous and independent state body responsible for deciding on appeals related to public procurement procedures, concession award procedures and private partner selection procedures in public-private partnership projects. Specific quasi-judicial competence is reflected in its structure and procedures, as well as in the binding nature of its decisions.

The State Commission is authorized to file motions to indict for misdemeanours prescribed by the Act on the State Commission for Supervision of Public Procurement Procedures (Official Gazette, Nos. 18/13, 127/13, 74/14 and 98/19, hereinafter: “The State Commission Act”) and other pieces of legislation governing the field of public procurement.

Pursuant to Article 18, paragraphs 1, 2 and 3 of the State Commission Act, the State Commission is obliged to submit a report on its work to the Croatian Parliament once a year, and, at the request of the Croatian Parliament, it is obliged to submit a report for a period shorter than a year. Data and analyses of appellate cases in public procurement procedures, concession award procedures and private partner selection procedures in public-private partnership projects are an integral part of the annual report.

Considering the thoroughness and depth of insight into the application of the provisions of the Public Procurement Act (Official Gazette, No. 120/16, hereinafter: “PPA 2016”), and especially the procedural provisions on review, an assessment of the situation in public procurement, which refers to both public procurement and review procedures, as well as the institutional framework of public procurement, is an integral part of the State Commission’s Report.

### **1.1. The Structure and Organisation of the State Commission**

The Decree on the Internal Structure of the State Commission for Supervision of Public Procurement Procedures (Official Gazette 84/13 and 145/14, hereinafter: “the Internal Structure Decree”) regulates the internal structure, organization, modalities of work and other issues of importance for the work of the State Commission.

The State Commission consists of the members of the State Commission and professional staff.

The State Commission, in a narrower sense, consists of nine members, one of whom is the President, two Deputy Presidents, and six members, who have a specific status because they are appointed for a term of five years by the Croatian Parliament, at the proposal of the Government of the Republic of Croatia, with pre-prescribed requirements for appointment and reasons for dismissal. They have the status of officials only in terms of the legislation governing the prevention of conflicts of interest, but not the legislation governing the obligations and rights of state officials. The basic function of the members of the State Commission is to render decisions in review procedures. The employment status of members of the State Commission is not regulated by the State Commission Act, i.e. it is not regulated whether the members of the State Commission are civil servants or state officials, which causes difficulties in exercising the rights and obligations arising from employment.

The State Commission's professional staff are: the Secretariat with the Registry, Professional Staff for Decisions on Appeals, and Professional Staff for Monitoring Case Law and Court Procedures.

## **1.2. The Financial Performance Indicators of the State Commission**

Funds for the work of the State Commission are provided from the State Budget, and include funds for salaries, funds for material expenditures and funds for capital investments in buildings and technical equipment. The State Commission has no revenues other than budget revenues, and the fee paid for initiating appellate procedures in public procurement (according to the provisions of the PPA 2016) is paid directly into the State Budget and is the revenue of the State Budget.

The total plan for 2019 amounted to HRK 10,425,409.00 from the State Budget. Of this amount, HRK 7,835,240.00 was planned for salaries, HRK 2,235,600.00 for material expenses, HRK 4,569.00 for financial expenses and HRK 350,000.00 for capital expenditures.

The total execution amounts to HRK 9,883,025.30 or 94.80%.

HRK 7,835,240.00 was planned for the salaries of employees, and the execution is HRK 7,628,602.95 or 97.36%.

HRK 2,235,600.00 was planned for material costs, and execution is HRK 1,996,737.75 or 89.32%. Out of HRK 4,569.00 of the planned funds for financial expenses, HRK 1,101.00 or 24.10% was executed, mainly for banking services.



HRK 350,000.00 was planned for capital expenditures, of which HRK 256,583.00 or 73.31% was executed, mainly for the procurement of technical equipment, and the development of new applications that enable work in procedures in which an e-appeal was filed, and a search of decisions rendered by the State Commission.

In 2019, the amount of HRK 17,311,848.23 was paid into the state budget that was collected from the fees for initiating appellate procedures.

It is clear from the above that, on the basis of the amount of fees paid for initiating appellate procedures, HRK 6,886,439.23 more funds were paid into the State Budget of the Republic of Croatia than the funds planned for the work of the State Commission for 2019.

### **1.3. Human Resources**

The structure and number of employees of the State Commission are regulated by the Internal Structure Decree.

During 2019, special attention was paid to the professional education and training of the State Commission employees. In April 2019, members of the State Commission actively participated in the two-day "International Conference on the Work and Organization of Appellate Authorities in Public Procurement Proceedings" in Sarajevo, organized by the Appeals Review Office of Bosnia and Herzegovina and the GIZ Program for Strengthening Institutions of Bosnia and Herzegovina.

During 2019, employees of the State Commission attended the special programmes organised by the EU and the State School of Public Administration (Competition Law, Implementation of Twinning Projects, Communication Skills, General Administrative Procedure Act in Practice), and the first in-house workshop on Violations of EU Law and Judgments of the European Court of Justice was held in cooperation with the State School of Public Administration on the premises of the State Commission.

In 2019, the institutional framework for cooperation with the Judicial Academy was established, and employees of the State Commission could participate in the Judicial Academy's Professional Development Programme, especially in the areas of administrative law, commercial law, and EU and international law.

The structure of members and civil servants in the State Commission as of December 31, 2019:

Job Description	Number of Employees	Decree on Internal Structure of State Commission
President	1	1
Deputy Presidents	2	2
Other Members of the State Commission	6	6
Secretariat	2	5
Subdivision Registry	2	4
Professional Staff for Appellate Procedures	16	22
Professional Staff for Monitoring of Case Law and Court Procedures	5	8
<b>Total:</b>	<b>34</b>	<b>48</b>

*The fact that State Commission’s employees (members and civil servants) have many years of experience in the institution, amounting to almost 7 years, testifies to the stability of human resources and their high level of expertise, which results in better work organization and greater efficiency.*

Of the total number of employees, 94% have a university degree (a Professional Master’s Degree).

After the 15 years of work of the State Commission, the need for training and career management of professionals in the field of public procurement is clearly visible. They must have the appropriate qualifications, training, skills and experience necessary for their level of

responsibility. The State Commission, as a quasi-judicial body and authority in the field of public procurement, is the creator of case law, and by its decisions it significantly influences the conduct of public procurement procedures, not only directly by rendering decisions in specific public procurement procedures, but also indirectly in the way that its decisions are a source of knowledge in the conduct of public procurement procedures on which all participants in the procedures rely. Therefore, the State Commission is committed to continuous and consistent improvement, and the enhancement of the quality of the knowledge of its experts who participate in the decision-making process.

Accordingly, in 2019, additional efforts were made in the field of professional development in the area of public procurement, whereby two civil servants from the State Commission were sent on a university course: an International Master's Degree in Public Procurement Management, at the Faculty of Law of the University of Belgrade, organized in collaboration with the University of Tor Vergata in Rome. This study was fully funded through scholarships from the European Bank for Reconstruction and Development.

During 2019, training was also conducted through the exchange of experiences, knowledge and good practice through cooperation with other comparable bodies in the European Union, as well as through cooperation with the European Commission and its expert groups.

The systematic work of the Expert Service for Monitoring Case Law and Court Procedures, which acquaints all employees of the State Commission, in good time and comprehensively, with the legal opinions of the European Court of Justice, the High Administrative Court of the Republic of Croatia (hereinafter: "the High Administrative Court"), the Supreme Court of the Republic of Croatia and the Constitutional Court of the Republic of Croatia, made a significant contribution to the training. The legal opinions of the High Administrative Court are of special importance for the daily work of the State Commission, since an administrative dispute on the lawfulness of decisions of the State Commission can be initiated before that court, and in 2019, 192 decisions by the High Administrative Court were received. Monitoring of and learning about case law takes place on a daily basis, and at least once a month the Professional Service for Monitoring Case Law and Court Procedures submits a summary overview of the legal opinions of the courts and more significant decisions by the State Commission, which includes a breakdown by legal concepts and articles of the PPA 2016.

#### **1.4. The Anti-Corruption Activities of the State Commission**

The anti-corruption activities of the State Commission are primarily realized through the prompt performance of tasks within the competence and scope of this state body. Namely, the review of public procurement procedures, which results in the annulment of decisions and/or procedures that are found to have been conducted contrary to the law, prevents the conclusion of harmful public procurement contracts, and thus, among other things, prevents potential corrupt behaviour. At the same time, it performs a preventive function which prevents the occurrence of unlawful actions and damage.

*An important anti-corruption effect lies in the publicly available case law. All the decisions of the State Commission, as well as the decisions of the High Administrative Court in public procurement disputes, are published on the website of the State Commission in full, i.e. including the names of the parties. This makes the review procedures predictable and transparent, and represents the most significant anti-corruption effect of the work of the State Commission.*

*The register of appellate cases is publicly available on the website [www.dkom.hr](http://www.dkom.hr) and is updated in real time, which provides a general insight into the case flow.*

Furthermore, the entire handling of appeals and files takes place with the help of an application that allows the collection of data on appellate procedures and public procurement procedures, as well statistics, in order to establish all the facts. This is also a precondition for the objectivity of the decision-making process, and the ability to monitor the situation and phenomena, both in appellate procedures and in public procurement procedures, which are also the data reported to the Croatian Parliament.

The PPA 2016 prescribes the obligation of the State Commission to act *ex officio* in exhaustively listed cases, to review the lawfulness of procedures and the actions of contracting authorities, with emphasis on the activities of this state body in appellate procedures regardless of the stage of the procedures in which the appeal was filed.

The content of this Report, in the part assessing the situation in public procurement, which includes analyses of the shortcomings in the legal framework, in both public procurement procedures and review procedures, and in the institutional part, allows the legislator to correct the legal framework, which also has an anti-corruption effect.

The State Commission is an active participant in the development of the Anti-Corruption Strategy and is responsible for activities in the Action Plan for 2019 and 2020 with the Anti-Corruption Strategy for the period from 2015 to 2020, which includes the detection of corruption risks. The State Commission adequately cooperates and communicates with the competent State Attorney's Office in order to detect criminal offenses in the field of public procurement, and with civil society organizations.

Recognizing the importance of the fight against corruption, the State Commission, in addition to the aforementioned activities, also participates in the work of the Council for the Prevention of Corruption, which is a working body of the Government of the Republic of Croatia, where consultations between competent bodies are carried out, certain issues from the national anti-corruption policy are discussed, and concrete anti-corruption measures are proposed and implemented.

### **1.5. The Public Nature of the Work of the State Commission**

Transparency and public access to the work of the State Commission is a mission that ensures both objectivity and predictability in its work.

The publicity of its work is ensured by the legal provision according to which the decisions of the State Commission are served by publication and by the internal decision according to which the Register of Appellate cases is promptly updated on a daily basis, and published on the website of the State Commission, at: [www.dkom.hr](http://www.dkom.hr). In this way, the maximum level of transparency in the work of the State Commission is ensured.

At the same time, the possibility of public insight into the work of the State Commission reduces the need for requests for access to information. In 2019, 12 requests for access to information were received, which is 7.69% fewer than in the previous year, and all 12 were resolved in 2019.

The official website of the State Commission ([www.dkom.hr](http://www.dkom.hr)) contains relevant information related to the review system in public procurement, as well as to the work of the State Commission, and at the same address there are detailed instructions on appellate procedures. By raising the transparency of the work of the State Commission to the highest possible level,

through the publication of all relevant data, full access has been provided to information on the work of this state body.

In 2019, there were 1,090,696 page views registered on the website of the State Commission, which is an increase compared to 2018. This indicates that the website of the State Commission is an important source of information for participants in public procurement procedures, both in terms of information related to appellate procedures, and in terms of its case law, which guide participants in the conduct of public procurement procedures. The average length of visits per page was 00:03:49 minutes, which speaks of the visibility of the page and the availability of information.

The service of decisions by publication on the website continues to contribute to significant financial savings in the work of the State Commission, especially when it is borne in mind that several parties participate in some procedures, where everyone needs to be served the decision, under equal conditions.

In addition to the decisions of the State Commission, with the entry into force of the PPA 2016, which prescribes the publication of decisions in administrative disputes on the website of the State Commission without anonymization, after the initial standstill in the work of the High Administrative Court, the State Commission publishes judgments of the High Administrative Court rendered in individual appellate cases on the home page of the website in the same way as its own decisions.

In most cases, the website [www.dkom.hr](http://www.dkom.hr) is accessed via computer: 70.49% (decrease compared to last year), tablets: 1.95% and mobile devices: 27.5% (increase compared to last year). The website of the State Commission is responsive, which facilitates access to and search of the website.

