**Infrastructure Construction Companies' Association's/ICCA and European Business Association's/EBA**

# Notes and Positions

**on the Compliance of Public Procurement Draft Law with #2014/24/ EC, 2004/18/EC EU Directives Principles**

10. 2021, Tbilisi

# Contents

# About the document

This document was developed by the Infrastructure Construction Companies Association (ICCA) and the European Business Association (EBA) with the support CIPE (Center for International Private Enterprises) in July 2021.

The purpose of the document is to consolidate and analyze the views and comments expressed by members of the Infrastructure Construction Companies Association (ICCA) and members of the European Business Association (EBA) on the Draft Law (as of April 2021) prepared by the LEPL State Procurement Agency in 2018-2021. Also, to establish the compliance of the above considerations and remarks with the requirements of the EU Directive.

Given that the largest share of public procurement - 56% - comes for construction works and in the tender procedures the highest competition is observed in construction tenders (according to the annual reports of the Procurement Agency), planned changes and reforms in the field of public procurement, aimed at increasing transparency and healthy contest in the procurement system, is one of the most important issues for the representatives of this sector. Accordingly, declaring positions of the sector by the Infrastructure Construction Companies Association (ICCA) as a sectoral association (bringing together the largest suppliers working on infrastructure projects) and advocating for issues important to them in the reform process related to planned procurement changes, aims to support the effective implementation of the process and to promote cooperation between the private and public sectors.

It is important that the planned changes in the direction of public procurement, on the one hand, should take into account the current challenges for business, and, on the other hand, be in line with EU directives and the best European standards. For this very purpose and in the interest of the member companies, the European Business Association is actively involved in the process of finding ways to solve the problem. In addition, the European Business Association (EBA), with its diverse advocacy experience and accumulated knowledge of public procurement, with its mission to promote trade and investment between Georgia and Europe, and with sectoral diversity of member companies interested in participating in public procurement, will facilitate effective public-private dialogue and increase the quality of access to information.

Infrastructure Construction Companies Association and European Business Association express their readiness to cooperate with the State Procurement Agency as well as any procuring organization in the process of reviewing the Draft Law and its by-laws and to engage in sectorial working groups, councils and commissions aiming to eliminate the existing difficulties in the field of public procurement and to establish a successful practice of private and public partnership in the field.

## Key Notes and Recommendations

| Notes | Recommendation |
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| **1. Article 14, paragraph 1**<br>*1. By the decision of the head of Procuring Organization, taking into account the peculiarities of the procurement object, public procurement (except for the tender and negotiation procedure without prior publication) may be conducted both by the Procurement Committee and without the Procurement Committee.* | Procurement of construction works, taking into account the specifics, should not fall within the scope of the wide discretion provided for in Article 14 and the procurement should be carried out only by the Committee. |
| **2. Article 16, paragraph 1.**<br>*1. The person / persons employed in the structural unit provided for in Article 15 of this Law, who are directly involved in public procurement activities, must hold a Public Procurement Specialist Certificate (hereinafter in this Article referred to as the Certificate).* | It is important that in the process of training the public procurement specialists additionally to have a possibility to involve an outsourced expert and provide consulting services. |
| ***3. Article 19, paragraph 2***<br>*2. The Procuring Organization may request from the Economic Operator only such information or documentation as is necessary for selection and evaluation in accordance with the Procurement Terms, in order to identify the winner and enter into a Procurement Contract / Framework Agreement.* | Make a clear list of information and data that the Procuring Organization will have the authority to request; Prohibit the request from side of Economic Operator for such information and / or data that is stored / generated in another administrative body. |
| **4. Article 19, paragraph 3**<br>*3. An Economic Operator, as well as a group of Economic Operators can submit an application / offer. The Procuring Organization may not require these groups to be organize in a specific legal form as a prerequisite for submitting an application / offer.* | This clause makes it quite easy for foreign companies to participate in procurement procedures, creating a non-competitive environment for Georgian companies. It is imperative that the obligation to be organized in an appropriate legal form does not fall within the discretion of the procurement specialist. It is also important to raise the issue of Georgia's accession to the GPA. |
| **5) Article 19, paragraph 4**<br>*4. If the Economic Operator, its employee or the person indicated in the application / offer has participated in any previous stage of the relevant procurement project or in the development of procurement conditions, the Economic Operator shall* | In article 3 of the Draft Law, which defines the terms, should be specified what the term "preparatory work" means. |

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| *not be entitled to participate in the subsequent stages of the same project, if under these conditions the Economic Operator is given an advantage over other Economic Operators, thus restricting healthy contest.* | |
| 6) Article 20, paragraph 1, sub-paragraph "a".<br><br>*Subcontractor*<br>*1. If the Economic Operator intends to involve the subcontractor (s), it shall be obliged to provide the information about this to the Procuring Organization at the selection-evaluation stage, if the subcontractor (s) shall be obliged to perform:*<br><br>*a) at least 10% of the total obligations under the Procurement Contract and / or if the value of the procurement object to be performed by the subcontractor (s) is at least 10% of the total cost of the Contract.* | 10% threshold of subcontractor's prior agreement set by the Draft Law to be increased |
| 7) Article 21, paragraph 2, sub-paragraph "a"<br>*An Economic Operator shall be subject to blacklisting for one or more of below listed grounds:*<br><br>*A) an Economic Operator or a person who is a member of its governing body or supervisory board, or a trustee or a person who has the right to represent an Economic Operator in the activities of subsidiaries, has been convicted of any of the following offences by a court judgment that has entered into force:* | In Article 3 of the Draft Law it should be specify who is meant by the term "Trustee". Restrictions should be imposed only on the person authorized to govern and represent. |
| 8) Article 21, paragraph 2, sub-paragraph "b.c"<br>*2. b) violation of labor rights by an Economic Operator has been confirmed by a decision of a court or other competent authority that has entered into the legal force* | It is not advisable to be blacklisted without concluding an employment contract, or only for not submitting the declaration, moreover, for a period of 2 years or longer, rather than due to non-performance or improper performance of the Contract. |
| 9) Article 21, sub-paragraph "d.b" of paragraph 2<br>*d.b) submitting erroneous information intentionally or negligently during the procurement procedures in order to meet the requirements set forth in this Law, the relevant normative act or the procurement conditions;* | Blacklisting should not be based on an infringement (including submission of incorrect information) that does not affect the relevant decision (exclusion, revealing the winner, etc.), or the infringement is negligible. |
| 10) Article 21, paragraph 5.<br>*The relevant Economic Operator shall be registered in* | The new two- and three-year terms offered by the Draft Law are unreasonably strict; |

