

Irena Georgieva

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# Using Transparency Against Corruption in Public Procurement

A Comparative Analysis of the  
Transparency Rules and their Failure to  
Combat Corruption

# **Studies in European Economic Law and Regulation**

Volume 11

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Irena Georgieva

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A Comparative Analysis of the Transparency  
Rules and their Failure to Combat Corruption

 Springer

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PPG Lawyers  
Sofia, Bulgaria

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# Foreword

This is a most timely and most welcome work. It is timely because it arrives just as the new procurement directives package of 2014 has come into force; it is most welcome because it addresses the very serious matter of corruption in public procurement with a comparative law perspective. The author has a mission – an ambitious and exciting one – to contribute to the awareness of the part that corruption still plays in procurement. It is one thing to have paperwork in order, to tick the boxes, as it were, but it is quite another thing to establish that there is no elephant in the room. Appearances can be deceptive, and the field of procurement is certainly no exception.

Working from the experience and practice in Bulgaria, with comparators in the German and Austrian systems, Dr Georgieva offers the reader a clear and surprising insight into just how what might look above board is in fact decidedly underhand. The importance of transparency in procurement cannot be overestimated, although of course there are many aspects to compliance and successful high-quality procurement and procurement processes. The attractiveness of Dr Georgieva's work lies in the systematic and almost enchanting way in which she peels back the veils of corruption, like a magician removing layer after layer of covers to reveal the hidden jack-in-the-box. This is a work with a pan-European message and imagery.

While in some countries people think that procurement is straightforward, there is no Member State that is free from some form of diversion from the yellow brick road: a meeting here or there, a favour to someone's family, a holiday or two in an agreeable location or even a straightforward brown envelope with some enriching contents. Corruption in procurement is not, thankfully, endemic, but it is more prevalent than many would like to admit.

European Union law has sought to coordinate national rules relating to procurement, so that above the thresholds a clear systematic approach will apply, albeit with some options available for the Member States. Often, contracting authorities find the European rules irritating, even burdensome, but that is to misunderstand why the rules are there and how they operate to promote a level playing field characterised by undistorted competition, transparency and open access to market participants within the internal market that is at the heart of the European Union's

structure. The new rules have given much – perhaps even too much – room for social and other certain policy objectives to play a role. These objectives are laudable and may indeed be essential (in particular as regards the environment); however, they can also be abused to disguise the desire of local politicians and others to promote their hobbyhorses and the interests of their friends and allies. Corruption may also be intellectual and not just financial in nature.

The general criterion of MEAT (the most economically advantageous tender) is certainly better than simply looking at the lowest price, which may well not always be the best value for money. In applying MEAT contracting authorities must remain within the legitimate bounds of their discretion and stay on the yellow brick road. Dr Georgieva's work should assist those who wish to ensure that contracting authorities succeed in doing so. Her book deserves a wide and interested readership, and I wish her and it success.

University of Groningen  
Groningen, Netherlands

Prof. Laurence W. Gormley

# Preface

Writing about corruption is not particularly easy. Writing about corruption in your own country – even less so. However, the effort is worth it if the problematic issues revealed and the suggestions provided bear fruit and change the status quo for the better. Performing the process of awarding public procurements correctly and in the interest of all stakeholders, especially a country’s taxpayers, is of extreme significance as well as a very challenging topic, and the search for the right path continues.

This book is aimed at all those who sooner or later face a public procurement award due to the nature of their business or because they have to apply the regulations in their capacity as a contracting authority, as well as to the academics who continue to study this vast subject. Procurements themselves represent an artificial mechanism which seek to protect public resources by creating much stricter rules for spending ‘common funds’ than are usually found in the relations governing ordinary traders. When a resource is shared, however, determining responsibility for it is often more complex. Who owns the resource actually, who is liable for its distribution and what rules should regulate the transaction can be hard to determine and difficult to oversee. Finally, it is much more challenging to prove theft from the state than from a particular person. That is why in this atypical ‘vacuum’ of rules and procedures, corrupt practices emerge much more frequently, and because the appetites are much larger, corruption in this sector flourishes abundantly.

Procurement rules will continue to have its ups and downs, and their adaptation to real life will continue much longer. It is for this reason that I hope my work on this book, and the contrast that is made between the different countries, will be taken into account in the implementation of the new procurement rules at European level. Indeed, EU is a community of countries that have agreed to profess the same values, but to be successful the eyes of this alliance must be focused precisely on the ‘individual cases’. This is especially true for public procurements and the many corruption opportunities they create.

