4. REDUCTION OF THE CORRUPTION RISK IN PUBLIC PROCUREMENT – BALANCING ECONOMIC AND ENFORCEMENT POLICIES

As Bulgaria was preparing to meet the EU accession criteria and introduced several comprehensive changes to public procurement arrangements, the regime was generally made to comply with the EU Directives. Hence the prevailing opinion that the legal optimization process has been more or less completed as regards of the reduction of the corruption risk. The claim that the national legislation is basically harmonized with the *acquis communautaire* is to be accepted with some reservations. There still remain essential differences with regard to the legal regulation of concessions and also to the termination and cancellation of public procurement procedures. The harmonization with the *acquis* in the public procurement sector is not a one-off act; it is a dynamic process of reflecting the continuously changing market challenges in domestic legislation. For example, the common European regulatory standards for appeals in the public procurement sphere are still being adjusted. Being a full EU member, Bulgaria should already have its active position in the drafting of European policies.

Besides, the high levels of corruption risk and corrupt practices in this sphere come to show that the harmonization is not a goal for its sake but also a tool to reduce corruption. The harmonization of the legislation of the EU Member States is primarily intended to safeguard the equal treatment of suppliers and the free movement of goods, services, people and capital within the single market. Since these freedoms are related to transparency and free and fair competition, the harmonization produces an anti-corruption effect, too. But it cannot resolve the specific problems and challenges facing the governance of the public sector in the individual member states. Ultimately, each member state is responsible for the level of corruption in it.

There are several groups of tools to reduce and prevent corruption in the process of awarding and implementing public procurement contracts in Bulgaria. They point to the possible priorities for the policy pursued in this area:

a) optimization of the legal framework towards more transparency and competition in public procurement; increase of the percentage of commodity exchange transactions and e-tenders;

b) enhancement of the effectiveness of legal remedy and control mechanisms;

c) strengthening the administrative capacity and more stringent requirements to the professional ethics of the responsible officials in the contracting authorities;

d) increasing the effectiveness of criminal prosecution;

e) introducing effective control over the property and income affidavits submitted by senior officials;

f) optimization of the legal framework regulating the financing of political parties and election campaigns, including independent candidates;

g) development of legal framework regulating conflicts of interest in parliament, including regulation of lobbying.

In the case of most of these tools, it is necessary to foster their effectiveness and to bring them closer to good European practices. The opportunities for that are discussed below.

4.1. PROMOTING COMPETITION AND TRANSPARENCY

The general objective of the legal framework of public procurement is to ensure maximum competition at minimum compliance costs for the *bona fide* participants. This objective also points to what the main dimensions of the effectiveness of public procurement arrangements should be. In accordance with the *acquis communautaire,* the *Law on Public Procurement* in Bulgaria identifies three major principles underlying the legal framework of public procurement: openness and transparency; free and fair competition; equal treatment and non-discrimination. They shape the framework for the assessment of the effectiveness of the public procurement regime. The point is whether these arrangements provide maximum transparency, competition and equal treatment of suppliers and contractors. These criteria serve as a point of departure in the evaluation of the corruption risk level, as well as in the identification of the most vulnerable aspects of the legal framework in the public procurement sphere.

Over a rather short period of time, the legal framework of public procurement in Bulgaria went through substantial evolution towards its harmonization with the changing European legislation. The main thrust of the reform process was to reduce the barriers at the input of public procurement procedures, while optimizing the ex-post control and enhancing the guarantees for competition. At the same time, however, certain changes were carried out by providing more opportunities for discretionary and non-competitive selection of suppliers by the responsible officials.

The initial *Law on the Awarding of State and Municipal Public Procurement* of 1996 was short-lived but it can be assessed positively as the first step in the introduction of the legal figure of public procurement and its acceptance as an indispensable element of the modern organizational culture in the public administration and public service operators. The ongoing process of harmonization of the Bulgarian legislation with the *acquis communautaire* and the inefficiency of many legal provisions called for the adoption of a new *Law on Public Procurement* (LPP) in 1999.

The European legislation, in turn, has also been evolving. There were four directives in the public procurement sphere until 2004,[28] and they were entirely replaced by two new directives in 2004.[29] The deadline for the EU Member States to adjust their national legislation to those directives was 31 January 2006 (the deadline for Bulgaria was 1 January 2007). Therefore Bulgaria had to repeatedly adjust its legislation to the developing *acquis communautaire*.

The groundwork of today's legal framework of public procurement in Bulgaria was laid with the new *Law on Public Procurement* of 2004 (promulgated in The State Gazette, No. 28 of 6 April 2004; entered into force on 1 October 2004). The public procurement regime was considerably liberalized in accordance with the European legislation. For instance, the scope of application of the LPP was narrowed and the value thresholds were almost trebled to 1.8 million levs for construction works, 150 thousand levs for the supply of goods and 90 thousand levs for the provision of services. The contracts below these thresholds became subject to the easier procedural rules set out in the *Regulation on Small-Scale Public Procurement* (RSPP). Besides, the open procedure could be replaced by negotiations with a specific supplier under certain terms and conditions. The thresholds under the RSPP, below which no procedure was required, were also raised. After the changes in the European legislation of 2006, the LPP underwent so many and essential amendments (promulgated in The State Gazette, No. 37 of 5 May 2006; entered into force on 1 July 2006) that, for all practical purposes, we are faced now with the successive fourth new regulatory framework of public procurement in Bulgaria over the last ten years. Public procurement thresholds were modified and differentiated once again (*Table 7*).