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| *the black list: a) for a period of 3 years - in the case provided for in sub-paragraph "a" of paragraph 2 of this Article, unless the court decision does not provide for a longer period of prohibition of participation in public procurement; b) for a period of 2 years - in the cases provided for in sub-paragraphs "b" - "d" of paragraph 2 of this Article; c) for a period of 1 year - in the case provided for in sub-paragraph "e" of paragraph 2 of this Article.* | In addition, the Company shall be restricted from participating in the procurement procedure until it has rectified (where possible) the relevant defect. In addition, the relevant defect (grounds for blacklisting) must be confirmed by a final decision of a court or other relevant competent authority, which shall not be subject to further review (appeal). |
| **11) Article 30, paragraphs 1 and 2**<br>*1. Innovative partnership is a two-step process.*<br>*2. In conditions of procurement, the Procuring Organization shall be obliged to indicate the need for innovative goods and / or work and / or service, including research and development, that cannot be achieved through the procurement of existing goods, works or services on the national or international market.* | The Draft Law, in conjunction with the Innovation Partnership, should take into account EU directives and practices, which will allow alternative offers to be submitted in certain types of procurement procedures. |
| **12) Article 31, paragraph 2. Contest**<br>*2. The Procuring Organization shall be authorized to limit the number of participants in contest in accordance with the pre-defined, clear and non-discriminatory selection criteria within the procurement conditions. The number of invited candidates should be sufficient to ensure healthy contest.* | Instead of limiting the number of participants, inclusion of 2nd and 3rd place competitors should be encouraged as much as possible. |
| **13) Article 57, paragraph 1, sub-paragraph "b"**<br>*1. The Procuring Organization shall disqualify the candidate / bidder in the following cases: b) if there is one or several grounds provided for in sub-paragraphs "a" - "d" of paragraph 2 of Article 21 of this Law* | Exclusion should not take place solely on the basis of the existence of grounds for blacklisting, but only on the basis of a final decision confirmed by a court or other relevant competent body, which shall not be subject to further review. |

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| **14) Article 57, sub-paragraph "d" of paragraph 1**<br>*1. The Procuring Organization shall disqualify a candidate / bidder in the following cases: d) if the bidder or candidate has a tax debt in Georgia or in the country where he / she is registered or has a permanent residence;* | In the presence of a tax debt, it is necessary to specify in this article the exceptional cases when the company will not be disqualified due to the debt, namely: 1. When the tax debt is unrecognized; 2. When the tax agreement is concluded and the company complies with the terms of the agreement; 3. A certain monetary threshold below which debt shall not be considered as a ground for exclusion. |
| **15) Article 63, paragraph 3**<br>*3. The Procuring Organization shall evaluate the document certifying the adequacy of the pricing. If it fails to prove the adequacy of the offer price, the bidder shall be subject to exclusion, taking into account the circumstances referred to in paragraph 2 of this Article.* | The Draft Law should prevent the continuation of current incorrect and unhealthy practices and the confirmation of the adequacy of pricing should acquire a real, practical meaning. The Draft Law should strictly define the criteria and documentation on the basis of which the supplier will substantiate the pricing and monitoring over the issuance of these conclusions should be intensified. |
| **16) Article 66, paragraph 2**<br>*2. In the cases provided for in subparagraphs (a) and (b) of paragraph 1 of this Article, the value of the original contract/ framework agreement may not be increased by more than 50%.* | The Draft Law should set a maximum limit of 15%, beyond which the change of the value of the contract should not raise in case of construction works. |
| **17) Price adjustment**<br>In public procurement the contract price adjustment scheme and the corresponding "formula", that the Draft Law does not provide for, in especially important for the construction sector, on the basis of which the real increase in construction costs, caused by differences between the exchange rates and changes in the prices of construction materials, will be calculated. | A note on the possibility of price adjustment in construction contracts should be added to this Draft Law, which will be further regulated in details by a sub-legislative normative act. |
| **18) Transitional Provisions** | The Draft Law should include a chapter on transitional provisions, as well as an explanatory note, in accordance with the requirements of the paragraph 1 of Article 17 of the Law of Georgia on Normative Acts. |

# Introduction

According to the data of World Bank as of 2020, 1/5 share of the world GDP (88 trillion USD) was spent on public procurements, which is about 17.6 trillion USD. In Georgia, annually for public procurements taxpayers' money is spent in the amount of 1.5-2 billion USD. In 2020, the total value of contracts signed with people's money was 1.65 billion USD. Of these, the largest share comes from the procurement of construction works which amounts to more than 920 million USD (56% of the total contract value). The highest competition is observed in the same field, in particular, 2.9 participants in one electronic procedure. At the same time, the highest saving rate is observed in construction procurements, in particular, the construction sector accounts for 78% of the total savings.

In turn, costs of the state procurement, as operational costs incurred for fulfilment of one of the functions of the state, is at least 20 million USD (operating costs of the Unified Electronic Public Procurement System, salaries and other costs of the State Procurement Agency, cost for publication of the procurement procedure and submission of offers through the system, salaries of at least 3,000 procurement specialist and other expenses). This amounts to more than 1% of the total annual procurement budget.

The current Law of Georgia on Public Procurement (hereinafter - the current Law) was adopted on April 20, 2005. Prior to that, the law of December 9, 1998 with the same title was in force. Significant changes were made to the current law in 2009, according to which unified electronic system of public procurement was launched in Georgia on December 1, 2010, which is still operating. Since 2012, under the Deep and Comprehensive Free Trade Agreement with the European Union and the Association Agreement with the European Union, Georgia has undertaken to bring its national legislation in line with EU directives. It should be noted that neither in terms of the principles of the approximation of the directives nor in terms of legal technique, bringing the national legislation in line with the EU directives does not mean translating and transcribing the provisions of the directive word by word, but reflecting the spirit of the directives in national legislation at the level of principles and policies.

