EU Enlargement and the Emboldening of Institutional Integrity in Central and Eastern Europe: The 'Tough Test' of Public Procurement

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Abstract: European Union enlargement and the incorporation of the *acquis communautaire* are widely seen as successful and emboldening the integrity of political, administrative and legal institutions in Central and East Europe (CEE). The analysis reported here describes the specific problems associated with affirming institutional integrity in the field of public procurement, which constitutes a 'tough test.' Public procurement is namely an area where the *acquis* swiftly gained preeminence in accession states, but whose complex regulations depend on a well-functioning judiciary, effective administrative supervision and limited corruption. The experience in Poland and Bulgaria, countries that represent different stages of institution-building in this area, is compared. The results suggest that an EU-compatible public procurement regime is being consolidated throughout the CEE region. At the same time, that regime may only work well when boundaries between institutional subjects, as well as between the spheres of law, politics and economics, are upheld in post-communist countries.

This article analyses enlargement-induced institution-building in the field of public procurement, which operates at the nexus of business interests, public administration practices, political decision making, and complex legal rules. Arguably, a defining characteristic of public procurement is precisely its strategic location at the intersection between the realms of politics, economics and law. Another key characteristic is the constant tension between the letter of the law and the specific circumstances of economic sectors and of geographic regions, as the nature of different industries and business practices covered by the law often are far apart. To society as a whole in the European Union (EU), the stakes involved are typically high. Public procurement spending on average accounts for some 16 per cent of expenditures of the EU's aggregate GDP, though varying between 11 and 20 per cent for individual Member States.[1]

The share of government expenditures on public procurement remains lower in the new Member States, but the latter figure steadily rises as economies grow and an EU-compatible regime evolves. Some of the problems faced elsewhere—the balancing of interests of small firms versus large corporations and that of process efficacy versus bidder litigation rights—are often exacerbated in countries that recently acceded to the Union. Not infrequently a battle is raging between incoming and outgoing stakeholders, as the latter try to retain the privileged position awarded to them under a less competitive procurement regime. At the outset there is an especially uneasy relationship between sceptical bidders, who want to keep transaction costs to a minimum and avoid revealing trade secrets to their competitors, and inexperienced contracting authorities, that are required to apply process transparency and are uncertain where to draw the line. Finally, there is the issue of corruption, which loomed large in predictions about the effects of not implementing—but also of actually implementing—the relevant Community directives. Overall, the public procurement sector is said to have 'an enormous potential for corruption.'[2]

The EU's general approach to institution-building in CEE states was forged through the so-called 'Copenhagen criteria,' adopted by the European Council in 1993. Subsequent EU summits expanded on the original formulations and emphasised the notion of 'administrative capacity' as a requirement to accession. One of the most powerful contradictions inherent to EU enlargement arose as these requirements on the one hand needed to be sufficiently vague so as to accommodate the types of regulations applied in the existing Member States, while on the other hand being specified clearly enough to allow scrutiny of the progress of aspiring accession states. In most policy areas those vague formulas were interpreted by the EU Commission in white papers and annual progress reports. In the field of public procurement additional references were made to standards and guidelines of UNCITRAL (United Nations Commission on International Trade Law) and the OECD (Organisation for Economic Cooperation and Development).

Generally applicable to public procurement in the EU are the following norms associated with the internal market: the prohibition against discrimination on grounds of nationality, the free movement of goods and the concomitant prohibition of quantitative restrictions on imports and exports (and measures having equivalent effect), the freedom of establishment, and the

[1] EU Commission, 'Public Procurement' website, accessed 10 March 2009. Available online at: http://ec.europa.eu/internal_market/publicprocurement/index_en.htm

[2] Organisation for Economic Cooperation and Development (OECD), 'Executive Summary', in *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD Publishing, 2005, at 9

freedom to provide services.[3] During the pre-accession and early accession phases the relevant *acquis* included six key pieces of legislation.[4] Four of these covered contract award procedures, namely Directive 92/50/EEC concerning public service contracts, Directive 93/36/EEC on public supply contracts, Directive 93/37/EEC on public works contracts, and Directive 93/38/EEC on the award of contracts in the utilities sector. Another two pieces of legislation, Directive 89/665/EEC and Directive 92/13/EEC, regulated the problem of remedies.[5] Directives 2004/17/EC and 2004/18/EC, dealing with privatized utilities and the role of procurement entities, respectively, were adopted in 2004 and transposed in the following years.

From these norms follow three regulative principles of considerable importance for the functioning of public procurement, namely that of transparency, equal treatment and contestability. The analysis below gauges institution-building processes in two CEE states by way of a contextually situated analysis of those regulative principles. Out of a dozen accession countries working toward conformity with the EU's public procurement regime in recent years, Bulgaria and Poland were selected as suitable cases because of an interesting mix of similarities and differences.

Bulgaria joined the EU in January 2007 and is among the small- to medium-sized new Member States. Due to lingering doubts about the country's capacity to effectively implement EU laws and to combat corruption and organised crime, the EU Commission recommended that Bulgaria (alongside Romania) be made subject to 'safeguard measures'. This unprecedented measure means that close monitoring of certain areas continues after formal accession, and that the enforcement of specific rules in its relationship to other Member States may be suspended for three years should Bulgaria not live up to its obligations.[6] Within the framework of the specific problems identified by the Commission and by domestic observers, irregularities in the field of public procurement were explicitly cited.[7] In 2004 Bulgaria was one of the last accession countries to set up a central procurement agency to supervise and monitor the system, draft new legislation and train procurement officers.

For its part, Poland is by far the largest accession country, in size roughly equivalent to the seven other ex-communist countries that joined the EU on 1 May 2004. Consequently, Poland's performance is decisive to the overall success of the Union's eastwards enlargement. Whereas the country is quite advanced in terms of having established a market economy, Poland is also known to wrestle with corruption in its public administration system as well as at the level of political and economic decision-makers. Poland's central public procurement agency was created in 1995 and performs similar functions to that of its Bulgarian equivalent, except in one crucial respect. It administers the system of complaints review and remedies and therefore exerts direct influence on the evolving jurisprudence.

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[3] Trepte 2004, at 98

[4] Notably, Bulgaria and Romania joined two years and seven months later than the previous seven CEE countries

[5] A. Łazowski, 'Public Procurement,' In *Handbook on European Enlargement: A Commentary on the Enlargement Process*, A. Ott and K. Inglis, eds. (T. M. C. Asser, 2002), 619-630

[6] EU Commission, *Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania*, Brussels, 26 September 2006, 10

[7] K. Engelbrekt, 'Bulgaria's Accession and the Issue of Accountability: An End to Buck-Passing?' (2007) *Problems of Post-Communism* 54: 3-14

The Framework of Analysis: Institutional Integrity

How can we analytically approach institution-building in the CEE region? Well, the transformation of political, legal, organizational and social practices that accompanies the EU's enlargement policy in the accession states deserves attention not least because it potentially makes boundaries between institutions more distinct.[8] In a Weberian vein, institutional integrity is understood to denote intactness and the drawing of boundaries toward adjacent organizational bodies, but also to concern moral and value integrity, such as disinterestedness, and the purity and completeness of values.[9] If institutions are 'the rules of the game in a society or […] the humanly devised constraints that shape human interaction',[10] those games are necessarily 'nested' in different dimensions of a policy or decision making process.[11] The analysis of the incorporation of the *acquis communautaire* assumes that the emboldening of institutional integrity in CEE states needs to be purposefully developed. This implies taking into account the communist legacy and the limited experience of accession states as societies that promote democracy, free enterprise and the rule of law.[12]

