

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/EU¹ 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,² 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.³

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

¹ 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.

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

³ 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>.

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’⁴ 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).⁵ In the context of

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

⁵D 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’⁶ 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’.⁷

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,⁸ or (ii) describing the obligations which should be imposed on participants in the proceedings to ensure a proper level of transparency.⁹

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.¹⁰ 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.

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

⁷*Ibid.*

⁸See 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.

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

¹⁰See 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.

Dynamic inter-state integration increases the risk of a nation's actions in politics or economics negatively affecting other nations and international organisations. On the other hand, integration enables successful government practices to serve as examples for others. Therefore, the experience of one nation becomes valuable for another. At some point (ie the last decade of the twentieth century, being the point at which society awoke to the concept of transparency), countries started to unmask governments and to legislate to require publicity and openness at all levels of institutional activities.

As the veil concealing corruption, money laundering, non-competition, discrimination and all the other complaints of the global community began slowly to be drawn open, society matured to respect information and to protect the right to receive it. The simple desire to be socially informed started to transform into encoded rules and obligations aimed at ensuring the availability and accessibility of proper information as well as the supervision and exposure of the actions of the authorities at international, domestic and regional levels. The aim of these rules and obligations was called 'transparency', or in other words, creating the possibility that government policy would become transparent, see through.

Slowly but surely 'transparency [...] has taken on a life of its own'.¹¹ It crystallises in international law as one of the recognisable and general principles of a democratic, legitimate and social state. The principle creates different obligations for governments and government institutions to ensure publicity of their actions. Transparency is associated more often with a reliable instrument: 'Greater transparency reduces uncertainty'¹² and 'decentralizes global power by breaking governments' monopoly over information and by empowering Nongovernmental Organizations (NGO's) and citizens'.¹³

The growing significance of the transparency principle appears in international economic law, commercial relations between state institutions and private entrepreneurs, anti-bribery policies, environmental protection, counterterrorism, and many different areas of life. In Europe the European Union (the EU) began to prescribe different practices and requirements in numerous areas in order to guarantee proper levels of transparency and information, as well as the diligent implementation of government procedures and regulatory regimes. National legislation remains free to require a greater degree of transparency and to provide supervisory powers to different authorities, wherever Member States consider it effective and in conformity with the specificities of the relevant legal regime.

¹¹ Above (n 4).

¹² K Lord, *The perils and promise of global transparency* (Albany: State University of New York Press, 2006) 2.

¹³ Ibid.

2.2.1 *The Meaning of Transparency*

Despite the ‘trend towards greater transparency’¹⁴ and the significance and applicability of the transparency principle, which is widely discussed and questioned in academic literature, there is as yet no common definition of the term. The more ‘fancy’ and discussed transparency has become, the vaguer and more diluted its definition has become.

While the discussion which follows does not attempt to cover all the variations of the concept of transparency or definitions of transparency, or even to determine which is the most appropriate, several completely distinct approaches are examined considering various perspectives. The discussion proposes a summary of all the elements of transparency, which describes this universal principle in the most comprehensive way.

In order to introduce a single common, practically orientated and not strictly legal example of a definition of the transparency principle (or, more accurately, an explanation of it in its essence), it is convenient to focus on some simple propositions from Oliver’s (2004) book ‘*What is transparency?*’.¹⁵ Authors like Oliver (2004) tried to cover the more functional aspects of transparency by claiming that this principle ‘is taking a whole new meaning: “active disclosure”’. His explanation of the increasing role of transparency in our century is that it serves the most cherished right of the (international) public – to know and to be aware of the facts and the circumstances which influence those facts. Oliver’s (2004) view about the new ‘watchword’, as he qualifies transparency, focuses on these elements of the principle which regard access to information as the right of society actively to receive comprehensible, complete and indisputable information on every aspect of life and thus to defend its (legal) rights and interests.¹⁶ Oliver’s (2004) methodology, although suffering a lack of specificity, could be accepted as a simplified and general explanation of transparency – and could be used to assist in reaching a definition of the principle from a legal perspective.

An example of a more theoretical and sophisticated attitude, defining transparency as a legal instrument and not generally as a public right (as in Oliver’s (2004) approach) is presented by Chayes and Chayes (1995).¹⁷ Although starting from a brief and concrete meaning of the term simply by defining it as ‘the availability of and access to information’, in the course of their description they further supplement this definition by identifying transparency as:

¹⁴ Ibid.

¹⁵ Above (n 4).

¹⁶ Oliver (2004) (n 4), commented that ‘being transparent is ‘table stake’ for politicians around the world [...]. Government transparency extends from the local town council to the federal government in each action’.

¹⁷ A Chayes and A Chayes, *The new sovereignty* (Cambridge, Mass., Harvard University Press, 1995), 135.

The availability and accessibility of knowledge and information about: (1) the meaning of norms, rules, and procedures established by the treaty and practice of the regime, and (2) the policies and activities of parties to the treaty and of any central organs of the regime as to matters of relevant to treaty compliance and regime efficacy.¹⁸

Chayes and Chayes's (1995) analysis identifies three main operations for transparency:

- (i) facilitating coordination converging on a treaty norm;
- (ii) reassurance of no advantage by similar actions and compliance with norms, and
- (iii) deterrence against 'actors contemplating non-compliance'.¹⁹

This definition offers one academic approach by describing transparency as an informational tool for the observance of deviations among 'regime participants', where transparency could and should be used in order to penalise participants in such deviations. Further, the perception of Chayes and Chayes (1994) leans towards the 'self-reporting of parties, subject to evaluation'.²⁰

Finally, dictionary definitions are also useful to clarify the term 'transparency' by aiding comprehension of its main characteristics and how it is generally perceived. Two useful descriptions of transparency are: 'Minimum degree of disclosure to which agreements, dealings, practices, and transactions are open to all for verifications'²¹; and 'Essential condition for a free and open exchange whereby the rules and reasons behind regulatory measures are fair and clear to all participants'.²²

The spotlight in these definitions falls elsewhere from the one presented above and is not on the quantity of and/or accessibility of available information, but rather on the possibility for verification and on the regulatory measures. However, these are other significant features of transparency which also clarify why this principle is considered so valuable for society and how it is used to defend people's rights, and which are obviously the most recognisable for observers.

To conclude, the main characteristics of transparency, detected in the different approaches to the definition of the principle can be conveniently summarised as follows:

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ JE Nolan (ed), A Chayes. and A Chayes, *Regime Architecture: Elements and Principals in Global Engagement: Cooperation and Security in the 21st Century* (Washington DC: Brookings Institution, 1994) 66–67. Although quite comprehensive, the definition of Chayes and Chayes (1995) and the analysis of the transparency principle lead to some conclusions of the authors which could not be completely shared. The idea that transparency is an instrument which enhances the compliance with treaty norms by imposing on participants the (passive) obligations to report and to inform about a particular regime and its practices is only the best case scenario in which access to and the availability of information leads necessarily to the positive effect of obedience to the regime.

²¹ BusinessDictionary.com, 'What is transparency? definition and meaning' <www.businessdictionary.com/definition/transparency.html> accessed 20 April 2016.

²² Ibid.

A concept, used in national and international legal systems to ensure the public's right to the availability and accessibility of a certain level of information about (institutional) norms, rules, procedures and regimes, and the actions of participants; where the information provided should be presented in an understandable and clear manner and should always be sufficient to facilitate monitoring, verification and assessment.

2.2.2 Features and Functions of Transparency

Just as transparency has no single definition accepted in theory and practice, its inherent features and functions are understood and complemented differently in time. The reason for this is again the ambiguity regarding its role in the government of each state as well as in the various spheres of state activity. On the other hand, as demonstrated by the various methods writers have adopted to define transparency, some have assigned more moderate expectations about its positive impact on civil society to the principle, while others seriously expand its scope.

Of course, as noted above, transparency is not and could not be associated with the simple provision of information for a particular process led by a public institution, even though this is a basic and integral part of its essence. The main features of transparency can be classified into two streams to which its most recognisable functions belong:

- (i) *Representative features* – information provision; legitimacy of state institutions, demonstrating the political will for openness in governance; strengthening the relationship between state institutions and the public; and
- (ii) *Control features* – enabling the monitoring of the actions of all government bodies; clarity regarding the rights and obligations of individual institutions; allowing the public to take part in the decision making of the government bodies; anticorruption tools against backroom manipulation to the detriment of society.

These main features of transparency also serve to measure the level of democracy in a society. It is often believed that the more developed a government's publicity institutions are, the more developed the society is too. Transparency is dictated by the public interest, that the activities of all state bodies be performed for the public good – effectively and economically sustainably.

The work classifies the functions of transparency based on these two fundamental features. Due to the complexity of transparency and the fact that it covers different types of activities, the functions are grouped into five separate groups, which nevertheless constantly condition and depend on each other.

Providing the Right Amount of Information

As reviewed in the discussion of the various definitions of ‘transparency’, the information provided must be accessible to the public and easy to assimilate in order for the whole range of this principle’s functions to be deployed. The provision of all or any information is not a characteristic of transparency in its true sense. The provision of the *right* amount of information is the correct and expected expression of transparency. The information must be (a) in an exact quantity, (b) relevant to the respective action, (c) not misleading, (d) presented timely and, last but not least, (e) available to a broad group of people.

Given these additional features, which define an activity as transparent and public, the pursuit of transparency must be conditioned and regulated so as to make ‘transparent’ those specific elements of an activity to provide sufficiently effective control, but not those which would actually enable its manipulation. Therefore, if the balance in the function of transparency to inform the public about the actions of government institutions (in general) is disturbed, the principle itself becomes meaningless, since it causes more damage to a state government than good. The anticorruption drive is choked ab initio as the provision of too much information opens scope for various manipulations.

With respect to the above, it should always be borne in mind that ensuring transparency entails direct costs to the states. Governments usually seek an appropriate balance between the task of ensuring transparency and efficiency. Therefore, if the level of transparency (awareness) is properly defined, the benefits will outweigh the costs, especially when comparing the initial cost for ensuring transparency with any potential negative consequences of corruption and their impact on public confidence. European countries are gradually requiring the disclosure of more information in an effort to ensure the publicity of their actions. However, they tend to define what information should *not* be disclosed at any stage of the process and to whom to prevent the principle of transparency turning against them.

It could moreover be harmful if the information is not disclosed consistently and in a timely manner (eg the disclosure of information about other procurement contracts awarded in the context of a limited competition, which is the focus of this book) as this increases the possibility of collusion between stakeholders who can identify their competitors and contact them. This would impact directly on the market and the various competing bids offered and, in public procurement, respectively, this means concerted practice (bid rigging) to the detriment of the proper allocation of budgetary resources.

Last but not least, the obligation to provide information (even in terms of the purely technical and practical organisation of this activity) should in no case affect the task carried out by the institution subject to transparency. If the obligations are excessive and actually obstruct the actions of the administrative apparatus, the provision of information switches from ‘concomitant activity’ into a priority activity for civil servants. The internal control and the efficiency of the performance of the actual task set of the institution thus suffers. A brilliant example of this is Bulgaria, which is examined in this work.

Increase of Competition

By providing the right amount of information on the subject matter and the characteristics of public activities, transparency helps expand the circle of participants in such activities and thus increases competition in the relevant sector. The higher the level of competition the better the market efficiency, pricing and fair market conditions.

In fact, one of the preconditions for the deployment of effective competition is the presence of opportunity for consumers (even a closed group of consumers, as is the case for public procurement) to compare prices and the commercial conditions of the various undertakings, eg suppliers of goods or services. The availability of this option demands a certain level of transparency, which in turn appears to be an invariably necessary precondition for the deployment of the competitive process. If transparency is not ascertained ‘open competition cannot prevail, corrupt dealings can proliferate, and other failings in the procurement process may be covered up, so weakening accountability’.²³

Further, the increased level of competition not only literally extends the range of participants in an activity of public importance, but also offers an opportunity for SMEs to participate in the market, where through operation of the principle of transparency they will receive adequate and sufficient information on the needs of a given sector and thus be prepared to meet them. Transparency in fact therefore aims to decrease the levels of discretion and discrimination towards the various market stakeholders.