A good example of this is the differences between the national public procurement laws of the EU member states, while all of them (including the countries we have taken as examples - Portugal and Cyprus) unconditionally and undoubtedly comply with the EU directive. Considering the abovementioned, the approach pursued in the Draft Law needs to be further substantiated - namely, that the Draft Law in some cases envisages overly strict and maximalist implementation, while there was no need for this in the process of implementing the directive and the direct implementation of the directives could have been moderate, given the realities and challenges of Georgia's public procurement system today.

The EU Public Procurement Directives were significantly updated in 2014 compared to the version as of 2004 and many mandatory provisions were replaced by the recommendation provisions. Within the amendments to the directives experience of various countries, so called "pioneer" countries (Portugal, Cyprus, including Georgia, etc.) introducing the e-procurements in the early period, were taken into the account.

International experts of procurement agree that as a result of the amendments in 2014, the directives have become more flexible and in line with modern requirements. This means that the legislator has more discretion and freedom in transposing the requirements of the directives into the national law.

It should be noted that the number of articles, paragraphs and sub-paragraphs proposed by the Draft Law has increased significantly (more than 30 thousand words instead of about 12 thousand words, more than 90 articles instead of 26, new procurement procedures are proposed, the number of which is more than 10). In view of the above, much more resources are needed for training and raising the competency of employees (at least 3,000 people) of procurement organizations, representatives of potential suppliers, controlling bodies, or NGOs. When talking about training, the need to introduce mechanisms that ensure high quality documentation, compliance with the highest standard for the goods / services to be procured and their further operation should be emphasized.

Approximation with EU directives is a positive event in itself. However, despite the changes provided by the Draft Law in this regard, the Draft Law is still challenged to ensure a proper balance and fair approach between the rights and obligations of the Procuring Organizations and suppliers, which is manifested in clearly equal and balanced conditions. In addition, it should be noted that granting more discretion to procuring entities, which is automatically exercised in national legislation as a result of approximation, is directly related to the increase in corruption risks. The abovementioned is a circumstance to be considered and it requires the establishment of appropriate risk elimination mechanisms, both at the stage of developing the Draft Law and the by-laws to be adopted on its basis.

## Methodology

Davit Margania, an international public procurement expert, participated in the development of the document. The expert has 12 years of working experience in the field of public procurement reforms in the Eastern Partnership (Georgia, Ukraine, Moldova), the former Soviet Union and Asian countries (including Tajikistan, Kazakhstan, Mongolia, Afghanistan).

For the purposes of the document, joint meetings were held in 2021 and interviews were conducted with members of the Infrastructure Construction Companies Association (ICCA) and the European Business Association (EBA). In total, more than 30 member companies from 10 different sectors (construction, manufacturing of construction materials, manufacturing of plastic construction products, architecture, logistics, motor vehicles, insurance, consulting, certification / inspection, information technology) from both associations were interviewed. The views expressed were consolidated, analyzed and their compliance with the EU Directive was established, with the involvement of an expert. National legislation in the field of public procurement of the two EU Member States, Portugal and Cyprus, was also examined in relation to the comments made. Portugal and Cyprus were selected according to the following criteria: 1. Some similarities with Georgia in economic as well as cultural-political and social aspects; 2. In both countries, e-procurement was introduced earlier than in Georgia and, consequently, more experience and data have been accumulated for analysis; 3. Both countries, like Georgia, are mostly dependent on imports; 4. Like Georgia, Cyprus has a dispute with a neighboring state over its state border / territory. The use of the example of Ukraine is conditioned due to the fact that its procurement system, in recent years, is one of the best international practices.

In some relevant cases, examples from the legislation and practice of the two Eastern Partnership countries, Ukraine and Moldova were used. It should be noted that Moldova and Ukraine have better indicators in the ranking of transparent public procurement, however, Georgia remains in the top three, according to the summarized data for the last 5 years.

The chronology of notes and comments is given according to the chronology of the articles of the Draft Law. The main part of the document contains the wording of paragraph of the relevant article of the Draft Law, then the problem is identified, which we believe will be caused by this kind of regulation and based on EU directives, accumulated experience of association members in public procurement, knowledge and international experience of the expert in public procurements the ways are proposed to solve/avoid this problem as far as possible.

The document is limited to the notes and recommendations made during the above interviews. The research does not reflect the full opinions and suggestions of the authors regarding the Draft Law.

## Notes and Comments regarding the Draft Law

### 1. Article 14, paragraphs 1 and 10

*Article 14. Procurement Committee*

*1. By the decision of the head of the Procuring Organization, taking into account the peculiarities of the procurement object, public procurement (except for the tender and negotiation procedure without prior publication) may be conducted both by the Procurement Committee and without the Procurement Committee. The Procurement Committee acts on behalf of the Procuring Organization.*

*10. If, by the decision of the Head of the Procuring Organization, the public procurement is not conducted by the Procurement Committee, public procurement procedures shall be conducted in accordance with the rules established by this Law by a public procurement entity or official, and decision shall be made either by the head of the Procuring Organization or his / her deputy or the head of the structural unit of the Procuring Organization. In such a case, public procurement procedures shall be conducted, including decisions are made in accordance with the general rules established by this Law, as it is the case with Procurement Committee.*

***Note:***

Conducting a procurement procedure without a Procurement Committee is not in line with the established practice of public procurement recognized in EU countries, according to which decisions about the public procurement are made on a commission basis, with the involvement of professionals of the Procuring Organization with relevant competencies. Therefore, without further justification, we do not consider it appropriate to grant abovementioned wide discretion to the head of the Procuring Organization. It should be noted that a similar example is less common in the practice of the Eastern Partnership countries. The approach of the procurement laws of Portugal and Ukraine should be considered, according to which it is possible to include external professional services in the public procurement (so-called outsourcing). In this case, the traditional activities of the tender commission of the Procuring Organization are replaced by the services of an invited expert /company. Under the legislation of Portugal (Articles 67 and 69 of the Procurement Code), only direct procurements conditioned by an urgent need can be carried out without a tender commission.

***Recommendation:***

Construction works should be separated from this general rule, as construction works are often very complex and the competence of one person alone will not be sufficient to successfully manage the procurement process. In addition, procurement without a committee carries an increased risk of corruption.