I would like to thank all who have contributed to bringing this book into being and to helping my analysis of the three Member States researched here acquire meaning and completion.



I express my special gratitude to Prof. Laurence W. Gormley (University of Groningen, Netherlands) for the enormous dedication, guidance and support. Further, many thanks to Prof. Georgi Dimitrov (Bulgarian Academy of Sciences, Bulgaria) for his assistance and belief in his former student; to Prof. Elisabetta Manunza (University of Utrecht, Netherlands), Prof. Huib van Romburgh (University of Groningen, Netherlands) and Prof. Gert-Wim van de Meent (University of Amsterdam, Netherlands) for sharing their valuable opinions on my work; and, last but not least, to the public procurement legal expert Johannes Stalzer for taking the time to consult me on my work on the analysis of Austria.

Thanks to all my friends and especially my family, for having supported me throughout and for having always stood by my side.

Sofia, Bulgaria  
October 2016

Irena Georgieva

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# About the Author

**Dr Irena Georgieva** is a Bulgarian attorney and expert in public procurement law with over 15 years of practice. Currently, she works as a legal advisor and manager of her own niche law office in Sofia focused on public procurement and data protection matters. Dr Georgieva has graduated in law from Sofia University (master in law 2003) and has also a postgraduate qualification in accountancy from the University of National and World Economy, Sofia (2005). She obtained her doctoral degree in the University of Groningen, Netherlands (PhD 2015), with dissertation thesis on public procurement law. She takes part in many undertakings related to public procurement matters – round tables, open discussions and seminars – and is also a regular author of public procurement articles published in domestic and international law and business magazines. She is a member of the Sofia Bar Association.

# Abbreviations

ANAO	Bulgarian National Audit Office Act ( <i>Закон за сметната палата</i> ), S. 12/12.2.2015, as amended
AO	Austrian Audit Office (Rechnungshof)
APCA	First Bulgarian Award of Procurement Contracts Act, SG 9/3.1.1997, repealed SG 56/22.6.1999
APFIA	Bulgaria Public Financial Inspection Act ( <i>Закон за държавната финансова инспекция</i> ), SG 33/21.4.2006, as amended
BAK	Austrian Federal Bureau of Anti-Corruption ( <i>Bundesamt zur Korruptionsprävention und Korruptionsbekämpfung</i> )
BAKG	Austrian Federal Law on the Establishment and Organisation of the Federal Bureau of Anti-Corruption ( <i>Bundesgesetz über die Einrichtung und Organisation des Bundesamts zur Korruptionsprävention und Korruptions-bekämpfung</i> ), BGBl. I No. 72/2009, as amended
BBG	Austrian Federal Public Procurement Agency ( <i>Bundesbeschaffung GmbH</i> )
BHO	German Federal Budget Code ( <i>Bundshaushaltsordnung</i> ), BGBl. I S. 1284/19.8.1969, as amended
BIAC to OECD	Business and Industry Advisory Committee to the OECD
BKMS	German Business Keeper Monitoring System
BORKOR	Bulgarian project BORKOR ( <i>БОРКОР</i> ), launched under the aegis of the Minister of Interior and the Deputy Prime Minister in 2009
BVergG	Austrian Federal Procurement Act ( <i>Bundesvergabe-gesetz</i> ), BGBl. No. 17/2006, as amended
CM	Council of Ministers of Bulgaria ( <i>Министерски Съвет</i> )
CMS	Bulgarian Corruption Monitoring System of the Center for the Study of Democracy

Civil and Criminal Law Conventions against Corruption	Civil Law Convention on Corruption (adopted 4 November 1999) CETS 174 and Criminal Law Convention on Corruption (adopted 27 January 1999) CETS 173
CPB	Central Purchasing Body, as defined Article 2(16) Directive 2014/24/EU
CPC	Bulgarian Commission for Protection of Competition ( <i>Комисия за защита на конкуренцията</i> )
CPCCOC	Bulgarian Center for Prevention and Countering Corruption and Organised Crime ( <i>Център за превенция и противодействие на корупцията и организираната престъпност</i> ), established by decree of the Council of Ministers on 29 July 2010
CPI	Corruption Perceptions Index of Transparency International
CPV	Common Procurement Vocabulary, provided for in Regulation (EC) No. 2195/2002 of the European Parliament and of the Council as the reference nomenclature for public contracts
CSD	Center for the Study of Democracy ( <i>Център за Изследване на Демокрацията</i> ), founded 1989 in Sofia, Bulgaria, as an interdisciplinary public policy institute dedicated to the values of democracy and market economics
Directive 2004/17/EC	Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors OJ L134/1
Directive 2004/18/EC	Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ L134/114
Directive 2014/24/EU	Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC OJ L94/65
Directive 2014/25/EU	Directive 2014/25/EU of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L94/243
ECJ	European Court of Justice
ESPD	European Single Procurement Document under Article 59 of Directive 2014/24/EU
EU	European Union
EU Commission	European Commission



