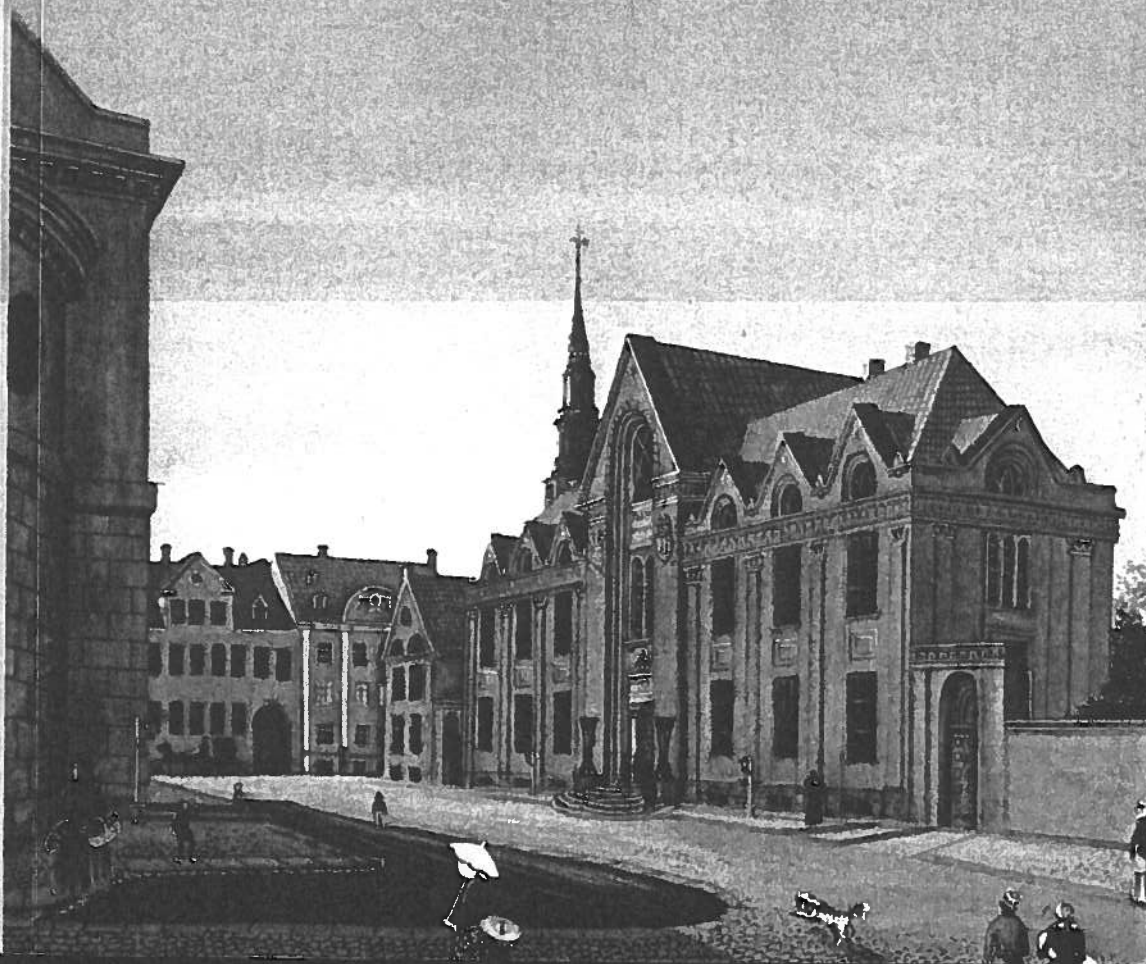


Public Procurement Law:

Limitations, Opportunities and Paradoxes

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BULGARIA

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The context

Question 1

The main systematic changes are to implement nationally at least some of the provisions and key points that represent the very core of the EU public procurement rules. It should be pointed out that answering the questions in terms of the application of EU rules and judgements in the Bulgarian jurisdiction constitutes quite a challenge. Bulgarian legislation in this particular regard is not so detailed, thus some of the questions inevitably will remain unanswered. However efforts have been put to create legislative framework which is more or less in line with the EU requirements.