#### **1.6. Other Activities of the State Commission (Bilateral and Multilateral)**

In addition to its basic task (deciding on appeals), the State Commission was active both bilaterally and multilaterally. The President, Deputies and members of the State Commission have participated in various professional activities and forums, focusing on public procurement law.

In 2019, work continued on strengthening cooperation with comparable bodies in other Member States, which was significantly contributed to by participation in the expert group of

audit bodies in public procurement at EU level, led by the European Commission, DG GROW.

Namely, in the Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, entitled *Improving the Single Market: More Opportunities for People and Businesses*, of 28 October 2015, to improve the efficiency, effectiveness and transparency of the legal protection system in public procurement, in accordance with the directives on review procedures, through the cooperation and networking of first instance audit bodies, the Initiative for Better Public Procurement Management, by introducing contract registers, improved data collection and *networking of audit bodies*, was highlighted as one of the measures of the *Single Market Strategy Implementation Plan*. Thus, by the invitation of the European Commission of February 2017, the First Meeting of the Network of First Instance Audit Bodies (hereinafter: “the Network”) was held in Brussels.

In the report of the European Commission to the European Parliament and the Council on the Effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, With Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts, of 24 January 2017, it was pointed out that the systems in which first-instance review in public procurement procedures is provided by administrative legal protection bodies instead of regular courts are generally more efficient in terms of the duration of procedures and judgment standards. As a result, the Commission will encourage first-instance bodies responsible for review to cooperation and networking in order to improve the exchange of information and best practices related to certain aspects of the operation of the Directives on Remedies and to ensure the efficient functioning of national legal protection procedures, as announced in the Single Market Strategy. The good practices in question will be shared through the network, and they can serve as a source of inspiration and benefit for Member States, to improve their own national review systems. In this context, special attention is paid to strengthening the first instance administrative bodies responsible for review.

Meetings of the Network, which are held twice a year, are attended by the highest representatives of the audit bodies of EU member states. Discussions are related to the application of the Directives, and attempts are made to find the best solutions for disputed issues.

After several meetings, numerous opportunities for cooperation between these specific bodies were identified, as well as an exchange of experiences in the application of the Directives and case law.

The State Commission, as a member of the Network, has been very active in its work since its establishment and has achieved good results. Cooperation with other audit bodies at the EU level enables further advancement of the work of the State Commission, and the use of the best peer practices. In October 2019, members of the State Commission participated in the 7th meeting of the network of first-instance audit bodies of EU Member States, organized in Bled by the State Audit Commission for the Audit of Public Procurement Procedures of the Republic of Slovenia. Topics at that meeting were Directive 2014/24EU and the case law of the Court of Justice of the European Union in the field of public procurement and remedies.

In addition to cooperation with appellate bodies within the Network, the State Commission, through active cooperation with the peer bodies, continuously strives to make additional efforts to exchange experiences and good practice, and thus raise the quality of its work. Thus, in December 2019, members of the State Commission paid a working visit to the body responsible for the supervision of public procurement procedures of the Kingdom of Spain, and exchanged experiences in the field of application of digital tools in appellate procedures.

Also in December 2019, a meeting was held in the premises of the State Commission with representatives of the State Commission for Appeals in Public Procurement of the Republic of Northern Macedonia. Experiences in the field of the review system were exchanged at the meeting, with the greatest emphasis on the further development of the review system (challenges faced by appellate bodies in their daily work, both in terms of application of the legislative framework and in terms of day-to-day work of appellate bodies), as well as on the further digitization of the appellate procedures, in relation to the internal actions of appellate bodies (e-file, e-appeal) and the public procurement system in general.

## **2. STATISTICAL INDICATORS OF THE WORK OF THE STATE COMMISSION**

### **2.1. Pending Cases**

In 2019, there was a total of 1,365 pending appellate cases before the State Commission, of which 156 were transferred from 2018, and 1,209 were cases newly received.



### 2.1.1. The Total Number of Appellate Cases Pending

Type	Number
Cases transferred from 2018*	156
Appeals received in 2019	1209
<b>Total</b>	<b>1365</b>

\* Cases transferred from 2018 were not resolved in 2018 mostly because appeals are also received at the very end of the year (128 cases were received in December 2018) and it was impossible to complete the case file documentation in these cases and start to resolve these appeals in 2018.

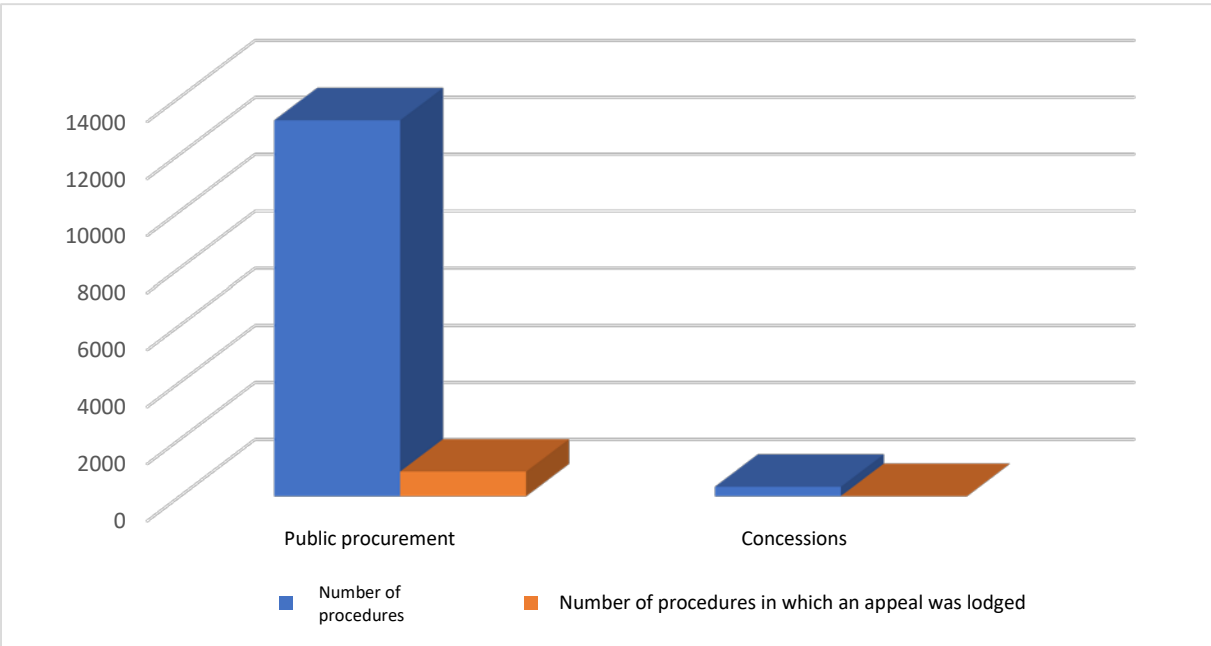
### 2.1.2. The Number of Appeals Received

Type	Number	%
Public Procurement	1194	98,76
Concessions	15	1,24
Public-private partnership	0	0
<b>Total</b>	<b>1209</b>	<b>100</b>

In the vast majority of cases appeals are lodged in public procurement procedures, and only 1.24% in concession award procedures, while in procedures for selection of public-private partners no appeal was received in 2019.

### 2.1.3. Comparison of the Number of Published Procedures and the Number of Procedures in which an Appeal was Lodged

	Number of Procedures Published in 2019 (Classifieds)	Number of Procedures in which an Appeal was Lodged in 2019	%
Public Procurement	13,190	870	6.59
Concessions	338	11	3.25

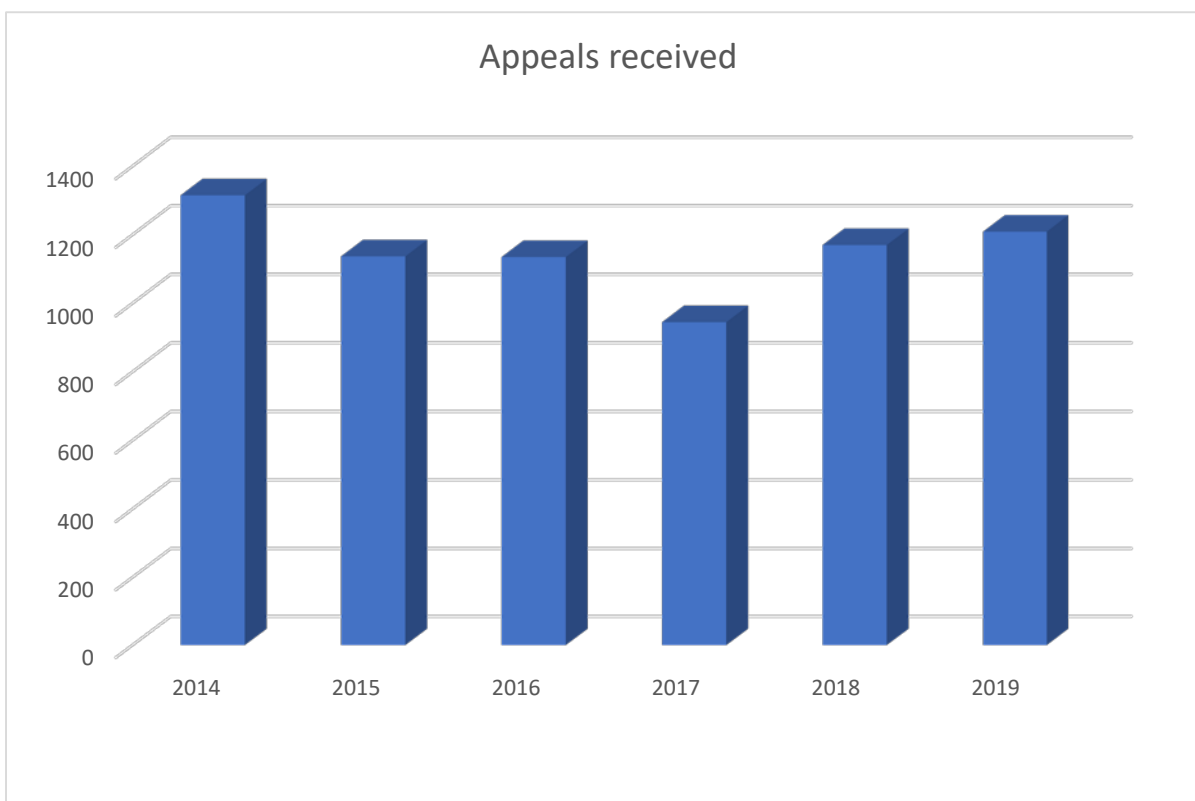


In 2019, the State Commission reviewed 6.59% of the total number of public procurement procedures published in the Electronic Public Procurement Classifieds (EPPC), and 3.25% of the total number of concession award procedures published in the EPPC. In 2019, the State Commission did not review any procedures for selecting a private partner in public-private partnership projects. The data on the total number of public-private partnership projects in 2019 are not available.

**2.1.4. Comparison of the Number of Cases Received in the period 2014-2019**

During 2019, the State Commission received 1209 appeals. In relation to the total number of cases pending before this state body (1365), the average number of appeals pending on a monthly basis was 113 cases.

Year	Appeals received	Comparison with the Previous Year	
2014	<b>1315</b>	-	-
2015	<b>1137</b>	15/14	-13.54 %
2016	<b>1135</b>	16/15	-0.18 %
2017	<b>945</b>	17/16	-16.74 %
2018	<b>1170</b>	18/17	+23.80%
2019	<b>1209</b>	19/18	+3.33%



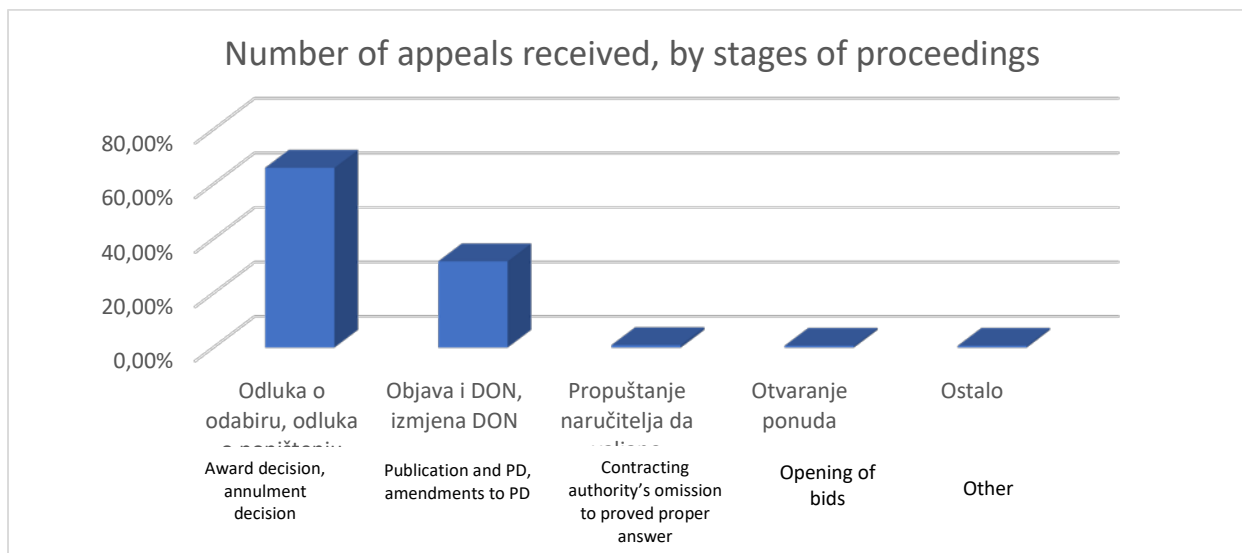
Although in the period from 2014-2017 a decrease in the number of appeals was recorded, at the same time there was a continuous increase in the complexity of appellate cases related to the possibility of using EU funds, but also the increasing involvement of practicing attorneys specializing in public procurement, and the participation of consultants.