The notion of institutional integrity draws on a distinction between the 'vertical' and 'horizontal' consolidation of institutional systems, originally outlined by Claus Offe. Institutional systems can according to Offe be consolidated vertically through the subordination of each actor's decision-making to 'higher-order decision-making rules', and horizontally through the 'insulation of institutional spheres from each other and the limited convertibility of status attributes from one sphere to another'.[13] To these two categories a third dimension is then added in an attempt to capture institutional systems that 'interface' with societal institutions, producing a three-dimensional analytical grid suitable for a more nuanced examination of institution-building in CEE countries. Consequently, the study of institutional integrity proceeds along three dimensions, each geared toward a specific relationship within a wider system of governance. The three dimensions concern relations between *institutional subjects*, between *institutional spheres*, as well as between *institutional agents* and *clients*.

First, *institutional subjects* apply to key units of the formal system of governance. This concept rephrases Offe's 'vertical consolidation' of institutional systems. A crucial feature of most understandings of the rule of law is that lower bodies comply with the decisions of superior ones, and that the (written or unwritten) constitution provides the most fundamental frame of rule-making.[14] Due to their specific legacy in this respect, there are reasons to expect

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[8] K. Engelbrekt, 'The Impact of Enlargement on Institutional Integrity in Central and Eastern Europe,' *Perspectives of European Politics and Society* 10(2): 167-180.

[9] M. Weber, *Wirtschaft und Gesellschaft* [Economy and Society], 5th edn (J. C. B. Mohr, 1972), at 126, 565, and 834

[10] D. C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge University Press, 1990)

[11] L. E. Lynn, *Managing Public Policy* (Little, Brown and Company, 1987)

[12] This line of argument builds on an influential 1998 report produced under the OECD's SIGMA program, cautioning CEE states against the introduction of civil service reforms based on New Public Management and other business-oriented theoretical concepts. Instead, several authors of the report favored an overall reform strategy that would seek to cushion the potentially destabilizing social and political effects of fledgling markets, and solidify government institutions and respect for the rule of law. Organisation for Economic Cooperation and Development (OECD), *Preparing Public Administrations for the European Administrative Space* (1998), Sigma Papers 23, CCNM/SIGMA/PUMA (98)39, 44, 61, 113, 176

[13] C. Offe, 'Introduction: Agenda, Agency, and the Aims of Central East European Transitions,' in *Institutional Design in Post-Communist Societies*, J. Elster, C. Offe and U. Preuss (Cambridge University Press, 1998) at 1, 31

[14] Weber 1972, at 124, R. Dworkin, *Law's Empire* (The Belknap Press of Harvard University Press, 1986), 380

demarcations related to the rule of law to present a special challenge in post-communist countries. Above all, for half a century the communist party was at the core of CEE rule, putting a premium on party loyalty rather than constitutional or judicial principles. In the field of public procurement, therefore, a well-functioning hierarchical relationship between the major supervising, monitoring and adjudicating bodies at the central level of government and their political principals, as well as the judicial control of these bodies, are relevant to an analysis of institutional integrity.

Second, the concept of *institutional spheres* corresponds to those of politics, economics and law. Here Offe emphasizes the importance of 'horizontal differentiation' in regard to the purpose of consolidating democracy in transition societies. Simply put, the overall system of governance will work better if the autonomy of institutions within different spheres is bolstered. A measure of successful differentiation, as mentioned above, is 'the degree of insulation of institutional spheres from each other and the limited convertibility of status attributes from one sphere to another'.[15] In the past the influence of the communist party to permeated practically all other institutions in Central and Eastern Europe, meaning that top-level officials in the civil service, in the economic sector, in the judiciary, in sciences and even in the arts, were typically members of the communist party. In the field of public procurement, institutional integrity thus depends on reinforcing the professional ethos of civil servants, legal practitioners and bidders/suppliers, along with a respect for functional delimitations toward the other spheres.

Third, we approach the stage of implementing policies in which principals no longer are directly involved, and the key relationship is that between agents and clients. By *institutional agents* I mean individuals representing governance bodies whose mandate derives from a deliberate decision to delegate authority, and whose activities are primarily regulated by national legislation. In turn, the notion of *institutional clients* refers to citizens, businesses and other legal persons who need the collaboration of institutional agents in order to operate effectively.[16] An analysis of the relationship between institutional agents and clients inevitably shifts the focus to implementation of legal and public administration reform and to the 'interface' between government and the citizenry. In the field of public procurement, this pertains to contracting entities that interact with bidders/suppliers, and indirectly to the relationship of the former to taxpayers and citizens, as suppliers and end-users of products and services resulting from public procurement.

To reiterate the main idea borrowed from the work of Offe, the three relationships outlined above represent important elements in institution-building processes that may advance democratization and the establishment of free markets and the rule of law.[17] That process is in most respects well underway, and in terms of formal transposition of EU legislation all new Member States have virtually completed the process. In the literature on EU enlargement it is often noted, however, that actual implementation and realization of the subtler qualities of governance, legality and democracy inevitably require more time.[18] Characteristic of the

[15] Epstein and O'Halloran 1999

[16] The agent-client dyad shares some features with principal-agent relations, but in public procurement the contracting entity typically retains responsibility and accountability for the product, service or public works that is purchased. That accountability represents an extension of that of the political principal that creates the legal framework in which agent-client relations are forged.

[17] Frank Emmert, 'Rule of Law in Central and Eastern Europe' (2009) *Fordham International Law Journal* 32: 551-586

[18] D. R. Cameron, 'The Tough Trials Ahead for the EU's Eastern Expansion' (2004) *Current History* 103, at 119, G. Falkner, E. Causse, and C. Widermann, 'Post-Accession Compliance in Central and Eastern Europe:

accession states is that the public procurement regime was introduced by way of a centrally-driven approach, through which market actors were supposed to learn the rules and internalize norms from the top down.[19] It may further be argued that such institutions, originally formulated outside a political-legal system, require 'sticky properties' so as to be successfully incorporated in domestic legal, administrative and social structures.[20]

Public Procurement 'Transplanted'

As noted above, public procurement operates at an intricate nexus of economic interests, political decision making and complex legal rules. The difficulty in creating a normative and institutional regime that creates barriers between the economic, political and legal institutional spheres, while not unnecessarily complicating the activities of public administrations or impeding economic growth, is a daunting task even in countries characterised by mature markets, a high degree of civil service professionalism, and 'settled' polities.[21] In accession countries, where the latter institutional qualities are still in short supply, the creation of an effective public procurement regime understandably represents a particularly tall order. With a shadow economy roughly twice the size of that in old Member States and associated problems of combating tax-evasion and non-compliance with regulatory standards,[22] CEE countries must establish rules that break up old dependencies and limit possibilities for corruption, rent-seeking and 'agency capture' by business interests.[23]

The EU's public procurement legislation has long evolved toward more numerous and precise demands on member and candidate states. Already in the 1970s two Directives were adopted to coordinate the rules on the award of public contracts in the public works and supplies sectors.[24] In the late 1980s the EU Commission was reorganised internally to better meet the challenges in the field, producing a guide to public procurement and creating the computerised Tenders Electronic Daily (TED) to provide up-to-date information on public sector tenders.[25] At this point the Commission started paying serious attention to enforcement issues and initiated legal proceedings against alleged violations.[26] Importantly, Directive 89/665/EEC granted the Commission 'quasi-federal competence' by requiring Member States to set up review bodies empowered to take interim measures, set aside unlawful decisions and award damages.[27] Whereas a Commission green paper (1996) subsequently criticised the slow incorporation of the directives into national law, the European Court of Justice showed that other criteria, e. g. related to the environment, could be integrated into procurement regulations.