## 2) Article 16, paragraphs 1 and 2

*1. A person / persons employed in the structural unit provided for in Article 15 of this Law, who are directly involved in public procurement activities, must hold a Certificate of Public Procurement Specialist (hereinafter in this article referred to as the Certificate).*
*2. The certificate shall be issued by the Agency on the basis of certification. Certification is conducted in the state language, electronically, at least twice a year.*

***Note:***

According to Article 16 of the Draft Law, a kind of mandatory "attestation" of the employees of the Procuring Organizations is carried out, which is supposedly aimed at eliminating one of the main problems in the field nowadays, i.e. the unsatisfactory level of competence and professionalism of persons participating in the procurement. Recent international best practices in public procurement show that improving the necessary skills and knowledge of persons involved in procurement takes place much more effectively by involving not only the exclusively responsible government agency (agency) but also, in addition, academic circles, consulting and training institutions working in the field of training and skills acquisition. A positive example of this is the experience of Georgia in 2009-2010, when it became possible to train 3,000 people in five months with the involvement of all large private companies operating in the field of training services (3,000 people in 5 months). By involvement of the private sector in Ukraine training services were also provided to 12,000 people in 2014-2015. Given that at least 4,400 specialists are involved in the procurement process in Georgia, the Agency's resources alone will most likely be insufficient. The Draft Law does not allow for the involvement of professional external resources (so-called outsourcing) in the process of public procurement. The invited experts retain only the advisory function (without the right to vote in decision-making).

In this regard, it should be noted that outsourcing in public procurement is quite an accepted practice in European countries (United Kingdom, Finland, Kingdom of the Netherlands, etc.). This approach is also actively gaining grounds in countries where public procurement systems have recently been reformed (Moldova, Ukraine).

***Recommendation:***

The Draft Law should inspire more opportunities for business involvement at the stages of planning and implementation of procurement and contract execution, for permanent and more effective, proactive business engagement. Recent best practices in public procurement are evolving right in this direction. In the EU and Eastern Partnership countries (Portugal, Cyprus, Ukraine, Moldova) the level of business and public involvement is being increased at all stages of procurement process. These can be consulting, dispute resolution, contract monitoring, drafting of standard tender documents, trainings and other activities that along with increasing the number of potential training providers, will naturally lead to healthy contest and improved quality.

## 3) Article 19, Paragraph 2

2. *The Procuring Organization may request from the Economic Operator only such information or documentation as is necessary for selection and evaluation in accordance with the Procurement Terms, in order to identify the winner and enter into a Procurement Contract / Framework Agreement.*

***Note:***

This type of clause entitles the specific employee of the Procuring Organization with broad discretion to identify the documents and information that will be needed to be submitted by the Economic Operator. Accordingly, what type of information should be requested from the Economic Operator will depend on the specific employee of the Procuring Organization. This could expose Economic Operators to a non-competitive environment and increase corruption risks, or unreasonably reduce the number of potential suppliers eligible to participate in a particular tender.

***Recommendation:***

Make a clear and exhaustive list of information and data that the Procuring Organization will have the authority to request. In addition, it is necessary to prohibit the request from the Economic Operator for such information and / or data that is stored / generated in another administrative body, and therefore, the request for this type of information imposes an additional burden on Economic Operators, related to the procedures and deadlines for obtaining these documents.

**4) Article 19, paragraph 1 and paragraph 3**

*Article 19. General conditions of relations with the Economic Operator*

*1. The Procuring Organization shall not be entitled to reject the offer of the Economic Operator on the grounds that it does not have a specific legal form provided by the legislation of Georgia, but can deliver goods, perform work or provide services in accordance with the legislation of its resident country. The Procuring Organization may not be also entitles to limit participation in public procurement as per territory of Georgia or part thereof.*

*3. Both the Economic Operator and the group of Economic Operators can submit an application / offer. The Procuring Organization shall not be entitles to require these groups to be organized in a specific legal form as a prerequisite for submitting an application / offer. In addition, the group shall be obliged to meet the requirements set by the order of the Chairman of the Agency. In accordance with the rules established by the order of the Chairman of the Agency, in case of winning, the group of Economic Operators may be required to be organized in a specific legal form, if this is necessary for the proper performance of the Procurement Contract. Failure to comply with this obligation will result in exclusion of the group of Economic Operators in accordance with the rules established by the order of the Chairman of the Agency.*

***Note:***

In this regard, it should be noted that the current electronic public procurement system makes it quite easy for foreign companies to participate in procurement procedures, while public procurement is legally and practically inaccessible to Georgian companies, which is clearly discriminatory and puts Georgian companies in a losing position. This problem is even more exacerbated by the clause of the Draft Law, which simplifies the issue of participation of non-resident companies in Georgian tenders to the extent that it even leaves the obligation to organize in the appropriate legal form at the discretion of the procurement specialist.

In addition, it should be borne in mind that the discretion of the Procuring Organization, whether or not to require a non-resident supplier to be organized in a specific legal form ("may be required" under paragraph 3 of

Article 19), increases the risks related to the liabilities of non-resident suppliers in the event of non-fulfillment of obligations from their side.

***Recommendation:***

The optimal way to solve the identified problem is to raise the issue of Georgia's accession to Public Procurement Agreement(GPA) of the World Trade Organization (WTO) , which will oblige the Contracting Parties to this Agreement (EU countries, USA, Canada, Ukraine, United Kingdom, Switzerland, Moldova, Armenia, Israel, Republic of Korea, Hong Kong, Japan, Australia, etc.) to make procurements of certain values (for goods and services above 130,000 USD, and for construction works above 5 000 000 USD) available to the companies of other Contracting Parties. At this stage, Georgia enjoys the status of an observer and joining the Agreement as a full member will not lead to any new legal burden (obligation), as the unified electronic public procurement system is already open to non-resident suppliers and, according to 10 years' data, the total value of contracts received by foreign suppliers during the year does not exceed 3 percent of the total value of all contracts. As of 2019, the total value of contracts concluded with non-residents through the tenders amounted to about 45 million USD, in other words, joining the abovementioned agreement shall be a prerequisite for entering a new market, both formally and practically.

Therefore, it is advisable for Georgia to join the Public Procurement Agreement of the World Trade Organization which will allow Georgian companies to access to a fairly rich portion of the public procurements in the countries with the strongest economies, with a total annual budget of 1.7 trillion USD. In other words, as a result of joining the agreement, Georgian companies will be able to enter the new market, both formally and practically.