First PPA	First Bulgarian Public Procurement Act, SG 56/22.6.1999, repealed SG 28/2004
GATT	General Agreement on Tariffs and Trade, signed in Geneva on 30 October 1947
GDP	Gross domestic product
GRECO	Group of States against Corruption, established in 1999 by the Council of Europe to monitor states' compliance with the organisation's anti-corruption standards
GWB	German Act against Restraints of Competition ( <i>Gesetz gegen Wettbewerbsbeschränkungen</i> ), Federal Gazette I, p. 2546, of 26 August 1998, as amended
GWB (VergRModG)	GWB after the transposition of the New Procurement Directives and the amendments made with VergRModG
IACA	International Anti-Corruption Academy, initiated by UNODC, OLAF and the Republic of Austria in 2010
IMK	Standing Conference of the Ministers and Senators of the Interior of the <i>Länder</i> in the Federal Republic of Germany
MEET	Bulgarian Minister of Economy, Energy and Tourism ( <i>Министър на икономиката, енергетиката и туризма</i> )
Member State(s)	Current state(s), which is/are member(s) of the EU
NAO	Bulgarian National Audit Office ( <i>Сметна палата</i> )
New PPA	Now applicable Bulgarian Public Procurement Act ( <i>Закон за обществените поръчки</i> ), transposing of the New Procurement Directives, SG 13/16.2.2016, effective as of 15 April 2016
New Procurement Directives	Collective reference to Directive 2014/24/EU and Directive 2014/25/EU
OECD	Organisation for Economic Co-operation and Development, founded in 1961 to promote economic progress and world trade
OECD Anti-Bribery Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) adopted by the OECD Negotiating Conference
OJEU	Official Journal of the European Union

OLAF	European Anti-Fraud Office ( <i>Office européen de lutte antifraude</i> ), charged by EU to protect its financial interests, established 1999
Pact	Integrity Pact created by TI as tool for monitoring procurement projects in Bulgaria
PFIA	Bulgarian Public Financial Inspection Agency ( <i>Агенция за държавна финансова инспекция</i> )
PPA	Bulgarian Public Procurement Act ( <i>Закон за обществените поръчки</i> ), applicable before the transposition of the New Procurement Directives, SG 28/06.4.2004
PPAgency	Bulgarian Public Procurement Agency ( <i>Агенция по обществени поръчки</i> )
Procurement Directives	Collective reference to Directive 2004/17/EC and Directive 2004/18/EC
Remedies Directive	Directive 2007/66/EC of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31, as amended
SAC	Bulgarian Supreme Administrative Court ( <i>Върховен Административен Съд</i> )
SektVO	German Ordinance on the Award of Public Contracts by Utilities ( <i>Verordnung über die Vergabe von Aufträgen im Bereich des Verkehrs, der Trinkwasserversorgung und der Energieversorgung</i> ), BGBl. I S. 3110/23.9.2009, as amended
SGB	Austrian Criminal Code ( <i>Strafgesetzbuch</i> ), BGBl. I S. 3322/13.11.1998, as amended
SME	Small and medium enterprises
Solution Model	Solution Model in the Area of Public Procurement, launched on 21 February 2012 by CPCCOC
StGB	<a href="#">German Criminal Code</a> ( <i>Strafgesetzbuch</i> ), Federal Gazette I, p. 945, p. 3322, of 13 November 1998, as amended
TEU	Treaty on European Union, signed in <a href="#">Maastricht</a> in 1992
TFEU	Treaty on the Functioning of the European Union, consolidated version OJEU C326/47, 30 October 2012
TI	Transparency International, founded in 1993 as a non-governmental organisation that monitors and publicises corporate and political corruption in international development