Transposition and Application after the Age of Carrots and Sticks' (2006), paper presented at the eps-net plenary conference, 16-27 June 2006. Available online at http://www.epsnet.org/2006/pps/falkner.pdf

[19] Organisation for Economic Cooperation and Development (OECD), *Central Public Procurement Structures and Capacity in Member States of the European Union* (2007), Sigma Paper 40 GOV/SIGMA (2007)4, 11

[20] A concise definition of 'institutional stickiness' says that it refers to 'a function of that institution's status in relationship to indigenous agents in the previous time period;' P. J. Boettke, C. J. Coyne, and P. T. Leeson, 'Institutional Stickiness and the New Development Economics' (2008) *American Journal of Economics and Sociology* 67(2), 331-358, at 331-332

[21] C. Bovis, *Public Procurement in the European Union* (Palgrave, 2005), 1

[22] F. Schneider, 'The Size of the Shadow Economies of 145 Countries All Over the World: First Results Over the Period 1999 to 2003' (2004) *IZA Discussion Paper* No. 1431, December 2004, Bonn, 26-30.

[23] J. Q. Wilson, Bureaucracy: *What Government Agencies Do and Why They Do It* (Basic Books: 1989)

[24] P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press, 2004), 351-354, A. Reich, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing* (Kluwer Law International, 1999), at 76

[25] J. Fernández Martín, *The EC Public Procurement Rules: A Critical Analysis* (Clarendon Press, 1996), 24

[26] Reich 1999, 198, 216-218

[27] Reich 1999, 218-221, Bovis 2005, 15

Two EU Directives adopted in 2004 consolidated what had earlier been separate regimes for public works, supplies and services contracts. This reform was coupled to the introduction of flexibility of contracts, a feature that grew out of difficulties encountered by practitioners. 'Framework agreements' allowed the renewal of contracts with a known supplier for a fixed period of time, while a 'competitive dialogue' cleared the way for procuring authorities and suppliers engaging in post-tender resolution of anticipated problems in complex projects. The new Directives also obliged member state authorities to immediately exclude contract bidders convicted for fraud, money laundering, corruption, and other economic crimes.[28] Further requirements were added concerning the review procedures, in 2007, to oblige Member States strengthen the opportunities for bidders to challenge the initial contract award decision.[29]

The EU's present public procurement regime inevitably imposes changes in many areas of institution-building, some of which became functional already during pre-accession. Albeit most CEE countries first approximated the UNCITRAL model of public procurement, the *acquis* and other criteria associated with the enlargement process supplemented those standards and, crucially, created the prerequisites for a much more comprehensive and speedy transposition and implementation. While procedural autonomy still formally applies in this area, the wide scope of provisions are designed to render the relevant institutions sufficiently robust and effective so as to thwart various forms of abuse and non-compliance with the overall regime. As a consequence, the process of institutional adaptation cannot help affect domestic legal procedure.

Linked to the operation of the internal market there are above all three regulative principles inherent to the EU's public procurement regime. The principle of *transparency* permeates all stages of the tender process, ensuring mandatory advertisement of public contracts and providing interested parties with generous access to information about criteria formulation and bidder selection before and after an agreement has been signed. A second major regulative principle is that of *equal treatment* or its corollary, non-discrimination, of potential and actual bidders. *Contestability* is a third regulative principle in the Community's public procurement regulations and goes to the core of the relevant directives. Contestability can be described as competition through genuinely competitive bidding, so that either buyer or seller never finds him- or herself in a position to control market prices.[30]

All three regulative principles were decisive to efforts to introduce the Union's public procurement system in CEE states already during the pre-accession stage. Those principles formed part of the *acquis communautaire*, as interpreted by the extraordinarily influential 1995 Commission White Paper devoted to accession preparations.[31] As agents vertically located between principals and clients, but also constituting the potentially weakest (or strongest) link between the horizontally structured spheres of economic, political and legal institutions, the role of procurement officers is clearly crucial to putting the regulative principles into practice. For this reason the most important data were elicited from semi-

[28] S. Arrowsmith, 'An Assessment of the New Legislative Package on Public Procurement' (2004) *Common Market Law Review* 41: 1277–1325

[29] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Text with EEA relevance)

[30] Trepte 2004, 12

[31] Commission of the European Communities (1995) 'White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union' (COM(95) 163 final/2, 274-280.

structured interviews with Bulgarian and Polish public procurement officers, in an effort to determine the progress of implementing the regulative principles of equal treatment, transparency and contestability in the regular handling of tenders. In other words, the officers constitute 'key informants,' uniquely positioned to interpret the process of institutionalizing new legal and administrative practices, and with direct access to all relevant professional communities.

Research Design and Methodology

The introduction of the EU's complex public procurement regime in countries with very limited experience of private enterprising, that is, regulations that depend on the maturity of markets as well as on a well-functioning public administration and developed legal institutions, implies a 'tough test' as to the contribution of the *acquis communautaire* to bolstering institutional integrity. Given its combined potential for corruption, abuse of power, institutional friction and the fact that law enforcement in the EU is delegated to Member States, public procurement thus emerges as a theoretically highly interesting area in which Union legislation is 'transplanted' to accession states.[32] Albeit a wide spectrum of actors and organizations are relevant to this research, the analytical emphasis is on monitoring, supervising and adjudicating bodies, as these are particularly influential when it comes to the eventual weakening or emboldening of institutional integrity, as well as on the pivotal relationship between contracting entities and bidders/suppliers prior to and during the tendering process.

It is assumed that the Bulgaria-Poland comparison can generate insights into the progress of public procurement reform in the CEE region by virtue of constituting such a 'tough test' of institution-building, providing more than a mere snapshot of the overall path and pace of eastward enlargement. Both countries pose serious challenges in terms of building institutions that will regulate and facilitate a well-functioning public procurement system in conformity with EU requirements. At the same time the expectation is that Bulgaria is less advanced by virtue of having launched its domestic public procurement institutions at least five years later than Poland. Because the Bulgarian analysis captures an 'earlier stage' of development and learning on the part of the main protagonists, below I will report the situation in this country first, and then move on to Poland.