In addition, a norm has to be removed from the Draft Law that entitles the Procuring Organization with discretion to request or not to request a non-resident supplier to be organized in a specific legal form in the future.

**5) Article 19, paragraph 4**

*4. If the Economic Operator, its employee or the person indicated in the application / offer has participated in any previous stage of the relevant procurement project or in the development of procurement conditions, the Economic Operator shall not be entitled to participate in the subsequent stages of the same project, if under these conditions the Economic Operator is given an advantage over other Economic Operators, thus restricting healthy contest.*

***Note:***

This paragraph needs to be clarified, as due to the mere fact that the Economic Operator has participated in any previous stage of the procurement project, the restriction of the right to participate is unfair. It is also not fair to impose restrictions on an employee, as one person may work with several Economic Operators. Therefore, such a constraint would lead to many misunderstandings and possibly create problems to a competitive environment.

In addition, it is necessary to clarify what is meant under wording "Previous Stages" of this paragraph and whether the market research is included in these stages.

***Recommendation:***

In Article 3 of the Draft Law, which defines the terms, should the specified what the term "preparatory works" means.

**6) Article 20, paragraph 1, sub-paragraph "a"**

*Article 20. Subcontractor*

*1. In case the Economic Operator intends to involve a subcontractor (s), it shall be obliged to provide the information about this to the Procuring Organization at the selection-evaluation stage, if the subcontractor (s) shall be obliged to perform:*

*a) at least 10% of the total obligations under the Procurement Contract and / or if the value of the procurement object to be performed by the subcontractor (s) is at least 10% of the total cost of the Contract.*

*b) specific / significant part of the contractual obligation (s), if specified by the Procuring Organization in the terms of the procurement.*

***Note:***

We suggest that subcontractor's "agreement threshold" (10%) is very low. Above 10% of the total volume of works, in any case, the pre-agreement obligation of the subcontractors will in major cases hinder the flexibility of involvement the subcontractor in tenders as it will create additional barriers for Economic Operators regarding the contract formalities.

In case of transfer of part of the works, especially when it comes to the transfer of specific works, it is advisable to have at least 30-40% margin, when this should be considered as transfer of important part to the subcontractor and where its prior agreement should be required.

The Draft Law should also clarify whether it is possible for subcontractor to be designated to perform specific works (to make an agreement) and then not be involved in works, and finally the contractor to perform the said work, i.e. how the Draft Law considered the further obligation in order to involve the subcontractor.

***Recommendation:***

Increase the 10% limit of the subcontractor agreement to at least 30-40%. Especially, when the directive does not impose a requirement to the state to impose a pre-agreement obligation to the subcontractor above 10%. Accordingly, under the Directive, there is a possibility for national law to set an adequate threshold that takes into account the interests of local suppliers and does not create additional barriers for them.

**7) Article 21, paragraph 2, sub-paragraph "a"**

*Article 21. Blacklist*

*2. An Economic Operator shall be subject to blacklisting if there are one or more of the following grounds:*

*a) if the Economic Operator or a person who is a member of its Governing Body or Supervisory Board, or a trustee or a person who has the right to represent an Economic Operator in the activities of subsidiaries, has been convicted of any of the following offences by a court judgment that has entered into force:*

*a.a) taking bribes, giving bribes, trading in influence, receiving a gift prohibited by law or commercial bribery;*

*a.b) fraud, misappropriation or embezzlement, money laundering;*

*a.c) tax evasion;*

*a.d) Terrorist act, financing of terrorism, other material support or providing resources for terrorist activities, publicly supporting the terrorist activities and / publicly supporting a terrorist organization or publicly calling for terrorism, threatening by terrorism, conducting training and instructing to carry out terrorist activities;*

*a. e) Human trafficking (trafficking), child trafficking (trafficking), use of the services from side of a victim (sufferer) of human trafficking;*

*a.f) other crime against the state, which is not defined by sub-paragraphs "a.a" - "a.d" of paragraph 2 of the same article;*

***Note:***

On these grounds, the company may be blacklisted for a period of 3 years, which is likely to be problematic and, in some cases, disproportionate, while the company may not even have information that, for example, a trustee or a person representing the company in the activities of subsidiaries is convicted of a specific offense. It is also unclear and needs to be clarified who is meant by a "trustee" - a person who is simply authorized to represent the enterprise (for example, in court)?

Sub-paragraph "a" of paragraph 2 of Article 21also refers to a "member of the governing body". If this paragraph will not nemoved, then it should be specified as "decision maker", as the decision maker manages the company's activities and makes decisions.

***Recommendation:***

Article 3 of the Draft Law should specify who is meant by the term "trustee". We suggest he/she should be a person in charge of governance and representation and this circle should not be wider.

**8) Article 21, paragraph 2, sub-paragraph "b.c"**

*Article 21. Blacklist*

*(grounds for blacklisting shall be:)*

*b) a decision of court or other authorized body that has entered into legal force, the violation of labor rights by the Economic Operator has been confirmed, such as:*

*b.a) employment of minors in prohibited cases;*

*b.b) employment of one or more persons who are not citizens of Georgia or the host country, if they are illegally present in the territory of Georgia or the host country;*

*b.c) employment of a person without a written employment contract, when there is an obligation to conclude a written employment contract by law, failure to submit the relevant declaration about the person within the period specified by law, which must be submitted in case of employment.*

***Note:***

Employment without a written employment contract -for this reason existence of the grounds for blacklisting the company for 2 years in this way is unequal and therefore unacceptable. Also, it is not advisable to be blacklisted solely for non-submission of the declaration, and for a period of 2 years, i.e. longer than due to non-performance or improper performance of the agreement. In addition, in accordance with the Directive, special attention

should be paid to the principle of proportionality and minor violations should only lead to the exclusion of the Economic Operator in exceptional cases. Repeated cases of minor violations, however, may raise doubts about the credibility of the Economic Operator, which may justify its exclusion.

***Recommendation:***

It is advisable to remove the grounds provided for in sub-paragraph b.c of this paragraph from the grounds for blacklisting. In addition, by Draft Law it is unreasonable to consider blacklisting for 2 years on the grounds provided for in this paragraph (while due to non-performance / improper performance of the agreement, the Draft Law provides for blacklisting for 1 year). Therefore, it is necessary to adjust this period as well.