The exchange of information which enhances transparency is useful for effective competition as far as it does not create conditions for concerted or coordinated practices (as discussed in the course of the book). There are certain types of information however, which, if exchanged and made available to the stakeholders, would lead to exceeding the favourable level of transparency and would actually limit the competition between the stakeholders involved. In this sense, the exchange of information should not lead to a reduction of incentives for the stakeholders to follow competitive behaviour in the relevant sector and to remove or significantly reduce the business risk coming from obscurity on the current or future market behaviour of competitors and their planned marketing strategies to attract more users.

Ultimately, the functions of providing optimal level of information and increasing competition should achieve three main objectives:

- (a) reduction of prices of basic goods and services to their actual market level (which highly refers to the public procurement procedures),
- (b) increase of the innovative proposals in a given sector (as the higher level of competition leads directly proportional to increase of the level of the innovative proposals), and

²³ D Jones, ‘Competition and Transparency in Government Procurement in Southeast Asia’, in C Wescott, B Bowornwathana and LR Jones (eds), *The Many Faces of Public Management Reform in the Asia-Pacific Region* (Research in Public Policy Analysis and Management, Volume 18) (Bingley: Emerald Group Publishing Limited, 2010) 97–121.

- (c) reduction of corruption pressure from participants in various activities affecting the entire society (which is displayed as a separate function of the transparency below).

These objectives, however, are sporadic in the individual sectors and the balance between the functions of transparency is often disturbed, as is clear from the analysis performed in this work. Very often, the transparency about actions of public significance is used to meet the ‘representative goals’ of the political class and its role shifts from positive to negative in terms of the levels of competition (eg, Increased transparency in a market with high concentration is likely to lead to elimination of competition. The exchange of information significantly increases the barriers to entry in the market because it allows the established market players immediately to notice any new market penetration and react to protect their market position).²⁴

Control, Collaboration and Participation in Government Policies

If transparency is an integral part of good governance, it is an inevitable condition for integrity in performing any activities of public importance in a Member State.

Transparency can be regarded as a sort of layman’s basic map of an organisation and reveals the depth of access it allows, the depths of knowledge about processes it is capable of revealing, and the level of attention to citizen response it provides (Welch and Hinnant, 2002).²⁵ In a sense we can say that the more transparent an organisation is (via its website or otherwise), the more it is willing to permit citizens to monitor its performance and to participate in its policy processes.²⁶

This principle thus acquires its other main function – to represent an opportunity for society to exert control over the public authorities and to participate actively in their decision-making process. Transparency is one of the qualities of publicity and, along with that, a principle which is fundamental in the work of the various state institutions, as the institutions and the public receive various benefits by relying on transparency.

It has until recently been actually unthinkable for society to review the public performance of the control bodies, their structure, goals and objectives. From this angle, it is felt that the lack of transparency and publicity disturbs the relationship between the controlling and the controlled party. Today there has been a novelty in the control practice, there is a new trend changing the role of the controlled and the controlling bodies. The publicity of the work of the controlling bodies permits society also to monitor the state institutions.

²⁴ CPC Decision 1778–2011.

²⁵ EW Welch, CC Hinnant, *Internet Use, Transparency, and Interactivity Effects on Trust in Government* (2003) Proceedings of the 36th Hawaii International Conference on System Sciences.

²⁶ D Curtin, *Executive power of the European Union: Law, Practices and the living Constitution* (New York: Oxford University Press, 2009), 219.

The state represents the public power, but the ‘public opinion’ of it should also be added to this power. Public opinion is formed by the perceptions of the public and civil society. The control over state institutions is thus not only expressed in the controlling function which a particular state organisation may have (eg Audit office). The control of the civil society, provided by the transparency of the activities of state institutions, is sometimes a much more powerful guardian and corrective of the legitimate use of the representative power. On its own, the publicity results from the interaction of public authorities and civil society, and vice versa – this function of transparency is the result of the interaction between the public authorities and civil society.

The opportunity for monitoring and controlling the governmental institutions broadens the scope of this function of transparency by allowing the public to be in actual collaboration with these state structures. Providing information, thus not only helps to evaluate the work of the government and its management, but also actively involves the public, the citizens of the state concerned, who become complicit in its management. Transparency becomes part of a ‘much larger project [...] that allows widespread *participation* in policy-making processes’,²⁷ as Curtin (1999) evaluates. This function of citizen participation in the governance of their own country is particularly in evidence when it comes to the allocation of general government funds through procurement procedures.

Gasco (2017), tracks the relationship between transparent management and the active participation of citizens in decision-making very systematically, making the following interrelated definitions part of the concept of an ‘open government’:

A transparent government, that is, a government that is accountable and that delivers information to citizens about its strategies, plans, and performance.

A collaborative government, that is, a government that involves citizens and other external and internal actors in the design, delivery and evaluation of public services.

A participative government, that is, a government that promotes citizens engagement in political processes, and, particularly, in the design of public policies.

A government that prioritizes the use of two key tools: open data [...] and open action [...].²⁸

Thus transparency provides added benefits, such as (i) increasing trust between the parties, (ii) increasing communication between the parties, (iii) enhancing the reputations of public organisations, and (iv) greater objectivity etc.

Of course, these benefits grow on condition that transparency is used to the right extent and in timely fashion, as discussed above, and one is always obliged to search for ‘the opposite side of the coin’ when it comes to possibilities. Therefore, along with the variety of formal information channels available and the variety of regulated mechanisms for public access to the process of government, it should be born in mind that these mechanisms very often fail to mobilise more active citizenship. Weak public interest is relied on by the local authorities to underplay the participation

²⁷ See above (n 5), 86.

²⁸ CE Jimenez-Gomez and M Gasco-Hernandes, *Achieving Open Justice through Citizen Participation and Transparency*, (Hershey: IGI Global, 2017), 158.

of citizens. At the same time, the more unfamiliar and unengaged the public remains the more their suspicions of the opacity and unaccountability of the actions of the state authorities grow. Citizens thus lose their desire to participate in the government of their own country and/or to be part of making collective decisions in the interest of the whole society and, as consequence, this feature of transparency can remain ‘stillborn’.

The aspects underestimated by local government (such as public awareness, participation and contribution in the decision-making process) emerges as a very serious deficit in their activities. The attention of the governance is often focused mainly on the budget winning projects and the other administrative activities. Thus, the local authorities proceed from the assumption that this in itself would provide civil support. The attention being paid to citizen participation is low and in many cases the authorities are also openly discouraged due the low social interest.

Anticorruption Instrument

The relationship between transparency and corruption has become axiomatic over the years and the two terms become almost inseparable from one another. Their influence is evident in most political and social statements by the ruling elites in every state as well as at an international level.

Naturally and logically, if transparency performs the three functions discussed so far – to disclose optimal quantity of information, to increase competition and to create a basis for thorough monitoring and control – it should also be a very successful tool to combat manipulation and other corrupt practices which permit the unjust enrichment of private individuals and groups from state budgets.

The idea that transparency diminishes corruption is well-established and uncontroversial, and was coined over 200 years ago. According to Bentham, exposure to public scrutiny promotes virtue in public officials, and diminishes the chance of dishonest behaviour. ‘Sunlight is the best disinfectant,’ as Supreme Court Justice Brandeis held in 1913. Transparency is often introduced as a tool to fight corruption, and is prominently featured in chapter 5 of the UN Convention against corruption, which deals with the prevention of corruption. The international financial institutions also promote transparency as a tool to fight corruption.²⁹

However, the set of functions, and mostly the anticorruption function, of a principle whose definition continues to challenge theoreticians and practitioners should not be exaggerated to such an extent that it does not consider its negative features and/or weaknesses.

As the focus of this work, through the examples and the comprehensive comparative analysis provided, is to assess the anticorruption function of transparency in the sphere of public procurement in particular, the evolution of this principle as a bulwark against corruption is discussed separately in 2.5 below.

²⁹ A Buijze, *The Principle of Transparency in EU Law* (Den Bosch: BOXPress, 2013), 47–48.

A Moral Postulate

As a summary of the existence of all basic features of transparency, systematised in this part of the chapter and related almost homogeneously with each another, one more function which goes well with the others should inevitably be added – transparency sets moral standards. Looking a little beyond the focus of this work, this function is fundamental to the principle, since if transparency is not perceived as a moral standard, it will lose all its other functions and their value for society. In contrast, as demonstrated in the following chapters, and especially in Chap. 5, transparency and the rules it imposes are very often used as ‘iron cover’ for what is happening beyond the scope of the public monitoring.

In fact, transparency should be regarded more as a symbol – a symbol of the will of the legislator and the market to ensure fair competition and economic procurement, a symbol of a moral standard known for centuries, but not recognisable in today’s bids; a symbol and a promise that the allocation of public funds will not entail theft.³⁰

That is why it is extremely important that the perception of transparency as a set of components and features does not merely provide ready-positives and access to information on the management of a Member State (which in itself means that the very existence of transparency already solves pressing problems of the modern democratic society). Quite the opposite - transparency is expected to provide actual opportunities for the public to be actively involved in management: sufficient information for decisions to be properly assimilated and, ultimately, for the public to feel the need, the moral obligation, to observe and monitor compliance with European values in government.

This aspect of transparency is likely to be assessed and met relatively rarely in theory, but the legal and regulatory framework cannot exist in isolation from the ‘natural rules’ of behaviour and outside the historical and socioeconomic conditioning of how a country is run. This additional function should therefore stand alongside all the other features of transparency listed above. The comparative analysis performed in this book also definitely supports this view.

2.3 Transparency in the EU Public Procurement Legislation and the Work of International Organisations. Evolution of the Principle

Having systematised transparency in terms of its definition (in general), and its main features and functions, the discussion here focuses again on transparency in the field of public procurement. Due to the marked lack of unanimous opinion about

³⁰I Georgieva, ‘The miracle of transparency’ (2015) *‘Capital’ newspaper* <http://www.capital.bg/biznes/vunshni_analizi/2015/09/27/2616907_chudoto_na_prozrachnostta/>, accessed 2 October 2016.

the role of transparency in public procurement, it is necessary first to discuss how this principle is codified in the EU legislation, and its specific nature in the award process to be elucidated. Therefore the systematisation of the material acts and practice within the EU and the work of the main international organisations towards expanding the scope of transparency are a milestone for this chapter. The ‘character’ of transparency in public procurement will thus be built consistently, along with its specific elements, as a common understanding of this principle to be achieved.

2.3.1 *The Treaties and the European Court of Justice*

The Treaty on European Union (TEU) and the TFEU, collectively referred to as the Treaties,³¹ do not specifically regulate any issues concerning the award of public procurement contracts, except through the normal internal market provisions.³² The transparency principle is not explicitly regulated by the Treaties.

However, the European Court of Justice (ECJ) deliberately addresses this problem in the *Telaustria* case³³ in 1998. This judgment practically imposes an additional element to the principle of free movement in the EC Treaty in the context of public procurement, namely the obligation of transparency. According to the ECJ ‘[t]hat obligation of transparency which is imposed on the contracting authority consists in ensuring, for the benefit of the potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed’.³⁴

The transparency principle in the public procurement regime finds its origins in the provisions of the Treaties through the *Telaustria* case.³⁵ This means that the transparency obligations become applicable to all procurement procedures irrespective of their value, ie whether they are below or above the EU thresholds. This general application of the principle has been widely criticised as creating confusion and

³¹ The current consolidated version of these Treaties can be found in OJ 2016 C202, p. 13 and 47 respectively.

³² The main relevant provisions are Arts 34–36 TFEU on the free movements of goods, Arts 49–55 TFEU on the freedom of establishment, Arts 55–62 TFEU on services and Art 106 TFEU on special or exclusive rights on public undertakings and entities.

³³ C-324/98 *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG* [2000] ECR I-10745.

³⁴ In light of the discussion of the lack of any unanimous definition of transparency, Arrowsmith (n 9) 191–199, discusses whether the conception of transparency provided by the ECJ in *Telaustria* is indeed clear and comprehensive and whether transparency involve requirements other than advertising.