A methodological challenge at another level was how to approach the public procurement officers as 'key informants' with unique insights, while reducing the danger of their accounts being partial or reflective of mere window-dressing.[33] It was important that the interviewer was well-prepared as well as empathetic so that officers did not become defensive, but engaged in a 'professional' conversation on the merits and problems of the fledgling public procurement regime. The interviews were structured to capture how the three principles feature in the day-to-day work of the informants within a particular market, in their interaction with interested parties as well as with relevant administrative and legal bodies. The qualitative interview technique used in the parallel interview sets combined probing questions aimed at extracting insights into the deeper understanding of the national and European public procurement regimes, with more direct questions allowing informants an opportunity to express their views of the relevant issues. The semi-structured questionnaire was only slightly

[32] G. Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' (1995) *The American Journal of Comparative Law* 43: 93-117

[33] M.-A. Tremblay, 'The Key Informant Technique: A Nonethnograhic Application' (1957) *American Anthropologist* 59: 688-701, V. Gilchrist, R. L. Williams, 'Key Informant Interviews', In *Doing Qualitative Research*, W. L. Miller and B. F. Crabtree, eds. (Sage, 1999), 71-88

modified along the way.[34] By piecing together the various partial accounts offered on the establishment of an EU-compatible public procurement regime in Bulgaria and Poland, it was possible to conduct a relatively probing as well as comprehensive analysis.

Below the answers produced in parallel sets of interviews conducted in Bulgaria and Poland between October 2005 and March 2006 are analysed.[35] Together the Bulgarian and Polish interview sets yielded coded answers to nearly 1,400 questions. The results from the study have been set against other relevant documentation and literature on the subject of public procurement, as well as communications with officials in national public procurement offices in Warsaw, Sofia, Budapest and Stockholm. Not all of those data and secondary studies will be extensively analysed here because of constraints of space. In the conclusion I will compare the record of the two countries with regard to the three regulative principles in the institutional systems, but also comment on the broader, theoretical discussion concerning EU legislation and its contribution to institution-building in CEE states.

Bulgaria: Early Days

In 2004 public procurement accounted for some five per cent of Bulgaria's GDP, which was roughly a third of the EU average.[36] The first version of a modern Public Procurement Law was adopted in June 1999 and revised in 2002. It was replaced by a new law in April 2004 that by January 2007 had been amended eight times.[37] Throughout the process of tinkering with the law, there has been steady evolution toward a more liberal, efficient and open regulatory regime. The Law on Public Procurement must be used in all contracts with a value of at least 1.8 million Bulgarian leva in construction, 150,000 leva in supplies and 90,000 in services, whereas a separate law offers a simplified regime below these thresholds.[38]

The key component of Bulgaria's public procurement regime is made up of the Agency for Public Procurement (APP), set up to assist the Minster of Economy and Energy in performing a variety of functions. The APP monitors and controls the procurement regime, maintains a public procurement register, coordinates its activities with international counterparts, provides advice and training to domestic procurement practitioners, and drafts primary and secondary legislation. Meanwhile, the National Audit Office and the Agency for Internal Financial Control perform *ex post* auditing. At the time of the research the complaints and review procedures consisted of the APP Executive Director initiating a court appeals procedure in the case of suspected violations of the law (sometimes involving the annulment of contracts).

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[34] In a first set of interviews the mere hint at the issue of corruption turned out to be so disturbing to some informants that it subsequently had to be rephrased and toned down, so as not to distort or 'cloud' responses to the remaining questions. One interpretation of this observation might be that corruption is very widespread in both countries. After closer examination of the entire interviews, however, the interpretation evolved that in most cases procurement officials have simply become highly sensitised to the issue, to the extent that a positive professional identification hinges on internalizing an anti-corruption agenda.

[35] Here I wish to acknowledge the splendid field work conducted by Paulina Polak and Bistra Nikolova., who respectively conducted the Polish and Bulgarian sets of interviews. Thirty semi-structured, in-depth interviews per country were carried out October 2005-March 2006. Interviewees were selected by way of identifying contact persons for large-scale tenders on the relevant public procurement websites, above so-called EU thresholds in the case of Poland, and the equivalent threshold set by the Bulgarian parliament. In the case of the Polish interviews, I also rely on the translation provided by Paulina Polak.

[36] Bulgarian Chamber of Commerce (BCC), *Monitoring na obshtestvennite porachki: nay-chesto sreshtanite narusheniya i koruptsionni praktiki* [Monitoring of Public Procurement: The Most Frequently Found Violations and Corruption Practices] (BCC, USAID, Open Government Initiative, 2005), 4-5

[37] *Darzhaven vestnik* [State Gazette]. 2004: 28. Sofia: Bulgarian National Assembly.

[38] Agency for Public Procurement (APP) *Godishen doklad 2005* [Annual Report 2006] (APP, 2005), 10-14. The Bulgarian lev is pegged to the Euro at the rate of 1.95583 = € 1

Since July 2006 the Commission for the Protection of Competition and a separate Court of Arbitration hear and settle procurement disputes.[39]

The 2004 law changed the relationship between *institutional subjects* involved in the establishment of Bulgaria's public procurement regime. Prior to 2004 the responsibility for Bulgaria's public procurement regime lay squarely with the Minister of State Administration, who had to supervise legal implementation with extremely scarce resources. In fact, the original Public Procurement Office within the Council of Ministers had in 2002 merely one employee and nine vacancies, and plans to augment the organization were several times postponed. The official register of public tenders was maintained by the same office, whose functions were further expanded with the 2002 revision of the law. It goes without saying that this small unit was poorly equipped to monitor, control and evaluate the domestic public procurement system, let alone address structural weaknesses or specific disputes among the parties involved.

Instead, the 2004 legislation created the APP outside the Council of Ministers. Many procurement officers quickly found the agency very forthcoming and helpful, in part because it provides answers to individual queries to the best of its capacity and maintains an up-to-date website with the official register of tenders, relevant legal rulings and practitioner-oriented manuals.[40]. To some extent, though, the high levels of satisfaction with the agency's performance in the first two years of its existence may correspond to the weakness of its actual implementation mandate. The agency is perceived as a facilitator and coordinator in the institutional environment of public procurement, and lacks effective enforcement mechanisms. Indeed, the enforcement role of the Minister of State Administration was strengthened by the 2004 law, but again without substantial resources having been added. In 2002 a SIGMA study complained of slow implementation, time-consuming review procedures, sporadic financial control (mainly by the National Audit Office), scarce funding for knowledge development, and limited coordination between different procurement entities within the public sector.[41]

The main remedy provided by the 2004 law consists in strengthened supervision by the National Audit Office and the Agency of Public Internal Financial Control, in the form of *ex post* auditing. But the question is whether more robust auditing can make current problems go away. Most interviewees say that neither administrative nor judicial review belongs to standard procedure, and that compliance primarily relies on indirect control exerted by bidders and tender evaluation committees.[42] The tender evaluation committees include lawyers, technical experts and in most cases a decision is eventually taken unanimously.[43] One procurement officer, not unique in wholly rejecting further control as unnecessary, expresses the rather weak argument that review would create a chain reaction of legitimacy questions 'because who would then evaluate the work of the evaluator?' Oddly enough, the same interviewee goes on to suggest that conscious violations of the law are quite frequent at the level of tender evaluation committees.[44]

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[39] SIGMA 2007, 50-51, and Support for Improvement in Governance and Management in Central and Eastern European Countries (SIGMA) *Bulgaria: Public Procurement System Assessment 2002* (OECD, 2002), 3-4. Available online at http://www.oecd.org/dataoecd/11/5/34991740.pdf

[40] Bulgarian interview set (BIS), nos. 1-636, at 204, and APP 2006, 10-14

[41] SIGMA 2002, 3-5

[42] BIS: 547

[43] BIS: 196

[44] BIS: 526, 530

However, the Bulgarian law tends to take the integrity and professionalism of tender committees and procurement agents for granted. It is true that every member of the tender committee signs the protocol, and thereby puts his or her reputation on the line.[45] Moreover, the bidders who refuse to accept its evaluation can resort to the regular court system. On the other hand, merely one hundred and ten court cases were registered in 2005, and no significant increase occurred in 2006.[46] Meanwhile, only a handful of informants say that corporate management as a rule demands an *ex post* analysis of the work of the tender committee.[47] Some interviewees acknowledge that more frequent reviews by the National Audit Office would at least somewhat enhance the government's control mechanism in the field.[48] (The 2006 amendment, inserting the Committee on the Protection of Competition as a powerful control instrument among institutional subjects, therefore makes a lot of sense.)