However, in 2018 the number of appellate cases increased again by 23.80% compared to the previous year, which can be attributed to the logical consequence of the application of the PPA 2016. Namely, the PPA 2016 entered into force on 1 January 2017, which means that it was only in 2018, after the case law became established and a certain degree of legal certainty was achieved, and after the *ex-officio* review of the procedures was made possible, that a larger number of received appeals was recorded. A larger inflow of appeals continued in 2019.

## 2.2. The Number of Appeals Received by Stages of the Procedures

No.	Stage	Public Procurement	Concessions	PPP	Total	%
1.	Award decision; Annulment decision	784	13	-	797	65.92
2.	Publication and procurement documentation, amendments to procurement documentation	385	-	-	385	31.85
3.	Failure of contracting authority to provide proper answer	11	-	-	11	0.91
4.	Opening of tender applications	8	-	-	8	0.66
5.	Other*	6	2	-	8	0.66
6.	<b>Total</b>	<b>1194</b>	<b>15</b>	<b>0</b>	<b>1209</b>	<b>100</b>

\* Appeals in relation to other actions, decisions, procedures and omissions by contracting authorities



The trend of a large number of appeals against procurement documentation (31.85%) continued, largely due to the single fee for initiating appellate procedures in the amount of HRK 5,000.00, regardless of the estimated value of the procurement.

Review of public procurement procedures in the early phase of published documentation or amendments to the procurement documentation significantly affects the quality of implementation of public procurement procedures and indirectly leads to avoidance of certain irregularities that result in financial corrections in procedures financed from EU funds.

### 2.3. The Number of Unresolved Cases

Cases Received in 2019	Resolved Cases	Unresolved Cases
1209*	1102	107*
100%	91.15%	8.85%

\*In 2019, there were a total of 1365 cases pending, since 156 cases were transferred from 2018.

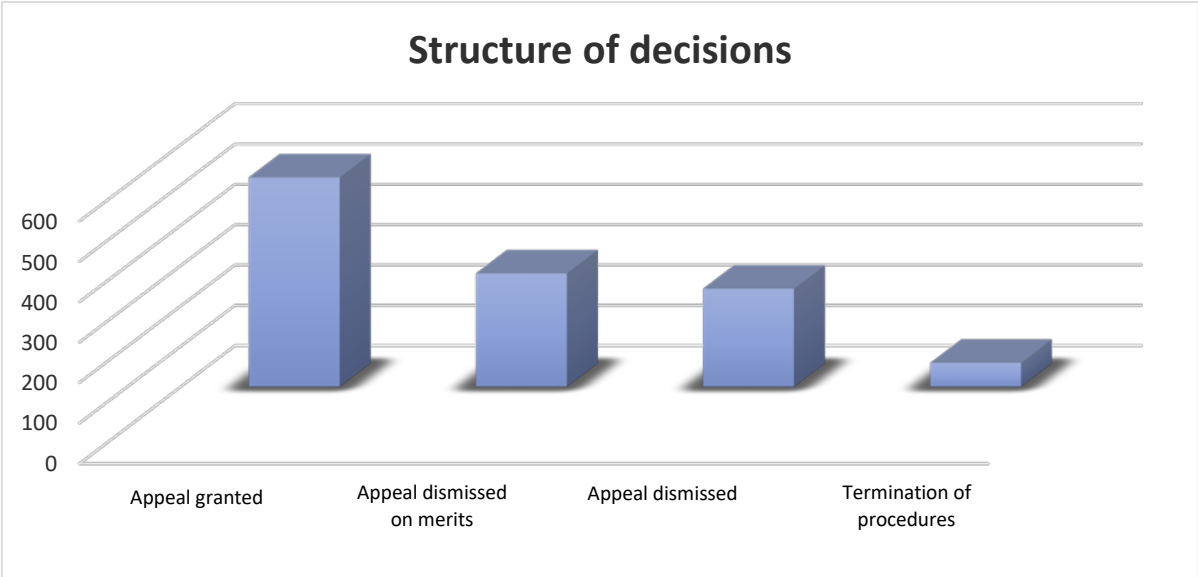
\*On 31 December 2019, 107 cases had not been resolved, mostly received at the end of the year (106 appeals in December), whose resolution continued in 2020 within the time limits set by law.

### 2.4. The Structure of Decisions in Appellate Cases

The total number of cases pending in 2019 (1365) consists of cases transferred from 2018 (156), and those received in 2019 (1209).

For the purposes of this report, the cases received and resolved in 2019 are analyzed, 1102 of them, i.e. the data on cases transferred to 2020 are not presented (107).

Type of Decision	Number	%
Appeal granted	519	47.10
Appeal dismissed on merits	281	25.50
Appeal dismissed	243	22.05
Termination of procedures	59	5.35
<b>TOTAL</b>	<b>1102</b>	<b>100</b>

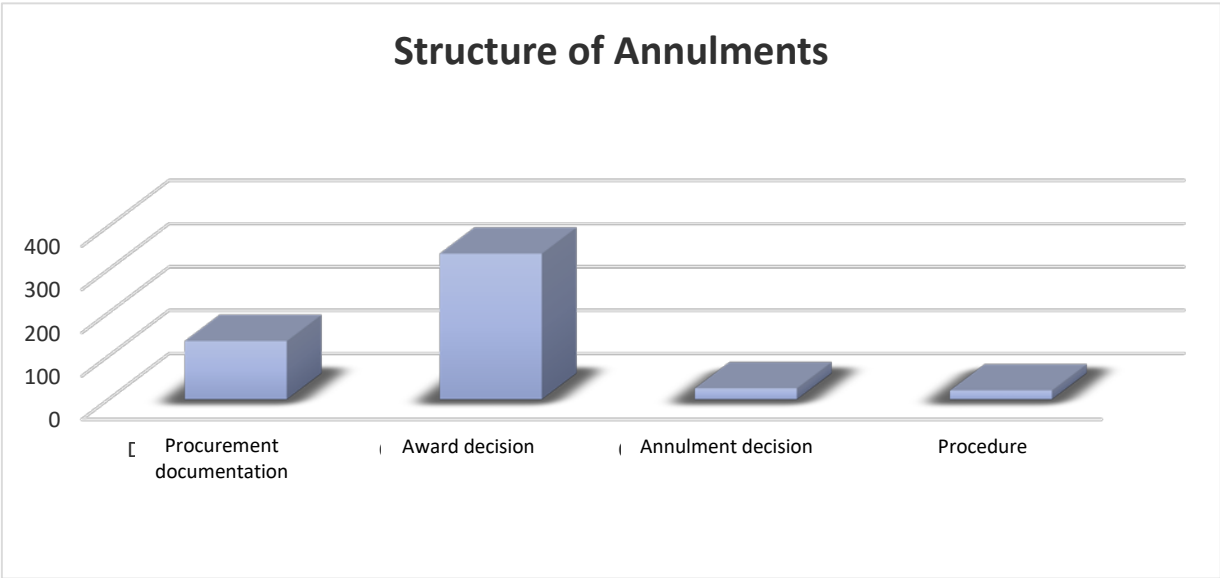


The trend has continued of a high percentage of granted appeals (47.10%) compared to 2018 (52.28%), which to a different extent results in the annulment of the contracting authority’s decisions, procedures or actions. Although the percentage of appeals granted over the years is high, a downward trend can be nevertheless observed, i.e. a decrease in this percentage compared to the previous year. The high percentage is still related to the effects of the application of the PPA 2016, and is manifested mostly through the filing of appeals against procurement documentation, and *ex officio* procedures in relation to particularly essential violations of public procurement procedures.

In the observed period, there was a fairly high percentage of appellate cases in which the appeal was dismissed – a total of 22.05%. This percentage represents an increase compared to 2018, when the appeal was dismissed in 15.98% of cases. This increase may be a consequence of insufficient knowledge of review procedures, primarily of the standing to lodge an appeal, but also possible manipulative initiation of appellate procedures, which is analysed in more detail in point 2.6. of this report.

**2.5. The Structure of Annulments (Decisions, Procedures and Actions of Contracting Authorities Affected by Unlawfulness)**

Subject of Annulment	Number	%
Procurement documentation	135	26.01
Award decision	337	64.93
Annulment decision	26	5.01
Procedure	21	4.05
<b>TOTAL</b>	<b>519</b>	<b>100</b>



In 2019, the largest number of appellate cases in which the appeal was granted were related to the annulment of the award decision (64.93%).

In 2019, the number of annulled public procurement procedures was significantly lower than in 2018 (when there were 47 annulled procedures), which resulted in a reduction in the need to reopen public procurement procedures after the decision by the State Commission. Also, this indicates a decrease in the number of particularly essential violations, which result in the annulment of the public procurement procedures. The decrease in the number of annulled public procurement procedures is causally related to the number of appeals granted in the procurement documentation phase, since particularly essential violations of the public procurement procedures, which were sanctioned and eliminated at that stage of procedures, cannot result in annulment of the public procurement procedures in the stage of appeal against the award decision.

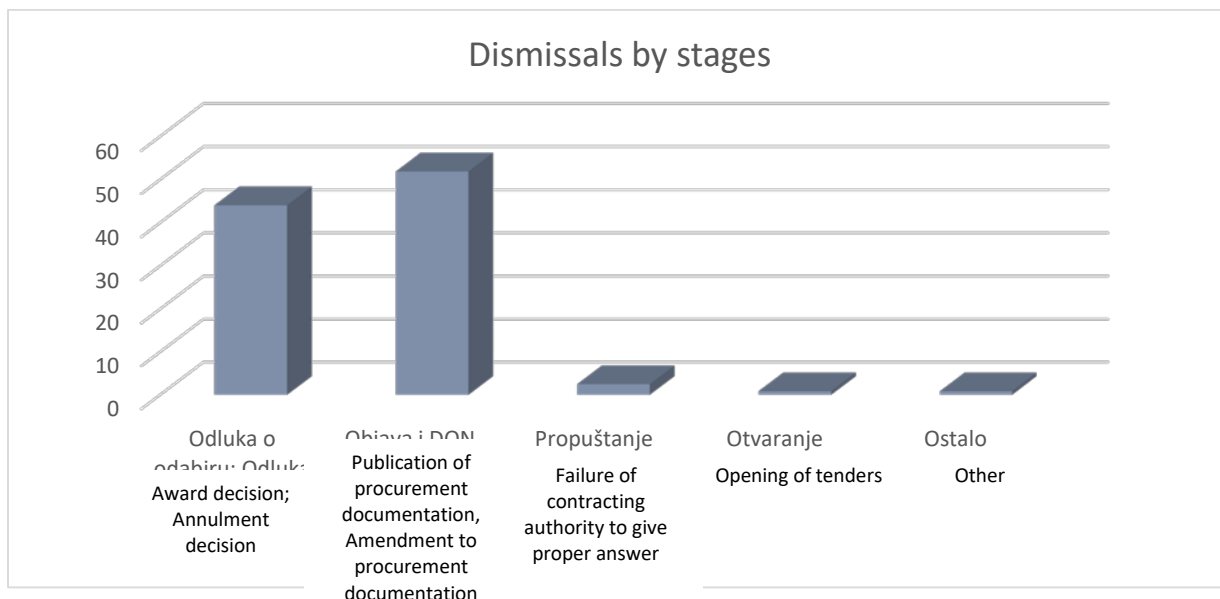
## 2.6. The Structure of Dismissals

In 2019, a total of 243 decisions were issued dismissing the appeal, which represents 22.05% of the total cases resolved. This percentage represents an increase compared to 2018 when the appeal was dismissed in 15.98% of cases. Of the total number of appeals dismissed in 2019, the largest number refers to appeals lodged in the procurement documentation phase, namely 51.45%.