Table 7. Thresholds for public procurement procedures (levs, net of VAT)

Subject-matter	Under the LPP	Under the RSPP	No formal procedures	
			With 3 bids	Without 3 bids
Construction works	Over 1,800,000	100,000 – 1,800,000	45,000 – 100,000	Below 45,000
Goods	Over 150,000	30,000 – 150,000	15,000 – 30,000	Below 15,000
Services	Over 90,000	30,000 – 90,000	15,000 – 30,000	Below 15,000
Design competition	Over 30,000	10,000 – 30,000		Below 10,000

Note: These thresholds do not apply to public procurement contracts to be implemented outside the country either under the LPP or under the RSPP. Source: Center for the Study of Democracy.

[28] Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts, Directive 92/50/EEC coordinating procedures for the award of public supply contracts, Directive 93/37/EEC concerning the coordination of procedures for the award of public works contracts and Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sector.

[29] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (often referred to as "the Public Sector Directive") and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procedures of entities operating in the water, energy, transport and postal services sector (often referred to as "the Public Services Directive").

These thresholds have never been an effective barrier to corruption because of the wide-spread practice of fragmentation of public procurement contracts into smaller portions in order to evade a competitive procedure (typically an open procedure, open competitive bidding or a public tender). The LPP defined such practice as circumvention of the law which distorted the selection procedure and the contract itself.

In addition to the thresholds, the legislation substantially changed with regard to the **LPP scope of contracting authorities.** The group of contracting authorities included not only the sectoral contracting authorities from the public utilities but also companies and non-profit organizations in which the government has a prevailing or dominant influence in the decision-making process. The law-makers' assumption was that in such cases managers in the public sector had the opportunity to transfer public funds to the private sector. Those were, for instance, the cases where the government, or perhaps a municipality, held shares in a company in a sufficient quantity to direct the decisions of the general meeting of the partners/shareholders on the distribution of dividends. The voluntary refusal of the principal to receive that source of income wholly or in part represents actually indirect disposal of budget resources. They were infused back into the company and therefore it had to fall within the scope of the LPP. That group included sole-owner companies, as well as all joint ventures with government or municipal interest, where the government or municipality had retained a blocking quota in the decision-making process. The legislative solution complied with the definition and interpretation of the concept "contracting authority" within the meaning of Art. 1, para 9 of *Directive 2004/18/EEC* of the European Parliament and of the Council of 31 March 2004.[30] The definition covers also persons controlled or supervised by an organization (entity) governed by public law or having a collective governance body, more than half of whose members are appointed by an organization governed by public law.

Finally, for the last few years the set of tools at the disposal of public procurement contracting authorities has been considerably enriched with regard to the types of procedures. On the one hand, it has developed towards greater transparency with the introduction of e-tenders and commodity exchange trading. But on the other, the broadening of the range of tools tends to move towards more negotiations. The existing legal framework envisages such tools for the awarding of public procurement contracts and the acquisition of goods and services as the competitive dialogue, negotiations with or without announcement, dynamic supply systems and framework agreements. All of them imply a certain degree of restriction of the access of participants and greater discretionary powers of the contracting authority in the selection of the supplier/contractor which increases the risk of corruption. Does it mean that they have no place in the legal framework of public procurement?

As stated earlier, the economic efficiency of public procurement depends mostly on maximum transparency, equal treatment and competition among suppliers. But it depends also on the unlimited consumer choice of the contracting authority,

[30] The Public Sector Directive

alongside with these legislative principles. From the perspective of the public interest and fair competition, it is important not only for the contractors to have equal access to the public procurement market but also for the contracting authorities to have access to the market on equal footing with the other consumers from the private sector. The transaction costs incurred by both the public and the private sector should not be higher than the public benefits from the distribution of public procurement contracts on a competitive basis. These two relatively underestimated principles of economic efficiency guarantee that the public sector will not consume goods and services at prices which are higher than the market ones. The problem is that they do not always imply decisions that ensure maximum guarantees against corruption. This issue becomes increasingly relevant with the development of the knowledge-based economy, the need for choice among high-tech solutions associated with asymmetry of information between suppliers and consumers. It calls for new commercial practices where, together with transparency and competition (which play the leading role in non-differentiated products), increasing importance is attached to partnership relations, trust and confidence, information and expertise, as well as the freedom of choice of the contracting authority in selecting its suppliers. In other words, with respect to many high-tech goods and services the use of negotiations - provided that there is no abuse of such procedures - serves the public interest much better than the conventional open procedure. In this context, the challenge for the anti-corruption policy is to strike the proper balance between the limitations of the procedures and their economic efficiency. In a nutshell, the solution is not to restrict negotiation procedures but to limit the opportunities for their discretionary application or for their use to personal benefit. Of course, this makes the tasks of control in this sphere ever more difficult as it requires increased relevance of **expediency judgments** alongside with **legality considerations.**[31]

Generally, Bulgaria has modern public procurement legislation which complies with the requirements of the EU Directives in its spirit and content. Naturally, its effective enforcement largely depends on the administrative and judicial capacity. A new phase of harmonization of the LPP is expected in the near future because of the upcoming changes in the European legislation concerning the administrative and judicial control in the process of awarding public procurement contracts.

4.2. E-TENDERS

E-tenders are a relatively new tool in the public procurement sphere. They are regulated in the two EU Directives of 2004 and they were incorporated into the Bulgarian national legislation with the latest amendments to the law in 2006.[32] However, their practical application is still very limited. The Ministry of Finance keeps the e-tender register for small-scale public procurement covering mainly the public tenders within the framework of the pre-accession funds. Modest as it is, the experience gained so far comes to prove that they are very appropriate

[31] Directive 89/665/EEC on review procedures and Directive 92/12/EEC on sectoral contracting authorities

[32] See Pavlova, M., *New Public Procurement Procedures Envisaged in the EU Legislation* (in the Bulgarian language), Pazar i Pravo Journal, No. 5, 2006.

for attaining maximum competition and access to the market at minimum costs for the participants in the procedure. The scope of application is confined to goods with clear qualitative parameters, where the major criteria and the price and delivery time-table. Such supplies are possible not only in the case of small-scale public procurement. E-bidding should become the rule in all possible cases, that is, when the quantitative and qualitative parameters of the supply are clearly defined. It is somewhat more difficult to apply this procedure to construction works and other services, although there are some examples to this effect. The share of e-tenders could be a good measure for the determination of the respective institution to restrict corruption in the public procurement sector.