TIBG	Bulgarian branch of Transparency International ( <i>Прозрачност без Граници България</i> ), founded in 1998
Treaties	Collective reference to TEU and TFEU
TUAC to OECD	Trade Union Advisory Committee to the OECD
UNCAC	<a href="#">United Nations Convention Against Corruption</a> , signed 9 December 2003 in Merida, New York
UNODC	United Nations Office on Drugs and Crime, founded in 1997
VergRModG	German Act for the Modernisation of Public Procurement Law ( <i>Gesetz zur Modernisierung des Vergaberechts</i> ), BGBl. I S. 203/23.2.2016, Federal Gazette I, p. 2546, of 26 August 1998, as amended
VergRModVo	German Regulation for an Act for the Modernisation of Public Procurement Law ( <i>Verordnung zur Modernisierung des Vergaberechts</i> ), 18 March 2016
VgV	German Ordinance on the Award of Public Contracts ( <i>Vergabeverordnung</i> ), <a href="#">BGBl. I S. 321/22.02.1994</a> , as amended
VOB/A	German Procurement Regulation for Public Works ( <i>Vergabe- und Vertragsordnung für Bauleistungen</i> ), 20.9.2009, BAnz. 196a/29.12.1997, as amended
VOF	German Procurement Regulations for the Award of Independent Contractor Services ( <i>Verdingungsordnung für freiberufliche Leistungen</i> ), 12.05.1997, BAnz. 164a/03.09.1997, as amended
VOL/A	German Procurement Regulation for Public Supplies and Services ( <i>Vergabe- und Vertragsordnung für Leistungen</i> ), 31.7.2009, BAnz. 155a/15.11.2009, as amended
WIN	Whistleblowing International Network
WKStA	Austrian Public Prosecutor's Office for <i>White-Collar Crime</i> and Corruption ( <i>Zentrale Staatsanwaltschaft zur Verfolgung von Wirtschaftsstrafsachen und Korruption</i> )
WTO	World Trade Organisation, formed on 1 January 1995 under the Marrakesh Agreement, the successor to the GATT

# Table of Cases of the European Court of Justice and the General Court (in chronological order)

- Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635;
- Case C-87/94 *Commission v Belgium (Walloon Buses)* [1996] ECR I-02043;
- Case C-353/96 *Commission v Ireland* [1998] ECR 1998 I-8565;
- Case C-44/96 *Mannesmann Anlagenbau AG and Others v Strohal Rotationsdruck GmbH* [1998] ECR 1998 I-6821;
- C-454/06 *Presstext Nachrichtenagentur GmbH v Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH and APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung* [1998] ECR I-4401;
- Case C-275/98 *Unitron Scandinavia A/S* [1999] ECR I-8305;
- Case C-107/98 *Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* [1999] ECR I 8121;
- Case C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745;
- Case C-19/00 *SIAC Construction Ltd.* [2001] ECR I-07725;
- Case C-59/00 *Bent Moustén Vestergaard v Spottrup Boligselskab* [2001] ECR I-9095;
- Case C-470/99 *Universale-Bau AG, Bietergemeinschaft: (1) Hinteregger & Söhne Bauges.m.b.H. Salzburg, (2) Östü-Stettin Hoch- und Tiefbau GmbH v Entsorgungsbetriebe Simmering GmbH.* [2002] ECR I-11655;
- Joined cases C-397/01 to C-403/01 *Bernhard Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I 8835
- Case 496/99 *Commission v Italy (Socchi di Frutta)* [2004] ECR I-3801;
- Case C-264/03 *Commission v France* [2005] ECR I-8831;
- Case C-458/03 *Parking Brixen GmbH v Gemeinde Brixen, Stadtwerke Brixen AG* [2005], ECR I-8612;
- Case C-231/03 *Consorzio Aziednde Metano ('ConAME') v Padania Acque Spa* [2005] ECR I-7287;
- Joined cases C-226/04 to C-228/04 *La Cascina Soc. Coop. arl.* [2006] ECR I-0147;
- Case C-129/06 *Autosalone Ispra Snc v European Atomic Energy Community* [2006] ECR I-131
- Case C-221/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I 6057.

- Case C-6/05 *Medipac-Kazantzidis AE v Veniseleio-Pananeio* [2007] ECR I-04557;  
Case C-195/04 *Commission v Finland* [2007] ECR I-3351, 3553;  
Case C-532/06 *Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v Dimos Alexandroupolis and Others.* [2008] ECR. I-251;  
Case T-258/06 *Federal Republic of Germany v European Commission* [2010] ECR II-2027;  
Case C-218/11 *Észak-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövízig) and Hochtief Construction AG Magyarországi Fióktelepe v Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság* ECLI:EU:C:2012:643, 18.11.2012;  
Case C-574/10 *Commission v Germany* ECLI:EU:C:2012:145, 15.3.2012;  
Case C-440/13 *Croce Amica One Italia Srl v Azienda Regionale Emergenza Urgenza (AREU)* ECLI:EU:C:2014:2435, 11.12.2014;  
Case C-278/14 *SC Enterprise Focused Solutions SRL v Spitalul Județean de Urgență Alba Iulia* ECLI:EU:C:2015:228. 16.4.2015;