³⁵ Historically, the first case which considered the principle of transparency is Case C-87/94 *Commission v. Belgium (Walloon Buses)* [1996] ECR I-02043. Case C-275/98 *Unitron Scandinavia A/S* [1999] ECR I-8305 then added that transparency should always apply, even when no tendering requirements are under consideration. However, *Telaustria* had the most definitive impact on the implementation of this principle in public procurement procedures.

undermining clarity in the procurement process, rendering unclear which particular obligations and rules should be complied with. Arrowsmith's (2005) view that 'the Treaty's transparency principle should be fashioned to apply only when there are no [...] alternatives in place'³⁶ seems to be a rather better approach than the uncertainty created by the *Telaustria* case.

Further, Trepte (2007)³⁷ explains in detail why the *Telaustria* conclusions are open to criticism, by discussing three main issues:

- (a) advertising below the threshold might contradict national policies with respect to when the value for money principle applies (advertising below a certain value of contract could be considered not cost efficient);
- (b) the imposition of thresholds for contracts of higher value, which are most likely to affect competition seriously reflects the desire of the legislator that such procurements be treated more strictly and follow a chain of rules which are considered unnecessary for contracts under a certain value (this is in effect a *de minimis* principle);
- (c) the imposition of a general transparency requirement implies that an advertising obligation would apply even to those numerous specific contracts excluded from the scope of the applicable procurement legislation, which 'cannot be what was intended'.³⁸

Following *Telaustria*, these issues have arisen in numerous subsequent cases,³⁹ as well as in *Coname*,⁴⁰ where, however, the scope of application of the common Treaty rules, and in particular transparency, was limited to contracts which are of interest to bidders from other Member States (even if below the thresholds).

Finally, in 2007, Advocate General Sharpston clarified to the greatest extent so far the uncertainty regarding the application of the transparency rules to contracts below the threshold in *Commission v Finland*.⁴¹ She adopted a much more liberal approach to below-threshold contracts, concluding that the degree of publicity for low value contracts should be determined by national law (meaning that the general rules of the Treaties could not apply sufficiently to such contracts).⁴² She opined that the imposition of detailed publicity requirements for these contracts would lead to legal uncertainty.

³⁶ Arrowsmith (n 9) 197.

³⁷ Trepte (n 6) 19–22.

³⁸ Ibid 22.

³⁹ See Case C-59/00, *Bent Moustén Vestergaard v Spottrup Boligselskab* [2001] ECR I-9095; 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 – which reiterate to a great extent the conclusions in *Telaustria* and discuss again the applicability of the general rules of the Treaties to below-threshold contracts.

⁴⁰ Case C-231/03 *Consorzio Aziednde Metano ('Coname') v Padania Acque SpA* [2005] ECR I-7287.

⁴¹ Case C-195/04, *Commission v Finland* [2007] ECR I-3351, 3353.

⁴² See paras 79 to 98 of the Opinion of Advocate General Sharpston in that case.

As will be seen in this book, it is not always the case that, where European legislation or ECJ decisions provide Member States with greater freedom of action in the application or regulation of a certain element of public procurement procedure, this freedom finds expression in a successful and practical legal rule. In many cases, eg in Bulgaria, the legislator tends to ‘play it safe’ and attempts to secure its work against possible criticism by the EU and so, despite the availability of an option of a lighter regime, chooses to regulate procedures in such a way as to make them far more complicated and difficult to apply than necessary. In this specific case, however, it is possible to draw the general conclusion that the opinion of Advocate General Sharpston in *Commission v Finland* puts a stop, at the very least, to the issue of the endlessly widened application of the general Treaty rules⁴³ following *Telaustria* and subsequent cases, and the uncertainty as to how and to what extent below-threshold contracts should be advertised and publicised.⁴⁴

2.3.2 *The Directives*

Council Directive 71/304/EEC and Council Directive 71/305/EEC⁴⁵ were the first European measures which introduced the basic principles of public procurement conduct – non-discrimination, equal treatment and transparency. However, the original texts of these directives⁴⁶ did not mention the term ‘transparency’ explicitly but rather implied the need for such a rule and some of its elements.

Further, the four directives⁴⁷ which regulated public procurement procedures before the current EU public procurement legislation were also concise as to matters

⁴³ See also paras 27 to 32 of the judgment in *Commission v Finland* (n 41).

⁴⁴ See also D McGowan, ‘Clarity at Last? Low value Contracts and the Transparency Obligations’ (2007) 4 *Public Procurement Law Review* 274–283.; T Kotsonis, ‘The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls Below the Relevant Value Threshold: Case C-195/04, *Commission v Finland*, 26.4.2007’ (2007) 5 *Public Procurement Law Review* NA119–NA122.

⁴⁵ Council Directive 71/304/EEC of 26.7.1971 concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches [1971] OJ L185; and Council Directive 71/305/EEC of 26.7.1971 concerning the coordination of procedures for the award of public works contracts [1971] OJ L185/5.

⁴⁶ The preamble to Directive 89/440/EEC [1989] OJ L210, amending Directive 71/305/EEC, discusses the need for increased transparency in the procedures to improve monitoring of the compliance with the prohibition of restrictions to the Treaties freedom of establishment and the freedom to provide services.

⁴⁷ ie Council Directive 92/50/EEC relating to the coordinating of procedures for the award of public work contracts [1992] OJ L209/1; Council Directive 93/36/EEC co-ordinating procedures for the award of public supply contracts [1993] OJ L199; Council Directive 93/37/EEC concerning the co-ordination of procedures for the award of public works contracts [1993] OJ L199; and Council Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] OJ L199.

of concrete transparency rulings. By way of exception, Council Directive 93/38/EEC⁴⁸ discussed in its preamble the need to ensure a ‘minimum level of transparency [...] for monitoring the application of this Directive’.

However, based on the requirements and restrictions of these four directives, Arrowsmith (2005)⁴⁹ determines quite comprehensively the four basic aspects of the transparency principle in government procurement and the corresponding obligations of the parties involved in procurement which reflect these elements. She distinguishes six explicit transparency rules, which require that entities:

1. advertise contracts Europe-wide through the European Commission,
2. hold a competition between interested firms. Entities may dispense with an advertisement and competition only in exceptional and specific cases, such as extreme urgency.
3. exclude firms from the competition only for justified reasons specified in the directives, mainly concerned with the firm’s lack of financial or technical capacity.
4. respect minimum time-limits for important phases of the procedure, to ensure that all firms have time to participate.
5. award the contract based on the results of the competition, on the basis of criteria specified in the directives and notified in advance.
6. provide information on decisions to interested parties, including tenderers.⁵⁰

The four aspects of transparency which Arrowsmith (2005) sees as directly linked to these obligations are:

- (a) publicity for all contract opportunities;
- (b) publicity for the rules governing each procedure;
- (c) limitation of discretion, particularly relevant to preventing concealed discrimination and
- (d) opportunities for verification and enforcement.⁵¹

The first EU procurement legislative measures that explicitly set out rules and concrete provisions on how transparency should be secured in the conduct of any public procurement procedure were Directive 2004/17/EC and Directive 2004/18/EC⁵² (collectively referred to as the Procurement Directives). While these Procurement Directives and their current replacements – Directive 2014/24/EU and

⁴⁸ Council Directive 93/38/EEC co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1993] OJ L199.

⁴⁹ Arrowsmith (n 9) and S Arrowsmith, *The law of public and utilities procurement. Vol. 1* (London: Sweet & Maxwell, 2014).

⁵⁰ Ibid 155 and 164–166 and Arrowsmith (n 9) 127–128.

⁵¹ Although Arrowsmith (n 9) does indeed provide the most detailed explanation of the transparency principle, covering all its possible features and characteristics, I remain unsure whether transparency in procurement must be such an overly meaningfully loaded idea.

⁵² 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; and Directive 2004/18/EC of the European Parliament and of the Council on the coordina-

Directive 2014/25/EU⁵³ (collectively referred to as the New Procurement Directives) – will be discussed as appropriate in this work, it is worth noting at this stage that none of these directives contain a definition of the term ‘transparency’. Although the new procurement package, which should have been transposed in all Member States by April 2016, contributes to the expansion of transparency to some extent (eg by promoting e-procurement), the focus of the changes is elsewhere: facilitating procedures, supporting small and medium enterprises, fighting corruption and regulating social and economic goals in procurement.⁵⁴

2.3.3 The Work of International Organisations⁵⁵ Towards Transparency in Public Procurement Procedures

In the light of the growing importance of transparency as a tool to combat corruption in public procurement, some international organisations have prepared guidance on this principle and have researched into good practice in transparency in government policy as a priority. The role of the World Trade Organisation (WTO), the Organisation for Economic Co-operation and Development (OECD) and Transparency International (TI) are of particular importance in this respect.⁵⁶

tion of procedures for the award of public works contracts, public supply contracts and public service contracts OJ L134/114.

⁵³ Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC OJ L94/65; and Directive 2014/25/EU of the European Parliament and of the Council of on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L94/243 (both directives to be transposed by 18 April 2016).

⁵⁴ The mechanism provided by all these European directives in the field of the public procurement, past and present shows that the European legislator has rejected full harmonisation of all public procurement procedures, with the idea of ‘general harmonisation’ being perceived as sufficient. Individual Member States have thus preserved some differences in their legislative schemes, which also affects the transparency rules.

⁵⁵ Not exhaustively enumerated and reviewed.

⁵⁶ The EU and the United Nations have also developed specific anticorruption policies and endorse transparency programmes and instruments as the fundamental instruments to combat corruption. See also the 2011 Uncitral Model Law on Public Procurement, (Uncitral.org 2011) <www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html> accessed 20 April 2016.

WTO

The WTO started operation in 1995 as the successor of the [General Agreement on Tariffs and Trade](#) (GATT).⁵⁷ The WTO is an international organisation created to act as a supervisor of international trade and its work is directed towards regulating trade between different countries and to providing framework trade agreements.

One of the major achievements of the WTO in public procurement regulation is the Agreement on Government Procurement (GPA).⁵⁸ The GPA covers matters such as public works, supplies and other services contracts, the principles which should be observed and dispute resolutions. It also sets out sample transparency obligation provisions. Although the GPA remains an optional agreement for WTO members and could not become an obligatory measure, it is a positive step towards the concretisation of a procurement regulatory scheme at an international level.

After the good example of the GPA another creative initiative of the WTO was the unsuccessful attempt to establish a multilateral agreement for transparency in procurement. In 1996 the Singapore Ministerial Conference set up a WTO Working Group on Transparency in Public Procurement to ‘conduct a study on transparency’⁵⁹ in different countries’ government procurement by reviewing national policies. At the Doha WTO Ministerial Conference, held in November 2001, the need for a multilateral agreement on transparency in government procurement was broadly discussed. The delegates agreed to negotiate further⁶⁰ and decided that the ‘negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers’.⁶¹

However, the lack of clarity about the main purposes of transparency and its regulation and the delegates’ differing views resulted in a decision on the future of the transparency agreement only in 2004. The WTO General Council adopted a decision,⁶² which included determining that the issue of transparency in government procurement ‘will not form part of the Doha Work Programme and therefore no work towards negotiations [...] will take place within the WTO during the Doha

⁵⁷ An international organisation established in 1947.

⁵⁸ The *Agreement on Government Procurement* entered into force 1981, and was renegotiated in 1994 (entered into force 1996). The GPA was further revised in 2012, which entered into force on 6 April 2014.

⁵⁹ Singapore WTO Ministerial 1996 (Ministerial Declaration) 13 December 1996 WT/MIN(96)/DEC, <www.wto.org/english/thewto_e/minist_e/min96_e/wtodecl_e.htm> accessed 20 April 2016.

⁶⁰ The agreement of the delegates was for these negotiations to be conducted at the Fifth Ministerial Conference in Cancun, 2003. However, no such negotiations were launched at this Conference and the agenda was referred to the General Council of the WTO.