Since June 1999 the Bulgarian Public Procurement Act (PPA) is in effect, a new Public Procurement Act has replaced the old one since 2004. At present a new version of the Public Procurement Act is already in effect with the latest amendments being in effect since October 2012 and March 2013. The new act is elaborated in line with a Concept adopted by the Bulgarian Council of Ministers for the time being aimed at diminishing the role and effect of a number of bylaws which by their very nature create a chaos in the legislation. Moreover the new version of the Public Procurement Act is aimed at implementing the provisions of Directive 2009/81 of the European Parliament and of the Council of the EU dated 13.07.2009 in terms of coordinating the procedures of awarding the public procurement contracts (or arrangements) therein.

The new amendments include approval of the terminology thus making it more precise in terms of comprehending the meaning of the respective provisions. The more important amendments are in substance. In general terms such changes are related to the implementation of new mechanism of awarding the relevant contracts, the new approach in the relations between the ter-

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derers on the one side and the Commission for assessing and approving the public procurement awards on the other side, the implementation of certain new procedures of negotiating the terms of the contracts etc.

In brief, parties to public procurement procedures as per Bulgarian law are the contracting authorities, the candidates, the tenderers and the suppliers, the contractors and the service providers. The approach adopted by Bulgarian legislator to public procurement is to trust public servants thus leaving them wide discretion on how to choose contractors – the principle of the so called minimal regulation. The principles of public openness and transparency, free and fair competition, equality and non-discrimination are also promoted therein.

Bulgarian Public Procurement Act (PPA) provides for four mechanisms of awarding:

- a. Open tender;
- b. Limited tender by using preselected list;
- c. Competitive dialogue;
- d. Direct negotiations.

The applicability of each mechanism is determined by the rules of Article 5 of the PPA which follows the philosophy of Articles 20-22 inch and 33 of Directive 2004/17/EC as Appendices IIA and IIB of the same EU law Act.

The choice of the relevant mechanism in each case is decided as per the character of the subject and as per the value of the public procurement contract itself.

Subjects of public procurement procedures are in mandatory:

- i. supply of goods, obtained by means of purchase, rent, lease with or without option of buying, hire purchase, as well as preliminary operations as shall be necessary for the actual use of the goods, such as installation, testing of machinery and plants, etc.
- ii. rendering services;
- iii. works, including: building or civil engineering (design and construction) of building sites; realization or design and execution, by whatever means, of one or several construction and erection works covered under Annex 1 hereto, related to the construction, redevelopment, remodeling, maintenance, restoration or rehabilitation of buildings or construction facilities; integrated engineering services and realization, by whatever means, of one or more activities related to construction of building sites in compliance with the requirements of the contracting authority, such as

feasibility study, design, organization of building, supply and installation of machinery, plant and technical equipment, preparation and commissioning of works.

- iv. supply of military equipment, including any parts, components and/or subassemblies thereof, including the equipment covered by the list of defence-related products adopted in pursuance of Article 2(1) of the Defence-Related Products and Dual-Use Items and Technologies Export Control Act;
- v. supply of special-purpose equipment, including any parts, components and/or subassemblies thereof;
- vi. works and services directly related to the equipment referred to in Items 1 and 2 for any and all elements of the life cycle thereof;
- vii. works and services for specifically military purposes or special-purpose works and special-purpose services.

In a nutshell, the process of awarding public procurement contracts is related to the spending of public funds aimed at satisfying the economic needs of the contracting authorities, respectively of the thorough society.

According to the Organization for Economic Cooperation and Development (OECD), between 15-20% of the GDP of a country worldwide are spent on purchasing goods and services in the public sector. Through its policy in the sphere of public procurement, the public sector could exert impact on the structure of the market, influence the competition among market participants and affect significantly the economic behaviour of the participants in the respective public tenders.

The awarding of public procurement rests on the economic principle of supply and demand which predetermines the bilateral nature of the relations between the authorities contracting the public procurement procedures and the participants in the relevant market. As a rule, the contracting authorities in public procurement rely on competition to ensure that their budgets will be spent in the most effective way. They have interest in purchasing products of high quality at low prices because their resources are always limited unlike the needs that have to be satisfied. In the conditions of market economy the effective competition process is the one which could lead to lower prices or higher quality, or more innovations in offering goods or services in public procurement procedures.