4.3. LEGAL REMEDIES

The legal protection and control system, too, has undergone serious evolution. Administrative and judicial control under the general provisions of the *Law on the Administrative Procedure* was quite limited initially and subsequently the applicable provisions became those concerning the general procedure of filing claims. The main reason given was the inefficiency caused by the time limits for hearing court cases and the prospects for suspension of public procurement proceedings against the backdrop of the urgency and volume of the economic, legal and public interests interwoven in a public procurement procedure. Over the period from 2004 to 2006 it reached the paradoxical state of administrative acts issued in the public procurement process being challenged under a special procedure at the district courts. A lot of resources were spent at that time to train magistrates of first-instance courts who were not familiar with that matter. In 2006, the legal protection system was reshuffled once again and the first-instance control was entrusted to the Commission for the Protection of Competition (CPC). It is too early to say whether that measure is effective or not. One of the main problems it will encounter is the lack of human and material resources to cope with backlogs. A certain barrier to the malicious appeal is the financial guarantee to be paid by the contestant as a provisional security measure in the amount of 1% of the value of the transaction.

It is necessary to review some procedural rules concerning the liability of the central and local governments for damage inflicted on individual citizens. Regressive action against the official who has made the public institution liable will have to become mandatory in certain or most cases, depending on the nature of the liability.

A major problem in the redress arrangements is the use of the term "legal interest" when administrative acts are challenged before a court of law. Many acts of the highest body of the executive power cannot be contested by anybody because for this to take place the contestant has to prove that he has personal and immediate interest in the repeal. For example, the decisions concerning the largest investment projects that are supported or launched by the government cannot be challenged because they do not affect anybody **personally** according to the applicable interpretation of the term. The paradox lies in the fact that it is exactly decisions that affect **everybody** cannot be challenged by **anybody**. Thus

the prevailing interpretation of the term legal interest is a statutory brake on the challenging of decisions of special public importance.

Legal interest is an essential element of the active legitimization in the civil and administrative process. It boils down to the questions "Who can challenge the acts of the contracting authority?" and "Who can request the court to announce a public procurement contract, awarded without due procedure, null and void?" The concept of "any party concerned" (Art. 120, para 2 LPP) gives the formal answer to the former question. The court practices under the two consecutively repealed laws on administrative procedures (LAP) of 1971 and 1979 have left the concept that the interest of a person is legitimate if it is: (i) legal; (ii) personal); and (iii) direct (immediate). This has been the court practice since 1976;[33] there is also a judgment to this effect ruled by the Constitutional Court.[34] At present, Art. 147 of the *Code of Administrative Procedure* (CAP) recognizes the interest in attacking an individual administrative act to a person whose rights, liberties or legitimate interests are infringed or threatened by the act or a person for whom obligations arise out of the act. However, the formal definition is limited by the third element of the wording cited above, i.e. whether the interest is immediate or not. In the context of the LPP, potential direct infringement of interests would exist only with regard to the entities which are (pursuant to Art. 6) the contracting authority, the bidders, the participants and the contractor. The relevant definitions in the LPP (see § 1 of the *Additional Provisions*) leave no opportunity for broader interpretation. Similar is the treatment of this issue in the two existing EC Directives on the legal protection in public procurement.[35] *Directive 89/665/EEC* recognizes the legitimate interest of persons who have or had interest in winning and being awarded a public procurement contract; this principle is further developed by the European Court of Justice also with regard to the persons who are affected or could be affected by infringements in the awarding of public procurement contracts.[36] This generally exhausts all opportunities for civil society to intervene in the way in which public funds are spent.

The practice in Bulgaria knows no exceptions, apart from the area of environmental protection. Pursuant to Art. 9 of the Aarhus Convention[37] environmental non-governmental organizations have the explicitly recognized right to challenge acts of public authorities which could affect the environment. However, there is no such international or national procedural rule with regard to public procurement

[33] At that time, *Ruling No. 4/76* of the Plenum of the Supreme Court was adopted with the objective to summarize and bring uniformity in the practices under the *Law on Administrative Procedures* of 1971. It largely became the point of departure for the doctrine of the administrative process for decades on end, including the subsequent interpretative judgments related also to the understanding of legal interest in challenging administrative acts.

[34] See Judgment No. 21 of 1995 of the Constitutional Court on the objective element in the infringement of personal interests.

[35] *Directive 89/665/EEC* on review procedures and *Directive 92/12/EEC* on sectoral contracting authorities

[36] Hackermuller ECJ 19/6/2003 C-249/01; also Fritsch, Chiari & Partners C-410/01.

[37] *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention),* ratified by a law adopted by the 39th National Assembly on 2 October 2003; promulgated in The State Gazette, No. 91 of 14 October 2003. The text of the Convention was published by the Ministry of the Environment and Waters, The State Gazette, No. 33 of 23 April 2004 and entered into force on 16 March 2004.

A kind of breakthrough can be seen only in the practice of the European Court of Justice which assumes that third parties can be legitimized to challenge public procurement procedures, where discriminatory terms of reference have disallowed them from participation.[38] EU Member States are not strictly bound by this ruling. Conversely, they can envisage easier access to justice of a broader range of persons. Whether and how this can be done is a matter of national legislation.