In short, the cabinet and the Ministry of State Administration lack structures and routines that would allow them, as principals, to effectively monitor and evaluate the implementation of the law by agents, to whom responsibilities have been delegated. Slow and weak enforcement can nevertheless not be blamed on government institutions alone. Reflecting the insufficient resources of the Bulgarian judiciary, court cases take an exceeding 1.5-2 years to decide, with potentially high costs incurred on the parties involved.[49] As the legal system remains in flux court practice will continue to be contradictory. For instance, the 2004 law allowed for out-of-court arbitration, but the newly formed Court of Arbitration was poorly organised.[50] A common view is that the quality of rulings suffers from 'judicial experiments' with respect to public procurement, and that this problem was reinforced through the transfer of court proceedings from a Supreme Administrative Court panel to regular district courts.[51]

Also the disentanglement of *institutional spheres* constitutes a formidable task in Bulgaria's emerging public procurement regime. While a functioning public procurement regime relies on a complex set of interaction between legal rules, markets and public administration bodies, it remains especially important that the boundaries between the roles of relevant actors are respected. There are several indications that the distinctiveness of institutional spheres is not being upheld in Bulgaria's public procurement system, resulting in substantive problems with respect to wasteful spending of public funds, corruption, and correspondingly low levels of procedural transparency and market competition.

An ambitious review of the Centre for the Study of Democracy (CSD) think-tank, conducted in 2006, provides a comprehensive picture of present corruption practices and perceptions of corruption. The CSD review suggests that, although fewer private companies reported that they paid bribes to win a public tender in 2005 compared to three years earlier, that decrease was almost entirely cancelled out by the growth of the public procurement share of the national budget from 19.6 to 31.3 per cent between 2003 and 2005.[52] This means that public

[45] BIS: 626
[46] APP 2005, 13; APP 2006, 20
[47] BIS: 464, 485, 506
[48] BIS: 512
[49] BIS: 66, 112, 185
[50] APP 2005, 13; app 2006, 21
[51] BIS: 395, 515
[52] Center for the Study of Democracy (CSD), *Antikoruptionnite reformi v Balgaria na praga na chlenstvoto v Evropeyskiya sayuz* [Anti-corruption Reforms in Bulgaria on the Threshold of European Union Membership] (CSD, 2006), 28-29. Available online at http://www.csd.bg

procurement is virtually the only sector of the economy where the problem of corruption, in relative terms, has not been reduced in recent years.[53]

Lingering corruption does not necessarily mean that the reform process has stagnated or been reversed. In fact, many procurement officers testify to the fact that the 2004 law successfully eliminated a considerable number of problems and quirks that facilitated corruption or sharply increased costs.[54] A widely acknowledged weakness of the 1999 law was the inflexibility when it comes to minor omissions or errors in the submitted bid, which became grounds for immediate disqualification. Today the contracting authority can ask for additional information when there are minor omissions or obscure points, as bidders no longer are disqualified for trivial errors.[55]

Some procurement officers still appear reluctant to speak candidly about the existence of real competition in the market and segment where they work, or simply express satisfaction as soon as more than one bid has been submitted in a tender that they have organised. Compared to previously, contracting authorities in such instances often have a choice between two or three bidders. This choice can lead procurement officers to believe that costs can be cut. On the other hand, other studies demonstrate that fewer bids than four can easily induce anti-competitive behaviour on the part of potential suppliers.[56] Especially if the market is small and local, collusion may arise even without a formal agreement having been made between bidders.

In the utilities sector procurement officers acknowledge the continued strong position of 'ex-monopoly' companies, and indirectly of weak competition with a negative impact on competition.[57] Outside the country's capital and other large cities there is often a lack of new bidders in some areas of the wider public procurement market.[58] One procurement officer says outright that the companies have done precisely what the legislation is supposed to prevent, namely 'divided up the market between themselves'.[59] Another interviewee observes that the tendency is that 'around each contracting authority a cluster of friends is formed'.[60] While these remarks were made by individual procurement officers, there are indications that others share the same experience but are reluctant to speak out or fail to realise the scale of the problem. One such indication is that contracting authorities quite often appear to be 'pampering' bidders in order to bolster competition, meaning that they work hard to woo and assist prospective suppliers throughout the tender and implementation process.[61]

Especially when informants in the utilities or defence sectors say that competition is satisfactory, there are grounds to suspect that they are not entirely sincere.[62] In most cases

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[53] S. Antonov, 'Violations Detected in Every Second Public Procurement Tender' (Vsyaka vtora obshtestvena porachka e s narusheniya), *Dnevnik*, 14 May 2008, online edition accessed 11 June 2008.
[54] BIS: 168b, 174, 412, 419
[55] BIS: 540
[56] C. A. Holt, 'Industrial Organization: A Survey of Laboratory Research', in *The Handbook of Experimental Economics*, J. H. Kagel and A. E. Roth, eds. (Princeton University Press, 1995), 349-444; J.-E. Nilsson, M. Bergman, and R. Pyddoke, *Den svåra beställarrollen: om konkurrensutsättning och upphandling i offentlig sektor* [The Difficult Role of the Buyer: On Competitiveness and Procurement in the Public Sector]. (SNS Förlag, 2005), 107
[57] BIS: 549, 552, 577
[58] BIS: 108, 315, 343, 437
[59] BIS: 491
[60] BIS: 577
[61] BIS: 314, 330, 348, 421
[62] BIS: 571, 576, 577

defence sector companies operate with the Ministry of Defence as the sole contracting authority, and only dual-use products typically find buyers outside the defence forces. Nor are ex-monopolies in the communications, transport, energy and water supply sectors often faced with serious competition from other bidders. Whether optimistic answers in these sectors reflect a residual culture of non-transparency, or one of widespread violations of the law, is difficult to judge. Most informants deny the existence of conscious breaches of the law in their field, and only few informants speak openly of massive irregularities in which contracting authorities take active part.[63]

Arguably, the most important means by which boundaries between institutional spheres are being consolidated is the principle of transparency. Several of the Bulgarian interviewees expressly confirm that the newly awarded right of bidders to be present at the opening of bidding envelopes is beneficial for all parties to the public procurement regime in that it creates confidence in the proper functioning of the system.[64] Potential suppliers may now themselves monitor tenders and raise certain concerns and complaints directly with the tender committee evaluating their bids. Although there is a point at which procurement officers regret the expansion of transparency requirements that make the procedures more cumbersome, they also appear to realise that a regime with higher credibility can ease their own burden and lead to more competitive bids.[65]