⁶¹ Doha WTO Ministerial 2001 (Ministerial Declaration) 14 November 2001 WT/MIN(01)/DEC/1 <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 20 April 2016.

⁶² WTO ‘Doha Agenda Work Programme’ (General Council Decision) 1 August 2004 WT/L/579 <www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm> accessed 20 April 2016.

Round’.⁶³ This decision discontinued the activity of the Working Group on Transparency in Government Procurement.

OECD

The OECD is an international economic organisation established in 1961 and dedicated to improving democracy, identifying good practices, coordinating domestic and international policies in economic, environmental and social issues. The risk of corruption and the lack of transparency in public procurement is an issue largely covered by the activities of OECD. In 1997 OECD members and associated non-members signed the ‘Convention on Combating Bribery of Foreign Public Officials’, known as the Anti-Bribery Convention. One of the main recommendations in that text is that member countries should work on increasing transparency levels in public procurement. The OECD Working Group on Bribery undertakes various kinds of activities and publications to promote transparency and accountability. The elements of the transparency principle which ensure integrity in public procurement were described by the OECD as:

Ensuring a sufficient degree of transparency to promote fair and equitable treatment in the whole procurement cycle (eg record management, e-procurement); Shedding light on non-competitive procurement to enhance integrity (eg specific reporting, rotation, random audits).⁶⁴

As another endorsement, the OECD Revised Recommendation on Combating Bribery in International Business Transactions⁶⁵ pledges to support the WTO in their efforts for promoting transparency in public procurements.

Transparency International

Transparency International (TI) is an international non-governmental organisation founded in 1993. It describes itself as a ‘global civil society organization leading the fight against corruption’.⁶⁶ Its network consists of more than 90 locally established national agencies. The main activity of this organisation is to promote transparency at each level of political and economic behaviour and, in particular, in public procurement. TI approaches other organisations, including the OECD and encourages joint activities and lobbying government to enact and apply anticorruption measures

⁶³ Ibid.

⁶⁴ OECD/DAC Joint Venture on Procurement, ‘Integrity and transparency in public procurement – from good practice to the OECD Checklist’ (Presentation) (2007) Copenhagen, 6.

⁶⁵ OECD ‘Revised Recommendation of the Council on Combating Bribery in International Business Transactions’ (adopted by the Council at its 901st session on 23 May 1997) C/M(97)12/PROV 4.

⁶⁶ Transparency International, ‘The Global Anticorruption Coalition’ <www.transparency.org> accessed 20 April 2016.

and to increase transparency in the international legal framework. In this respect TI is often portrayed as the great supporter and promoter of the OECD Anti-Bribery Convention. TI's policy is to investigate instances of corruption from multiple angles and to support studies, research and reports on corruption.

Currently, the best known of TI's activities is its Corruption Perceptions Index (CPI), which annually ranks all countries according to their degree of perceived corruption. The CPI was developed by TI and was first published as an annual index in 1995. It illustrates (based on subjective principles) the corruption levels in more than 170 countries worldwide. The index is based on studies conducted among representatives of business and analysts from each country considered. The CPI puts particular emphasis on corruption in the public sector and defines it as 'abuse of public status for personal benefit'.⁶⁷

2.3.4 Evolution of the Transparency Principle in the Field of Public Procurement

The aspects of how the transparency principle manifests itself in the process of awarding procurement contracts overlap to some extent with the functions and features of transparency, as a main democratic principle (see Sect. 2.2.2), but they also have their own specific features which are analysed here.

The development of the legal framework governing the transparency rules in awarding public contracts reviewed above clearly demonstrates the evolutionary path that this principle has followed and the functions attributed to it today. A certain ambiguity regarding this principle's definition and content is reflected in its existence in the public procurement system. Along with the purely theoretical differences that burden transparency in this specific area, however, there are other factors which affect the understanding, sense and application of this principle.

Traditional Perception

By way of a summary, the initial attempts to codify this principle in the procurement legislation, the academic attitude towards it (eg the four aspects of transparency in procurement, as observed by Arrowsmith (2005)), and even the OECD's attempts to delineate transparency depict the application of transparency in the award of public procurements as significant in two main respects, which form the traditional perception of the functions of this procurement principle:

- (A) Expanding competition between the candidates by providing appropriate amounts of information about the award

⁶⁷ Transparency International, 'Corruption Perception Index – Transparency International Bulgaria' <www.transparency.bg/en/research/corruption-perception-index> accessed 20 April 2016.

First, transparency in public procurement is perceived mainly as a tool for providing the requisite level of awareness/information for all stakeholders in the award process. Transparency thus becomes a major element of the rules on public procurement due to the very nature of this specific and artificial mechanism for spending the resources of a Member State in the public interest (eg rules on advertising the procurement, publishing the award criteria and its overall documentation etc). This in turn enables society to track compliance with the procedural rules smoothly, and to actually participate in the process of the allocation of its funds, as further discussed below.

Second, transparency is an essential tool for supporting the wider range of competitors and defining the choices faced by citizens. In public procurement the freedom to negotiate is generally exceptional, and the basic idea of this mechanism is to create competition among manufacturers and/or suppliers in a given area, so that the state can take advantage of the most economically advantageous offer on the market.

Transparency, thus, contributes to the expansion of competition in two ways:

- (i) Advertisement of the procurement – the notification of each new procurement procedure at local and EU level enables a significant niche market at a European level to take part in public procurement procedures. The common publication requirements imposed by the EU's Procurement Directives, mean that transparency plays a central and irreplaceable role in removing the boundaries and limits for the potential tenderers who are not locally-based. The circle of the competitors increases markedly, which in turn gives a serious impulse to innovation, the demand for goods and services that have proved their quality in different European markets, and the emergence of leaders in presenting the best offers in terms of value for money.

The Procurement Directive sets out step-by-step procedures related to the notice and advertisement of tenders, leaving little choice as to when, where, and how to advertise procurement events. However, fulfilling the obligation of transparency requires the use of transparent language.⁶⁸

- (ii) Information regarding the requirements of the award and the parameters of the procurement contract – the specific documentation on the award and the technical requirements for it are also public and transparent, which enables competitors to evaluate the feasibility of concluding the procurement contract. The detailed specifics helps bring in further, SME competitors to orient themselves to the needs and requirements of the contracting authorities and to prove their reliability, and thus to participate equally in the procedures alongside the 'big players'. The participation of SMEs widens the competition and provides the contracting authorities basis for sufficient price and quality comparison.

⁶⁸ *Briefing No. 3: The guiding principles of public procurement transparency, equal treatment and proportionality* <<http://www.clientearth.org/reports/procurement-briefing-no-3-guiding-principles-equal-treatment-transparency-proportionality.pdf>> accessed 20 October 2016.

In addition to the publication (advertising) of the subject of the procurement contract and the rules for winning the bid, transparency achieved a reduction in the possibility of subjective discrimination of participants (thus expanding the circle of candidates and the competition further) and also provides an opportunity for control over the application of such rules, as discussed further below. The circle of all the required elements needed to achieve integrity in public procurement closes with transparency, applied in absolute symbiosis with the other principles of the award. Of course, as already commented above, i) and ii) can only survive and develop their potential if the information provided is balanced and optimal in its extent, and does not enable concerted practices and/or manipulation of the procurement procedure.

(B) Enabling the public to participate in the award process, made accessible to the widest possible range of individuals (including but not limited to the stakeholders).

The EU legal framework ensures transparency so that the general public may have full access to the process of public expenditure by providing a wide range of interested parties the right to appeal and/or to interact in the procedure. Interested parties can thus affect the stages of the procurement procedure as well as the enforcement of the contract. They often serve not only their own interest but also the interest of all taxpayers. An interested party can draw the bottlenecks in a procurement tender to the attention of the competent authorities. Therefore, if a discriminatory and/or illegal thread in the procedure or its documentation is established, its correction or cancellation would be of interest to the whole public and not just to the complaining party. Therefore Bovis (2016) reviews this proactive role even as a 'second objective' of transparency, which aims to ensure that this principle 'represents a substantial basis for a system of best practice for both parts of the equation'.⁶⁹

If the view, advanced earlier in this chapter, that society does not always show the necessary trust in government, and often loses the desire to take advantage of the benefits of transparency by gathering information and by direct involvement in the government process, is true for transparency in general, for transparency in the process of procurement the public interest rarely drops due to the clear financial issues involved. Sometimes a narrow range of stakeholders can act as decision-changers, changing the original intention of the contracting authority, doggedly trying to amend the parameters or even annul the entire tender. In general, though, the public interest in an honest allocation of public money matches that of the separate groups of stakeholders (at least when it comes to preliminary documentation and notification). Therefore, active participation in the whole process of procurement would be not possible without openness and publicity of the awards (applying the *de minimis* principle strictly, however).

In a different perspective the disclosure of the procurement process not only enables public participation in the distribution of public funds, it also forms the overall opinion and satisfaction of the level of accountability of the government.

⁶⁹ C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Cheltenham: Edward Elgar, 2016), 35.

Transparency in public procurement is critical. The manner in which government conducts itself in its business transactions immediately affects public opinion and the public's trust in good government. In addition to encouraging the public's good will and strengthened trust, the more practical business benefits of transparency are increased competition and better value for goods, services, and construction.⁷⁰

On this basis however, the role of transparency in public procurement in some Member States tends to be exaggerated, and it becomes a true benchmark for a democratic and accountable governance, in line with the European values. The questions whether the transparency principle can actually be trusted to such an extent and whether procurement practice strains the principle with too many expectations are addressed in this book.

Anticorruption Aspect. Shift of Priorities

So far the role of the transparency principle in public procurement has been described mainly as a link between the other principles of the process that provides good level of competition and the possibility of co-participation of the society. Attention now turns to the development of this principle and its targeting in a different direction than originally perceived.

Analysis of the various aspects and nuances of this multilayered principle suggests a secondary conclusion regarding the differences in its content. Apparently, the problem is not only in the theoretical approaches towards transparency, but also in its evolution with a view to the ongoing dynamic changes at EU level. The review of the European legislation governing transparency in public procurement in the last nearly five decades, and the work of the international organisations in this field clearly demonstrates the development in the attitude of the European legislator to this principle. In particular, the legislative framework of public procurement has been amended severely in recent decades, which is a function firstly of the regular post-legislative monitoring processes and the incidental identification of various issues in the process, and secondly the considerable extension of the EU's borders in recent years.

As became clear from the classification of the main functions and features of transparency, when regarded as a basic principle of a state government, it certainly possesses the qualities to serve as an anticorruption tool. Further, expanding the circle of competitors by providing enough information about the process of the award, as well as enabling the community to take direct part in this process facilitates this anti-corruption aspect in the award procedures. It turns out that transparency can help the fight against corruption in public procurement by highlighting the actions of all stakeholders; there is confidence that it will produce results. The procurement principle thus slowly develops from being an information pillar for the

⁷⁰ *Public Procurement Practice: Transparency in Public Procurement* <<https://www.nigp.org/docs/default-source/New-Site/global-best-practices/transparency.pdf?sfvrsn=2>> accessed 20 October 2016.

nationwide distribution of resources into a serious anti-corruption tool. From this perspective, the original meaning of transparency shifts to being a useful mechanism for determining the basic and most common corruption scenarios to select a contractor in violation of procurement rules. This anticorruption function of transparency gradually began to outpace the two traditionally perceived aspects of transparency in procurement so far described, and even turns out to be its main characteristic in the award procedure. But why has this shift taken place?

On the one hand, the rising levels of corruption in the sector are a major incentive to refocus the role of transparency in public procurement. This is clearly visible in the discussions depicted in the following chapters of this book. The artificial environment for implementing the exchange of goods and services for state institutions and utilities, regulated strictly, and with (usually) no direct negotiations between traders, leads to serious increase in the attempts to manipulate the process. The limitations in the choice of a procurement contractor and the spending of public money (or spending of money in the public interest) are a driving force for the private sector to overcome the legal barriers to accessing public funds. This creates scope for various corruption schemes, and also challenges for the European legislator seeking to reduce corruption in the procurement sector.