The issue at stake in Bulgaria is how the review of the legal interest concept can expand the opportunities for effective public control over the awarding of public procurement contracts. A tangible step forward are the general provisions on legal interest in attacking administrative acts under the new *Code of Administrative Procedure* (more specifically, Art. 147, para 1 and Art. 186, para 1). It is for the first time that the Bulgarian law-makers explicitly recognize the right of citizens and organizations whose rights, liberties or legitimate interests are affected or could be affected to challenge individual and statutory administrative acts. This approach sets the beginning of the long awaited constitutionalization of the administrative process perceived as a shift primarily to the protection of the constitutional rights and freedoms of individual citizens and their organizations.[39]

The next possible step is the introduction of class action which could render meaningful the provisions of Art. 120a of the LPP. Otherwise, they would seem only palliative because the prevailing understanding of legal interest in challenging acts before the court of law is still strongly restrictive. Class action would lead to significant procedural economy because court judgments would become enforceable with regard to all affected consumers who suffered from the same action or inaction of the defendant, although only one or a few brought the case to the court. But this would call for substantial amendments to the *Code of Civil Procedure (CCP)*. The time for the introduction of class action is quite appropriate because of the upcoming debate on the draft of a new CCP.

4.4. CONTROL

The institutional ex-post control is entrusted to three agencies. The Public Procurement Agency at the Ministry of the Economy and Energy is responsible for the overall coordination and conduct of tender procedures and maintains the Public Procurement Register (PPR). The National Audit Office performs the external audit functions, i.e. it exercises supervision mandated by the legislative power with regard to the lawfulness of public procurement procedures. However, it has no powers to impose sanctions when irregularities are detected; it can only advise the Parliament and the Ministry of Finance. The internal audit is carried out by the Public Financial Inspection Agency (PFIA which was the Public Internal Financial Control Agency or PIFCA until 2006). It has more powers to check not only the compliance with the legislation but also the quality and outcome of

[38] Grossmann Air Services, ECJ 12/2/2004, C-230/02.

[39] The lack of constitutional justice at the appeal of the party concerned casts a shadow on both the direct effect of the Constitution and the opportunity for protection of the constitutional rights and freedoms of citizens. In the latter case, the only remedy is the administrative process in the court of law.

public procurement procedures. The process of absorption of budget resources and EU funds will be monitored and audited also by internal auditors at the contracting authorities in pursuance of the *Law on the Internal Audit in the Public Sector and the Law on the Financial Management and Control in the Public Sector* which were adopted in the beginning of 2006. The effectiveness of this control is based on adding expediency considerations to its scope. Increasing importance is attached to the ex-ante review and risk management, the establishment and monitoring of the compliance with rules of ethics, the development of written policies and the introduction of a monitoring system. Still, the effectiveness of internal audit should be also subject to monitoring and public accountability. In this sense, it is necessary to use a modern risk assessment system and to broaden the scope of audits in big transactions, i.e. in value terms the internal audit should cover some 60% of the contracts awarded at the implementation stage. Currently, it does cover 60% of the contracts but they account for only one-third in value terms.

Whatever the forms of legal and administrative protection and control, they cannot sufficiently compensate for the public and individual losses incurred in a poorly conducted procedure. The forms of retroactive control could be effective only if they create conditions for serious prevention of future infringements. In this sense, the CPC is faced with great challenges but it hardly has more capacity to meet them than district courts have on a short-term basis. Urgent measures are needed to strengthen the CPC capacity to handle appeals. Special attention should be paid to the so called secondary guarantees of legality, such as the collateral to be paid by the appellant, the suspension of the procedure only at a decision of the CPC, the internal audit work in the public administration and the monitoring systems and the compliance with the rules of ethics by public procurement officers.

4.5. IMPLEMENTATION OF THE CONTRACTS

At present, the legal framework with regard to public procurement covers only the awarding procedures, i.e. the whole process up to the signing of the contracts. The only subsequent guarantee against abuses is the ban on changing the contracts once they have been signed. The purpose of this provision is to curb the practices which were quite common until recently, i.e. to sign annexes to the contracts so that to change the parameters which were indicated to win the contract.

However, the LPP contains no guarantees and control mechanisms against abuse in the implementation phase. The risk of deviation from the contract with the tacit consent of the contracting authority is significant in the case of construction works which account for a half of the value of all contracts and also in services. Such corrupt practices remain beyond the remit of financial control or sanctions. A partial barrier to compromises with quality in the implementation phase could be a more detailed regulation on the performance collateral required in construction works and services. It would be even better to optimize the investor's control functions in the implementation of public procurement contracts, especially in

construction works. This, too, might prove quite difficult since the investor's control is not immune against corruption either.

4.6. MONITORING

Transparency and the monitoring of the public procurement process are among the most important elements of the protection against corruption in this sphere. The main tool to this effect is the Public Procurement Register. Its establishment was undoubtedly a step forward in enhancing the transparency of tender procedures and reducing the corruption pressure. Nevertheless, its use still falls short of optimal levels because not all procedures are registered there yet. Besides, it remains a good source of information about a specific procedure (provided that the contracting authority has registered it) but it is not suitable for monitoring of the process and identification of risk areas and sectors by means of aggregated data. The register should provide not only information about individual tenders but also statistical indicators to assess the level of corruption and corruption risks by awarding sectors and industries (suppliers). An example of such an indicator is the type of procedure. Until 2004 it was possible to use it in order to gauge the percentage of non-tender procedures (direct negotiations, direct awarding, etc.) of the total number of contracts. It would be even better to have the statistics based on the value rather than the number of contracts. But no such breakdowns have been made since the register was transferred to the PPA. The register should make it possible to identify sectors and contracting authorities with high vulnerability on the basis of several indicators of the corruption risk.