Stage	Number	%
Award decision; Annulment decision	108	44.44
Publication of procurement documentation, Amendment to procurement documentation	125	51.45
Failure of contracting authority to give proper answer	6	2.47
Opening of tenders	2	0.82
Other*	2	0.82
<b>TOTAL</b>	<b>243</b>	<b>100</b>

\* Appeals against other actions, decisions, proceedings and omissions of contracting authorities.





When the data on dismissed appeals are analyzed in relation to the stages of the procurement procedures, it is evident that the largest share of dismissed appeals in relation to the total number of appeals in that phase is found in the stage of appeal against procurement documentation (basic documentation and amendments) and it is 34,53%.

Of the total number of appeals lodged in the award/annulment decision phase, only 13.55% were dismissed.

A comparison of the data on the percentage of appeals dismissed in the award/annulment decision phase (13.55%) with the percentage of lodged appeals dismissed in the documentation/amendment of procurement documents phase (34.53%) shows that the share of appeals dismissed in the documentation/amendment of procurement documentation phase in relation to appeals in the award decision/annulment decision phase is almost 3 times higher.

The possible reasons behind these data are given in Point 4 of this Report – Assessment of Review Situation.

## 2.7. The Structure of Decisions in the Stages of Publication, Procurement Documentation and Modifications of Procurement Documentation

In 2019, 385 appeals were received related to the phase of publication and of amendment of procurement documentation. Of these, 362 were resolved in 2019. In the largest number of cases, the appeal was granted (38.12%) or the appeal was dismissed (34.53%).

Type of Decisions in Stages of Publication, Procurement Documentation and Amendments to Procurement Documentation	Number	%
Appeal granted	138	38.12
Appeal dismissed on merits	70	19.34
Appeal dismissed	125	34.53
Termination of procedures	29	8.01
<b>TOTAL</b>	<b>362</b>	<b>100</b>

Appeals lodged at the stages of publication, procurement documentation and amendments to procurement documentation prevent the continuation of the public procurement procedures. Given the large number of dismissals and terminations in this phase (Total 42.54%), the issue of abuse of the right to appeal in this phase of the public procurement procedures was raised. At the same time, a more detailed analysis of appeals against procurement documentation and amendments to procurement documentation showed that a large number of appeals were lodged in the period immediately before the opening of tenders, which is generally not in line with the time limits prescribed by the PPA 2016.

The table below shows the number of days between the date the appeal was lodged and the deadline for submission of tenders (ending on the fifteenth day before the opening of tenders), and the total number of appeals for each of these days.

Number of Days	Number of appeals				TOTAL
	Appeal Granted	Appeal Dismissed on Merits	Appeal Dismissed	Termination	
0	1	-	8	2	11
1	5	3	9	1	18
2	3	4	17	1	25
3	3	3	13	-	19
4	-	4	9	-	13
5	2	-	4	1	7
6	1	-	3	-	4
7	4	3	8	2	17
8	4	3	6	-	13
9	5	2	5	1	13
10	3	-	5	-	8
11	12	3	4	4	23
12	7	3	1	1	12
13	5	-	2	-	7
14	4	2	4	3	13
15	2	2	2	1	7

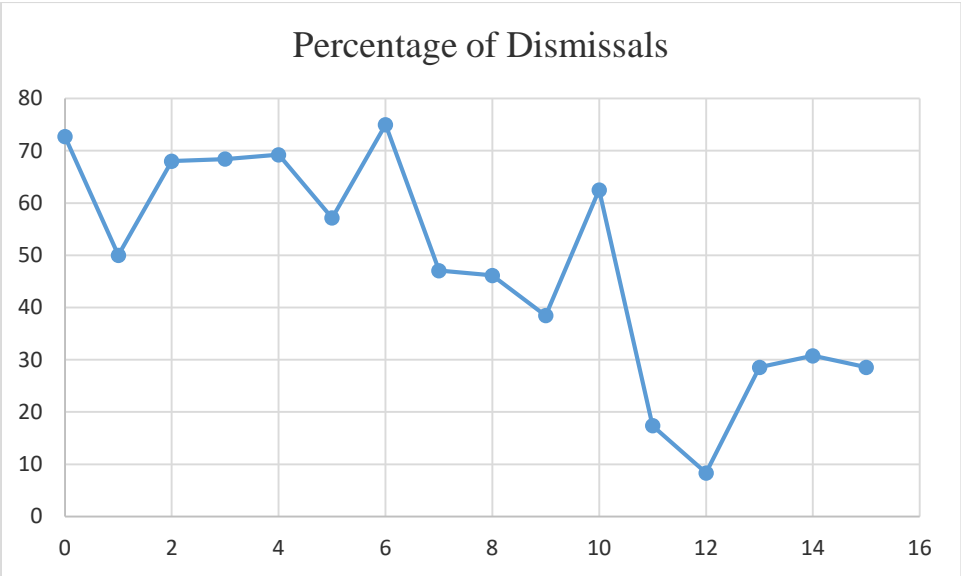
It can be seen from the table above that the majority of such appeals, lodged immediately before the opening of tenders, were dismissed, while very few of the procedures initiated on these appeals resulted in the granting of appeals.

The percentage of lodged appeals that were granted in a period of four days before the opening of tenders up until the final deadline for opening tenders was 13.9%, which drastically deviates from both the total number of appeals granted in the phase of publication of the invitation to submit tenders and procurement documentation, which is 38.12%, and the total percentage of appeals granted in all procedures before the State Commission, which amounts to 47.10%.

At the same time, in the total number of appeals lodged in the same period (in the period from four days before the opening of tenders up until the final deadline for opening of tenders), the percentage of those dismissed or in relation to which the proceedings were terminated, is as high as 69.7%.

The comparison of data presented may indicate something that is specifically substantiated in point 4.2.2. of this report, which is that by filing appeals in this period (immediately before the opening of tenders) in a number of cases, certain economic entities do not have any real intention to obtain a review of allegedly unlawful proceedings by the contracting authority, but the question arises whether economic entities use the review for some other objectives in relation to the procurement procedures.

For the sake of clarity, the graph below shows the percentage of appeals dismissed for each number of days between the day of filing the appeal and the deadline for submission of tenders (ending on the fifteenth day before the opening of tenders).



**2.8. Analysis of Ex Officio Conduct - Application of the PPA 2016**

Pursuant to the PPA 2016, the State Commission pays attention *ex officio* to the procedural requirements and particularly essential violations of the public procurement procedures, which are listed exhaustively in Article 404, paragraph 2 of the PPA 2016.

In 2019, the State Commission, acting *ex officio*, found the existence of particularly essential violations referred to in Article 404, paragraph 2 of the PPA 2016 in 76 decisions.

**2.8.1. The Number of Decisions Finding a Particularly Essential Violation with regard to the Subject of the Appeal (Stages)**

Subject of Appeal	2018	2019
Procurement documentation	14	21
Amendment to procurement documentation	3	1
Award / annulment decision	59	53
Opening and omission	0	1
Other	0	0
<b>TOTAL</b>	<b>76</b>	<b>76</b>

The comparison between the number of decisions in which a particularly essential violation of public procurement procedures was found in 2019 and the number of decisions in which a particularly essential violation of public procurement procedures was found in 2018, shows that the total number of decisions in which a particularly essential violation was found in 2019 remained unchanged. This is only the indicator of the importance of the supervisory function of the State Commission acting *ex officio* (for the purpose of checking and determining possible particularly essential violations of public procurement procedures).

Furthermore, a comparison between the number of decisions in which a particularly essential violation was found with regard to the subject of appeals in 2019, and statistics on the number of decisions in which a particularly essential violation was found with regard to the subject of appeals in the previous 2018, shows a slight increase in the particularly essential violations found in the procurement documentation phase, and a slight decrease in the number of particularly essential violations found in the award/annulment decision phase.

**2.8.2. The Number and Structure of Particularly Essential Violations Found**

The State Commission, acting *ex officio*, found particularly essential violations, as referred to in Article 404, paragraph 2 of the PPA 2016, in 76 decisions, whereby several violations were found in several decisions. Also, in certain decisions, certain appellate allegations

corresponded to the particularly essential violations found. The total number of particularly essential violations found is 85.

Particularly Essential Violation	2018	2019
Short time limit for submission of tender applications	9	3
Correction of notice was not published	0	0
Time limit for submission of tender applications was not extended	2	2
Award criterion	0	0
Mandatory grounds for disqualification	24	44
Negotiations and amendment of tender	5	0
Criterion for award to economic entity	44	36
<b>TOTAL</b>	<b>84</b>	<b>85</b>

A comparison of the statistical data presented on the number of particularly essential violations found and statistics on the number of particularly essential violations found in the previous 2018 shows an increase in the total number of these violations by 1.19%. The total number of decisions in which particularly essential violations were found (76) is lower than the total number of particularly essential violations found, because several violations were found in some decisions. With regard to the type of particularly essential violation, a decrease in number is evident in each of the above types, except for the mandatory grounds for disqualification, where a significant increase was recorded.

**2.9. Annulment of Public Procurement Contracts or Framework Agreements**

In 2019, the State Commission did not render any decision on annulment of the public procurement contract or framework agreement. One appeal against the amendment of the public procurement contract was lodged and was dismissed on merits as unfounded.

**2.10. Decisions on Proposals for Issuing An Interim Measure**

In 2019, 40 proposals for issuing an interim measure were received, with an average decision-making time of three days, which is a reduction in the average decision-making time by two days compared to 2018.

<b>Proposals for Issuing Interim Measures</b>		<b>Number</b>
Number of proposals decided in 2019, of which there were:		40
	Dismissed on merits	3
	Dismissed	14
	Proposals granted	13
Other (resolved in another way) *		10
<b>TOTAL NUMBER OF PROPOSALS RECEIVED</b>		<b>40</b>

\* In certain appellate procedures decisions on the merits of the appeal were made, and so no separate decisions on accessory claims were made.

In 2019, 14 proposals to issue interim measures were dismissed, and 3 were dismissed on merits. Proposals were granted in 13 appellate cases.

**2.11. Decisions on Requests for Approval of the Continuation of Procedures and/or Conclusion of a Public Procurement Contract**

In 2019, 14 requests were received for the continuation of procedures and/or conclusion of a public procurement contract, or a framework agreement, which were resolved in an average time of four days, which is a reduction of the average decision-making time compared to 2018 by one day.

<b>Request to Grant Continuation of the Proceedings and/or Conclusion of a Public Procurement Contract</b>		<b>Number</b>
The number of applications decided in 2019, of which were:		14
	Dismissed on merits	10
	Dismissed	-
	Granted requests	2
Other (resolved in some other way) *		2
<b>TOTAL NUMBER OF APPLICATIONS RECEIVED</b>		<b>14</b>

\* In certain appellate procedures no decisions on the merits of the appeal were made, and so no separate decisions on accessory claims were made.

Requests were dismissed on merits in 10 appellate cases and granted in 2.

**2.12. Fines**

Pursuant to Article 429 of the PPA 2016, the State Commission may, in cases prescribed by law, impose a fine on the contracting authority. In 2019, no fine was imposed pursuant to the provisions of that Article of the Act, since the requirements for the imposition of a fine, as prescribed by the law, were not met.

**2.13. Oral Hearings**

Pursuant to Article 427 of the PPA 2016, the parties to the appellate proceedings may propose the holding of an oral hearing before the State Commission, in order to clarify complex facts of the case or legal issues. In 2019, a request for an oral hearing was made in fourteen (14) appellate cases. None was granted and no oral hearing was held.

Holding an oral hearing would, in principle, prolong the review procedures, where the procedures conducted by the State Commission are subject to a time limit. By their legal nature, proceedings before the State Commission consist of a review of the lawfulness of documentation, which, given the explicit obligation to ensure the burden of proof, the party is



obliged to provide. For this reason, the holding of an oral hearing is replaced by a written communication with the parties, requesting the completion of the documentation.

Regardless of the above, an oral hearing, as an important element of adversarial procedures, is a procedural tool which should be developed in a targeted manner, in specific appellate procedures.

**2.14. The Length of Appellate Procedures**

The length of the review proceedings is prescribed by Article 432, paragraph 2 of the PPA 2016, according to which the State Commission is obliged to render a decision within 30 days of the submission of an orderly appeal, and prepare and submit a written copy of the decision within eight days from the date of rendering the decision at a session of the panel.

The State Commission Act requires the disclosure of data on the average length of proceedings from the date of receipt of the appeal to the date of the decision, as well as from the date of completion of the documentation of the appellate case until the rendering of the decision. The first data speak of the time period the file spends at the State Commission, and the second of the active time required to render a decision on the main matter, since no decision can be made before the file is completed. Although this Act does not prescribe the obligation to disclose data on the average length of appellate procedures from the date the appeal is deemed orderly to the date of the decision, the PPA 2016 prescribes the obligation to render a decision within 30 days from the date the appeal is deemed orderly, which is why this information is given in this Report.