**9) Article 21, sub-paragraph "d. b" of paragraph 2**

*Article 21. Blacklist*

*(grounds for blacklisting shall be:)*

*d) if a duly substantiated decision of the Procuring Organization proves that the Economic Operator has committed an unscrupulous act while participating in a public procurement, such as:*

*d.a) negotiating with another Economic Operator in order to influence the public procurement procedure and / or obtain material benefits;*

*d.b) intentionally or negligently submitting erroneous information during the procurement procedures in order to meet the requirements set forth in this Law, relevant normative act or procurement conditions.*

***Note:***

The company may be blacklisted even if it "submits incorrect information by negligence". Although this is a standard of donor organizations, we do not consider it proportionate to blacklist a company on this basis. In this regard, an approach of the EU Directive should be considered, according to which:

According to the Directive, special attention should be paid to the principle of proportionality. Minor violations should only lead to exclusion of the Economic Operator in exceptional cases. Repeated cases of minor violations, however, may raise doubts about the credibility of the Economic Operator, which may justify its exclusion.

In addition, the Directive does not require that due to negligent submission of incorrect or incomplete information, the Economic Operator would automatically be prohibited from participating in the tender or disqualified for a certain period, but Directive provides that when incomplete or incorrect information is submitted by the Economic Operator, the Procuring Organization may (unless otherwise provided by national procurement law) enable it to supplement, clarify or amend relevant information, within the appropriate timeframe. Consequently, the removal of the grounds for blacklisting for negligent submission of incorrect information does not conflict with the requirements of the Directive. Especially when it also contradicts the principle of proportionality laid down in the Directive.

***Recommendation:***

Blacklisting should not be based on such violation (including submission of incorrect information) that does not affect the relevant decision (exclusion, revealing the winner, etc.), or it insignificant. Moreover, Article 57 of the EU Directive, which refers to similar issues, does not provide for such a restriction.

10) Article 21, paragraph 5

*5. The relevant Economic Operator shall be registered in the black list:*

*a) for a period of 3 years - in the case provided for in sub-paragraph "a" of paragraph 2 of this Article, unless a longer term for prohibition of participation in public procurement is provided by a court decision;*

*b) for a period of 2 years - in the cases provided for in sub-paragraphs "b" - "d" of paragraph 2 of this Article;*

*c) for a period of 1 year - in the case provided for in sub-paragraph "e" of paragraph 2 of this Article.*

***Note:***

Deadlines related to blacklisting, in particular, 1 year of blacklisting due to non-performance or improper performance of the contract or due to other unscrupulous actions and blacklisting for 2 years for breaching the labor obligations, seem illogical and disproportionate. The purpose of the blacklist should be to restrict the access of suppliers to public procurement procedures who, through their unlawful actions, compromise the principle of fairness and reliability of the system. According to the proposed version of the Draft Law procedure for blacklisting represents a punitive (often disproportionate) tool that can neither provide effective prevention of violations nor achieve the legitimate goal of the blacklist discussed above.

***Recommendation:***

We think that the new two-year and three-year terms offered by the Draft Law are unreasonably strict, given that there is no justification for what circumstances were taken into account when setting different and extended deadlines for blacklisting. Also noteworthy is the fact that Articles 55 and 55A of the Portuguese Code, which in similar cases to Article 21 of the Draft Law provide not to allow / prohibit participation for not one, two or three years, but until the specified circumstances are rectified (where possible). Therefore, the existence of such a blacklist when registering a company for the relevant period proposed by the Draft Law is inconsistent with the principles of the EU Directive as well as with Portuguese practice and needs to be revised. In addition, the relevant defect (grounds for blacklisting) must be confirmed by a final decision of a court or other relevant competent authority, which shall not be subject to further review (appeal).

11) Article 30, paragraphs 1 and 2

*Article 30. Innovative Partnership*

*1. Innovative partnership is a two-step process.*

*2. In terms of procurement, the Procuring Organization shall indicate the need for innovative goods and / or works and / or services, including research and development, which cannot be achieved by procurement of existing goods, works or services on the national or international market. It must also indicate which element (s) of the procurement object determines the minimum requirements that all Draft Law must meet. The information provided should be clear so that Economic Operators could determine the nature, content and scope of the*

*procurement and, therefore, decide whether to submit an application to participate in the procurement procedure. It is mandatory to use the criterion of the best ratio of price and quality.*

***Note:***

Article 30 of the Draft Law, which deals with innovative partnerships, is a novelty and is only now being put into practice in many EU member states, and tangible results are yet to be found.

First of all, we should note that the appearance of the article about innovative partnership within the Draft Law is an unequivocally positive fact, however, as mentioned above, at this stage there is not enough data accumulated in the EU Member States to properly discuss its effectiveness and efficiency. Consequently, this article does not provide the opportunity for Economic Operators to offer different approaches or solutions, which, based on their experience in the relevant field, may provide the opportunity for a more innovative, effective and efficient solution.

***Recommendation:***

It is important that the Draft Law, in addition to the Innovation Partnership, also should take into account the practice of the EU Directives (Article 45) and the practice of the countries discussed (Article 42 of the Cyprus Law and Article 59 of the code of Portugal), according to which alternative offers may be submitted in certain procurement procedures. This issue is especially important given the difficulty and complexity of the construction projects, where the bidder will be allowed to submit an alternative offer in addition to the standard one. Accordingly, the bidder will be able to offer different design or engineering solutions to the procuring organization based on the difficulty and complexity of the work to be performed, based on innovative engineering technologies and its experience, when this leads to the resolution of project difficulties and a qualitative increase in the final result. Accordingly, the Procuring Organization, in the event of this type of tender being announced, will be able to accept or reject the alternative offer as a result of the reviewing and evaluating the Alternative offer, in addition to the reviewing the standard offer (provided by the Tender). The purpose of the alternative offer should be to offer different approaches from the approach set out in the tender documents by suppliers, delivering more efficient, effective and sustainable results than the solution set out in the tender documents.

**12) Article 31, paragraph 2**

*31.* Contest

*2. The Procuring Organization shall be authorized to limit the number of participants in contest in accordance with the pre-defined, clear and non-discriminatory selection criteria in the procurement conditions. The number of invited candidates should be sufficient to ensure healthy contest*.