The academic perspective on the legislative changes to the EU directives governing public procurement shows that in recent years corruption in this sector is in the focus of the rules, and in the latest legislative framework the EU is clearly seeking to strengthen the anticorruption measures.⁷¹

The ongoing EU legislative reform is meant to facilitate cross-border joint procurement by providing uniformity and avoid the legal and procedural hurdles created by national law conflicts. Its second purpose is to minimize if not eradicate corruption from public procurement process by bringing transparency, integrity and accountability. Solutions and good practices exist and most EU members have taken steps in the right direction but sometimes too small and/or too few. It is true that public procurement corruption still strives in Eastern European EU countries compared to its Western ones. Too often, interests groups are acting on behalf of the citizens on false pretences, spending public money to serve their own interest and living the community with the false impression of progress.⁷²

This process of minimising ‘corruption from public procurement process by bringing transparency’⁷³ creates a whole new era in the existence and use of the rules of transparency in public procurement. Moreover, the anticorruption hopes about the power of transparency have gradually reached their zenith. The two terms (corruption and transparency) are almost inextricably linked now. From this point of view a retreat to other aspects of transparency in public procurement is even observed (as already discussed) at the expense of the anti-corruption aspect.

⁷¹ See eg Art 35(5), Art 57, Art 83(3) Directive 2014/24/EU.

⁷² A Popescu, ‘Public Procurement Corruption in the European Union’ (2014) Journal of Public Administration, Finance and Law, issue 1/2014 <http://www.jopafl.com/uploads/special-issue-1-2014/PUBLIC_PROCUREMENT_CORRUPTION_IN_THE_EUROPEAN_UNION.pdf> accessed 24 October 2016, 15.

⁷³ Ibid.

[T]ransparency may facilitate collusion, leading to a conflict between the desire to promote competition and the desire to prevent corruption and favouritism. Rules which limit the pool of potential suppliers (for, say, industrial policy objectives) may have an important effect on the level of competition and on the efficiency of the procurement. Where procurement is used as a tool for the pursuit of such other public policy objectives, the benefits should be carefully weighed against the effects on competition.⁷⁴

On the other hand, the rampant corruption in the allocation of budgetary resources in the EU is not just about the temptations that this artificial mechanism creates itself for the private sector. The growth of corruption in recent years is also a result of the EU's expansion, to embrace now countries which have very different socio-economic status from each other.

The largest EU expansion, which happened to Central and Eastern Europe (CEE), Malta and Cyprus, and saw no fewer than 10 countries become new members in 2004, followed by two more in 2007, did not hamper the overall efficiency of EU decision-making either, not even during the five years in which it functioned on the basis of the Nice Treaty; [...]. Nonetheless, 'enlargement fatigue' has become a scapegoat for a range of deeper problems and stumbling blocks in the EU, giving a new understanding to the 'widening versus deepening' dichotomy which characterised the debate prior to the 2004 enlargement round.⁷⁵

As TI has put it: 'EU accession countries often face considerable systemic corruption problems in their public institutions. The scale of the problem has forced the EU to tackle corruption seriously in the accession process. Across the countries concerned, a major weakness of anticorruption reforms undertaken so far has been the significant gap between reforms on paper and their real implementation in practice'.⁷⁶

Against this background, the legislative framework, not only at European but also at local level, began to suffer serious adjustments in the attempt to tackle corruption in public procurement in all (and the new) Member States. As discussed, it is very tempting for civil servants to allow manipulation in the allocation of resources other than own resources, in public procurement procedures. This applies fully to the recent Member States of Eastern Europe and the Balkans:

The accession of Bulgaria and Romania in 2007 is widely perceived as having been carried out too quickly and not preceded by adequate preparation, especially with regard to justice reforms and anticorruption policies. [...] To date, recurrent problems with corruption, organised crime and the functioning of democratic institutions in Bulgaria and Romania fuel the EU's 'enlargement blues' but increasingly also mistrust among member states [...].⁷⁷

Since Bulgaria is one of the focuses of this book – as an example of a Member State which remains unable to curb corruption in public spending – and its procure-

⁷⁴ OECD *Competition and Procurement (Key Findings)* (2011) Competition Committee <<https://www.oecd.org/daf/competition/sectors/48315205.pdf>> accessed 24 October 2016, 56.

⁷⁵ R Balfour and C Stratulat *The enlargement of the European Union* (2014) Discussion Paper <http://www.epc.eu/documents/uploads/pub_3176_enlargement_of_the_eu.pdf> accessed 24 October 2016, 1.

⁷⁶ Transparency International <http://www.transparencyinternational.eu/focus_areas/enlargement/> accessed 24 October 2016.

⁷⁷ See above (n 75), 2.

ment system is part of the comparative analysis performed between three Member States, the attitude towards corruption in that country and the measures taken against this negative phenomenon offer a solid basis for significant conclusions regarding the evolution of the principle of transparency in public procurement and the development of its anticorruption aspect into a substantial third aspect of the principle.

Moreover, the evolution of the meaning and function of transparency in EU legislation and the evaluation of this principle as an anticorruption tool after EU enlargement not only displaces the concept of transparency in public procurement. It crystallises the fact that the anticorruption essence of this procurement principle could complement the other aspects of transparency. The access to information, the level of competition achieved and the participation of society in the award process interact with each other to achieve the best possible results when choosing a contractor in a public procurement, as reviewed above. However, when transparency serves its purpose of limiting the distortions corruption in an otherwise strictly regulated sphere, it could also increase competition among the participants, ie a positive interaction with the anticorruption aspect of transparency also exists. If the information released, being public, useful and accessible to a wide range of individuals, contributes to the increase of competition in the award process, the existence of a corrupt environment has the reverse effect – it reduces serious competition in the sector. Therefore, assuming that transparency has an anticorruption impact on procurements, it certainly helps to ensure its other immanent feature – competition among the stakeholders.

The above discussion shows that the change in the attitude towards transparency as a fundamental principle in procurement does indeed highlight its anticorruption aspects. This arises from the main factors described – the increasing corruption in the sector caused by (but not limited to) the enlargement of EU. That ‘priority shift’ does not affect the essence of this principle, however, which also remains a main pillar of the competition between the participants and openness of all contracting authorities’ actions. On the contrary – it adds value.

Undoubtedly, when the actions of public institutions focused on spending public funds in the interest of all society are as transparent as possible, a major proportion of existing corruption schemes become much more difficult to do, if not impossible. The anticorruption function of transparency is thus justified and its positive impact is undeniable.

By studying corruption in public procurement, however, there are some critical aspects of the correlation between transparency and corruption which become apparent. The anticorruption aspect of transparency in public procurement turns out to be an especially convenient tool for the authorities to demonstrate activity in the fight against corruption. Therefore the actual limitations of transparency as a tool against corruption as well as the assessment of the effectiveness of this principle still remain a grey zone.

These issues in terms of the anticorruption aspect of the transparency principle are at the heart of this book. Numerous issues arise. Can a Member State’s legal system which proclaims transparency as its creed rely on transparency to deal with

rampant corruption in spending public funds? What kinds of schemes remain hidden from transparency? Can this otherwise proven fundamental principle of modern society sometimes obstruct the efficient operation of state institutions, and even be turned to contribute to the concealment of corrupt machinations? Or, in the words of Lindstedt and Naurin (2010), ‘we find that looking only at average effects gives a misleading picture of the significance of transparency for corruption. Just making information available will not prevent corruption’.⁷⁸

That is why the book presents a comparative analysis between the three Member States that demonstrate a radically different attitude to the principle of transparency in the fight against corruption in public procurement, thereby achieving the contrast conclusions on whether the evolution of this principle goes in the right direction.

2.4 Progress and Degradation of the Principle of Transparency. The Example of Bulgaria

2.4.1 *Historical Predisposition*

A comparative analysis of the laws of different countries is successful and has achieved its objectives only if it considers the historical and/or social basis of the differences in the legislative decisions. It is not possible to arrive at a correct theoretical conclusion without looking at the root of the problem and determining why the tendency to create norms which do not produce results was born. Therefore, this part of the chapter offers a brief historical ‘tour’ of Bulgarian procurement legislation (as an example of a Member State which mainly relies on transparency to cure corruption in procurement), which sets the background for examining subsequent proposals for changes in legislation, because as useful as the benchmarking with Germany and Austria may be, the individual characteristics of the countries compared is needed for final conclusions not to seem more desirable than applicable in practice.

Bulgarian legislation and Bulgarian legal theory engage with the principle of transparency in public procurement with the typical attitude of a post-communist country attempting to become a reliable EU Member State. At the beginning of its harmonisation process as an associated EU partner (after February 1995)⁷⁹ Bulgaria recognised the need to increase the transparency rules in its legislation as the ‘inevitable evil’ which would somehow persuade EU that the fight against corruption at a domestic level had unequivocally commenced. However, no reliable sanctions were

⁷⁸ C Lindstedt, D Naurin, *Transparency is not Enough: Making Transparency Effective in Reducing Corruption*, International Political Science Review Vol. 31, No. 3 (London: Sage Publications, Ltd., 2010), 301.

⁷⁹ The European Community Association Treaty came into effect on 1 February 1995 for Bulgaria.

proposed against participants in a particular regime for the consequences of infringing the obligations of transparency.⁸⁰

However, after a series of EU Commission reports criticising the high level of corruption and discrimination in the country, and strongly recommending legislative changes to ensure transparency at different institutional levels and in public procurement procedures in particular, Bulgarian members of Parliament began to realise the unavoidable need for fundamental change in the legal *status quo*.

Karadjova (2008)⁸¹ describes the Bulgarian attitude towards the European legislation regulating public procurement and the new principles which Bulgaria has to honour very perceptively:

The relations between the administration and the private business were built for the West-European countries. This leads to the implementation of a commonly accepted borderline of tolerance by the interference between public and private, reflected in the legislative acts, as well as in unwritten, but approved in time and observed ethical norms. Probably this is one of the reasons for the relatively easy establishment of common regulations for the public procurements by the founders of EEC. As part of the European market since 2007, Bulgaria is obliged not only to accept, but also to adequately apply this legislation. It is a huge challenge, that it should apply not only the Community directives, but also its ethical standards. Because of a number of historical, social and national psychology factors this turns out to be difficult to achieve.⁸²

The challenging change expected to happen in the Bulgarian mentality as well as the respect owed to the European principles on a domestic level, started to affect primarily academic theory, where some Bulgarian authors described the principle of 'publicity and transparency' (as it is known in Bulgarian legislation) as 'an important guarantee for the legal assignment, the functioning of the rest of the principles, as well as for the performing of public control over the procedures'.⁸³

However, the meaning of the transparency principle is neither clarified in current legislation in Bulgaria, nor studied in theory, with the simple exception that transparency is defined as a principle of public procurement.⁸⁴

Pressed by the EU and the reports of the EU Commission (before and after Bulgaria's accession to the EU), the Bulgarian legislator started a series of amendments and supplements to the existing legislative framework regulating public procurement which demonstrate, one after the other, a huge level of inconsistency in drafting and no reflection in practice.

In order to discuss the Bulgarian legislative approach to public procurement and to highlight the numerous negative changes which Bulgarian legislation has suf-

⁸⁰ As a consequence of the above, the Bulgarian legal scholarship has not specifically explained and analysed the transparency principle.

⁸¹ M Karadjova, 'Legal mechanisms for decreasing the conflict of interest by the assignment of public procurements' (2008) *Yearbook of New Bulgarian University* <www.nbu.bg/PUBLIC/IMAGES/File/CPA/Godishnik_2008/MilenaKaradjova.pdf> accessed 20 April 2016.

⁸² Ibid 3.

⁸³ M Markov and M Krivachka, *The new aspects in the Public Procurement Act* (Sofia: IK Trud i Pravo, 2006).

⁸⁴ Art 2(4) New PPA.

ferred, it is useful to investigate in chronological order the various public procurement laws, up to the one currently in force, discussing where appropriate the existence or absence of any transparency requirements.