Length of Appellate Procedures	2018	2019
Average time from the date of completion of appellate cases to the rendering of a decision, in days	14	16
Average time from receipt of the appeal to the rendering of the decision, in days	34	34
Average time from the date the appeal is deemed orderly to the rendering of the decision, in days	26	27

*Despite the continuous increase in the number of appeals compared to previous years, the trend of resolving cases before the legal deadline was maintained in 2019, so the average time from the date the appeal is deemed orderly to the decision was 27 days.*

*The time from the completion of the appellate case to the decision was 16 days.*

## **2.15. The List of Contracting Authorities with five or More Appellate Procedures**

The following table shows the number of appellate cases in relation to the contracting authorities that had 5 or more appellate procedures before the State Commission in 2019. The table also shows the number, that is, the percentage of appeals granted in relation to the number of appeals received, as well as the total number of conducted procedures by contracting authorities in 2019.

No.	Contracting Authority	Total Number of Public Procurement Procedures published in EPPC 2019.	Number of Public Procurement Procedures in which an Appeal was Lodged	Number of Reviewed v. Number of Published Procedures	Appeals Received	Appeals Granted	Appeals Granted v. Appeals Received
1.	HEP-Operator distribucijskog sustava d.o.o., Zagreb	1021	40	3,92%	54	39	72,22%
2.	Grad Zagreb, Zagreb	1352	45	3,33%	53	24	45,28%

3.	Hrvatske ceste d.o.o., Zagreb	255	26	10,20%	46	10	21,74%
4.	Hrvatska elektroprivreda d.d., Zagreb	176	19	10,80%	35	15	42,86%
5.	Hrvatske autoceste d.o.o., Zagreb	306	20	6,54%	27	7	25,93%
6.	HŽ-Infrastruktura d.o.o., Zagreb	208	14	6,73%	26	11	42,31%
7.	Hrvatske vode, Zagreb	220	21	9,55%	26	16	61,54%
8.	HEP-Proizvodnja d.o.o., Zagreb	364	20	5,49%	26	12	46,15%
9.	Središnji državni ured za središnju javnu nabavu, Zagreb	30	9	30,00%	26	8	30,77%

10.	Hrvatski operator prijenosnog sustava d.o.o., Zagreb	352	10	2,84%	18	9	50,00%
11.	Osječko-baranjska županija, Osijek	37	8	21,62%	18	14	77,78%
12.	Grad Split, Split	156	10	6,41%	15	11	73,33%
13.	Plinacro d.o.o., Zagreb	115	10	8,70%	14	2	14,29%
14.	Istarski domovi zdravlja, Pula	32	4	12,50%	13	11	84,62%
15.	HP-Hrvatska pošta d.d., Zagreb	243	12	4,94%	13	3	23,08%
16.	Hrvatske šume d.o.o., Zagreb	121	8	6,61%	13	6	46,15%

17.	Međimurske vode d.o.o., Čakovec	19	4	21,05%	13	1	7,69%
18.	Grad Osijek, Osijek	64	5	7,81%	13	3	23,08%
19.	Klinički bolnički centar Rijeka, Rijeka	207	10	4,83%	13	12	92,31%
20.	Ministarstvo unutarnjih poslova, Zagreb	285	10	3,51%	12	1	8,33%
21.	Opća bolnica Pula, Pula	65	6	9,23%	11	4	36,36%
22.	KD Vodovod i kanalizacija d.o.o., Rijeka	40	6	15,00%	11	6	54,55%
23.	Hrvatski zavod za zapošljavanje, Zagreb	137	4	2,92%	11	4	36,36%

24.	Klinička bolnica Dubrava, Zagreb	85	10	11,76%	11	8	72,73%
25.	Klinički bolnički centar Split, Split	125	7	5,60%	10	5	50,00%
26.	Klinički bolnički centar Zagreb, Zagreb	330	13	3,94%	16	7	43,75%
27.	Klinički bolnički centar Sestre milosrdnice, Zagreb	96	8	8,33%	9	6	66,67%
28.	Varkom d.d., Varaždin	35	5	14,29%	8	3	37,50%
29.	Opća bolnica Zadar, Zadar	82	7	8,54%	8	7	87,50%
30.	Ministarstvo poljoprivrede, Zagreb	83	5	6,02%	8	6	75,00%

31.	Jadrolinija, Rijeka	127	7	5,51%	8	5	62,50%
32.	Ministarstvo gospodarstva, poduzetništva i obrta, Zagreb	66	5	7,58%	7	3	42,86%
33.	Grad Slavonski Brod, Slavonski Brod	40	5	12,50%	7	3	42,86%
34.	Opća bolnica Dr. Ivo Pedišić, Sisak	51	4	7,84%	7	5	71,43%
35.	Klinički bolnički centar Osijek, Osijek	81	7	8,64%	7	5	71,43%
36.	Vodoopskrba i odvodnja Zagrebačke županije d.o.o., Zagreb	15	5	33,33%	7	3	42,86%
37.	Splitsko- dalmatinska županija, Split	20	2	10,00%	7	2	28,57%

38.	Državni hidrometeorološki zavod , Zagreb	41	5	12,20%	7	3	42,86%
39.	Hrvatska Lutrija d.o.o., Zagreb	97	5	5,15%	6	3	50,00%
40.	Hrvatska kontrola zračne plovidbe d.o.o., Velika Gorica	90	4	4,44%	6	5	83,33%
41.	Financijska agencija, Zagreb	175	4	2,29%	6	1	16,67%
42.	Grad Rijeka, Rijeka	55	4	7,27%	5	1	20,00%
43.	Fond za zaštitu okoliša i energetske učinkovitost, Zagreb	29	4	13,79%	5	3	60,00%
44.	Ministarstvo uprave, Zagreb	28	4	14,29%	5	3	60,00%



45.	Zračna luka Dubrovnik d.o.o., Čilipi	34	3	8,82%	5	5	100,00%
46.	Dom zdravlja Krapinsko- zagorske županije, Krapina	11	4	36,36%	5	3	60,00%
47.	Grad Dubrovnik, Dubrovnik	68	4	5,88%	5	2	40,00%
48.	Opća bolnica Varaždin, Varaždin	70	4	5,71%	5	4	80,00%
49.	Hrvatska radiotelevizija, Zagreb	271	5	1,85%	5	3	60,00%
50.	Općina Podbablje, Kamenmost	5	3	60,00%	5	3	60,00%

*The number of appeals refers to public procurement procedures and concession award procedures, while the number of publications in the EPPC of the Republic of Croatia for 2019 refers only to public procurement.*

## 2.16. Appellants with 6 or More Appellate Procedures

In this statistical period, appellants and their success in appellate procedures were monitored. This type of data contributes to obtaining a broader picture of appellate procedures before the State Commission.

Number	Appellant	Number of Appeals Lodged in 2019	Appeal Granted	Appeal Dismissed on Merits	Appeal Dismissed	Termination
1.	Shimadzu d.o.o. Zagreb	27	21	3	3	0
2.	Siemens Healthcare d.o.o. Zagreb	22	15	4	2	1
3.	Ramić-Trade d.o.o. Podstrana*	20	12	7	1	0
4.	Medical Intertrade d.o.o. Sveta Nedjelja	18	13	1	3	1
5.	Trames d.o.o. Dubrovnik	17	5	2	9	1
6.	Elektrocentar Petek d.o.o. Ivanić Grad*	16	9	6	1	0
7.	Institut IGH d.d. Zagreb*	14	5	8	1	0

8.	Birodom d.o.o. Zagreb- Lučko*	13	8	4	1	0
9.	WYG savjetovanje d.o.o. Zagreb*	11	5	3	3	0
10.	Heplast-pipe d.o.o. Prelog	10	0	1	9	0
11.	HOK osiguranje d.d. Zagreb	9	6	3	0	0
12.	Lima O.I. d.o.o. Zagreb	9	5	3	1	0
13.	Valard Zagreb d.o.o. Zagreb	9	6	2	1	0
14.	M.T.F. d.o.o. Zagreb*	9	6	2	0	1
15.	Eko-flor plus d.o.o. Oroslavje	8	6	1	1	0
16.	Croatia osiguranje d.d. Zagreb	8	1	5	1	1
17.	SGM Informatika d.o.o. Split	8	5	2	1	0

18.	Veritas Esco d.o.o. Split	8	4	2	2	0
19.	Vik-dental d.o.o. Zagreb	8	7	1	0	0
20.	Zitex-ZB d.o.o. Donji Miholjac	8	8	0	0	0
21.	Dinarid d.o.o. Zagreb	6	5	1	0	0
22.	Eurco d.d. Vinkovci	6	1	4	0	1
23.	Insepo d.o.o. Zagreb	6	3	3	0	0
24.	Point-Split d.o.o. Split	6	6	0	0	0
25.	Projekt jednako razvoj d.o.o. Zagreb	6	3	3	0	0
26.	Sanac d.o.o. Rugvica	6	4	2	0	0

\*The table shows the appellants with six or more resolved appeals, who lodged their appeals independently or as members of bidder consortiums.

### **2.17. The Most Frequent Reasons for Lodging an Appeal and the most Frequent Irregularities Identified by the State Commission**

The most frequent reasons for filing an appeal and irregularities identified by the State Commission are largely repeated from year to year.

In appellate procedures conducted before the State Commission, the following most common reasons for filing an appeal can be singled out:

- non-compliance of procurement documentation with legislation in force (mostly in the part related to the description of the subject of procurement, technical specifications, criteria for qualitative selection of the economic entity and award criteria)
- omissions of the contracting authority during the examination and evaluation of tenders
- non-compliance of the selected bidder's tender with the conditions and requirements from the procurement documentation
- incorrect application of the provisions on supplementation, clarification/explanation, completion of tenders and submission of the necessary information or documentation
- violation of the principles of public procurement
- unlawfulness of the decision to annul the public procurement procedures

#### *The Most Frequent Irregularities Found by the State Commission*

For the purposes of this report, the most frequent irregularities found by the State Commission will be divided into those committed by bidders (2.17.1. Specific Bidder errors) and those committed by the Contracting Authority (2.17.2. Specific Contracting Authority Errors).

##### **2.17.1. Specific Bidder Errors:**

- submission of a tender that is not drawn up in accordance with the conditions and requirements from the procurement documentation (mostly in terms of proving the absence of grounds for disqualification, proving the criteria for qualitative selection of economic operator, proving compliance with the prescribed technical specifications of the procurement subject and errors in costing)

- supplementing and clarifying the tender contrary to statutory restrictions (negotiating and amending the tender)
- insufficient use of the possibility to request additional information, explanations or amendments related to the procurement documentation

### **2.17.2. Specific Contracting Authority Errors:**

- unclear, dubious and contradictory procurement documentation
- unjustified restriction of competition by prescribing detailed technical specifications
- describing the subject of procurement, i.e. prescribing technical specifications, in a way that gives advantage to a certain economic entity
- prescribing criteria for the selection of an economic operator that exceed the minimum levels of competence
- incorrect determination of the criteria for selection of the tender (criterion of the most economically advantageous tender)
- deviation from the conditions and requirements in the procurement documentation during the examination and evaluation of tenders
- deviation from the conditions and requirements from the procurement documentation during the examination and evaluation of tenders
- acceptance of insufficient evidence proving the absence of grounds for disqualification
- incorrect application of the provisions on supplementing and clarifying the bid (negotiation, violation of the principles of equality of arms and transparency, etc.)
- non-transparency of examination and evaluation of tenders (lack of reasoning or faulty reasoning for disqualification or non-fulfilment of criteria for selection of economic operator, i.e. reasons for rejection of tenders in the minutes on examination and evaluation of tenders, etc.)

### **2.17.3. The Most Frequent Appeal Allegations**

The largest number of appeals is lodged in the procurement documentation phase and in the award decision phase. In view of this, the following is a presentation of the most frequent appellate allegations in these two stages of the procedures.