# Chapter 1

## Introduction

### 1.1 Aspects Analysed

The book scrutinises the transparency obligations, the procurement rules, and the participants and responsible control institutions in procurement award in three Member States. It seeks to prove that obedience to the transparency principle is not an essential element of the proper response to corruption in the spending of public funds. The comparison between the Bulgarian public procurement system and the German and Austrian systems is performed through detailed research not only as regards adherence to the transparency principle, but also as to the use of other mechanisms to limit corruption, insofar as they are appropriate and could be adapted in other countries which lack sufficient anticorruption measures. The broad-spectrum analysis of these Member States' anticorruption rules in the procurement process also refers to the new procurement package and the new national legislation. The book contains a strong critical line on the broadened (with the new rules) discretion of the contracting authorities, the new legal solutions that could actually expand the corruption in the sector, as well as the separate national solutions designed with the transposition of the new rules.

The types of infringements involving corruption typical of the different phases of the award process are classified and discussed in additional detail, as is their link to violations of the transparency principle. The following methodology is used in this part of the work: (i) description of the EU law provisions breached<sup>1</sup>; (ii) description of the infringement itself; (iii) violation of transparency rules, if any; and (iv) types of corruption loopholes opened. Structured in this manner, the method I have applied not only helps prove that in most cases manifestations of corruption and infringements do not depend on the level of publicity of the process and often do not

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<sup>1</sup>And, where applicable, also national legislative provisions. Some infringements have already been overcome in some Member States, but in others (like Bulgaria) they remain an issue.

even violate transparency, but also identifies the weak points in the award process which still need treatment and future legislative solutions.

The systems of control and appeal against the contracting authority's actions within the various legislative schemes are reviewed and compared, and the legislative weaknesses which fail to reduce corruption are highlighted. The functions of the control and appellate authorities of the three Member States are examined so that the ineffectiveness of some of the institutions (ie in Bulgaria) is clearly revealed, along with their lack of awareness of the process participants' actual activities, tending mainly to monitor the legal compliance of the award process and the observation of procedural requirements.

By way of background and thus to achieve all the above, I also introduce a brief historical overview of the Bulgarian legislation in the field of public procurement and corruption. This serves both to illustrate the trend towards the constant increase in transparency rules and to highlight the individual social and economic specificities of corruption in this Member State. A proper understanding of the 'national identification' of corruption in a given country and its origins is extremely important if the most common manifestations of corruption are to be identified, as well as properly to analyse the options available to deal with corruption and limit its occurrence to a minimum. In this light, some of the conclusions drawn in this book can be viewed as general conclusions regarding how corruption should be prevented in procurement, but others need to be considered through the prism of the national characteristics and specificity of one Member State to achieve an appropriate level of objectivity.

## 1.2 Benchmarking

The benchmarking presented in this book aims to reveal that the legislation of the countries which succeed in combating corruption does not focus on cumbersome imperative rules making procurements public knowledge, and does not rely so much on transparency in the fight against corruption. Although all the countries examined are Member States of the EU and base their legislation on European directives, they achieve a balance between the amount of transparency rules and the quality of prevention of corruption in entirely different manners.

Comparison between these Member States is important for the development in the regulation of public procurement towards clearer and simpler procedural rules and towards meaningful anticorruption measures. It exposes the main weaknesses in a legislative system which over the last decade has undergone endless amendments and supplements, but has not yet succeeded in limiting corruption and the resulting considerable loss of public funds. The goal of the work is to 'debunk' the unconditional policy to pursue transparency as the key way to combat corrupt procurement participants and pre-allocation of public funds. Although this policy is in fact dictated by the EU, in the example of Bulgaria the attempts to overcome criticism against widespread corruption in public contracts have been manifested solely

through legislative changes targeting at the monitoring and publicity of procedures, but not through efficient rules aimed at enhancing the competence of control bodies and/or strengthening the sanctioning mechanism against corruption.