***Note:***

*Granting the Procuring Organization the right to limit the number of participants by law will in all cases lead to a restriction of the level of competition, consequently to certain deterioration in quality and an increase in contract prices.*

***Recommendation:***

We consider it expedient not to limit the number of participants, but to encourage (both financially and non-financially) the involvement of the 2nd and 3rd place competitors as much as possible. This can be done

financially, without additional budget expenditures (involving donors and professional associations / unions). Also, in a non-financial way (emphasizing the involvement of 2nd and 3rd place competitors in order to improve their publicity).

### 13) Article 57, paragraph 1, sub-paragraph "b"

*Article 57. Exclusion*

*1. The Procuring Organization shall disqualify a candidate /bidder in the following cases:*

*b) if there is one or more grounds provided for in sub-paragraphs "a" - "d" of paragraph 2 of Article 21 of this Law;*

***Note:***

Article 21, paragraph 2, sub-paragraphs "a" - "d" of the Draft Law defines several grounds for registration of an economic operation in the black list, whereas Article 57, paragraph 1, sub-paragraph "b" of the Draft Law defines the circumstances as grounds for exclusion when there is one or more grounds provided for in Article 21, paragraph 2, sub-paragraphs "a" - "d". Exclusion on the above grounds, when there are grounds for registration in the black list provided for in Article 21, paragraph 2, sub-paragraphs "a" - d" (although this may not lead the company being blacklisted) is deemed unreasonable. This above does not comply with the principles of the EU Directive. It should also be noted that Article 57 of the Directive stipulates that if an Economic Operator takes appropriate measures to remedy the circumstances of its inadmissibility, it should no longer be restricted to participate in the tender procedure. And the article of the present Draft Law does not provide for such an exception, which once again confirms the overly strict approach of the Draft Law. Also, Articles (55, 55A) of Code of Portugal do not recognize exclusion on similar grounds.

***Recommendation:***

Exclusion should take place not only as a result of the existence of grounds (or assumption of such grounds) for blacklisting, but only as a final decision of a court or other relevant authorized body, which shall not be a subject to further review (appeal).

### 14) Article 57, paragraph 1, sub-paragraph "d"

*Article 57. Exclusion*

*1. The Procuring Organization shall disqualify a candidate / bidder in the following cases:*

*d) if the bidder or candidate has a tax debt in Georgia or in the country where he/she is registered or has a permanent residence;*

***Note:***

The clause about exclusion due to tax debt does not distinguish between recognized and unrecognized tax debts, as well as cases where a tax agreement has been concluded with the company. It is necessary to take into account that in case of unrecognized debt, the company should not be disqualified, as under tax law it has the right to dispute the imposition of debt and eventually the status of the debt may change. It is also necessary for the article to provide for the exceptional case when the company has concluded a tax agreement and fulfills the terms of the

agreement reached with the relevant state structure in accordance with the tax legislation. In addition, this article may impose a certain percentage tied to the company's turnover over the last year or estimated tender value, within which the debt is not considered as a ground for exclusion. This is also reflected in the rule provided for in Article 57 (Part 3) of the Directive, according to which an exception may be made (to avoid a disproportionate approach) when it comes to small amounts of unpaid tax debt.

Taking into account these exceptional cases also is in conformity and does not contradict with the general principles of the Directive. However, the directive provides for an exception when an Economic Operator has fulfilled its obligations to cover a tax debt (in which case, under the directive, its exclusion rule should no longer be applied).

***Recommendation:***

In this article, in the presence of a tax debt, it is necessary to define the exceptional cases when the company will not be disqualified due to the debt, namely 1. when the tax debt is unrecognized; 2. When a tax agreement is concluded 3. A certain monetary threshold below which (tied to the Company's turnover or the estimated value of the tender), the debt is not considered as a ground for exclusion.

**15) Article 63, paragraph 3**

*Article 63. Offer with an unreasonably low price*

*3. The Procuring Organization shall evaluate the document certifying the adequacy of the pricing. In case he fails to substantiate the adequacy of the offer price, the bidder shall be subject to exclusion, taking into account the circumstances specified in paragraph 2 of this Article. If the low price of the offer is due to the receipt of state aid by the bidder, the Procuring Organization will disqualify the bidder only if it fails to substantiate the legality of such assistance within the time period specified by the Procuring Organization.*

***Note:***

Nowadays, the real meaning of the conclusion of pricing adequacy is quite problematic in practice. Under the current legislation, this conclusion must be submitted by the bidder in the case of an offer that is 20% or more less than the estimated value of the procurement. Unfortunately, the current reality shows that the given conclusions are issued with conditional data and can not substantiate the possibility of project implementation by the bidder. Although there is a methodology for developing the conclusion about adequacy of pricing (which is regulated by a relevant by-law, provides for minimum reporting requirements and is mandatory for expert institutions), nevertheless it failed to meet with function of these conclusions in practice. Accordingly, the issue of practical function and significance of these conclusions needs to be reviewed and it is necessary to tighten the monitoring of preparation of conclusions.

Paragraph 3 of Article 63 of the Draft Law contains additional risks, as it raises the question of how the Procuring Organization will evaluate the document / conclusion confirming the adequacy of pricing and to what extent it has the competence to do so. It is given a fairly broad authority to evaluate the documents confirming the adequacy submitted by the bidder.

***Recommendation:***

The Draft Law should prevent the continuation of erroneous and harmful practices in force today, and the confirmation of the adequacy of pricing should acquire a real practical load. The Draft Law should strictly define the criteria and documentation on the basis of which the supplier will substantiate the pricing and monitoring for the issuance of these conclusions should be tightened.