#### **2.17.3.1. The Most Frequent Appellate Allegations Relating to Procurement Documentation**

The most frequent reasons for contesting procurement documentation given in appeals lodged are:

- unclear, dubious and contradictory procurement documentation
- technical specifications formulated contrary to statutory provisions (in terms of reference to a specific brand, references to "equivalent", criteria for assessing equivalence, etc.)
- description of the subject of procurement and technical specifications, in the context of favouring a specific economic operator
- prescribed conditions, and evidence of technical and professional capacity
- prescribed criteria for selection of the tender (criterion of the most economically advantageous tender)
- prescribed conditions and requirements that must be met in accordance with special regulations or professional rules

#### **2.17.3.2. The Most Frequent Appellate Allegations Relating to Award Decision**

The most frequent reasons for contesting award decisions given in lodged appeals are:

- (non) compliance with the technical specifications of the subject of procurement
- proving the (non) existence of grounds for disqualification
- meeting the requirements of technical and professional capacity
- application of Articles 263 and 293 of the PPA 2016 (concept of supplementation and clarification/explanation of the tender)
- application of the provisions on the reliance of the economic operator on the capacity of other entities
- examination and evaluation of tenders in relation to the award criteria (criterion of the most economically advantageous tender) - irregularity of scoring
- application of the extremely low tender concept

#### **2.18. The Number of Motions to Indict Filed**

The State Commission Act, in Article 3, paragraph 4, defines the competence of the State Commission for filing motions to indict for misdemeanours prescribed by that Act, and other

laws and regulations governing the field of public procurement. During 2019, the State Commission did not file any motions to indict for misdemeanours.

## 2.19. Total Fees Paid for Initiating Appellate Procedures

Under Article 430 of the PPA 2016, the appellant in procedures before the State Commission pays a fee for initiating the appellate procedures in the amount of:

Amount of Fee	For the Estimated Value of Procurement
HRK 5,000.00	to HRK 750,000.00
HRK 10,000.00	from HRK 750,000.01 to HRK 1,500,000.00
HRK 25,000.00	from HRK 1,500,000.01 to HRK 7,500,000.00
HRK 45,000.00	from HRK 7,500,000.01 to HRK 25,000,000.00
HRK 70,000.00	from HRK 25,000,000.01 to HRK 60,000,000.00
HRK 100,000.00	over HRK 60,000,000.00

Exceptionally, for an appeal against the procurement documentation, the appellant is obliged to pay a fee for initiating appellate procedures in the amount of HRK 5,000.00, regardless of the estimated value.

*Revenues from fees for initiating appellate procedures are paid into the state budget. In 2019, a total of HRK 17,311,848.23 was paid into the state budget on the basis of the fee for initiating appellate procedures, which is 14.32% more than in 2018.*

Budget revenues on this basis are increasing compared to 2018 for reasons that, in addition to the increase in the number of appeals compared to the previous year, they include the fact that the estimated values of procedures in which appeals were filed in 2019 were higher than in



the previous year, and the amount of compensation in most appellate procedures depends on the estimated value of the specific procurement procedures.

### **2.19.1. Revenues from the Administrative Fee for Initiating Appellate Procedures before the State Commission**

Pursuant to Article 430 paragraph 8 PPA 2016, appellants are no longer obliged to pay administrative fees when lodging an appeal.

### **2.20. Other Relevant Indicators in Appellate Cases**

Among the other relevant indicators in appellate cases in 2019, it is necessary to point out the effects of the application of the e-Appeals system, and the features of appellate cases of public procurement financed from EU funds and strategic investments, as well as the structure of such procedures.

#### **2.20.1. Lodging an Appeal Electronically in Public Procurement**

By introducing the possibility of filing appeals by electronic means of communication, through the interconnected information systems of the State Commission and the EPPC of the Republic of Croatia (e-Appeal system), the requirements were met for improving the efficiency and shortening the length of appellate procedures.

This implies that in procedures in which an electronic appeal is lodged, communication with the parties is performed by electronic means of communication, which significantly speeds up procedural actions, and speeds up appellate procedures.

### 2.20.1.1. The Number of e-Appeals Received in 2019

Type of Procedures	Total Number of Appeals Received	Number of e-Appeals Received	%
Public procurement	1194	563	47,15
Concessions	15	-	-
Public-private partnership	-	-	-
Total	1209	563	46,57

The table shows that in 2019, 46.57% of all appeals were lodged as e-Appeals. This percentage represents a significant increase compared to 2018, when 28.71% of all appellate procedures were initiated by an electronic appeal.

### 2.20.1.2. The Length of Appellate Procedures Initiated by a e-Appeal

Period	e-Appeal (Number of Days)	All Procedures (Number of Days)
Average time from the date of completion of appellate cases to the rendering of a decision	15	16
Average time from receipt of the appeal to the rendering of a decision	27	34
Average time from the date the appeal is deemed orderly to the rendering of a decision	25	27

The table shows that the average length of appellate procedures in cases where an e-Appeal was received is shorter than the average length of appellate procedures in all cases received in 2019, especially in relation to the length of the procedures from receiving the appeal to the decision (7 days shorter).

Although modest at first, the expected effect of filing an e-Appeal against the total length of the appellate procedures was achieved. In this context, it is necessary to make more effort in this field and provide the additional conditions necessary for faster and more efficient resolution. This primarily relates to the improvement of the existing technical conditions that would make the faster and easier functioning of the e-Appeal system possible.

**2.20.1.3. The Structure of Decisions in Cases in which an e-Appeal was Received**

For the purposes of this Report, 521 cases are analyzed that were received and resolved in 2019, and data on cases transferred to 2020 (42 of them) are not reported.

Of the total 521 electronic appeals received and resolved, 143 resulted in dismissal.

Type of Decision	Number	%
Appeal granted	247	47.41
Appeal dismissed on merits	102	19.58
Appeal dismissed	143	27.45
Termination of the procedures	25	5.56
<b>TOTAL</b>	<b>521</b>	<b>100</b>

## 2.20.2. The Characteristics of Public Procurement Cases Financed from EU funds

	Number of Procedures Published in 2019. (Classifieds)	Number of Proceedings in Which Appeal was Lodged in 2019.	%
All procedures	13190	870	6,59
Procedures financed from EU funds	1938	231	11,91

The total number of public procurement procedures which were first announced in 2019, was 13,190. Of this number, 1,938 public procurement procedures were financed from European Union funds. The State Commission reviewed 231 procedures financed from European Union funds (11.91%)

Therefore, given the total number of reviewed procedures in relation to the total number of published procedures financed from EU funds, it is clear that the number of procedures that were the subject of challenge before the State Commission was insignificant.

### 2.20.2.1. The Length of Public Procurement Cases Financed from EU Funds

Period	EU Funds (Number of days)	All Procedures (Number of days)
Average time from the date of completion of appellate cases to the rendering of a decision	15	16
Average time from receipt of the appeal to the rendering of a decision	31	34
Average time from the date the appeal is deemed orderly to the rendering of a decision	25	27

Regarding the average length of procedures in appellate cases financed from European Union funds, it should be noted that, despite the continuous increase in the total number of appeals in 2019, the average time from receiving an appeal to rendering a decision in relation to the same cases in 2018, was shortened by three days.

It is noted that the data in the table above refer to all the urgent cases conducted before the State Commission.

Urgent cases are appellate procedures conducted in accordance with the legislation governing the field of public procurement and concessions, and are related to the implementation of strategic projects; appellate public procurement procedures related to projects financed in whole or in part by European Union funds, and appellate public procurement procedures in the field of defence and security. Appellate procedures, which are fully or partially financed by the European Union, account for the largest proportion of urgent cases, and shortening the time limit for resolving these cases contributes to the total shortening of the length of public procurement procedures, which is important since contracting in such procedures is subject to short time limits.

#### **2.20.2.2. The Structure of Appellate Cases Financed from EU funds**

In 2019, the State Commission received a total of 1209 appeals, of which 341 appeals related to public procurement procedures financed from European Union funds.

For the purposes of this Report, the cases received and resolved in 2019 are analyzed, which were financed from European Union funds, i.e. 313 of them.

Type of Decision	Number	%
Appeal granted	136	43.45
Appeal dismissed on merits	80	25.56
Appeal dismissed	75	23.96
Termination of procedures	22	7.03
<b>TOTAL</b>	<b>313</b>	<b>100</b>

**2.20.2.3. Annulment Structure (the Decisions, Procedures and Actions of Contracting Authorities Affected by Unlawfulness)**

Subject of Annulment	Number	%
Procurement documentation	24	17.65
Award decision	107	78.68
Annulment decision	4	2.94
Procedures	1	0.73
<b>TOTAL</b>	<b>136</b>	<b>100</b>

The State Commission mostly annuls the award decision (78.68%), or annuls the part of the procurement documentation affected by unlawfulness, while it annuls the entire public procurement procedures to an almost insignificant extent (0.73%). It is clear from these data that a decision by the State Commission granting an appeal does not require the conduct of the entire public procurement procedures from the beginning again, but their effect is to remand the case to the contracting authority to correct the unlawfulness identified in the phase of examination and evaluation of the tenders (if it is a matter of annulment of award decision), or changes to the unlawful part of the procurement documentation and continuation of the procedures (if it is a matter of annulment of part of the procurement documentation).

### **3. ADMINISTRATIVE DISPUTES AGAINST DECISIONS BY THE STATE COMMISSION**

In 2017, the High Administrative Court, pursuant to Article 434, paragraph 1 of the PPA 2016, was granted jurisdiction to decide in the first instance in administrative disputes against decisions by the State Commission.

Since the High Administrative Court, after receiving the first lawsuit in 2017, initiated procedures before the Constitutional Court of the Republic of Croatia to review the constitutionality of Article 434, paragraphs 3 and 4 and Article 435 of the PPA 2016, it also ordered the stay of the procedures in all cases until the decision by the Constitutional Court of the Republic of Croatia was rendered.

Since the Constitutional Court of the Republic of Croatia issued a decision on 5 February 2019 dismissing on the merits the request for review of the constitutionality of Article 434, paragraphs 3 and 4 and Article 435 of the PPA 2016, this Report shows the initial effects of the application of the provisions of the PPA 2016 which define the jurisdiction of the High Administrative Court in the first instance in an administrative dispute, and which sets a 30 day limit for rendering a decision in an administrative dispute. The initial effects show a shortening of the time limits for rendering a decision in an administrative dispute, and a significant number of decisions by the High Administrative Court upholding the decisions of the State Commission.

Given the fact that some administrative disputes were instituted before the PPA 2016 came into force, for which the jurisdiction of four administrative courts (Zagreb, Split, Osijek, Rijeka) was prescribed in the first instance, and were concluded in 2019, this Report contains data on the decisions by the first instance administrative courts and the second instance High Administrative Court, which were rendered in application of the previous Public Procurement Acts.

The tables and graphs below provide an overview of the number of administrative disputes and the types of decisions rendered in administrative disputes.

### **3.1. The Number of Administrative Disputes against Decisions by the State Commission**

<b>Year</b>	<b>Number of Appeals</b>	<b>Number of Administrative Disputes</b>	<b>%</b>
2019	1209	123	10.17
2018	1170	72	6.15
2017	945	85	8.99
2016	1135	113	9.95
2015	1137	93	8.17
2014	1315	145	11.02

The higher number of administrative disputes against the decisions of the State Commission from 2019, compared to 2018, is a consequence of the delay in review in 2018, i.e. the continuation of the review in 2019 before the High Administrative Court.

### **3.2. The Number and Structure of Decisions in Administrative Disputes in 2019**

#### **3.2.1. The Structure of Decisions by the High Administrative Court in the First Instance**

In 2017, the High Administrative Court, pursuant to Article 434, paragraph 1 of the PPA 2016, was granted jurisdiction to decide in first instance review proceedings, i.e. to decide on lawsuits against decisions by the State Commission.

In 2019, the State Commission received 192 decisions by the High Administrative Court deciding in the first instance, referring to decisions by the State Commission in 2017, 2018 and 2019. The largest number of decisions was received immediately after the decision was



rendered by the Constitutional Court of the Republic of Croatia, i.e. in March and April 2019 (Total 106).

<b>Decisions by the High Administrative Court in the First Instance</b>		
<b>Type of Decision</b>	<b>Number</b>	<b>%</b>
Action dismissed on merits	138	71.88
Action dismissed	11	5.73
Termination of administrative dispute	5	2.60
Action granted, State Commission's decision annulled and the court rendered its own decision in the administrative matter	32	16.67
Action granted, State Commission's decision annulled and the case remanded to the State Commission	6	3.12
<b>TOTAL</b>	<b>192</b>	<b>100</b>

It should be noted here that despite the obligation under the PPA 2016 that in case the High Administrative Court annuls the decision of the State Commission and decides on the appeal by its judgement, in 3.12% of cases the High Administrative Court did not act in compliance with this obligation but it remanded the case to the State Commission after the annulment of its decision.

### **3.2.2. The Structure of Decisions by Administrative Courts in the First Instance**

In 2019, the State Commission received 66 decisions rendered by the first instance administrative courts deciding on the lawsuits against the decisions of the State Commission. Decisions of administrative courts in the first instance received in 2019 refer to the decisions by the State Commission which were rendered by applying the previous laws on public procurement, i.e. before the entry into force of the PPA 2016.