Various criteria have determined the selection of the countries with which the procurement system of Bulgaria is compared so that the contrast between the legislative solutions can be discerned. The goal was to select those examples whose good practices could actually be implemented in countries with similar issues to Bulgaria, practices which do not appear outlandish or impossible to apply to this legal system, or diametrically opposite to the economic and social situation of the country. This is of utmost importance in ensuring that the conclusions highlighted from this comparative work are reliable and applicable to other countries with similar concerns within the EU. The Member States were examined in view of the following characteristics: (i) corruption levels, (ii) procurement system efficiency, and (iii) historical, substantive and economic similarities. Precisely from this perspective, Germany and Austria turned out to be a logical choice for benchmarking, given that a good proportion of the above criteria were met, along with proximity of legislative systems and deep existing economic relations between the three countries.

Germany and Austria are reviewed on the basis of their main legislative rules regulating public procurement and the transparency rules applicable to procurement awards. Their main legislative and institutional solutions for combating corruption are reviewed. Positive practices which could be adopted by other countries with less success in this sphere have been identified, as have such which yield good results in Germany and/or Austria (and/or are EU based legal solutions) but cannot be regarded as suitable to other Member States.

The book presents an in-depth review of three different legislative solutions regulating public procurement which focus (each employing its own means) on the fight against and the prevention of corruption in the selection of contractors. The parallels drawn between those Member States provide findings which could contribute both to combating corruption at the national level and to the creation of more appropriate and effective anticorruption measures at the EU level. For this reason the works' contribution is relevant not only to the particular legal systems reviewed in detail but also to other Member States in which public spending is systematically threatened by corruption. The distinguishing angle taken by the research in this respect makes the work particularly useful – good EU legislative solutions are not just extracted and identified as such, but account is taken of the possible applicability of the measures and how they can be approached practically in countries which still do not fit within the definition of an average Member State.



## Chapter 2

# The EU Principles in Public Procurement.

## Transparency – Origin and Main Characteristics

*'Cellophane, Mister Cellophane  
Should have been my name  
Mister Cellophane  
'Cause you can look right through me  
Walk right by me  
And never know I'm there!'*  
(Fred Ebb 'Mister Cellophane', 'Chicago' musical)

### 2.1 The Procurement Principles. The Concept of Transparency

Transparency is an important element in public procurement policy and law. Particularly given the socially significant nature of the complex system needed for the proper use of public money by all those institutions and commercial companies defined as 'contracting authorities', the basic principles governing such spending should be well defined, and a central plank of these principles is transparency. In all aspects of public procurement the public sector can influence the market structure, affect the competitive process between the market participants, and affect significantly the economic behaviour of the participants in procurement processes. As a rule, contracting authorities rely on the competitive environment in public procurement to achieve the most efficient use of their budgets. They are interested in buying products at low prices and of high quality, since their resources are usually more constrained than the needs to be met. In a market economy, an effective competitive process can lead to lower prices or higher quality, or more innovation in the goods or services offered.

Based in particular on these needs of contracting authorities and the market, European legislation outlines the basic principles, rules and procedures for procurement, the control of the expenditure of public funds, and the provision of information relevant to the award of public contracts. This approach restricts (from accession to the European Union) individual Member States from defining their procurement

rules freely and at their own discretion. Public procurement contracts have to be awarded based on the procedures laid down in EU legislation and transposed into Member State's national law, and in accordance with the following basic principles: equal treatment, non-discrimination, proportionality and transparency. These principles are interrelated and often overlap in their key functions to ensure competitive, fair and incorruptible procedures.

Article 18(1) Directive 2014/24/EU<sup>1</sup> establishes the following principles as the fundamental basis on which all procurement rules are implemented:

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

*The principle of equality* ensures that all candidates in public procurement processes are subject to exactly the same conditions for submission and evaluation of tenders and are treated in exactly the same way. This includes ensuring that they receive equal and satisfactory information about the object of a contract. Accordingly, this principle often incorporates the main elements of the principle of transparency. Equality requires identical situations to be treated equally for all participants in a process and equal opportunity to compete to be ensured, regardless of differences between the candidates as to their commercial organisation, nationality,<sup>2</sup> etc. This principle thus also covers the requirement of non-discrimination against any candidate who is knowingly deprived of legal rights in participating in a process or of sufficient information to present an adequate and satisfactory offer.