Bulgarian legislation, related to public procurement definitely is within the ambit of the Bulgarian administrative legislation. Despite that fact, the PPA is to a certain extent in line with the EU requirements.

The boundaries of EU public procurement law

Question 2

As already stated above, the Bulgarian public procurement legislation is firmly within the scope of the Bulgarian administrative legislation, thus public contracts are not set apart from the legislative administrative acts and decisions.

The contracts which are not considered as public procurement contract are precisely but at all pointed out in Article 4 of PPA.² Its provisions are closely connected with the Articles 1 paragraph 4, 16, 24 and 57 of Directive 2004/17/EC.

2. 1. the acquisition or rental of land, existing buildings or other corporeal immovable, as well as the creation of limited rights in rem, with the exception of the financial services in connection with such transactions; 2. the acquisition, development, production and co-production of programme material by radio and television broadcasters and the provision of broadcasting time; 3. the financial services in connection with the issue and transfer of securities or other financial instruments; the services provided by the Bulgarian National Bank; the services provided in connection with the management of the government debt; the services provided in connection with the management of the assets of the State Fund for Guaranteeing the Stability of the State Pension System, upon purchase and certification of produce, approval of warehouses for storage and conduct of auctions for sale with intervention on the farm produce markets under the Agricultural Producers Support Act; 4. the scientific research and experimental developments, where the contracting authority wholly remunerates the service but the benefits from the said research and development do not accrue exclusively to the contracting authority in the conduct of its own affairs; 5. arbitration and conciliation services; 6. the employment contracts; 7. the extending of loans by the Bulgarian Development Bank for the financing of the shortage of financing for projects under Operational Programmes Transport, Environment and Regional Development, approved by the European Investment Bank in accordance with the procedure under the Credit Agreement for a Structural Programme Loan, Bulgaria EU Funds Co-financing 2007-2013, between the Republic of Bulgaria and the European Investment Bank; 8. (new, SG No. 15/2013, effective 1.01.2014) the agreements referred to in Article 154(9) of the Public Finance Act, the operation, software and resources of SEBRA and the operations related to the collection of revenue and other income receipts of budgetary organisations through the card payments referred to in Article 154(8) and (10) of the Public Finance Act, the operations related to the liquidity management of the treasury single account system and the provision of guarantee deposits as well as other deposits referred to in Article 154(22) and (23) of the Public Finance Act.

At the same time even there are within the scope of the PPA objects some public contracts are not under the provisions of the PPA. For example, any contracts or the award of a construction concession within the meaning given by the Concessions Act; any contracts which the contracting authorities covered under Item 5 or 6 of Article 7³ herein conclude in connection with an activity other than the activities covered under Articles 7a to 7c and in Article 7e⁴ herein, or in connection with any such activities which are pursued in a third country and which does not involve the use of a network or geographical area within a Member State of the European Union; any supply contracts concluded by a contracting authority covered under Item 5 or 6 of Article 7 herein for purposes of resale or hire of the subject matter of the contract to third parties, provided that the contracting authority enjoys no special or exclusive right to sell or hire the subject matter of such contracts and other entities are free to carry out the said activity under the same conditions [as the contracting authority]; any contracts for the supply of energy or of fuels for the production of energy, concluded by contracting authorities covered under Item 5 or 6 of Article 7 herein, carrying out an activity under Article 7a herein; any contracts for the supply of water, concluded by contracting authorities covered under Item 5 or 6 of Article 7 herein, carrying out activities under Article 7b herein; any service, supplies or works contracts concluded by a contracting authority referred to in Item 5 or 6 of Article 7 herein with an affiliated enterprise, provided that at least 80 per cent of the average annual turnover of the said enterprise with respect to services, supplies or works arising within the Republic of Bulgaria for the preceding three years derives from the provision of such services, supplies or works to enterprise wherewith the said enterprise is affiliated; any contracts awarded by a combination formed by a number of contracting authorities for the purpose of carrying out an activity covered under Articles 7a to 7e herein, to any of the partners in the said combination; any contracts awarded by a partner in a combination formed by a number of contracting authorities for the purpose of carrying out an activity covered under Articles 7a to 7e herein, to the said combination, provided that