<b>First Instance Decisions of Administrative Courts</b>		
<b>Type of Decision</b>	<b>Number</b>	<b>%</b>
Action dismissed on merits	51	77.27
Action dismissed	3	4.55
Termination of administrative dispute	7	10.60
Action granted, State Commission's decision annulled and the court renders its own decision in the administrative matter	2	3.03
Action granted, State Commission's decision annulled and the case remanded to State Commission	3	4.55
<b>TOTAL</b>	<b>66</b>	<b>100</b>

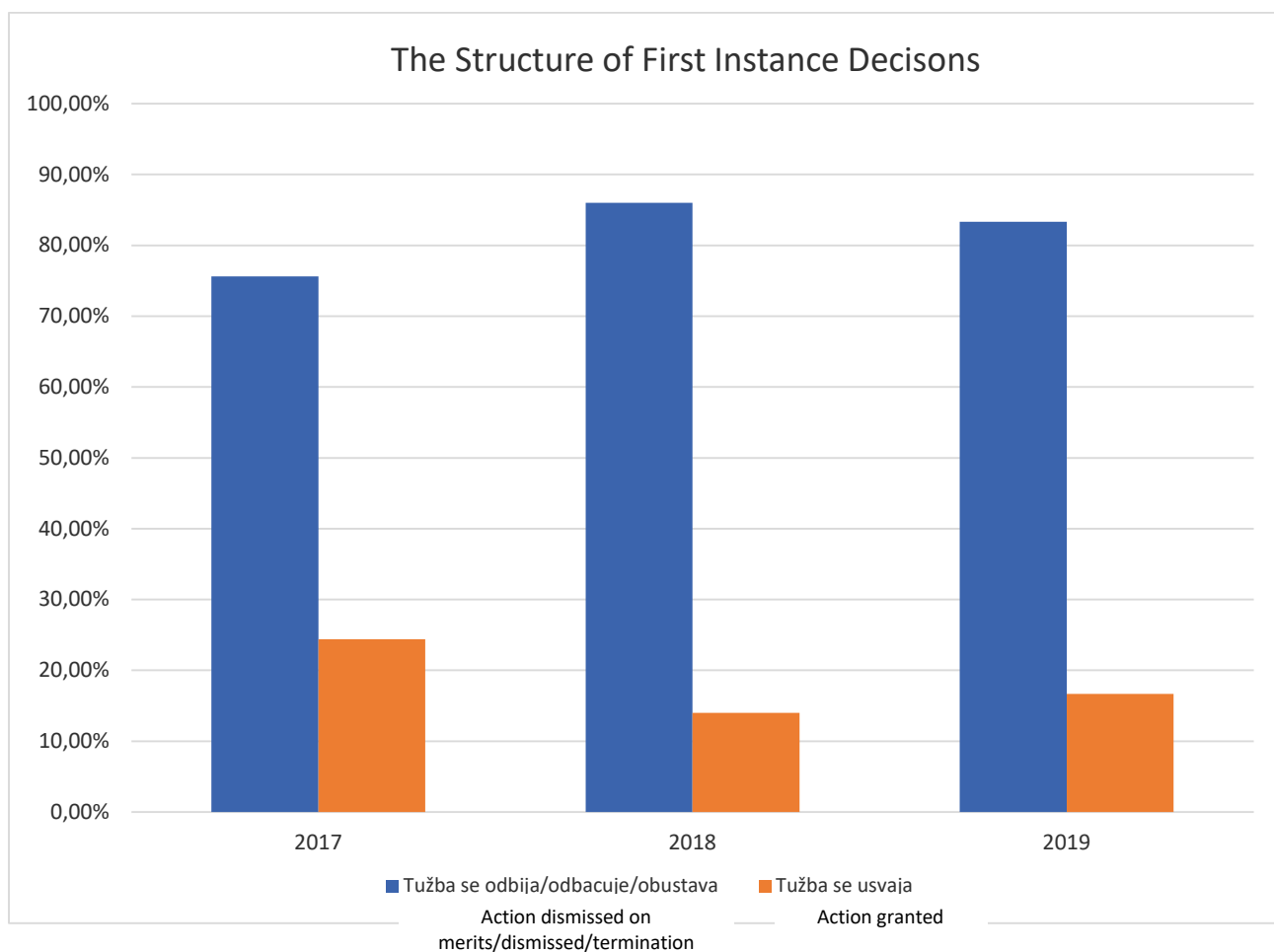
### 3.2.3. The Structure of Decisions in the First Instance and a Comparative Presentation

<b>Type of Decision</b>	<b>2017</b>		<b>2018</b>		<b>2019</b>	
	<b>Number</b>	<b>%</b>	<b>Number</b>	<b>%</b>	<b>Number</b>	<b>%</b>
Action dismissed on merits	72	<b>60.50</b>	72	<b>72.00</b>	189	<b>73.26</b>
Action dismissed	2	<b>1.68</b>	4	<b>4.00</b>	14	<b>5.43</b>
Termination of administrative dispute	16	<b>13.45</b>	10	<b>10.00</b>	12	<b>4.65</b>
Action granted, State Commission's decision annulled and the court	6	<b>5.04</b>	7	<b>7.00</b>	34	<b>13.18</b>

renders its own decision in the administrative matter						
Action granted, State Commission's decision annulled and the case remanded to State Commission	23	<b>19.33</b>	7	<b>7.00</b>	9	<b>3.48</b>
<b>TOTAL</b>	<b>119</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>258</b>	<b>100</b>

The data show that in 2019, a significantly higher number of first-instance decisions was received. This is the consequence of the new legislative regulation of review in public procurement, which granted the High Administrative Court exclusive jurisdiction for deciding in administrative disputes in public procurement procedures. The High Administrative Court also significantly accelerated the resolution of administrative disputes in public procurement procedures. Furthermore, the data show a significant increase in decisions by which the court finally resolved administrative matters on the merits, which all contributed to reducing the total length of public procurement procedures.

In 2019, in 16.66% of disputes, the law suits were granted and the decisions by the State Commission were annulled. Taking into account the court decisions dismissing the claim on the merits, dismissing the lawsuits and terminating the administrative dispute, it follows that the decisions of the State Commission were upheld in 83.34% of cases. From the comparative presentation by years, it can be seen that the number of first-instance decisions dismissing the lawsuit on the merits is growing continuously.

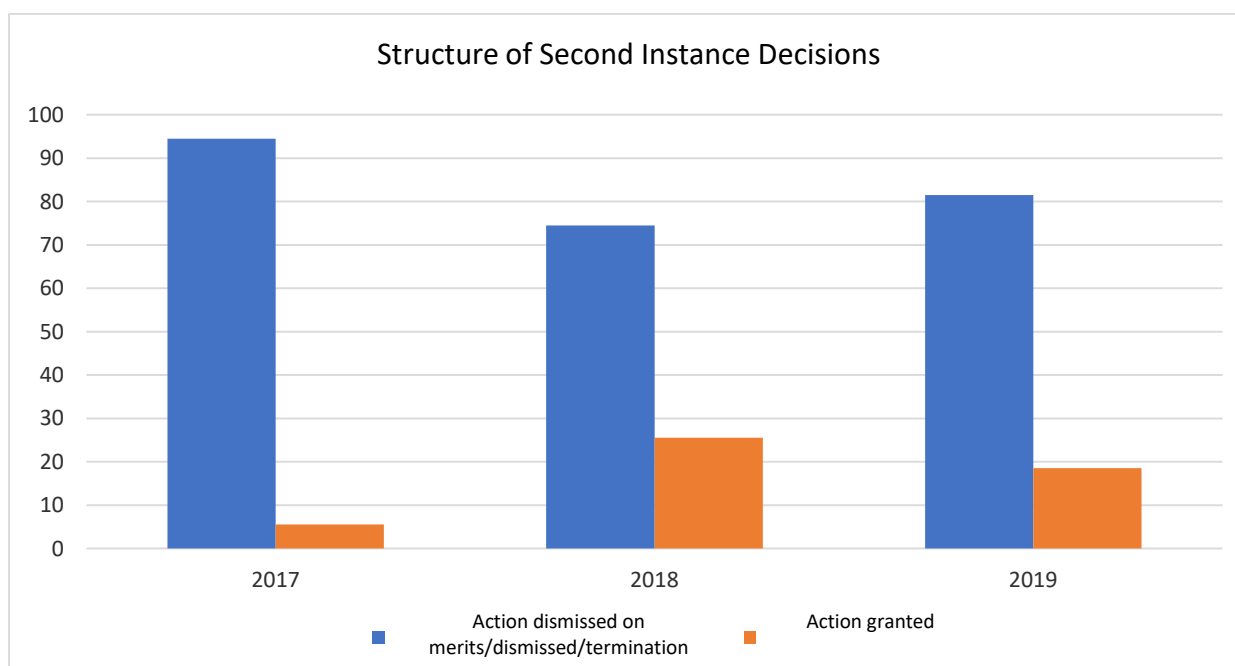


### **3.2.4. The Structure of Decisions by the High Administrative Court in the Second Instance**

In 2019, the State Commission received 54 decisions by the High Administrative Court deciding on appeals against decisions by the first instance administrative courts.

In 77.78% of cases, the High Administrative Court dismissed the appeals on the merits, in 3.70% of cases it dismissed the appeals, while in 18.52% of cases it granted the appeals.

	2017		2018		2019	
Type of Decision	Number	%	Number	%	Number	%
Appeal dismissed on merits	33	<b>91.66</b>	32	<b>68.08</b>	42	<b>77.78</b>
Appeal is dismissed	0	<b>0</b>	1	<b>2.13</b>	2	<b>3.70</b>
Termination of Administrative Procedures	1	<b>2.78</b>	2	<b>4.26</b>	0	<b>0</b>
Appeal granted	2	<b>5,56</b>	12	<b>25,53</b>	10	<b>18,52</b>
<b>TOTAL</b>	<b>36</b>	<b>100</b>	<b>47</b>	<b>100</b>	<b>54</b>	<b>100</b>



A comparison of data on the structure of court decisions shows that the trend has been maintained, i.e. that in 2019, as in 2018, in the vast majority of cases, first instance courts dismissed claims on the merits and confirmed the lawfulness of State Commission decisions, and the High Administrative Court dismissed appeals on merits as unfounded in most of its decisions and confirmed the legality of the decisions of the first instance courts.

### 3.2.5. Remedies

In 2019, the State Commission, as the defendant in administrative disputes, filed 4 appeals and 4 proposals to the State Attorney's Office of the Republic of Croatia for a request for extraordinary review of the legality of a final judgment (*res iudicata*) (Article 78 of the Administrative Disputes Act).

In 2019, the Supreme Court of the Republic of Croatia, following a request for an extraordinary review of the legality of a final judgment, rendered one ruling quashing the judgment of the High Administrative Court and remanding the case to the High Administrative Court for retrial.

	2017.		2018.		2019.	
Type	State Commission	Appellants	State Commission	Appellants	State Commission	Appellants
Ordinary (appeal)	23	43	6	46	4	37
Extraordinary	4	0	3	0	4	0
<b>TOTAL</b>	<b>27</b>	<b>43</b>	<b>9</b>	<b>46</b>	<b>8</b>	<b>37</b>

The table shows the structure and number of legal remedies filed in administrative disputes and the applicants who filed these remedies. During 2019, the State Commission lodged four appeals and four times proposed to the State Attorney's Office of the Republic of Croatia to file a request for an extraordinary review of the legality of a final court decision before the Supreme Court of the Republic of Croatia.

## **4. ASSESSMENT OF THE SITUATION IN REVIEW PROCEDURES AND PUBLIC PROCUREMENT IN GENERAL**

This assessment of the situation includes an assessment of the legal framework, namely the substantive legal provisions governing public procurement, procedural provisions governing review and the provisions governing the institution that provides review.

### **4.1. Assessment of the Situation in Public Procurement in General**

The public procurement system in the Republic of Croatia is stable. It is developing and adjusting itself to the economic environment.

This is evidenced by the fact that the European Commission published a revised version of the 2019 Single Market Scoreboard in September 2019, where the Republic of Croatia was marked as "green" for the first time since joining the European Union. This was the result of an analysis of several indicators relating to public procurement procedures whereby the public procurement in the Republic of Croatia was assessed as satisfactory, which is the best of the three possible assessments of the situation. Thus, the Republic of Croatia is among the 9 equally rated "green" countries (Kingdom of Denmark, Republic of Estonia, French Republic, Republic of Finland, Republic of Iceland, Kingdom of Norway, Kingdom of Sweden, and the United Kingdom of Great Britain and Northern Ireland).

After three years of application of the PPA 2016, certain positive effects are visible, as well as certain shortcomings of the legislative framework of the public procurement system.

Due to the fact that the State Commission openly publishes its decisions in full, when it comes to the public's perception of public procurement, this perception is primarily based on the case law established by the State Commission through its decisions.

Due to the relatively small number of public procurement procedures that were subject to appellate review (870 of the total 13,190 procedures published in 2019, or 6.59%), this assessment is based solely on assessment of the procedures that were subject to review before the State Commission.