In this context, the confidentiality of the information related to public procurement procedures becomes particularly relevant. Public procurement contracts with their numerous appendices cannot be kept secret from the public on behalf and in the interest of which they have been awarded. Pursuant to Art. 31, para 1 and Art. 33, para 4 of the LPP both the contracting authority and the participant have the right to specify which portion of their documentation is of confidential nature and is not subject to disclosure. In practice, however, there is a tendency to restrict the access to the information and documentation related to public procurement as much as possible. This should not be allowed with regard to information that is not protected by law (the latter include personal data, classified information and know-how).

4.7. EFFECTIVE SANCTIONS AGAINST ABUSE

Criminal prosecution of corruption has limited applicability in public procurement. The reasons lie in the very essence of criminal law which focuses on behavior that is entirely or primarily dependent on the capability of conscious judgment and the right of choice of the individual. They, in turn, affect the evidence required in criminal proceedings and therefore the most frequent result from the prosecution of infringements in the public procurement sector is close to zero. Furthermore, the Bulgarian *Criminal Code* does not contain any special provisions to criminalize unlawful behavior in public procurement. It is prosecuted under the general terms and conditions of what is defined as breach of trust under the

well-known Art. 282 CC. No such special provisions would have been necessary if Art. 282 had been effective. But this is not the case and it is sufficient to recall the origin and spread of such an approach in the legislation of other countries.

Law enforcement and economic policies operate on the basis of sets of rules and concepts which have little in common. This is particularly dangerous when some general financial and business concepts are used because their meaning has undergone substantial changes. In spite of its numerous amendments since 1989, the *Criminal Code* is based on obsolete terminology which would be more appropriate for the centrally planned economy. The market economy is associated with many more risks and calls for much greater flexibility. The expectations for profit are not backed by any guarantees. On the other hand, it is very difficult and almost impossible to decide when the loss is deliberately caused and when other reasons prevail. The *Criminal Code* is premised on the theory of universal causality. The issue concerning the relationship between the doctrinal understanding of guilt in the *Criminal Code* and the concepts of modern psychology is similar.

In this context, it is interesting to trace out the links of the public procurement market to gray economy. Such a linkage seems highly improbable at first glance. Public procurement implies the spending of public funds which are typically budget resources. Transactions are associated with greater transparency and accountability, reducing the opportunities for tax evasion and accounting fraud. On the other hand, however, it is precisely for these reasons that the revenues of public procurement contractors enjoy a positive public image to the utmost degree. It is hard to imagine a more legitimate source of revenue than from the state budget. Therefore public procurement is quite attractive for money-laundering purposes. This becomes most apparent when the winner has submitted an inexplicably low-priced bid that is obviously below cost. Such cases are not rare, especially in construction works and engineering. It is no secret that the shadow business tries to find legitimization through "regular" business that is, in a sense, the tip of the iceberg. The new wording of Art. 70 LPP can be assessed positively from this perspective. It envisages the obligation of the public procurement body to require detailed written justification of the price bid which is more than 30% lower than the average price of the other bids. If the committee is not convinced that the arguments stated in the justification are warranted, it may propose to the contracting authority to remove the respective participant from the procedure.

Such a risk, although in the reverse direction, exists in high-value consulting services because, as a rule, it is very difficult to justify or assess costs there. A bid may be unjustifiably high but it might well be the winner if there are no other competitive bids. This would happen when possible competitors are discouraged to take part in the procedure or when the terms of reference and the technical specifications are worded exclusively to the benefit of a certain bidder/participant.

Making criminal prosecution even stricter would hardly produce a tangible effect. More stringent penalties could not be productive at low detection rates and with a small number of persons convicted. The crime detection rates and the number of pre-trial proceedings ending up with indictments in court determine the level of public perceptions as to the inevitability of punishment. Even more important

to this effect is the number of court cases ending up with convictions. These perceptions have a greater deterrence effect than penalties. This is evidenced by the data published in the 2004 and 2005 *Corruption Assessment Reports* of the Center for the Study of Democracy. Over the period from 1999 to 2005, the number of court cases ended with convictions under Arts. 282-283a CC ranged from 30 to 45 and that of the persons convicted was 30 to 50 per annum, although the legal provisions had been amended to make the liability more serious. A similar conclusion can be drawn from the number of pre-trial proceedings and the number of those proceedings which ended with an opinion on the need for a trial over the same period. In fact, since 1993 the number of cases brought to court, the number of indictments and the number of persons convicted have fluctuated only insignificantly for reasons other than the amendments to the substantive law or to the *Code of Criminal Procedure*.[40] Therefore the penal policy can become more effective in Bulgaria only if it is integrated into the other policies pursued by government institutions. Effectiveness can be enhanced through the implementation of simultaneous measures along several lines.

Insofar as the adoption of an entirely new *Criminal Code* is a matter of generally recognized need, it could provide the opportunity to introduce effective provisions criminalizing specific actions in public procurement on the basis of the typical cases of infringements. The reverse argument challenges the justification of the specialization because the general and the special provisions could not be distinguished from one another. An argument to this effect is the criminal liability for breach of trust in the privatization and the disposal of state-owned or municipal property (Art. 283a) introduced in 1997. The trade-off between the two theses lies in the understanding that, generally, it is time to go beyond the prevailing hypotheses of resultant breach of trust in the economy as they prove to be futile. It would be more prospective to criminalize the conspiracy against the market as is the case in many developed market economies. The practice of enforcing the existing provisions of Art. 220 and Arts. 282-285 CC[41] is most unsatisfactory. It has turned out that in a market economy these offences cannot be proved for all practical purposes and they cannot be sued in court. Bribery is even more difficult to prosecute, especially when graft is indirect (through one or more intermediaries) or within the framework of an existing organized group which holds the requisite infrastructure (network of companies in Bulgaria and abroad, bank accounts, money-laundering schemes and other forms of disguise). Thus the possible criminal abuse in public procurement remains unpunished and, in turn, reduces the power of prevention. The only possible outcome is to criminalize conspiracy in the economy and to prosecute money laundering more persistently.