The first Bulgarian legislation dealing with public procurement was drafted soon after the establishment of the third Bulgarian state.⁸⁵ The Ministry of Public Buildings at that time proposed the Public Tenders Act (*Закон за публичните търгове*), which entered into force in 1882. This Act did not formulate any principles for the performance of public tenders. However, some provisions stipulate the need for specific written evidence of the moral qualities of the candidates.⁸⁶

The first Bulgarian act which heralded what might be called a ‘transparency principle’ as a condition for fair and non-discriminatory procurement awards was drafted in 1906 – the Act on the Public Enterprises (*Закон за публичните предприятия*). The requirements related to transparency obligations were presented in detail. The provisions elaborated the strict order in which the contracting authorities should provide particular information about forthcoming tenders, so that all interested parties might be informed. Further, each tender had to be published in the State Gazette and tender announcements had to be posted in the cities and villages.

Later on, in 1921 the Public Enterprises Act was amended and supplemented. The new act, called The Budget, Accountancy and Enterprises Act (*Закон за бюджета, отчетността и предприятията*), further improved public procurement regulation and was an example of high quality, valuable legislation which guaranteed the implementation of fair and transparent procedures. Unfortunately, the communist regime after 1945 repealed all legal acts which regulated private property and the commercial activities of private enterprises.

The era of the communist regime in Bulgaria was later defined by history and the commentators as a period of flourishing ‘organised and official’⁸⁷ corruption. Even the communist dictator Todor Jivkov exclaimed: ‘Corruption has taken a permanent place in our lives and causes heavy moral and material damages [...] sometimes the interests of the state, evaluated in thousands and millions of Levas⁸⁸ and Dollars, are sacrificed just for a trivial bribe’.⁸⁹ At that time, public procurement no longer existed due to the fact that each property and/or service was distributed directly by the state and the government, and private property was prohibited.

As a symbol of post-communist Bulgaria, Ordinance No 2 of 1991 of the Ministry of Architecture and Construction for conducting tenders in the field of construction (*Наредба No 2 от 1991 г. на Министъра на строителството и архитектурата*

⁸⁵ After Bulgaria ceases to be part of the Ottoman Empire and regained its independence after five centuries lack of statehood in 1878.

⁸⁶ Art 6 Public Tenders Act 1882 stated that ‘No one could participate in the tender if he/she does not present a certificate of honesty taken from the local municipality’.

⁸⁷ R Avramov, *The communal capitalism – among the Bulgarian economical past* (vol III, Sofia: Centre for Liberal Strategies, 2007).

⁸⁸ ie the Bulgarian currency, the Lev, internationally abbreviated as BGN or Lv.

⁸⁹ M Ivanov, *Reformation without reforms. Political economy of the Bulgarian communism 1963–1989* (Sofia: Open Society Institute and Ciela 2008).

за провеждане на търгове в областта на строителството) was a first but poor attempt to regulate procurement in the field of construction works. This piece of legislation did not deal with any determination of the principles of the tender procedures whatsoever, although some transparency rules and obligations could be distinguished in some of its provisions. For example, Article 13 required that each tender be announced in advance through the mass media, and Article 14 set out the minimum requirements and information which a call for competition should contain. Even though this system was a step in the right direction, it was nevertheless a vague attempt to structure and regulate the tender procedures for construction works.

In 1995 Bulgaria entered into the Europe Agreement Establishing an Association with the European Communities and their Member States (signed 8 March 1993, entered into force 1 February 1995).⁹⁰ Article 68 of this Agreement stated that ‘The Parties consider the opening up of the award of public contracts on the basis of the principles of non-discrimination and reciprocity, in particular in the GATT context, to be a desirable objective’.

As a logical continuation of the undertakings from this agreement as well as of the development process in Bulgarian public procurement legislation, 1997 saw the adoption of the first Bulgarian Award of Procurement Contracts Act (*Закон за възлагане на държавни и общински поръчки*, APCA).⁹¹ This was the first attempt to codify public procurement procedures. Far from being a masterpiece, it was widely criticised for being incompatible with the Procurement Directives (despite the ongoing process of harmonisation). The APCA did not create any productive opportunities for promoting and practically enforcing transparency or any other procurement principles. It did not provide any definition of transparency but it did, however, contain some worthy provisions viewed in the light of the transparency requirements, such as:

- (a) a call for competition should be promulgated in the State Gazette and in at least two national daily newspapers;
- (b) a call for competition for major construction projects should be published at a certain period prior to the tender;
- (c) the tender documentation and conditions had to be described in detail;
- (d) the criteria for evaluation of the candidates had to be announced in advance etc.

After the APCA, the first Public Procurement Act (*Закон за обществените поръчки*, the First PPA)⁹² was enacted as an attempt to harmonise domestic and European legislation. Its main goal was stated to be ‘increase of effectiveness in the use of the budget and public funds through: 1. determination of transparency [...]’.⁹³

⁹⁰ OJ 1995 L358/3.

⁹¹ As promulgated SG 9/3.1.1997; repealed by SG 56/22.6.1999.

⁹² As promulgated SG 56/22.6.1999; repealed by SG 28/2004.

⁹³ Art 2 First PPA.

The four principles of the award of public procurement contracts were explicitly set out in Article 9:

1. guaranteed publicity of the procedure and transparency
2. free and fair competition
3. ascertained equal opportunities for participation of all candidates
4. guaranteed protection of the commercial secrets of the candidates and their offers.

The First PPA saw the creation of the first Bulgarian Public Procurement Register. An obligation for contracting authorities to publish in the State Gazette all planned procurement calls of over BGN 1 million (approx. EUR 511,273) by 31 March each year, was also envisaged. However, the information published had the simple purpose of attracting more candidates. Contracting authorities were still not obliged to announce the procurement procedure itself.

This First PPA could be regarded as a positive step towards the harmonisation of the Bulgarian procurement legislation with the Procurement Directives. However, one of its major failings was that it did not stipulate the establishment of a centralised supervisory authority to monitor the accurate application of the law and to control and sanction contracting authorities. The early years of the application of this act thus failed to achieve the desired clearer regulation, transparent actions by the participants in the procedure, and less corruption.

As a consequence of the EU Commission's Regular Report in 2003⁹⁴ and its harsh criticism of the state of the public procurement regime in Bulgaria, in 2004 the Bulgarian legislator decided to repeal the First PPA and to start tackling public procurement all over again with a brand new Public Procurement Act (*Закон за обществените поръчки*, the PPA).⁹⁵

A positive outcome of the PPA was the establishment of the Bulgarian public procurement Agency (the PPAgency) as a centralised controlling body specialised only in public procurement. The establishment of the Court of Arbitration by the PPAgency has been a further step towards the recognition of the transparency principle by contracting authorities as one of their ultimate obligations in the award of public procurement contracts.

In 2006 the Procurement Directives were transposed into the PPA which required so many amendments to the PPA and the whole package of applicable secondary legislation that in reality it became an almost entirely new law. Though criticised, the amendments of 2006 were a major step towards a modern, communicable and open regime.

⁹⁴In its 'Regular Report on Bulgaria's progress towards accession' (2003) the European Commission found that: 'As to public procurement, further efforts are necessary to align with the *acquis* and to build up the necessary administrative capacity', 24, and concluded that Bulgaria needs to address urgently the delays incurred in aligning with EU public procurement rules. (European Commission report <http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/rr_bg_final_en.pdf> accessed 20 April 2016).

⁹⁵SG 28/6.4.2004, as amended.

An additional reason for the radical redrafting of the PPA in 2006 was the monitoring report of the European Commission (EU Commission) of 25 October 2005. The conclusions of the EU Commission were:

Surveys and assessment conducted by both national and international organization confirm that widespread corruption remains a cause for concern and affects many aspects of society. There is a positive downward trend as far as administrative corruption is concerned, but the overall enforcement record in the field of corruption remains very weak [...] Some areas of public administration remain particularly vulnerable to corruption. This is the case for those engaged in public works contracting [...] There have been several exemptions already from the new law on public procurement [...] Claims of non-transparent procedures for procurement [...] are continuing.⁹⁶

As a consequence, the amended PPA provided some reasonable measures on how Bulgarian procurement administration could become more effective and transparent (although the corruption levels remain the same). The electronic format of the public procurement register was introduced and helped increase access to applicable procedures and planned procurements. Another positive effect of the amendments was the alignment of domestic law with the changes required by Procurement Directives and the obligation on contracting authorities to publish public procurement calls for competition at the European level as well.

For almost a decade, the PPA has undergone more than thirty amendments and supplements, most of them dictated by negative reports from the EU Commission commenting on the flourishing of corruption and the lack of transparency in the management of public and EU funds in Bulgaria. The EU Commission evaluated the lack of transparency and accountability in the area of public procurement as a 'grave problem' and recommended that urgent action be taken so that Bulgaria could 'improve the supervision and transparency of public procurement procedures at central, regional and local level in strict conformity with the applicable EU rules'.⁹⁷

However, despite the various amendments over the years and the increase in legislative rules which require publicity and transparency in the conduct of award procedures, Bulgarian contracting authorities regarded most of the amendments as obstructive to the procurement process rather than limiting corruption. Practice shows that in some cases the legislative rules made the situation even worse: contracting authorities misinterpreted the new rules and justified their actions on the basis of ambiguity in the applicable legal norms and have thus opened the doors to even greater administrative abuse and corruption.

As of 15 April 2016 a brand new piece of legislation comes into force and replaces the until recently applicable PPA. The new Bulgarian public procurement

⁹⁶ Commission (EU), 'Comprehensive monitoring report on the state of preparedness for EU membership of Bulgaria and Romania' (Communication) COM (2005) 534 final, 25 October 2005.

⁹⁷ Commission (EC), 'On the Management of EU-funds in Bulgaria' (Report from the European Commission to the European Parliament and the European Council) COM (2008) 496 final, 23 July 2008.

act (*Закон за обществените поръчки*, the New PPA)⁹⁸ transposes the New Procurement Directives into national legislation. While still too early to draw general conclusions about its effects in the absence of sufficient practice in its application, quite a large part of the clauses of the New PPA already suggest that it will follow the fate of its recent predecessor and be subject to many amendments and supplements. What is immediately noticeable is that the law is definitely not easier to implement than the previous (which was the main hope of all procurement practitioners). Further, ‘despite the respectable volume of the new law there were too many [...] outstanding hypotheses [...] Whether under time pressure and the large volume of euro-provisions [...] or for some purely national reason it came to the paradoxical situation the law to refer to the Regulation⁹⁹ on substantive aspects’.¹⁰⁰ The policy of chiefly deploying transparency measures is still evident (albeit with some slight adjustments, as discussed below). Some problematic aspects of the previous legislation which had left the door open to corruption have been solved, but at the expense of others which now loom on the horizon (which is not only because of national decisions, but because of the too liberal approach of the new procurement package). The law and its provisions is subject to a critical analysis in the following chapters of this book, along with the laws of the other two Member States considered here.

2.4.2 *Transparency in the Bulgarian Procurement Legislation*

As revealed by the brief historical chronology the system of procurement in Bulgaria has been caught in an upward spiral of increased transparency rules which continues to the present day with the now in force (since mid-2016) New PPA, reflecting the new European legal framework.

One of the substantial amendments to the PPA of 2014¹⁰¹ and the applicable secondary legislation, before the transposition of the New Procurement Directives into the New PPA, was dictated by yet another fit of ‘ostentatious transparency’ on the part of the Bulgarian legislator, and by the desire to transpose part of the rules under the New Procurement Directives into Bulgarian legislation (before the transposition of the rest of the EU rules, for no apparent reason).

Oliver’s (2004) words on transparency apply in fully to the PPA in its current version: ‘[transparency] has moved [...] to center stage in a drama being played out [...] in many forms and functions. [...] It blossomed from a simple ideal to a complex set of expectations and regulations. [...] [It] spawned a growing horde of gov-

⁹⁸ SG 13/16.2.2016, effective as of 15 April 2016.

⁹⁹ ie Regulation for Implementation of the New PPA (SG 28/08.04.2016, in force as of 15 April 2016).