In the European context, the concept of equal treatment requires yet another definition since, in this context, the concept of equality is, in addition, based on nationality or on the origin of goods, such that all economic operators of Community nationality and all bids including goods of Community origin must be treated equally (this is the principle of non-discrimination). This is more than simply an extension of the concept of equal treatment. It implies that any condition of eligibility or origin (based on nationality or local provenance) will automatically give rise to unequal treatment, since those conditions will, by definition, discriminate against a certain group of (foreign) economic operators or favour another. However, whilst discrimination in a given context will produce unequal treatment, unequal treatment does not always give rise to discrimination.<sup>3</sup>

*The principle of non-discrimination* prohibits discrimination based on preferences due to nationality of the suppliers and producers – eg local tenderers at the

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<sup>1</sup> Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC OJ L94/65; The general principles of procurement are inherited by the provisions of European Parliament and Council Directive 2004/18/EC on procedures in public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004 and slightly amended. These principles comply with the principles of the Treaty on the Functioning of the European Union (TFEU) and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom - equal treatment, non-discrimination, mutual recognition, proportionality and transparency.

<sup>2</sup> See Case 31/87 *Gebroeders Beentjes BV v Netherlands* [1988] ECR 4635.

<sup>3</sup> OECD, 'Public Procurement in the EU: Legislative Framework, Basic Principles and Institutions' (2011) Sigma Brief 1, accessed 20 April 2016 <[www.sigmaweb.org/publications/Public\\_Procurement\\_EU\\_2011.pdf](http://www.sigmaweb.org/publications/Public_Procurement_EU_2011.pdf)>.

expense of foreign ones. Accordingly, this principle represents a real division of the principle of equality, and is therefore also defined in the already replaced Directive 2004/18/EC: Recital 9 of the Preamble refers to ‘the principle of equal treatment, of which the principle of non-discrimination is no more than a specific expression’. This principle is also inextricably linked to the principle of transparency, which is responsible therefore for ensuring maximum information to be available on a contract, so that every entity can participate in a tender, regardless of its country of registration.

*The principle of proportionality* expresses the expectation that the required award criteria are proportional and appropriate to the objective of the procurement. It is strictly linked to the other principles. The principle of proportionality requires inquiry into whether the selected measure is appropriate to meet the objective pursued, but also whether the measure exceeds what is necessary to achieve that end. In cases where a contracting authority’s requirements go beyond what is necessary for a particular procurement, the principles of non-discrimination and equal treatment are also automatically infringed, since competitive participants are restricted from taking part in the procedure due to these overweening requirements.

*The principle of transparency* is mainly to do with the amount of information to be provided on orders and procedures, and the publicity of the actions/inactions of the contracting authorities on selection of a contractor. Some perceptions of this principle are too narrow in defining it and limited only to the advertising of the notice of public instruction and ensuring the necessary minimum level of publicity with regard to procedures. Transparency is generally viewed as the concept of ensuring openness and publicity at the various stages in a process, to enable participants and supervisory authorities to observe its progress and ascertain that the contract has been awarded and be satisfied (or not) that the process was conducted legitimately and fairly. Other concepts of transparency expand the functions of the principle so as to ensure a competitive environment, the ability to monitor the implementation of procurement, and also view the principle as an anticorruption measure. The ‘public’s right to know’<sup>4</sup> is perceived to be a successful response to the needs for fair and less corrupt disbursement of public funds, and has been recognised at Treaty level, with transparency of proceedings being an essential obligation incumbent on the EU institutions: Article 15(1) of the Treaty on the Functioning of the European Union (TFEU) requires that they must conduct their work as openly as possible in order to promote good governance and ensure the participation of civil society. Curtin (1999) has drawn attention to the vertical aspects of transparency within the European Institutions (now reflected in Article 15(3) TFEU), as well as transparency’s place in the pantheon of more horizontal principles (such as the protection of fundamental rights; the objective legal basis of legislation; effective judicial protection, and decisions being taken as openly as possible).<sup>5</sup> In the context of

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<sup>4</sup>R Oliver, *What is transparency?* (New York: McGraw-Hill, 2004) ix.

<sup>5</sup>D Curtin, ‘The Fundamental Principle of Open Decision-making and EU (Political) Citizenship’, in D O’Keefe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart, 1999) 71, 72–73.

procurement legislation and case law, transparency unsurprisingly plays a key role, essentially facilitating the proper conduct of, and confidence in the procurement process.

Some writers, however, still criticise the ‘prominent place’<sup>6</sup> of transparency in public procurement claiming that this ‘gives rise for concern not only because of its questionable foundation but also because it may lead to unexpected and certainly unwanted results and deprive the [European Union] procurement regime of the legal certainty it requires’.<sup>7</sup>

There is indeed not much theoretical consensus on what transparency in procurement actually means in practice, as a consequence of the lack of a unanimous definition of the general term ‘transparency’, as reviewed below.