Administrative liability is also within the scope of sanctions. Naturally, many infringements in public procurement procedures do not warrant criminal prosecution under the *Criminal Code* either because of insufficient evidence of

[40] *Anti-Corruption Reforms in Bulgaria*, Center for the Study of Democracy, Sofia, 2005, pp. 39-40; *On the Eve of EU Accession: Anti-corruption Reforms in Bulgaria,*, Center for the Study of Democracy, Sofia, 2006, p. 66.

[41] Non-beneficial transaction and breach of trust respectively.

an offence or because of inability to gather admissible evidence or because the infringement does not fall within the purview of the Criminal Code. Nevertheless, the administrative criminal liability should not be underestimated. The new provisions of the LPP (Arts. 127-133) envisage many new cases of liability aimed directly at the contracting authority and its staff. When the public procurement contract is of high value and conditions exist to presume a corrupt transaction, the administrative liability of the procurement officer as a natural person is a relatively weak barrier. The amount of the fine envisaged for such cases is of little relevance. At the same time, the provisions concerning the actions or inactions of other officials involved in public procurement procedures would be much more effective, including from the perspective of prevention. From the viewpoint of the individual motivation of officers, it is very unlikely for them to be prepared to take risks related to the behavior of their superior. An exception to this rule would be the case of their complicity in the respective offence. Therefore one should welcome the introduction of the new provisions of Arts. 127a-129b LPP and, more specifically:

- the actions of officials authorized by the contracting authority to organize and conduct public procurement awarding procedures and to sign the contracts;

- the disclosure of information on the public procurement awarding procedure by a member of the evaluation committee.

Even more important is the fact that the statements on the violations detected are drawn up by officials of the Public Financial Inspection Agency. Their findings could provide legitimate grounds to start pre-trial proceedings; moreover, they could contain sufficient indications that an offence has been committed. The actual prerequisites for this possibility are the professional qualifications of the officials and their obligation under the *Law on the Administrative Violations and Penalties* to collect evidence of the infringement as a precondition for drawing up the statement.

One of the weaknesses of the administrative liability under the LPP is its focus exclusively on the contracting authority, as defined under Art. 7. The problem lies in the definition itself rather than the cases in which this liability can be invoked. Liability is always personal, whereas Art. 7 refers to both organizations as contracting authorities (administrations within the scope of the *Law on the Administration* and legal entities under the *Commercial Code*) and natural persons as heads of administrative structures (bodies) without making any distinction between them. Moreover, the term "organization governed by public law" within the meaning of § 1, subpara 21 of the LPP could exclude (and does exclude in the strictest interpretation of the term) municipalities and their mayors. Since the provisions envisaging sanctions cannot be construed restrictively, the liability of mayors and local governments is put to doubt, especially if the penalty orders are attacked in court under the *Law on the Administrative Violations and Penalties*.

4.8. STRENGTHENING OF THE ADMINISTRATIVE CAPACITY

The adjustment of practices to the legal framework is always a lengthy process. Due to the dynamic nature of legislation from 1999 to 2006, contracting authorities did not always have the opportunity to adapt their operations to the legislative novelties. But the gaining of experience in public procurement enables them to shorten the lead period. The most important accomplishment is the already existing organizational culture of using public procurement as a policy tool in the various sectors and, conversely, making public procurement itself the subject of policy.

Most administrations and other contracting authorities have used the time since the adoption of the LPP for their own institutional development and strengthening of the administrative capacity in the public procurement sphere. The establishment of specialized public procurement management structures has started either as independent units or as bodies performing other administrative functions as well. This has produced positive impact on their public procurement expertise.

The enforcement of the LPP and RSPP in their current wording narrows the loopholes for their circumvention. Parallel to the increased public intolerance to corruption, this reduces the opportunities for practicing the familiar forms of corruption and the introduction of new ones. The reinforcement of this tendency calls for development of public procurement policies along several lines: introduction of rules for ethical conduct in public procurement; development of policies and corporate public procurement plans in each administration which operates as a contracting authority; and strengthening of the administrative capacity to implement international projects with partial or predominant external financing with a view to gaining access to the EU funds.

The introduction of codes of conduct for public procurement officers is not widely discussed. The EU legislation guarantees transparency and equal treatment of the participants in public procurement procedures but everyday practices tend to deviate from these principles by giving preferences to domestic participants or circumvention of the applicable law. It is the rules of ethics that need to offset these negative tendencies and to promote compliance with the European and national legislation in the public procurement sphere. Codes of conduct should fill in the loopholes in the legal framework, guide to proper understanding and interpretation of legal provisions, and foster greater efficiency of public procurement.

The introduction of codes of conduct for civil servants and all other public procurement officers is a recognized need. Compliance would greatly reduce infringements and create preconditions for intolerance to them within administrations and corporations. Such model rules have already been drafted and what remains for government authorities is to adopt them for their respective administrations and make arrangements for their application. The rules could serve as a quality criterion in administrative work. Their use for the purposes of the certification systems in the administration could turn into a powerful incentive not only for their formal adoption but also for their application in day-to-day work.

The systematic human resources training should run for magistrates and controlling bodies at the same time, as well as for the personnel of the public and corporate administration on issues of common interest. An example of such issues could be public procurement, particularly with regard to the standards set out in the EU Directives and the case law of the European Court of Justice in Luxembourg.