¹⁰⁰ I Stoyanov, ‘Analytical overview of the main points in the draft Regulation for Implementation of the PPA’ (2016) 3 ZOP+ 7–8.

¹⁰¹ SG 40/13.5.2014, effective as of 1 July 2014 and 1 October 2014 respectively.

ernment and non-government organizations [...] and created an entire legion of transparency hiders and seekers'.¹⁰²

These changes to the PPA were introduced at a time of severe political instability, which additionally affected the adopted texts, effectively reducing the PPA to a 'patchwork' of endless rules and obligations for publication and promulgation of each and every act and action of the contracting authorities, without, however, protecting the interest of candidates.

The material changes to the legislation were connected to:

- (a) *Excessively enhanced importance of the use of the buyer's profile*¹⁰³ – The contracting authority publishes the procurement notice (and its main procurement decisions) on the internet portal of the PPAgency, on the buyer's profile on its official webpage and sends it to the Official Journal of the EU (OJEU), where applicable, and to the local media. Further, the contracting authority is obliged to make publicly available almost the whole procurement file¹⁰⁴ on the buyer's profile in brief terms. It is threatened by administrative fines if it does not comply with these obligations.

The Explanatory Memorandum on the amendment to the PPA¹⁰⁵ justifies this superimposition and overlapping of information submitted to the PPAgency and the OJEU and information uploaded on the buyer's profile as working precisely towards enhanced public control of procurement. This effort of the contracting authorities, however, serves to deprive them of the opportunity to exercise *ex ante* and ongoing control over their own procurement procedures (due to lack of any sufficient time) rather than achieve any other purpose. Such excessive information (although somewhat limited by the New PPA rules, as discussed below) will be of little interest to anyone other than the parties concerned, who will have access to this information anyway, as well as the opportunity to appeal it. Also – the *ex ante* control carried out by the Executive Director of the PPAgency covers an explicitly defined set of documents related to a limited scope of procurement procedures: hence, this largely overlapping information will not be of much use for more efficient control.

¹⁰² See above (n 4) ix.

¹⁰³ Introduced as an additional but non-mandatory option for ensuring procurement publicity under Art 35 Directive 2004/18/EC (also mirrored in Directive 2004/17/EC). The New Procurement Directives (eg Art 48 Directive 2014/24/EU) also refer to the 'buyer's profile', without adding additional content on the previous rules or making its use obligatory.

¹⁰⁴ ie prior notices, decisions on the launch of procedures, the relevant participation documentation and any supplementary documents and explanations thereto and any other documents containing important information for interested parties and candidates. Further, commission's protocols and reports on procedures; concluded public procurement contracts; subcontracting agreements and information on payments made under those agreements; the date, grounds and amount of each payment made under public procurement contracts and subcontracting agreements including advance payments, if any; and the date and grounds for the release, claim or retention of performance guarantees for each contract are also to be published.

¹⁰⁵ Explanatory Memorandum to the draft Bill amending and supplementing the Public Procurement Act 2013 (2015) <www.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0211&n=73&g> accessed 28 May 2015.

- (b) *Other platforms* – The contracting authority publishes its decisions for the initiation of contracting procedures, for any changes to or termination of procedures, any notices of contracts tendered above a relevant threshold,¹⁰⁶ information on awarded and implemented contracts, information on the progress of procedures in the event of appeal proceedings and any other relevant information in the public procurements register by the PPAgency. Where a procurement exceeds European thresholds, in addition to promulgation in the public procurement register, the contracting authority must advertise in the OJEU all decisions regarding the launching, change and termination of public procurement procedures as well as notices which need to be entered into the register; information on awarded procurements and implemented contracts, information on the progress of procedures in the event of appeal proceedings etc.
- (c) *Archive obligations* – All the documents uploaded on the buyer's profile (including any sensitive information and/or commercial secret, if applicable, deleted in advance) must be retained there for a period of 1 year starting from the time of their promulgation or amendment, while the statements of the Executive Director of the PPAgency and any other documents relating to the internal rules of the contracting body and participant contact information must be retained for an indefinite period.
- (d) *Tender opening is public* and may be attended by participants or authorised representatives, as well as media representatives and other individuals in accordance with the access regime for the site in which the tender opening will take place. Given that this access regime usually involves a simple ID check, the law actually admits anybody to a tender opening.
- (e) *Voluntary transparency* – Separately from all the above, the Bulgarian legislation also regulates the rules on the use of voluntary transparency in compliance with the options provided by Article 37 Directive 2004/18/EC.

This list is not exhaustive but even this abbreviated form is quite sufficient to illustrate the information flow and the numerous obligations of the contracting body intended to ensure transparency throughout the award process. Of course, some of the examples above correspond to the requirements of the Procurement Directives and the New Procurement Directives,¹⁰⁷ but a critical observer will not fail to notice the numerous additional publications that have been layered on the European requirements (as mandatory obligations and not options) and the superfluous overlapping of information thus achieved.

Given that one of the reasons for the EU taking action to replace the prior Procurement Directives with the New Procurement Directives was precisely the

¹⁰⁶ The mechanism for award under Bulgarian law is divided on (i) procurements below the thresholds; (ii) procurements above certain national thresholds as determined by the national legislation and (iii) procurements above the EU thresholds as defined by the EU legislation.

¹⁰⁷ It is not clear why the legislator has chosen to transpose some of the rules of the New Procurement Directives into the PPA so early, given the clear intention that the whole package should be transposed at the same.

desire to simplify rules and procedures, the legislative decision to saddle participants with so many additional obligations obviously runs contrary to that desire. As pointed out in the EU country report for 2014: ‘The amendment to the Public Procurement Act of May 2014 has further aggravated the situation, with different commencement dates for its specific parts, while a number of weaknesses in the legal framework remain unaddressed [...] At the same time, however, many procurement procedures are subject to overlapping *ex post* controls, sometimes resulting in divergent findings’.¹⁰⁸

The Bulgarian legislator has listened to this legitimate criticism and understands that developers are bewildered by this sea of obligations to ensure transparency and took this into account when drafting the New PPA. In the New PPA at least the information to be uploaded to the buyer’s profile is limited and somehow reduced: this will positively affect the contracting authorities. Overall, however it has so far proved unable to conclude that the New PPA is an effective legislative solution that renounces transparency as its main corrective method.¹⁰⁹ On the contrary, the new rules neither provide for lighter procedures, nor are more flexible. They do not add any material or substantially different methods for dealing with corruption than before. Ultimately, the task of ensuring publicity and transparency and prohibiting the provision of advantages or unreasonable restriction of participation in the procedure on behalf of potential bidders has been supplanted by some inconsistent compilation of documentation and the introduction of restrictive conditions in some of the procedures. It appears that there is no mechanism for protection against these actions.

The problems in the above concept of increasing transparency provisions (although slightly more adequate with the New PPA) are several:

- (i) Against the background of the multitude of procedural and administrative obligations on the contracting authority, the focus of the latter is shifted. There is no time for sufficient quality, ongoing internal control nor the possibility to detect serious (fraudulent) infringements;
- (ii) To comply with the requirement to maintain an official website of sufficient quality and the necessary storage capacity to upload and retain hundreds of documents, a contracting authority requires financial means which are unavailable to a great many contracting authorities (eg small municipalities);
- (iii) In order to observe all deadlines and upload the documents on the buyer’s profile in the required manner, some contracting bodies need to hire additional staff, which will again require financial resources which are simply not available;

¹⁰⁸ Commission (EC) ‘Country Report Bulgaria 2015 including an In-Depth Review on the prevention and correction of macroeconomic imbalances’ (Staff Working Document) SWD(2015) 22 final, 26 February 2015, 57.

¹⁰⁹ There is a separate Chapter 5 of the New PPA, as well as Chapter 4 of the Regulation for Implementation of the PPA, dedicated to publicity and transparency, providing rules for exchange of information

- (iv) Work on the organisation of procurement competitions is still too complicated and burdensome and the aim at combating corruption (by means of the transparency achieved thereby) is completely lost.¹¹⁰

In addition to the above, all other characteristics of the transparency principle itself have been pushed far into the background of the Bulgarian procurement legislation. The analysis in terms of how the legislator has opted to ensure transparency in the award process shows that the letter of the law focuses mainly on *publicity* (through the requirements for ‘advertisement of the procurement’ and ‘provision of sufficient information’, as highlighted by Arrowsmith (2005)).¹¹¹ The remaining aspects of this principle, relating to *limitation of discretion*, *preventing discrimination* and *provision of opportunities for verification and enforcement*, are indeed reflected in the national legislation (based on the requirements of the EU rules), but have failed to achieve the desired result, as is evident in the subsequent chapters of this book as well. It is precisely for this reason that Bulgaria has arrived at the absurd situation – much to the public’s perplexity – where EU reports (year on year) continue to demand increased transparency in public procurement regardless the ‘efforts’ of the legislators to this exact end.

The conclusion which emerged in the course of writing this book and the analysis of the most common violations and models of corruption in public procurement it entailed, is that for as long as the other elements¹¹² required to achieve sustainability and integrity in public procurement are missing, any elaboration of the transparency principle as a means in itself will serve no purpose; or as Lord (2006) warns: ‘[g]reater transparency will not necessarily promote democracy and good governance’.¹¹³

2.5 Concluding Observations

This chapter introduces transparency and its place among the other main principles in the process of procurement – equality, non-discrimination and proportionality. Except in terms of public procurement, the analysis here follows the origin and development of this institution and its main elements and functions.

The global establishment of the principle and its incorporation into the general legislation governing public procurement in EU Member States as a guarantee for fair distribution of budget funds demonstrates the essence of this principle and how

¹¹⁰ See also my comments on these legislative amendments: I Georgieva, ‘Bulgarian Procurement: The Old Razzle-Dazzle’ (2014) *CEE Legal Matters* <www.ceelegalmatters.com/index.php/component/content/article?id=358:bulgarian-procurement-the-old-razzle-dazzle> accessed 20 April 2016.

¹¹¹ See above (n 9).

¹¹² (a) elements (features) of transparency, as a multi-layered concept, but also (b) elements of the control and prevention system for violations in public procurement (eg the judiciary, the executive power etc).

¹¹³ See above (n 12) 3.

it can function as an anticorruption weapon. The transparency principle is a major feature of the public procurement regime, where it has taken on certain specific characteristics. Secondary EU legislation stipulates requirements and restrictions on the parties involved in procurement procedures, aiming to ensure that the procedures are conducted openly and fairly. National legislation supplements these rules in compliance with the requirements of the Procurement Directives and now – the New Procurement Directives.

But what is transparency and how has it come to be such an important feature not only for the quality award of procurement contracts, but also in all other spheres of public interest? As reviewed, transparency emerged in response to society's need to combat corruption, discrimination and the abuse of government control in different spheres of life. It has crystallised into a public right to the availability and accessibility of a certain level of information, presented clearly and understandably, about the norms, rules, procedures and regimes in procurement, and the actions of the participants. The significance of this principle and the achievement of its objectives has become a priority for a number of international institutions and organisations. It has become clear that transparency in a democratic society is a synonym of legitimacy and trust in the public power and quality of governance.

Over the past 20 years, the EU has implemented multifaceted transparency policies. Starting from a situation of no formal provisions before 1992, pro-transparent Member States succeeded between 1992 and 2006 in bringing about considerable change in the direction of more openness. In the subsequent period, particularly after the EU Commission presented a proposal for a renewal of the access to documents legislation, a deadlock has resulted over the right implementation of transparency since 2012.¹¹⁴

Nevertheless, despite all the positive features of transparency enumerated above, an unresolved issue concerning this institution is, paradoxically, the lack of a common definition and the notably varying positions of the Member States regarding the values embraced by this principle. Some authors are very concise in their analysis of this principle and limit it only to the advertising and provision of the minimum necessary level of publicity regarding the work of the public institutions. Others expand the functions of transparency by adding complementary features such as the assurance of a competitive environment or the ability to monitor. One of the most discussed functions of transparency is the possibility the bribery attempts to be limited since it provides public access to all state activities. For this reason, the Bulgarian legislator, for example, (as seen from the comparative analysis between several Member States made in this book) has found an easy way to advertise a somewhat moral principle as a method to combat corruption and to simulate political desire to limit corruption. This leads to impressive levels of obligations to provide information not known in any other state – duties which only hamper the already complex administrative procedures and provide for additional administrative hurdles.