3. 5. the public undertakings and any combinations thereof, where carrying out one or several of the activities covered under Articles 7a to 7e herein; 6. the merchants and other persons which are not public undertakings, where carrying out one or several of the activities covered under Articles 7a to 7e herein on the basis of special or exclusive rights.
4. Activities relating to natural gas, heat or electricity, drinking water, to transport services; to the provision of a universal postal service; to exploitation of a geographical area.

the said combination has been formed in order to carry out the activity concerned over a period of at least three years and that the instrument setting up the said combination stipulates that the contracting authorities which form it will be part thereof for the same period; any service contracts awarded by a contracting authority to another contracting authority referred to in Items 1 and 3 of Article 7 herein or to an association of such contracting authorities which enjoy exclusive rights to provide such services by virtue of a law, a statutory instrument of secondary legislation or an administrative act; the act conferring the exclusive rights shall be issued in compliance with the provisions of the Treaty on the Functioning of the European Union; 11. any contracts for medicinal products, medical goods and for dietic food for special medical purposes, concluded by the National Health Insurance Fund under Article 45 (8) of the Health Insurance Act; contracts whereby activities are assigned pertinent to afforestation, logging and timber harvesting and the utilization of non-timber forest resources within the meaning given by the Forestry Act; contracts for public utility services, concluded by the contracting authorities referred to in Item 1 of Article 7 herein, which are local executive authorities or combinations thereof, with a corporation created according to the procedure established by the Municipal Property Act, which is a contracting authority referred to in Item 3 of Article 7 herein and which simultaneously meets the following conditions: (a) the capital of the said corporation is wholly municipal-owned; (b) the said corporation is subject to control similar to the control exercised by contracting authorities over their own structural units; (c) the objects, according to the basic or organic instruments of the said corporation, are carrying out public utility services; (d) at least 90 per cent of the turnover of the said corporation derives from the provision of public utility services to the contracting authority or combination of contracting authorities concerned; contracts awarded in implementation of an international treaty, concluded in compliance with the provisions of the Treaty on the Functioning of the European Union, between the Republic of Bulgaria and a third country and providing for supplies, services or works intended for the joint implementation or exploitation by the signatories thereto; contracts awarded according to specific procedural rules of an international organization.

As it was mentioned in the paragraph above, Bulgarian PPA permits under certain conditions an award of public procurement to be put out of scope of law even it is within it. An illustrative example to this is chapter 8a⁵ within

5. Chapter Eight JI (New, SG No. 93/2011, effective 26.02.2012); AWARD OF PUBLIC PROCUREMENTS BY PUBLIC CALL FOR TENDERS; Article 101a. (New, SG No. 93/2011, effective 26.02.2012) (1) (Amended, SG No. 33/2012) The terms