Equally important for the strengthening of the administrative capacity is to gradually move the administrations of contracting authorities away from political influences through the recruitments systems and to enhance the independence of their middle management level. This is relevant also to the appointment of public procurement committees and to their rules of procedure as their members should be as independent from the political offices as much as possible. Parallel to it, positions for compliance monitoring officers could be opened so that they could supervise the observance of legal and ethical standards in close interaction with civil society institutions and media. Such positions could be opened at the inspectorate departments of the respective conventional contracting authorities and the regulators in the utilities sector.

4.9. REGULATION OF THE FINANCING OF POLITICAL PARTIES, LOBBYING AND PUBLIC-PRIVATE PARTNERSHIPS

As well as the internal factors and prerequisites within the public procurement system, the reduction of the incentives and preconditions for political corruption, which generates corruption also in public procurement, should be the focus of the anti-corruption policy. Otherwise the optimization of the legal framework of public procurement with all its components would not produce the desired results. The main highlights are the financing of political parties, the regulation of political lobbies and public-private partnerships.

The financing of political parties remains high on the agenda. There are strong public expectations of a solution while at the same time there is no tangible progress. By definition, each political party is an organization for systematic exercise of public influence. When coupled with higher level of organization and discipline it becomes potentially dangerous if the party falls prey to corrupt motivation and standards of conduct. In fact, the problem becomes public when the party leadership is fully or partially in the hands of people whose value systems and life priorities deviate from the generally accepted goals and principles of political life. These are cases in which the individual behavior is most easily transformed into the dominant organizational conduct. For these reasons, political favoritism of certain businesses is already a highly reliable indicator of corruption. The transparency of financing is a still unresolved problem. Unlike public benefit NGOs, political parties do not submit financial reports that are sufficiently open to the general public. Indeed, their reports are submitted to the National Audit Office which audits them and publishes them in its bulletin and on its web site (Art. 34, para 5 LPP). However, the truthfulness and completeness of the financial documentation made available are not checked. It is only formally irregular files that go to the National Revenue Agency. It is impossible for the time being to counter-check the sources of financing if the political party has formally fulfilled its obligation to draw up seemingly impeccable financial reports. But this does

not particularly enhance the public confidence in the way in which political life is financed in Bulgaria.

On the other hand, it is necessary to analyze whether the domestic legislation concerning political parties is adequate and realistic. The financial constraints are so formidable that there is hardly any political party capable of unconditional compliance. The ineligible financial sources are enumerated in Art. 24 of the LPP, including anonymous donations, whereas the preceding provisions allow fund-raising activities. These two concepts are defined in § 1, subparas 1 and 3 of the law.[42] The definition makes it clear that any collection of money could be considered a fund-raising activity, including the collection against promises to achieve certain political and economic results. No distinction is made between the cases when an individual requests funds and the specific activities targeted to an indefinite or broadly defined audience at which the party, or its representatives, put forward their platform and solicit financial or material support but in an unconditional manner.

It is widely known that the amount of the state subsidy (for parties represented in parliament) and membership dues is insufficient to ensure normal party operation and running in elections. Election campaign costs have increased drastically in the last ten years and this is a trend not only in Bulgaria but also in all democratic countries. The growing influence of the media and the media presence of political parties inevitably sustain this trend. Political activities become ever more technological and professional, while the voluntary participation and the personal financial input lose grounds. A large portion of the party expenditures will remain hidden from society. The typical examples to this effect are the expenditures a media presence, promotional materials (especially in election campaigns), rents and support of halls and clubs, concerts and other promotional events, transportation and accommodation costs. A national party event, for instance, implies the traveling of several hundred to several thousand people, something that is hardly affordable even to the biggest representatives of the corporate world, not to speak of the massive or group transportation of voters or the organized "vote shopping" among certain groups of the electorate which have been repeatedly covered by the media.

It is also well-known that much of the financing of political parties is provided by ancillary organizations, sometimes in cash and often in kind, insofar as media and other costs could be presented as corporate expenditure (promotion, advertisement, encouragement of sales, business development, etc.). The advancement of privatization and the obscure relations between the corporate environment and politics, which are still in the making, limit the possible sources of financing. This drastically enhances the importance of public procurement as a source and provides the logical explanation of the parameters of political corruption in the awarding of public procurement contracts. It is not sufficient to have the legal ban on the financing of political parties with resources of bidders and participants

[42] 1. 'Anonymous donations' are donations in which the identity or name of the donor are not disclosed to third parties; ... 3. 'Find-raising activities' are collecting activities on the basis of a transaction for consideration or free of charge in the form of money, services or technical equipment to the benefit of a specific political party".

in public procurement procedures, where the latter have not been completed and the time limit for appeal under the *Law on Public Procurement* has not expired, or resources of a public procurement contractor or a legal entity in the process of privatization. Against this backdrop, the reduction of the corruption pressure on the awarding of public procurement contracts calls for legalization of some existing sources of party financing and elimination of some legislative constraints. This is particularly relevant to the donation arrangements, where the ceilings are too low and certainly inadequate to the needs of a political party. Besides, it is important to take into account the diversity of financing forms, including indirect financing, such as the various forms of contribution in kind by third parties (mainly legal entities) – transportation services, halls, offices, printing, access to electronic media, outdoor advertising, etc. If they are explicitly regulated and treated as eligible donations, the effect would be positive provided that analogous and adequate tax arrangements are introduced. Thus it would become easier to trace out the donations with a view to the other legal constraints, e.g. the ban on the financing by foreign governments and foreign legal entities. Such measures would not be successful without the gradual but consistent minimization of payments in cash which is within the remit of the central bank and the government.