If government principals in large measure have relinquished control over agents, the relationship between *institutional agents* and *clients* is fraught with more practical difficulties. By all accounts the red tape involved is considerable. One of the most common complaints of procurement officers (institutional agents) concerns heavy, cumbersome and time-consuming procedures.[66] One interviewee describes how procurement officers only for the preparation of the initial announcement have to 'figure out the codes for many tenders, organise the documentation, spend enormous amounts of time on every detail, and unnecessarily consume paper as the name has to appear on ever page and then be Xeroxed, and so forth…'.[67] Several interviewees also observe that companies quite often refrain from submitting bids when they realise the amount of documentation required. Another recurring concern is that competitors will be given access to trade secrets through details provided to the contracting authority.[68]

On the part of potential suppliers (institutional clients), some never succeed in overcoming the initial bewilderment and therefore fail or are reluctant to submit acceptable bids.[69] One view is that the time available to contracting authorities for preparing tenders so that they cannot be challenged in a complaints procedure is insufficient.[70] Other prospective suppliers are, to the contrary, critical of what they regard as excessively generous time frames because they operate with seasonal crops or other activities in which it is difficult to plan how much work needs to be done and when additional staff is required.[71] A third opinion is that the legislator allows too much variation of different time frames, depending on which procedure is selected, leaving bidders confused.[72] Inexperienced suppliers are known to sometimes lower their

[63] BIS: 308, 530, 532
[64] BIS: 460, 543
[65] BIS: 77, 142, 481
[66] BIS: 3, 12, 258, 404, 483, 576b
[67] BIS: 554
[68] BIS: 195, 326, 525, 566
[69] BIS: 508
[70] BIS: 362
[71] BIS: 87, 404
[72] BIS: 44

prices to a level at which they, in the next stage, simply prove unable to fulfil their contractual obligations.[73] The existing law does not give the contracting authority the right to ask for an explanation for the price given, even when that price appears to be exceedingly low.[74] On the other hand, many of these complaints suggest that procurement officers often take a 'safe,' legalistic approach to the regulations, rather than pragmatically facilitating the tendering process for the benefit of bidders/suppliers.

Due to these and other complications, many Bulgarian contracting authorities prefer to deal directly with qualified bidders and to avoid open procedure. The procurement officials feel that contracting authorities are unduly constrained and have problems shedding unqualified bidders.[75] One idea in this vein is to create a qualified bidders register, based on already existing practices—in some sectors—of licensing professionally active suppliers.[76] The procurement officers appreciated that the 2004 law limited the possibility for disgruntled bidders to file complaints primarily to postpone or obstruct implementation of a given project, and thus precipitated a drop in the number of complaints.[77] The old law had allowed for suspension of the entire procedure often when merely two or three (depending on the method applied) potential suppliers submitted bids. In some markets with limited competition the strict use of this requirement led to several repeated, failed tenders.

Some who argue that bidders have insufficient rights demand that Bulgaria reverts back to a system by which the lodging of a complaint prompts the suspension of implementation.[78] Because of the limited number of potential suppliers in some areas of the country and fields of business, procurement officers sometimes feel a need to 'pamper' certain bidders. In such an atmosphere ties may evolve, as plainly expressed by one procurement officer, out of old habit: 'You know how it is, once you get used to working with certain companies and know their work, naturally you prefer working with them'.[79] From that point on, however, it is also possible that deeper loyalties develop, and through which public contracts are traded for social, political or economic favours. In a society where corruption is widespread to the point of virtually having become endemic, it is easy to see how a general disregard for boundaries between the roles of different institutions would be a symptom of low institutional integrity.[80]

To sum up the Bulgarian case study, all three counts of institutional integrity reveal certain encouraging signs, though an array of obstacles stem from design flaws in terms of enforcement and accountability structures. None of the key organisational bodies was charged with a distinct and powerful mandate. Nor were the functions of public policy bodies, the courts and market actors clearly defined in the first years of the regime. In many respects these flaws negatively influenced the relationship between contracting entities and bidders/suppliers, which in turn became fraught with inefficient practices associated with legalistic formalism, excessive bidder litigation, 'pampering' of serious suppliers on the part of procurement officers, as well as non-compliance and corruption. The overall picture, at least valid in early 2006, is one of considerable weaknesses in the newly introduced public procurement regime.

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[73] BIS: 302, 585
[74] BIS: 308, 356
[75] BIS: 268, 294
[76] BIS: 384, 536
[77] BIS: 103
[78] BIS: 200, 350
[79] BIS: 155
[80] CSD 2006, 22-23

Poland: Maturing Institutions

In 2006 Poland spent a total of 7.6 per cent of its GNP on public procurement, the equivalent of some 79.6 billion zloty.[81] The first Polish Act on Public Procurement was adopted by the *Sejm* in June 1994 and entered into force in 1995. The Act was substantially amended in 1997, 2001, 2003 and 2004, mainly to bring the Act in line with recent developments in European law. The 2001 amendments went especially far in harmonizing domestic law with EU legislation by extending the applicability to the utilities sector, whereas the 2003 revision introduced thresholds in relation to public contracts awarded by entities outside the public finance sector. Contracts signed under the revised regime may pertain to the exploitation or mining of gas, oil or coal, the management of public services such as rail or bus transport, or the creation of networks for the public distribution of gas, heat or water. These entities must apply the Act in case the contract value exceeds €400,000 for supply and services contracts, €600,000 as regards public telecommunication networks, and €5,000,000 for construction and works.[82] One indication of an expanding and maturing procurement market in Poland is the increasing number of consultancy firms that try to match contracting authorities with prospective suppliers.[83]

The core of Poland's procurement regime is made up of the Public Procurement Office (PPO), whose president is directly appointed by the Prime Minister. Like its Bulgarian counterpart, the PPO supervises and controls the procurement regime, maintains a public procurement register, coordinates its activities with international counterparts, provides advice and training to domestic procurement practitioners, and drafts primary and secondary legislation. In addition, however, the PPO is in charge of complaints review and remedies, through the strength of the mandate of its president and the Bureau of Appeals. The Control Department of the PPO carries out both *ex post* and *ex ante* control of specific contract award procedures. Another body with no equivalent in the Bulgarian system is the Public Procurement Council, which is an advisory entity representing political and business interests. Finally, regional courts are in charge of judicial review and the Agent for Public Finance Discipline takes disciplinary action in case of violations of the law.[84]

Compared to Bulgaria the relationships between *institutional subjects* set up to devise, implement, and evaluate public procurement policy in Poland have in important respects reached a more mature stage, and there has been less of organizational experiments along the way. Ever since 1995 the PPO, as just mentioned, has been at the core of the regime.[85] The PPO gathers and disseminates all information related to tenders and contract awards, and evaluates of statistics of continuing developments in this field. The PPO president reports directly to the prime minister and makes decisions that alter any preceding measures taken by the interested parties and/or removes accountability from staff who oversee procurement