¹¹⁴MZ Hillebrandt, D Curtin, A Meijer, 'Transparency in the EU Council of Ministers: An Institutional Analysis' <<http://www.clientearth.org/reports/aarhus-centre-resources-library/scholarly-articles/Transparency%20in%20EU%20Council,%20Curtin.pdf>>, accessed 2 October 2016, 18.

The functions and elements of transparency – as well as the positives its implementation in state government achieves – are further diluted and often stretched like chewing gum, depending on the angle of review of the principle in the academic researches, the interests of the governing body, the public sphere in which transparency is used etc. It was also shown that the main functions of transparency are intrinsically linked to each other and could be grouped into: (i) provision of the right amount of information, (ii) increase of competition, (iii) provision of control opportunities, (iv) anticorruption functions and, last but not least, (v) ethical functions. All these features build the ‘halo’ of transparency as a completely irreplaceable part of modern democratic governance.

Apart from the main features and functions of the principle of transparency in general, this chapter discussed transparency in the process of awarding public contracts, as well as the specifics of transparency in that field. The analysis of the regulatory framework at European level shows that transparency in public procurement is perceived mainly as (a) a tool to increase competition by providing the necessary level of information for participation in procedures and (b) a technique for promoting active social participation (ie interested parties) in decision making for the distribution of budgetary resources for the needs of the Member States. In recent years, however, due to the growing levels of corruption in the sector, caused in part but not exclusively by the substantial expansion of the EU by states having divergent socio-economic statuses, the legislators have given priority to another aspect of the function of transparency (not traditionally perceived until recently), namely its role in combating bribed tenders. Obviously, the information for and elucidation of the award process helps not only to expand the circle of competitors but also to limit the possibilities of secret manipulations and distortion of the choice of contractor. The role of transparency in this respect is indispensable. Therefore, this anticorruption aspect of transparency in the procurement award process has gained serious value in recent decades and has almost superseded the other aspects of the principle. Nevertheless, this aspect of transparency offers considerable cause for doubt as to whether it can indeed be one of its strongest features.

Although the importance of the principle is not disputed here, its implementation (in some cases excessive and wrong) and its use as an antibribery instrument in the public procurement systems of several Member States is subject to testing and is the focus of this work. The conflict between transparency and anti-corruption policies is a major theme throughout the book. The comparison between the three different methods of awarding contracts reveals (a) how this aspect of transparency is achieved (or not) in the laws of those states, (b) what procurement rules have been upgraded over the European legal framework to ensure transparency of procedures and (c) whether indeed this aspect of transparency occurs as expected and limits the corrupt choice of a contractor.

In particular, the example of the Bulgarian approach of transposing transparency rules reveals a failure in comprehension as well as a failure in the numerous attempts to put this principle in motion. Furthermore, despite the continuous increase in transparency rules and ever more complicated legislative bases, the EU continues to

claim that corruption in Bulgaria has increased¹¹⁵ and the heavy transparency obligations imposed on the contracting authorities remain merely a burden on the public procurement award process. ‘The result is a ritualistic struggle over openness and privilege, with grave consequences’.¹¹⁶

As part of the European market since 2007, Bulgaria is obliged not only to accept but also to adequately implement the European legislation. This was a huge challenge for this post-communist country required to follow the EU directives as well as its ethical standards. For this reason, this chapter also presents a brief historical overview of the legislative framework governing public procurement in Bulgaria, which clarified the legislator’s understanding of the principles and rules for distribution of public funds long before that country became an EU member.

The comparative analysis of several Member States and their modes of procurement is especially important for the conclusions in this book and the proper demarcation of the possibilities of transparency to tackle corruption. It shows again that not only the perception and understanding of transparency in each state is different but the approach to it is too. Some countries exercise their endless stream of rule-making talent on transparency to create an infinite number of obligations and rules to ensure publicity and openness. This approach, however, as is clear from the book, actually stifles the positive influence of transparency over the actions of the state institutions and creates obstacles during the whole working process. In other countries, transparency is expressed as underlying principle of procurement regulation, with which the stakeholders (in the procurement process) conform and comply without delaying or stopping their actions.

Discovering the gaps in this puzzle of transparency features in Member States such as Bulgaria and how the transparency principle can be harnessed as a useful tool in combating the rampant corruption in public procurement are precisely the questions that this work seeks to answer.

From this perspective, this chapter is useful for the analysis throughout the rest of the book, as it not only describes the principle of transparency, set against and understood alongside the other main principles ensuring the lawful progress of public procurement procedures, but it also reveals the main field for discussion in this work. Can it be so reliable a principle to be a trustworthy source of anticorruption tools, when its definition, basic functions and positives are so hazily interpreted, and when each author assigns a different meaning to it? Could it be the case that, despite transparency’s indisputable role in increasing the flow of information from the state

¹¹⁵ eg Commission (EU), ‘Report from the Commission to the European Parliament and the Council on Progress in Bulgaria under the Co-operation and Verification mechanism’ SWD (2016) 15 final; Commission (EU) ‘Annex Bulgaria to the EU Anticorruption Report’ (The First EU Anticorruption Report) 3 February 2014, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anticorruption-report/docs/2014_acr_bulgaria_chapter_en.pdf> accessed 20 April 2016.

¹¹⁶ M Fenster, *The Opacity of Transparency* (2006) 91 *Iowa Law Review* 893.

to society, it is in essence a ‘pervasive cliché’?¹¹⁷ How and to what extent can it really be used by any or all of the Member States in the fight against corruption in public procurement?

The following chapters and their symbiosis with this initial part of the book will help find the correct perspective for the development of the principle of transparency in the context of the process of procurement award. Some unambiguous conclusions will crystallise as to where to locate the full stop in the determination of the compliance obligations assuring publicity and transparency in order for this principle actually to remain a symbol of the Rule of Law, and not become a meaningless statutory cover for the abuse of public funds.

Bibliography

- A Buijze, ‘The Principle of Transparency in EU Law’ (Den Bosch: BOXPress, 2013)
- A Popescu *Public Procurement Corruption in the European Union*, Journal of Public Administration (2014) Finance and Law, issue 1/2014 <http://www.jopafl.com/uploads/special-issue-1-2014/PUBLIC_PROCUREMENT_CORRUPTION_IN_THE_EUROPEAN_UNION.pdf> accessed 24 October 2016
- A Chayes and A Chayes, *The new sovereignty* (Cambridge, Mass.: Harvard University Press, 1995)
- C Bovis (ed), *Research Handbook on EU Public Procurement Law* (Cheltenham: Edward Elgar, 2016)
- C Hood, ‘Transparency in Historical Perspective’, in C Hood and D Heald (eds), *Transparency, the Key to Better Governance?* (Oxford, New York: Oxford University Press, 2006)
- C Lindstedt and D Naurin, ‘Transparency is not Enough: Making Transparency Effective in Reducing Corruption’ (2010) 31(3) *International Political Science Review*
- CE Jimenez-Gomez and M Gasco-Hernandes, *Achieving Open Justice through Citizen Participation and Transparency*, (Hershey: IGI Global, 2017)
- D Curtin, ‘The Fundamental Principle of Open Decision-making and EU (Political) Citizenship’, in D O’Keeffe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Oxford: Hart, 1999)
- D Curtin, *Executive power of the European Union: Law, Practices and the living Constitution* (New York: Oxford University Press, 2009)
- D Jones, ‘Competition and Transparency in Government Procurement in Southeast Asia’, in C Wescott, B Bowornwathana and LR Jones (eds), *The Many Faces of Public Management Reform in the Asia-Pacific Region* (Research in Public Policy Analysis and Management, Volume 18) (Bingley: Emerald Group Publishing Limited, 2010)
- D McGowan, ‘Clarity at Last? Low value Contracts and the Transparency Obligations’ (2007) 4 *Public Procurement Law Review*
- EW Welch, CC Hinnant, *Internet Use, Transparency, and Interactivity Effects on Trust in Government*, (2003) Proceedings of the 36th Hawaii International Conference on System Sciences
- I Georgieva, ‘Bulgarian Procurement: The Old Razzle-Dazzle’ (2014) *CEE Legal Matters* <www.ceelegalmatters.com/index.php/component/content/article?id=358:bulgarian-procurement-the-old-razzle-dazzle> accessed 20 April 2016

¹¹⁷ C Hood, ‘Transparency in Historical Perspective,’ in C Hood and D Heald (eds), *Transparency, the Key to Better Governance?* (Oxford, New York: Oxford University Press, 2006), 3.

- I Georgieva, 'The miracle of transparency' (2015) '*Capital*' newspaper <http://www.capital.bg/biznes/vunshni_analizi/2015/09/27/2616907_chudoto_na_prozrachnostta/>, accessed 2 October 2016
- I Stoyanov 'Analytical overview of the main points in the draft Regulation for Implementation of the PPA' (2016) 3 *ZOP*+
- JE Nolan (ed), A Chayes and A Chayes, *Regime Architecture: Elements and Principals in Global Engagement: Cooperation and Security in the 21st Century* (Washington DC: Brookings Institution, 1994)
- K Lord, *The perils and promise of global transparency* (Albany: State University of New York Press, 2006)
- M Fenster, *The Opacity of Transparency* (2006) 91 *Iowa Law Review*
- M Ivanov, *Reformation without reforms. Political economy of the Bulgarian communism 1963–1989* (Sofia: Open Society Institute and Ciela, 2008)
- M Karadjova, 'Legal mechanisms for decreasing the conflict of interest by the assignment of public procurements' (2008) Yearbook of New Bulgarian University <www.nbu.bg/PUBLIC/IMAGES/File/CPA/Godishnik_2008/MilenaKaradjova.pdf> accessed 20 April 2016
- M Markov and M Krivachka, *The new aspects in the Public Procurement Act* (Sofia: IK Trud i Pravo, 2006)
- M Krivachka, M Markov, E Dimova and Z Lilyan, *The new aspects in the Public Procurement Act* (Sofia: IK Trud i Pravo, 2006)
- MZ Hillebrandt, D Curtin, A Meijer, 'Transparency in the EU Council of Ministers: An Institutional Analysis' <<http://www.clientearth.org/reports/aarhus-centre-resources-library/scholarly-articles/Transparency%20in%20EU%20Council,%20Curtin.pdf>>, accessed 2 October 2016
- P Trepte, *Public procurement in the EU* (Oxford: Oxford University Press, 2007)
- R Avramov, *The communal capitalism – among the Bulgarian economical past* (vol. III, Sofia: Centre for Liberal Strategies, 2007)
- R Balfour and C Stratulat, *The enlargement of the European Union* (2014) Discussion Paper <http://www.epc.eu/documents/uploads/pub_3176_enlargement_of_the_eu.pdf> accessed 24 October 2016
- R Oliver, *What is transparency?* (New York: McGraw-Hill, 2004)
- S Arrowsmith, 'Towards a multilateral agreement on transparency in government procurement' (1998) 47 *International and Comparative Law Quarterly*
- S Arrowsmith, 'Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the WTO' 37 (2003) *Journal of World Trade*
- S Arrowsmith, *The law of public and utilities procurement* (London: Sweet & Maxwell, 2005, 2014)
- S Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 11 *Public Procurement Law Review*
- T Kotsonis, 'The Extent of the Transparency Obligation Imposed on a Contracting Authority Awarding a Contract Whose Value Falls Below the Relevant Value Threshold: Case C-195/04, *Commission v Finland*, 26.4.2007' (2007) 5 *Public Procurement Law Review*

<http://www.springer.com/978-3-319-51303-4>

Using Transparency Against Corruption in Public
Procurement

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

Georgieva, I.

2017, XXII, 269 p. 22 illus., Hardcover

ISBN: 978-3-319-51303-4