The regulation of lobbying is an anti-corruption measure which is quite non-conventional in Europe. It is exactly in the anti-corruption vein that the legislative initiatives of the 40th National Assembly to this effect are advertised. Generally speaking, lobbying is not typical of the continental type of parliamentarianism and this is the reason for the lack of such regulation in Europe (except for Poland since quite recently). Although the attempt at introducing such regulation in Bulgaria should be commended in principle, tangible results from its possible introduction could hardly be expected. One of the reasons is that the regulation of lobbying is called to life mainly by the requirements to declare and avoid conflicts of interest. This is a much broader concept than corruption and, in practice, it has little to do with corruption. The bill explicitly bans lobbying under the *Law on Public Procurement* and the *Law on Concessions*. This is to be welcomed because no lobbying should be allowed in strictly formalized procedures in principle. It is still unclear why the privatization process, for instance, is not included in its scope. It is more important, however, that lobbyists can easily circumvent the law by pressurizing through party staff or mimicking as consultants in the public sector. Therefore one encounters the everyday perception that lobbying comes to put order in corrupt practices instead of eliminating them. On the other hand, lobbying does not seem to be a lucrative prospect as long as the levels of political corruption are high. The gray sector of the economy would always opt for direct financing of party coffers and private accounts rather than for payment to expensive lobbyists without any guarantees for the final outcome.

Public-private partnerships. The concept of public-private partnerships is defined and used in many different ways. It covers various manifestations of partnership, e.g. joint ventures, joint projects, commissioning of the building and operation of a finished product for a certain period of time (B.O.T. arrangements or similar schemes), concessions, various forms of outsourcing, etc. However, the public opinion is particularly sensitive to the involvement of the central and/or local government in joint organizational forms of business. The public sector almost invariably participates with real estate. The doubts about inefficiency go hand

in hand with the doubts about corruption and they are most frequently caused by the non-transparent choice of a partner and negotiation of the terms and conditions. The existing problems can be out into three main groups:

- lack of rules/grounds for the "when, why, with whom and how" modalities to launch partnerships;
- lack of defined and announced policies for involvement in the various forms of public-private partnership;
- lack of competitive and transparent procedures for the choice of a partner similar to the procedures under the LPP, which constrains competition and hence efficiency.

Generally, public-private partnerships lead to avoidance of the need for application of the Law on Public Procurement once they are established. The exception to this rule is the regime of concessions which are subject to an exhaustive list of rules harmonized with the EU requirements and, basically, identical to those under the LPP. In all other cases, however, PPPs are established on the basis of the general terms and procedures, i.e. pursuant to the *Commercial Code*, neglecting the specific features of public institutions as the principals of business. Their covert goal could be the provision of unilateral competitive advantages which contradicts the logic of public procurement. No cases of public-private partnerships challenges on such grounds have become known so far and they can hardly be expected in the near future. Against the background of these problems, it is urgent to improve the legislation. First and foremost, rules need to be established for these partnerships and especially for the joint ventures between the central (or local) government and other companies with non-predominant state/municipal stake. The rules should be imperative for public institutions and the legal entities hey control directly or indirectly, regardless of whether they are business undertakings, associations or foundations. In principle, the range of the entities involved would be identical to that under Art. 7 and § 1 of the *Additional Provisions of the Law on Public Procurement*: "organizations governed by public law", "public enterprises", "related undertakings", etc. The rules should envisage competitive procedures for the selection of a partner, which are identical or similar to those under the LPP and the *Law on Concessions*.

The issue at stake is somewhat different in the case of the implementation of public-private partnerships. The *Law on Public Procurement* contains a number of provisions concerning PPP in order to ensure its application to the newly established partnerships. In the first place, these are the provisions of Art. 14, paragraphs 4 and 5 LPP concerning contracts for construction works or services related to construction contracts which are financed predominantly (over 50 percent) from the budget of public procurement contracting authorities governed by public law. In these cases, construction works are commissioned by a private person but the predominant budget co-financing automatically emancipated this person as the recipient of the financing to the level of a public procurement contracting authority within the scope of the LPP. Secondly, any legal entity which is the partner of a legal entity of a public procurement contracting authority (or which is established through such partnership) can be construed as

an organization governed by public law within the scope of § 1, subpara 21 of the LPP (i.e. a public procurement contracting authority) in any of the following four alternative cases:

- if during the previous year it had been financed mainly from a budget source or an equivalent source;
- if more than a half of the members of its managing or supervisory body are appointed by contracting authorities which are government bodies or organizations governed by public law;
- if the legal entity is subject to managerial control by contracting authorities which are government bodies or organizations governed by public law, i.e. they can exercise dominant influence on the activities of the legal entity;
- if the legal entity is a healthcare establishment – a company of which at least 30 percent of the revenues in the previous year came from the budget or the National Health Insurance Fund.

The application of these provisions depends also on the sector in which the legal entity operates. The conditions enumerated above are applicable only if it has been established to meet public interests (this objective is presumed for healthcare establishments). In this sense, it will not be each and every public-private partnership that would fall within the scope of the definition of an organization governed by public law as a type of public procurement contracting authority.

There is considerable corruption risk not only in the non-transparent and unclear way of establishing public-private partnerships but also in the rather easy arrangements under the LPP which enable them to channel budget resources to suppliers of goods and services, while circumventing the public procurement regime. For example, the obligation to apply this law to the consumption of goods and services by these entities refers only to those in which the government holds over 50% of the PPP. It is enough for the government to be involved with 50% in order to award contracts without applying the respective public procurement procedures, regardless of the value of the contract. To put it in brief, if those in government wish to channel substantial public resources to a supplier or a contractor who is close to them, without applying the LPP, it is sufficient for them to establish a PPP with a third close company with not more than 50% state participation.

It is recommendable in the future to apply competitive procedures to the establishment of the major types of public-private partnerships. For this purpose, it would be necessary to amend at least the *Law on the Administration* and the *Law on Local Government and the Local Administration*, so that to make reference to the LPP and require its application in such cases. As regards substantive law, these amendments could envisage grounds for the entry of a given administration into PPP of commercial or entirely public nature.