and procedure under this Chapter shall apply upon the award of public procurements covered under Article 14(4) herein; (2) (Amended, SG No. 33/2012) For the award of the procurements covered under Article 14(4) herein, the contracting authority shall solicit tenders by publication of a call; Article 101b. (New, SG No. 93/2011, effective 26.02.2012) (1) The call for tenders shall be prepared in a standard form endorsed by the Executive Director of the Agency and shall include at least the following information: 1. name and address of the contracting authority; 2. description of the subject matter of the procurement and, where applicable, quantity or scope as well; 3. the requirements set by the contracting authority for performance of the procurement; 4. the criterion for award and, where the criterion of the most economically advantageous tender applies in making the selection, also the criteria for arrival at an integral evaluation, including the relative weighting given to each of the criteria; 5. deadline for receipt of the tenders; (2) (Supplemented, SG No. 33/2012) The contracting authority shall publish the call for tenders on the Public Procurement Portal and shall indicate a time limit for public access to the said call which may not be shorter than seven days. The said time period shall begin to run as from the day next succeeding the day of publication. The call for tenders shall simultaneously be published on the buyer profile; (3) The contracting authority may furthermore insert an announcement of the call for tenders in print media, as well as dispatch the said call to persons selected thereby, without changing the conditions referred to in Items 2 to 5 of Paragraph (1). The announcement may not contain more information than the information in the call as published on the Portal; (4) The deadline referred to in Item 5 of Paragraph (1) may not be shorter than the time limit for public access to the call for tenders; (5) Upon change of the conditions as initially announced, the contracting authority shall be obligated to re-apply the procedure for soliciting tenders under Paragraphs (1) to (3); Article 101c. (New, SG No. 93/2011, effective 26.02.2012) (1) The tender referred to in Article 101a (2) herein must include at least: 1. particulars of the person who or which makes the proposal; 2. proposal for meeting the requirements referred to in Item 3 of Article 101b (1) herein; 3. price proposal; 4. period of tender validity, where applicable; (2) The content of the tender shall be submitted in an opaque sealed envelope; Article 101d. (New, SG No. 93/2011, effective 26.02.2012) (1) The tenders shall be received, examined and evaluated by officials designated by the contracting authority; (2) Upon receipt of the tenders, the persons referred to in Paragraph (1) shall submit declarations on the circumstances referred to in Items 2 and 3 of Article 35(1) herein; (3) The persons referred to in Paragraph (1) shall establish a procedure for examination of the tenders and shall draw up a memorandum on the results of the work thereof. The said memorandum shall be submitted to the contracting authority for endorsement; Article 101e. (New, SG No. 93/2011, effective 26.02.2012) The contracting authority may award the performance of the procurement even in the cases where a single tender has been submitted; Article 101f. (New, SG No. 93/2011, effective 26.02.2012) (1) (Amended, SG No. 33/2012) The contractor shall conclude a written contract including all proposals of the tender of the selected supplier, contractor or service provider; (2) (Amended, SG No. 33/2012) Upon conclusion of a contract, the selected supplier, contractor or service provider shall

the PPA. Within this part of the PPA the very mechanism in the technical sense of the word for awarding public procurement contracts has been developed in a detailed way. The invitation itself for public procurement awards issued by the contracting authorities contains certain elements that are compulsory therein and are strictly defined (numerus clausus). As per Article 101b of the PPA the elements are the following: the name and address of the contracting authority; description of the subject of the public procurement therein thus specifying quality and volume; requirements of the contracting authority in terms of the execution; criteria for awarding. In cases when the choice is based on the 'economic efficiency', the indications for the overall estimation/evaluation with the relative burden included; terms for receiving the relevant offers; the invitations are published in line with the requirements of the Regulation for applying the provisions of the PPA. The offers should contain at least the following information as per Article 101c: personal data in respect to the personality who has delivered the offer; proposal for meeting the requirements in line with Article 101b; price proposal; term of validity therein.

Article 101g is structured as to the evaluation of the offers that is done by the public servants, elected to this end by the contracting authorities. As per Article 101d, the contracting authority may award the public procurement contract also in case there is a single offer.

As per Article 101e, the contracting authority concludes a written contract (agreement), which includes all the proposals within the scope of the offer of the defined contractor.

The contracting authority concludes the final agreement with all the proposals therein. When concluding the contract, the contractor presents all the documents issued by the relevant authorities. The public servants responsible in terms of the public procurement procedures are chosen accordingly. The chosen public servants are due to fill in declarations in terms of the circumstances involved.

submit documents, issued by a competent authority, certifying the non-existence of the circumstances covered under Item 1 of Article 47(1) herein, and declarations on the non-existence of the circumstances covered under Article 47(5) herein, except in the cases where the procurement is awarded by a contracting authority referred to in Item 2 of Article 7 herein.; Article 101g. (New, SG No. 93/2011, effective 26.02.2012) The contracting authority shall be obligated to preserve all documents relating to the award of procurements under this Chapter for a period of three years after completion of the performance of the contract.

Peculiar in this mechanism is that it cannot be challenged furthermore. That procedure closes by the Protocol prepared by the Evaluation Committee of the contracting authority who (its legal representative) just 'confirm' it.

This procedure is applicable for public contracts between BGN 22 000 and BGN 66 000 VAT excluded (for reference EUR 1 – BGN 1,95583).