[81] Public Procurement Office (PPO), *Report on the functioning of the Public Procurement System in 2006* (PPO, 2007), 23. Available online at http://www.uzp.gov.pl/english/Reports
[82] On 1 January 2006 the thresholds were lowered from 154,000 to 137,000 Euro for Government department and offices, from 473,000 to 422,000 Euro for local and regional authorities, from 473,000 to 422,000 for contracting authorities in the utilities sector, and from 5,923,000 to 5,278,000 Euro when it comes to works contracts.
[83] Polish interview set (PIS), nos. 1-756, at 320
[84] SIGMA 2007, 74-77
[85] SIGMA 2007, 31

proceedings.[86] In 2006 alone, the Chair issued 2,202 first instance decisions in response to appeals.[87]

If chains of command among institutional subjects are clear, the current system suffers from other kinds of problems. PPO arbitration is widely considered weak because of the low quality of its rulings.[88] Arbitration rulings tend to be incoherent, and many say professional arbitration should be reintroduced.[89] Although the PPO is perceived as a useful organization in some respects, there are doubts regarding its overall efficiency.[90] There are complaints that the PPO is unnecessarily bureaucratic and in many cases requests documentation for which it has no or little use.[91] Moreover, the parties of every arbitration dispute must travel to Warsaw and bring the entire documentation with them. In addition, the regular district courts are typically slow, and individual courts have little time to penetrate the complex regime in order to produce good-quality rulings.[92]

The PPO has particularly important *ex ante* control powers, to be employed before a contract is signed, performed by the Office of the President of the PPO when values over €10 million (or €20 million in the case of public works) are involved. The office also has *ex ante* powers at its disposal through the obligatory presence of a tender observer.[93] But the institution of the tender observer is at the same time a substantial administrative burden, and a common complaint is that his or her presence serves a mainly symbolic function.[94]

Internal audit is practised by virtually all contracting authorities in Poland, and the value of all procedures subject to *ex post controls* exceeds 110 billion zloty.[95] As soon as local government is involved City Council officials perform an obligatory audit, while the Office of the Marshal of the Voivodship acts correspondingly at the regional level, and the Supreme Chamber of Control conducts *ex post* reviews whenever it so wishes.[96] Only the Ministry of Defence conducts regular audits in its own sector.[97] The health care system in particular seems to take control and inspection seriously, and parallel audits are occasionally conducted by several concerned authorities.[98] Needless to say, this frequency of review and control can cause frustration among procurement officers but infringements were found in 97 per cent of *ex post* reviews.[99] But in addition, bidders exert an important control function in the overall system through the regular complaints procedure leading up to arbitration or court litigation.[100] The tender committee normally plays a supplementary role (though non-corrupt

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[86] Support for Improvement in Governance and Management in Central and Eastern European Countries (SIGMA) *Public Procurement Review Acceding Countries (8), Central & Eastern Europe. Poland: June 2003* (OECD, 2003), 8, 14. Available online at http://www.oecd.org/dataoecd/11/39/34992690.pdf
[87] Public Procurement Office (PPO), *Report on the functioning of the Public Procurement System in 2006* (PPO, 2007), 8. Available online at http://www.uzp.gov.pl/english/Reports
[88] PIS: 13, 458, 701
[89] PIS: 26, 216, 512, 566, 728, 755
[90] PIS: 484, 539
[91] PIS: 161, 242, 314
[92] PIS: 26, 216, 324, 512
[93] PPO 2007, 11; PIS: 45
[94] PIS: 283, 288
[95] PPO 2007, 13; PIS: 18, 316
[96] PIS: 126, 180, 207, 234, 477, 639
[97] PIS: 450
[98] PIS: 260
[99] PPO 2007, 13; PIS: 692
[100] PIS: 17, 150, 200, 532

members are known to sometimes exclude themselves from a tender instead of confronting their peers).[101]

Regarding the level of control exerted by central bodies, many note that it, too, is high and that word gets around. One procurement officer asserts that 'any manipulation can easily be picked up and will be picked up by competitors, by other suppliers [so that] any attempts at rigging tenders will be discovered. Everything is public'.[102] Another interviewee argues from the view of rationality for the contracting authority itself, saying that any manipulation would be counterproductive for his own organization.[103] Yet procurement officers often express a sense of relative weakness in their intermediate position between principals and clients, the latter being businesses and citizens as 'end-users' of public procurement policy. One procurement officer complains of a stark asymmetry to the benefit of suppliers, making contracting authorities 'the whipping boys [of suppliers]'.[104] Another officer comments by way of a simple analogy, saying that 'suppliers are wolves and we are sheep'.[105] One ground for dissatisfaction is article 38 of the Act, which somewhat frivolously gives bidders the right to ask any questions they like and demand to have them promptly answered.[106]

On the other hand, Polish contracting authorities have considerable latitude with respect to how the object and award criteria are described.[107] One interviewee suggests that 'rules are always bent and the law is interpreted to suit one's needs'.[108] A second responds that 'it is actually a matter of honesty,'[109] and a third explains that officers can rig a tender at the stage of formulating 'entry criteria, like income, indemnity, which only large companies can meet. Or check a similar previous tender and set the prices accordingly, arrange prices with a friend'.[110] A highly experienced officer concurs that 'there is no such tender that cannot be rigged […] at the stage of terms and conditions of the contract and evaluation criteria'.[111]

As in Bulgaria, the delineation between economic, political and legal *institutional spheres* in Poland remains insufficiently solidified, with wasteful public spending and corruption presumably widespread as a consequence. In the 2006 Transparency International Corruption Perception Index, drawing on twelve different surveys and combining at least three for each country, Poland (at 61, with a 3.7 score) is even rated below Bulgaria (at 57, with a 4.0 score) out of 163 country positions (and Finland rated at the top, with a 9.6 score). The problem of corruption is well researched in Poland and a series of anti-corruption programs have been put in place. A recurring concern has been that corruption in particular will undermine efforts to create an efficient public procurement regime in Poland.[112]

Nevertheless, interviews with Polish procurement officers suggest that the boundaries between institutional entities in the economic, political and legal spheres are not as porous as

[101] PIS: 560
[102] PIS: 258
[103] PIS: 454
[104] PIS: 251
[105] PIS: 563
[106] PIS: 251
[107] PIS: 35, 128, 182
[108] PIS: 154
[109] PIS: 602
[110] PIS: 284
[111] PIS: 535
[112] EU Monitoring and Advocacy Program (EUMAP), *Corruption and Anti-Corruption Policy in Poland* (Open Society Institute in Poland, 2002). Available online at http://www.eumap.org/reports/2002/corruption/international/sections/poland/2002_c_poland.pdf

in the case of Bulgaria. The basic public procurement regime has now been in place for over a decade, and some of the problems that arose with first-generation legislation were addressed in subsequent amendments. The more mature public procurement law of today appears significantly less vulnerable to abuse and corruptive practices than its predecessor, which does not mean that it has been rendered immune to the deficiencies of the past or to perceptions of such deficiencies. As one informant put it: 'I often meet people who have nothing to do with public procurement and who are sure corruption is widespread there, and are surprised that I've been working in public procurement for so long and I've never taken [bribes]'.[113]

One result of the more advanced stage of the state of Polish public procurement law is that it has expanded its scope to encompass more types of economic activities, and legally differentiating between them. Until Poland's accession to the EU in May 2004, certain provisions of the Public Procurement Act did not apply to a part of the service industry, such as hotels and restaurants, railway transportation services providers, sea transport and inland navigation, and legal or personnel advisory services. Another general exception allowed the procuring entity to restrict participation in the proceedings to domestic suppliers, suppliers or foreign suppliers who have representation in Poland, as long as the value of the public contract does not exceed €30,000.[114] As of Poland's full membership, all domestic preferences have been abolished in public tenders.[115] Other recent changes help render the public procurement regime less discriminatory in a general sense, as well as more flexible and user-friendly.