Authors usually define the transparency principle in government procurement using two separate approaches: (i) strictly describing its main purposes to ensure non-discriminatory and open treatment in proceedings,<sup>8</sup> or (ii) describing the obligations which should be imposed on participants in the proceedings to ensure a proper level of transparency.<sup>9</sup>

The arguable meaning of transparency reflects the volume and the onus of the obligations imposed on the parties involved in procurement, which vary considerably across national legal frameworks. This uncertainty also creates a ‘fundamental obstacle to progress on [the] questions’ towards multilateral agreements on transparency in government procurement and the reasonable need for such agreements, as Arrowsmith (2003) observed.<sup>10</sup> Finally, as a consequence of these different approaches to defining the essence and applicability of transparency, the principle of publicity and information openness also leads to different (positive, neutral or even negative) results in its main purpose to combat corruption and its implications, as will be analysed in the later chapters of this work.

In any event, all four basic principles of public procurement – equality, non-discrimination, proportionality and transparency, convergent in some characteristics – should be considered through the prism of the provision of the minimum ethical standards to be respected for the process of allocation of taxpayers’ money in a Member State. These principles demonstrate the will of the legislator to ensure fair competition and economically advantageous products and services; they ensure the procedures to be conducted in the most honest way and finally, they guarantee that public money is not spent for corrupt personal gain.

<sup>6</sup>P Trepte, *Public procurement in the EU* (Oxford: Oxford University Press, 2007) 16.

<sup>7</sup>Ibid.

<sup>8</sup>See eg S Schooner, ‘Desiderata: Objectives for a System of Government Contract Law’ (2002) 11 *Public Procurement Law Review* 103; M Krivachka, M Markov, E Dimova, and Z Lilyan, *The new aspects in the Public Procurement Act* (Sofia: IK Trud i Pravo, 2006) 33.

<sup>9</sup>See eg S Arrowsmith, *The law of public and utilities procurement* (London, Sweet & Maxwell, 2005); Trepte (n 6).

<sup>10</sup>See S Arrowsmith, ‘Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the WTO’ 37 (2003) *Journal of World Trade* 283; and S Arrowsmith, ‘Towards a multilateral agreement on transparency in government procurement’ (1998) 47 *International and Comparative Law Quarterly* 793–816.

The objective of this book is primarily focused on the role of transparency as a principle of public procurement and mostly in terms of its anticorruption function. That is why in this chapter the elements and the formation of the principle, and its controversial nature are scrutinised, as well as its place in the European procurement legislation. The functions of transparency are highlighted and discussed below (separating the general functions of this principle and the role it plays as a principle in the procurement process), where their development, evolution and the shift of priorities in terms of their use are further commented on. The book provides a detailed analysis of transparency and its link to anticorruption politics by comparing the transparency rules in the procurement systems of three Member States and by opposing the two contrasting approaches observable in the EU of (a) ‘overkill’ in the enactment of imperative rules to ensure transparency in the procurement process, aiming at limiting corruption (which is an apparently dysfunctional model, as evidenced by the legal system in Bulgaria); or (b) enacting moderate transparency rules, treating the principle rather as a moral obligation, and providing other methods for dealing with corrupt behaviour (as found in countries such as Germany and Austria). This is why this chapter also includes a description of the Bulgarian approach to transparency and points the way to deeper reflection on the negative aspects of laws which inherently provide for maximum transparency of procedures for the awarding of contracts, but fail to reduce the prevalence of corruption, often providing more opportunities for the circumvention of fair competition rules.

## **2.2 Transparency – How Does it Start?**

The connection between transparency and the award of public procurement contracts is essential for the present book, which seeks to compare and pinpoint the manifestations and various applications of this principle in a number of EU Member States. That is why the core of the transparency principle, its ‘history’, basic elements, as well as the objectives it aims to achieve in various spheres of life are structured and summarised as a part of this chapter. In order for the nature and the positive and negative consequences of the presence of the transparency principle in public procurement to be analysed, its origin in a global sense and its meaning, as elaborated in theory, should be considered. The establishment of the principle and its evolution, as well as the problems related to its definition, will provide a clearer view and understanding of the issues that this principle emerged in response of in the field of public procurement.

During times of definite distrust of government policies, frequent market instability and increasing corruption in the late 1990s, society seemed to stumble upon a panacea to combat virtually every sin – the transparency principle. In every state and at every institutional level, transparency is on the lookout for irregularities. But what exactly this principle entails, what its actual content is, how it should be applied and whether it is indeed the best instrument to combat corruption are questions which cannot be answered with any level of certainty.