16) Article 66, paragraph 2

*Article 66. Amendment to the Procurement Contract / Framework Agreement*

*1. Amendments to the Procurement Contract / Framework Agreement without a new public procurement procedure shall be allowed in one or more of the following cases:*

*a) if it is necessary to supply additional goods, work or service and at the same time it is impossible to change the original supplier:*

*a.a) for technical reasons, such as compliance with the requirements of interoperability and functional compatibility with the equipment, service or equipment purchased at the initial procurement;*

*a.b) as this will lead to significant difficulties or an increase in the expenses of the Procuring Organization by at least in double amount;*

*b) If the following circumstances are satisfied simultaneously:*

*b.a) the need for change was caused by a factor that the Procuring Organization could not have predetermined and / or there are circumstances provided for in Article 398 of the Civil Code of Georgia;*

*b.b) in accordance with paragraph 3 of this Article, the change does not lead to a substantial change of the Procurement Contract / framework agreement*

*c) the original supplier is replaced due to total or partial succession due to organizational changes, including reorganization, acquisition or insolvency, if the successor supplier meets the originally defined selection criteria and this does not result in any substantial change;*

*d) if the change, regardless of its value, is not considered substantial in accordance with paragraph 3 of this Article.*

*2. In the cases provided for in subparagraphs "a" and "b" of paragraph 1 of this Article, the value of the original agreement/ framework agreement shall not be increased by more than 50%.*

***Note:***

This article stipulates that the value of the agreement may be increased by no more than 50%, including in case of amendments due to Article 398 of the Civil Code of Georgia. In accordance with Article 36 of the current Order # 12 of the Chairman of the State Procurement, this limit is 10%. We think that increasing this percentage amount in such a way excessively increases the ability to adjust the value of the agreement, and eventually a change of up to 50% of the total value may occur, which is associated with quite serious, corruption risks. Under the legislation

of Cyprus, in similar cases, the value of the agreement for the procurement of goods and services may increase by not more than 10%, and not more than 15% in the case of construction works.

***Recommendation:***

The Draft Law should set a maximum limit of 15%, above which the possibility of increasing the value of the contract should not be exceeded.

17) Price Adjustment

Another issue that the Draft Law does not address and is particularly important for the construction sector is the contractual price adjustment scheme in public procurement and the introduction of the relevant principle base on which the change in the cost of construction works caused by differences in rates and changes in construction materials prices will be calculated. The abovementioned is based on the practice, so-called "Price Adjustment" adopted by FIDIC agreements and donor organizations, Asian Development Bank (ABD) and the World Bank, which in this case will use the price index of construction materials published by the National Statistics Office of Georgia and is fully derived from the principles of fairness and efficiency.

Due to the fact that changes in material prices (Due to the changes of exchange rate of GEL and / or price changes in the international market) act as permanent obstacle that is unpredictable, this approach should be introduced not only as an ordinance adopted as a temporary measure (as an attempt to do so is in the Resolution # 619 of the Government of Georgia of March 31, 2020), but as a practice that will act as a currency risk insurance mechanism for all long-term infrastructural projects. We think the abovementioned should apply to multi-year contracts, as in the case of such contracts, as a result of abrupt and unpredictable changes in the prices of construction materials, there is often a difference between cost estimates and their actual market value, which is beyond the reasonable risk of the Economic Operator and excludes the possibility for this latter of entirely taking the responsibility for the results. It should be noted that this principle will be implemented not only in the interests of the supplier, but also in the interests of the customer, since price changes may increase or decrease the contractual value.

***Recommendation:***

It is necessary to add a note to the Draft Law regarding the possibility of price adjustment in construction contracts, which will be further regulated in detail by a sub-legislative normative act.

18) From the point of view of legal technique, the authors of the document present the following recommendations: in accordance with paragraphs 4 and 5 of Article 16 of the Law of Georgia on Normative Acts, a normative act may contain transitional provisions, if norms different from the main ones are established for a certain period of time or if certain conditions and time are needed for the full implementation of this normative act.

The final provisions of a normative act contain a list of normative acts that expire from the moment of entry into force of this normative act, a time of entry into force of the act and its validity period (if it is adopted (issued) for a specified period).
An explanatory note shall be attached to the Draft Law in accordance with the requirement of the paragraph 1 of Article 17 of the Law of Georgia on Normative Acts.

# Correlation table of Draft Law, directive, provisions (articles) of the national laws of Portugal, Cyprus and Ukraine

| Subject | Article of the Draft Law | Article of the Directive | Article of the Code of Portugal | Article of the Law of Cyprus | Law of Ukraine | Number or Note |
|---|---|---|---|---|---|---|
| Procurement Committee | 14 | 81, 82 Competition Jury | 12.1<br>219E Design Contest Jury | | | 1 |
| Certification of Public Procurement Specialists | 16 | | | | | 2 |
| General conditions of the relationship with the Economic Operators | 19 | 19<br><br>86 (2) | 14 - Associated companies, 54 Partnership | | | 3, 4, 5 |
| Sub-contractor | 20 | 71 | 316, 317, 318, 319, 320, 321, 321A, 383, 384, 385, 386 | 71 | | 6 |
| Black List/ Exclusion Disqualification | 21 | 18 (2)<br><br>101/107/ 57 | 55, 55A | 57 | | 7,8 de-Minimis ,9,10 |
| Innovation Partnershi | 30 | 31? | 30A 301A | 28 | | 11 |
| Variants (Alternative offers) | - | 45 | 59 | 42 | | 11 |
| Design Contest | 31 | 78-82 | 164<br><br>219-219J | 78-82 | | 12 |
| Exclusion grounds | 57 | 57 | 55, 55A | 57 | | 13, 14 |
| An unreasonably low price offer | 63 | 69 | 71 | 69 | | 15 |
| Ammendment in the Procurement contract / Framework agreement | 66 | 72, 73 - Cessation | 284 - Nullity<br>311-315 | 72, Cessation<br>73 | | 16 |

# Sources of information and data used:

- EU public procurement directives

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance

(https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024 )

- Code of Portugal (Collection of Laws and Other Regulations) on Public Procurement

O Código dos Contratos Públicos

https://dre.pt/web/guest/legislacao-consolidada/-/lc/168155479/202108130554/74212363/diplomaExpandido

(https://dre.pt/application/conteudo/108086621)

- Law of Cyprus about governing procurement procedures and related matters

The Law of 2016 on the Regulation of the Procurement Procedures and Related Issues

( http://www.cylaw.org/nomoi/enop/non-ind/2016_1_73/full.html )

- World Trade Organization Agreement on Government Procurement

Agreement on Government Procurement

(https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm)

- Transparent public procurement rating

Transparent Public Procurement Rating

(https://www.tpp-rating.org/)

- World Bank website
- Website of European Bank for Reconstruction and Development
- Website of the State Procurement Agency

http://procurement.gov.ge/ka/page/AnalyticalStudiesReports

- Open Procurement Data Website

http://opendata.spa.ge/#/

- Public Procurement System of Ukraine - Prozorro - Website
- Interviews with representatives of more than 30 member organizations conducted in 2021