It is disputable if the advantages or its disadvantages are more. The bureaucracy's really less but the principles of transparency and fairness are really broken as far as for the Bulgarian economic standard these amounts are not very low.

Question 3

Bulgarian Public Procurement Law is applicable even for those partnership and cooperation when their subjects enter within the scope of the law.

Question 4

For example in certain cases the bidders may try to share the economic benefit they have gained as a result of bid-rigging. This is highly likely in the cases of public procurement contracts of high value. There is suspicion of bid-rigging if the bid winner refuses to sign a public procurement contract with the contracting authority and later appears as a subcontractor of another bidder in the same public procurement procedure. On the other hand, the bid winner could carry out direct payment to other bidders in the procedure, or could subcontract a significant part of the tender to other participants. Such subcontracting, however, needs to be distinguished from the cases of winning a tender by undertakings which participated in it as a consortium, or through establishing a joint undertaking which may well be in some form of cooperation.

Question 5

The general principles of EU law: public procurement law and beyond

Question 6

The following example is illustrative in terms of rules and principles applicable to the award of contracts (or consensual arrangements) excluded, not at all covered by the EU procurement directives: Anticompetitive bid-rigging gives rise to considerable harms for the contracting authorities as their budget

funds or funds for implementing activities of social importance are taken away from them, thus undermining the advantages of the competitive market.

Question 7

Surely the principles of public openness and transparency, free and fair competition; equality and non-discrimination are widely promoted by the PPA. Even where a contracting authority grants special or exclusive rights to carry out a public service activity to a person other than a contracting authority, the act by which these rights are granted shall provide that, in respect of the supply contracts which it awards to third parties as part of its activities, the person concerned must comply with the principle of non-discrimination on the basis of nationality.

In practice, there are certain deviations from these principles. For example, in art. 33 of the PPA where the technical requirements of the offer are revised, the Bulgarian legislator provides the contracting authority with the discretion to decide if certain documents are 'appropriate means to the satisfaction of the contracting authority'. In this way the contracting authority is not bound by the objectivity of those means as it is the philosophy of from Directive 2004/18/EC. Another example is chapter 8a already cited above.

Public procurements and general EU law, including competition and State aids law

Question 8

The potential restrictions of competition in awarding public procurement contracts can be divided into two groups: public and private.

Public restrictions of competition: The violation of the competition principle should be considered a public restriction of competition when it stems from acts, actions or omissions of the contracting authorities in public procurement procedures. Those acts, actions or omissions have been issued or realized in implementing the authoritative (administrative) competences of the contracting authorities and are most often manifested in the phase of opening of public procurement procedures as well as in assessing the participants and selecting the contractor. The public restrictions of competition can be implemented by the contracting authorities themselves through introduction of discriminatory conditions and requirements to the participants during

opening a procedure, which narrows the circle of potential bidders and create unreasonable obstacles for the candidates while favouring a certain participant in the market. The principle of free and loyal competition could also be violated by enacting a decision for assessing the participants in which a bidder which should have been eliminated by the contracting authority has been illegally admitted to the evaluation and rating stage.

In the case of public restrictions of competition the violation of the principle of free and loyal competition could serve as grounds for repealing the respective acts, actions or omissions of the contracting authorities in accordance with the control competences of the CPC further to Article 120 and the following articles of the Public Procurement Act (PPA).

Private restrictions of competition: The private restrictions of competition cover the actions of the economic operators in the relevant market which could lead to prevention, restriction or distortion of competition in the process of awarding public procurement procedures. In this case bid-rigging is a form of horizontal anti-competitive conduct of enterprises as the rules of free and fair competition have been violated by the very participants in the procedures who happen to be competitors on the relevant market. The enterprises that take part in the public procurement procedures are interested in being awarded the procurement at conditions that are most favourable for them as in this way they could maximize the economic benefit they get once given the opportunity to implement the respective contract. As in the conditions of an effective competitive process there is an economic risk for the enterprises not to receive the public procurement contract by being displaced by their real or potential competitors on the market, the bidders are willing to participate in agreements among themselves for fixing the prices, quality or quantity of the procurement as well as to close the market for potential competitors or to boycott the participation of their real competitors. For achieving this objective they exchange among themselves sensitive market information and trade secrets, thus coordinating their behaviour when participating in public procurement procedures. The forms of coordination among undertakings lead to anticompetitive bid-rigging as they distort the competitive process among the participants in them.