Public procurement procedures, which begin with the publication of a call for tenders in the EPPC of the RC, and end with the enforceability of an award decision or an annulment decision, are only one part of the public procurement process in a broader sense, which begins

with public procurement planning and ends with monitoring of the execution of contract/framework agreement.

The public procurement system should be viewed as a whole, and in this assessment of the situation we consider it necessary to emphasize the need for its further development and in that sense, certain areas are listed below in relation to which, on the basis of procedures conducted upon appeals before the State Commission, it was assessed that there was a need to pay special attention to them.

These are the following areas:

- preparation and planning in the public procurement system
- strengthening the Public Procurement Policy Directorate.

#### **4.1.1. Preparation and Planning in the Public Procurement System**

As stated, the public procurement process in a broader sense begins with procurement planning, which includes, among other things, market research, definition of technical specifications, the bidder capacity requirements, etc. Public procurement planning is a very important and relatively neglected part of the public procurement process.

Adequate planning of the procurement process, and quality and timely market research reduce the need for frequent changes in procurement documentation after the start of the procurement procedures, and thus reduce the number of potential appeals that stop procedures, which further reduces the total time required to conduct the procurement procedures and contracting.

It is often clear from the results of the appellate procedures that the contracting authority did not conduct quality market research, and this results in deficiencies in the technical specifications, contract execution conditions, and an unclear definition of the procurement documentation, which may result in a final procurement, for which it is questionable whether it meets the contracting authority's needs, and whether it represents the best value for money. Inadequately conducted market research can lead to the inability of any bidder to offer the subject of procurement as defined by the technical specifications, which leads to the annulment of the procurement procedures, and the obligation to conduct them again from scratch.



Timely, systematic and quality planning of the public procurement process should lead to the realization of the principle of best value for money in the long run, but also to a significant reduction of the total time from the beginning of the procurement procedures to contracting, which is especially important in European-funded procurement procedures in which contracting within a certain time limit is a precondition for withdrawing funds. At the same time, systematic planning of the procurement process enables the implementation of certain development policy measures through the achievement of secondary public procurement objectives, such as elements of sustainable, social and green procurement.

#### **4.1.2. Strengthening the Public Procurement Policy Directorate**

As already pointed out in previous reports by the State Commission, the Public Procurement Policy Directorate of the Ministry of Economy, Entrepreneurship and Crafts plays a key role in designing the further development of the public procurement system. In addition to the development of the system, the Public Procurement Policy Directorate must take two other important aspects of its competence into account, namely: administrative supervision of public procurement procedures, and the system of training of all participants in public procurement process.

Given that the State Commission reviews public procurement procedures only upon appeal (in only 6.59% of procedures conducted), the role of administrative oversight conducted by the Public Procurement Policy Directorate becomes crucial to ensure lawfulness (in the form of preventive measures, but also as a corrective factor) in public procurement procedures that were not subject to review by the State Commission. Given that the total number of public procurement procedures is continuously increasing annually, it is necessary to work on ensuring the appropriate capacity of the Public Procurement Policy Directorate.

Public procurement procedures, namely public procurement in a narrower sense (starting with the call for tenders and ending with the enforceability of the award decision), are subject to the greatest public scrutiny and the highest degree of control and transparency, through the possibility of appealing to the State Commission at all stages of the procedures with a suspensive effect in the form of stopping the procurement procedures. On the other hand, the execution of public procurement contracts themselves remains out of focus, and amendments

to public procurement contracts outside the framework set by legal provisions represent a grey area that currently manages to go unnoticed in the public procurement system.

Although the possibility exists of challenging changes to a contract before the State Commission, such appeals are extremely rare, and in 2019 only one appeal was filed that aimed at annulling changes to the contract.

In this sense, there is a clear need urgently to build the administrative capacity of the Public Procurement Policy Directorate, which, in addition to the power to initiate misdemeanour proceedings, also has the power to lodge appeals before the State Commission in the public interest.

Furthermore, the system of training and certification of participants in public procurement procedures is one of the most respected and better quality systems in EU Member States, but at the same time it is necessary to point out the need to upgrade the system, to build and improve the professional capacity and knowledge of experts in the preparation and implementation of procurement procedures.

The stated need to strengthen the Directorate arises from the above data in this Report, which show that contracting authorities conducting a small number of public procurement procedures face difficulties in implementing the PPA 2016, and a large number of errors are found in the procedures they conduct that could, in the opinion of that state body, be prevented by administrative supervision and training.

This is particularly important in procedures financed by European Union funds, given that the contracting authority's errors in such procedures result in significant financial corrections, thus multiplying the negative financial impact on the budget. In this sense, the need is highlighted for continued horizontal cooperation of all bodies that perform a certain role in review of the lawfulness of public procurement procedures related to the allocation of EU funds, for the purpose of the uniform interpretation of legal provisions, taking into account that such cooperation should not jeopardize the independence of those bodies in carrying out their tasks.

#### **4.2. Assessment of the Situation Regarding Review**

As in previous years, there were no significant problems in the functioning of the legal framework of review of public procurement in 2019.

The data presented above show that after a three-year period of continuous decline in the number of appeals (from 2014 to 2017), in 2019, as in the previous 2018, the trend of an increase in the number of appeals in 2019 continued, by 3.33% compared to the previous year. Despite the increase in the number of appeals, the State Commission maintained the trend of resolving cases before the statutory deadline in 2019.

In relation to the content of the appeals lodged, there was again visible progress in the quality of appeals, with a very large number of appellate allegations and many pieces of evidence attached, supporting those allegations (opinions of experts in certain areas, technical documentation, references to judgments by the European Court of Justice, and the like.).

In the further part of this Report, four aspects that represent the basis for assessment of the situation in review during 2019, will be elaborated in particular:

- the increase in the number of e-appeals lodged
- appeals against procurement documentation
- appeals against award decisions
- administrative court protection

#### **4.2.1. The Increase in the Number of e-Appeals Lodged**

On 1 January 2018, the possibility was introduced for the State Commission to lodge an appeal through the interconnected information systems of the State Commission and the EPPC of the RC (e-Appeal system). In appellate procedures initiated in this way, further communication takes place through the EPPC of the RC, which lifts significant administrative burden from appellate procedures, and simplifies and speeds up the service of documents.

The two years of application of this option show a visible trend of an increasing number of appeals lodged in the form of e-appeals. Thus, in 2018 the percentage of appeals lodged in the form of e-appeals amounted to 28.71%, while in 2019 this percentage rose to 47.15%. In this period, the shortening is also visible of the average length of time needed for resolving appellate cases in procedures in which appeals were lodged in the form of an e-appeal, in relation to other procedures.

In this sense, given the perceived advantages and the fact that the number of lodged e-appeals is on the rise, we believe that it is necessary to consider the possibility of filing a appeal in public procurement procedures electronically as an obligation.

#### **4.2.2. Appeals against Procurement Documentation**

In 2019, a further increase in the number of appeals against procurement documentation was observed. Appeals against procurement documentation mostly try to point out the unlawfulness of procurement documentation related to the technical specifications of the subject of procurement, where appellants indicate potential preferential treatment for certain economic entities, or try to point out in their appeals possible distortions of the competition and limited access to the tender process.

Furthermore, it is evident that some economic entities do not file appeals against procurement documentation in order to obtain legal protection against the unlawful actions of the contracting authority, but to take advantage of the fact that untimely appeals against procurement documentation also stop the procedures and postpone the opening of tenders, and thus delay the procurement process or exert pressure on the contracting authority.

Thus, in 2019, a significant increase was observed in the number of appeals against procurement documentation that were dismissed (mostly due to lateness and non-payment of fees). According to the data presented in this report, over 42% of appeals lodged at this stage of the procedures end in dismissal or termination of the procedures, which is a significantly higher percentage than the percentage of these decisions at other stages of the procedures.

It has been noted that a large number of appeals were lodged immediately before the opening of tenders (0-4 days before the opening of tenders), which were obviously untimely and/or no fee was paid for initiating appellate procedures, and consequently they were ultimately dismissed. However, the contracting authorities were obliged to stop the procurement procedures or to postpone the public opening of tenders after these appeals were lodged. Appeals filed in this period (0-4 days before the opening of bids) are very rarely granted (only in 13.9% of cases), while in an extremely high percentage, 69.7% they result in dismissals or termination of procedures (mostly due to untimeliness and non-payment of the fee for initiating the appellate procedures).

The data presented in this report, in particular items 2.6. and 2.7. of the Report, indicate that the possibility exists that certain economic entities, by filing appeals in the period immediately before the opening of tenders in a number of cases, have no real intention to obtain a review of the lawfulness of the actions of the contracting authority, but it is highly possible that they are using the instrument of review to pursue other goals in relation to the procurement process.

In order to prevent the possibility of terminating public procurement procedures by lodging an appeal against the procurement documentation without any real intention to obtain a review, the State Commission points to the need of legislative amendments whereby the contracting authorities would not stop the procurement procedures or postpone the opening of tenders when the appeal is manifestly untimely. In this way, some of the abuses of the right to appeal would be prevented.

Nevertheless, it is important to emphasize that it is still necessary to encourage appeals against procurement documentation, as this is a stage of the procedures where potential errors by the contracting authority can be eliminated, which cannot be corrected at a later stage of the procurement procedures, and may have a negative impact on the outcome of the entire public procurement process. This is especially important in procedures financed from European Union funds, in which in this way (by correcting deficiencies in the procurement documentation phase in appellate procedures before the State Commission) subsequent negative consequences on the state budget in the form of financial corrections are prevented.

#### **4.2.3. Appeals against Award Decisions**

As can be seen from the previous part of the report, the largest number of appeals, which are in the process of being resolved before the State Commission, are still lodged at the stage of the award decision. The range of appellate allegations and issues in appeals against award decisions is vast, but for the purposes of this report we have singled out the issue of determining the absence of reasons for disqualification that appears in 2019 in a number of cases before the State Commission.

In 2018, it was made technically possible for contracting authorities to obtain updated supporting documents in the process of examination and evaluation of bids, in order to prove the absence of reasons for disqualification of bidders, through the module "Retrieval from the

Registers of the Republic of Croatia", EPPC of the RC by retrieval from the register of Tax Directorate and from criminal records of the Ministry of Justice. This institute represents the first step in the introduction of electronic examination and evaluation of tenders and is aimed at reducing the administrative burden on bidders and the contracting authority, and speeding up the procurement process through the direct possibility of verifying data contained in the registers.

In 2019, appeal procedures showed the exceptional positive effects of the use of this tool, but also the need for further efforts to adjust the module in the part related to retrieval from the register of the Tax Administration.

Namely, it became evident from appellate procedures that it is possible that, given how data are recorded on the state of debts in the information system of the Tax Administration, and the automatic retrieval of certificates on the state of tax debt, the data obtained do not correspond to the actual situation which is later determined in appellate procedures. As the contracting authorities' decisions to disqualify economic operators are based on the certificates in question, we point out that, in order to avoid difficulties in the process of examination and evaluation of tenders, and additional costs of appeal which are borne by contracting authorities in these cases, the contracting authorities should continue to work on further adapting this module to the specific features of public procurement procedures.

Furthermore, in the award decision phase of appellate procedures, difficulties were identified in determining the absence of reasons for disqualification on the grounds of no criminal record for certain economic entities, especially in the part where the 2016 PPA links evidence of no criminal record to the citizenship of natural persons. In appellate cases in 2019, it was noticed that omissions by both the contracting authority and the bidders in the phase of examination and evaluation of tenders, largely related to the issue of the evidence that needed to be submitted in order to establish that there was no criminal record. In the light of the above, we believe that it is necessary to consider the possibility of simplifying the relevant legal provisions, within the framework set by the applicable EU directives.

#### **4.2.4. Administrative Court Review**

Review in public procurement also includes administrative court review, which, according to the provisions of the PPA 2016, is within the jurisdiction of the High Administrative Court.

What marked the review in 2019 is the fact that after several years of stagnation in administrative court protection in 2019, the High Administrative Court started working effectively, and the case law of the High Administrative Court was established, related to various legal concepts from the PPA 2016.

As a result, during 2019, additional efforts were made to harmonize further the decisions of the State Commission and the positions of the High Administrative Court.

Given that the case law of the State Commission, and now the case law of the High Administrative Court, serve as guidelines for the actions of all stakeholders in the public procurement system, harmonization and adjustment to the established case law is expected in the coming period.

#### **4.3. Institutional Framework**

In relation to previous reports on the work of this state body, which refer to the legal framework governing the institution of the State Commission, there have been no changes, and in that sense we refer you to the observations and suggestions made in previous reports.

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**Zagreb, 15 June 2020**

**PRESIDENT**

**Maja Kuhar**