Anticompetitive bid-rigging may cause to considerable harms for the contracting authorities as their budget funds or funds for implementing activities of social importance are overspent by them, thus undermining the advantages of the competitive market.

In establishing certain behaviour of enterprises which could objectively lead to the prevention, restriction or distortion of competition in awarding public procurement contracts, there are grounds to hold these enterprises the

legally responsible for committing an infringement of Article 15, para. 1 of the Law on Protection of Competition /LPC/.

Question 9

Suspicious patterns with regard to participating in consecutive procedures:

Some of the bid-rigging schemes designed by the enterprises could be manifested or observed as a pattern, only after a number of public procurement award procedures have been carried out. For example, patterns could be observed when consecutive tenders are won by one and the same bidders. It is possible, in observing consecutive tenders, one winning bidder to stand out in relation to certain types and sizes of tenders, or it could also be noticed that certain bidders always win in certain geographic regions. Other patterns in consecutive procedures can be established when a certain participant never wins a tender but keeps participating, or when certain participants rarely take part in a tender but when they do, they are always the winning bidders. In observing the characteristics of the offers of the same participants it could be established that for certain tenders such participants submit comparatively high price offers while others unreasonably submit comparatively low price offers.

In analysing the presence of suspicious patterns in participating in similar public procurement procedures, some unusual characteristics of the price offers could be outlined as well – e.g. all offers are unusually high, or the offered discounts are unusually low. Similar are the cases when the offers under a given public procurement procedure are different from those in previous procedures, without a change of the economic factors which could justify such difference, or the size of the price offers of the traditional participants changes drastically when an offer is submitted by a new participant in the market.

The procedure of Article 101a mentioned above is within the scope of this question also.

Question 10

N/A

Strategic use of public procurement

Question 11

A lot of environmental and social policies can be impacted in a significant way by public procurements. The challenges are so many that it is truly difficult to avoid them.

All of the challenges are focused on trying to avoid anticompetitive behaviour in the broadest sense of the word. In certain cases, for example, the bidders may try to share the economic benefits they have gained as a result of bid-rigging. This is in principle highly likely to happen in the cases of public procurement contracts of high value. Of such a sort are the main challenges.

Question 12

Innovative thinking is often fostered by problems of such kind. To what extent public procurements are used as a tool to foster innovation is difficult precisely to say.

Remedies

Question 13

Strengthening the remedies against breaches of EU public procurement rules in line with Directive 2007/66/EC: Art. 120, para. 2 of the PPA constitutes one of the significant improvements created as to increase the efficiency of the relevant procurement – like procedures and especially the mechanism of control over all of the procedures thus enumerating in an exhaustive way the reasons for proclaiming public procurement contracts null and void, i.e.: (i) Through lack of any public procurement award despite the existing relevant reasons in this respect. This item includes the cases where there are no official acts for starting the procedure and/or the existing acts are themselves null and void; (ii) Contracts are concluded before the expiry of the deadlines for challenging the decisions in terms of defining the executor.; (iii) Before putting into effect the relevant act aimed at imposing interim measures as well as in cases of infringements of the public procurement awards.

The exceptions contained in the new provision within art. 43 of the PPA are of importance therein and are the following: (1) When as a result of force majeure the terms of the contracts have to be changed; (ii) In cases of making the contracted prices lower thus taking into account the interest solely of the contractors; (iii) In cases of amendment of the state-regulated prices when the main subject of the public procurement contract is any activity whose price is object to state regulation and the terms of execution is set to be more than 12 months.

Conclusion and reform

Question 14

It is indeed rather disputable if the modernization attempts in line with the procedures laid down in the 2004 directives are too burdensome and resulting in extremely high costs and inefficiency. Intended to allow measures of procedural flexibility, it remains quite unclear where and if there is room for any negotiations in EU public procurement rules. It is also clear that nationality – based discrimination is unavoidable. Moreover, hostile approaches to any negotiations and/or dialogues have to be taken into account.