Complaints concerning insufficient anti-discrimination regulations occur but relate to technicalities, and do not necessarily suggest that boundaries between the economic, political and legal spheres are systematically breached. One criticism is that VAT exemptions and labor market policy measures tend to skew competition and weaken the principle of equal treatment.[116] Another complaint is that state-owned profit-wielding companies perceive themselves as disadvantaged by the law because they have more legal obligations to fulfil than their private counterparts.[117]

Whether such criticism amounts to something more than a reflection of fierce competition in some areas of the Polish economy is difficult to say. On average 3.62 bids were submitted for each contract award procedure in 2006, which is slightly down from 4.40 bids in 2004.[118] Two interviewees confirm that companies that participate in tenders 'often have competitors spying on one another' and, respectively, that contracting authorities have 'people coming over all the time, lawyers sent by businesses to browse through bids'.[119] It is similarly difficult to assess whether trade secrets constitute a serious constraint on the evolution of the Polish procurement market in that procurement regulations are used as a pretext to gain economic advantage.

On a more general note, several interviewees express the view that transparency requirements go too far and alienate some of the most competitive potential suppliers. A concrete proposal is that losing bidders should not have the right to see the cost estimates of the winner, and

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[113] PIS: 560
[114] PPO 2006
[115] M. Lemke, 'The Experience of Centralised Enforcement in Poland', in *Public Procurement: The Continuing Revolution*, S. Arrowsmith and M. Trybus, eds. (Kluwer Law, 2003) at 103, 108
[116] PIS: 668, 673
[117] PIS: 116
[118] PPO 2007, 27
[119] PIS: 365, 557

another is that the point-based evaluation filled in by the tender committees ought not to be made public.[120] An additional problem stemming from high levels of transparency is perceived to be that bidders have ways of learning the value of the contract, and then to adjust prices to extract the maximum profit.[121] One source of information about contract values is the annual plan of contracting authorities, providing approximations of expenses for tenders above €60,000 and thereby a reasonably precise indication of how much they will spend.[122] Even more exact figures are available in repeated tenders, when the contracting authority already has shown its hand in the first round.[123]

Finally, the relationship between *institutional agents* and *clients* is not an easy one, though there are indications that both sides know quite well where they belong. While many would want rules that are even more precise, the 2001 law is said to enhance transparency, and be more user-friendly than previous legislation.[124] The procurement officer can today sign a contract despite that only one bid was submitted, or sign a contract with the second best bid if the first one falls through. Encouragingly, for the most part competition is fierce in tenders above €60,000 and prices have come down substantially.[125]

Yet there is still much paper work to be completed, especially in tenders with values above the EU thresholds. There is a requirement to put virtually 'everything on paper,' and all correspondence takes place via registered mail.[126] When there are many questions—and one informant says one single tender prompted four hundred of them—the procurement officer becomes bogged down.[127] Any citizen can ask for all the relevant documents, without even taking part in the bidding process.[128] Several informants say that the system is simply too complex, one stating that 'we needlessly produce red tape [and] we force people who are not qualified in it to learn the law'.[129] While there are still numerous faulty procedures, bidders are nevertheless said to be increasingly knowledgeable and receive better advice.[130] Unfortunately, procurement officers agree, quite a few concentrate on obstruction when they have lost the tender.[131]

None of the informants says that the law itself discriminates smaller firms, but some openly acknowledge that contracting authorities tend to be biased in favour of larger partners.[132] High-value contracts, for instance in construction, require experienced suppliers that have the capacity to manage the project.[133] They also need insurance warranties and an insurance policy to be acceptable to the contracting authority, and to be able to wait for payment when there are delays.[134] More than size alone, it is a reputation of reliability that helps win valuable and complex contracts such as in the construction sector.[135] But since big companies

[120] PIS: 149, 449
[121] PIS: 422
[122] PIS: 527
[123] PIS: 179
[124] PIS: 3, 40, 255, 312, 440, 663
[125] PIS: 74, 266, 425, 637, 641
[126] PIS: 281
[127] PIS: 440, 665
[128] PIS: 530, 611
[129] PIS: 597
[130] PIS: 292, 509, 644
[131] PIS: 8, 47, 125, 147, 281, 386, 440, 529
[132] PIS: 548
[133] PIS: 9, 306, 495, 684
[134] PIS: 121, 360
[135] PIS: 63

also are better known than their smaller counterparts, they are in a better position to benefit from a good reputation when submitting bids.[136]

In summing up the Polish case study, substantive issues exist on each of the three counts of institutional integrity, yet important progress is equally apparent. The centrally placed Polish Procurement Office has received a lot of criticism from domestic commentators but is an eminently powerful and capable organisational body whose authority for the most part helps to enhance the regime's functionality. By 2005-2006 the different actors involved in public procurement, such as contracting entities, courts and suppliers seemed to perceive themselves as distinct and independent, meaning that the system was less vulnerable to illicit practices. At the same time, there was still considerable friction between contracting entities and bidders/supplier as the latter were seen to be exploiting legal loopholes to slow down the activities of procurement officers and competitors.

Conclusions

So what results can be elicited from a single comparative case study like this one? In terms of the 'empirical' aim of gauging the development of an EU-compatible public procurement regime, first of all, this study recognises that substantial progress has been made throughout the accession process. All three regulative principles that form the core of the EU's public procurement system had by 2006 evidently begun to take hold in Bulgaria and especially in Poland, with interesting similarities as well as differences between the two countries reflected in this research.

The one regulative principle which universally receives positive assessments and endorsement among procurement officers is that of *transparency*. No single interviewee in either country expresses the view that the public procurement system does not function with regard to transparency. Moreover, a majority confirm that the transparency principle is becoming more deeply entrenched and respected, and that problems that it may create in terms of inadvertently revealing trade secrets and heightening transaction costs normally can be contained. Whereas Bulgaria has worked hard to introduce the Union's public procurement regime as set out in Community Directives, we need to remember that Polish contracting authorities since May 2004 are subject to stricter, formal demands regarding transparency (and that this data was gathered before Bulgaria's formal accession in January 2007). The requirement to advertise Polish tenders above EU thresholds on the TED website means that all the relevant award information is translated into English and corresponds to the categorizations applied there. Conformity with this demand is a cost in the short run but will in the long term presumably constitute an advantage in that exposure to competition at home will prepare Polish companies for submitting bids in other EU countries.

Regarding respect for *equal treatment* (or non-discrimination) Polish and Bulgarian procurement officers provide moderately encouraging answers. Follow-up questions related to the position of small firms versus large companies, as well as direct participation by foreign bidders, reveal some distinct weaknesses. Polish interviewees emphasise that the relative lack of resources and professional skills tends to disqualify small firms in the process of preparing a serious bid, if seen in the overall landscape of potential participants in the tender process, and that high arbitration fees similarly deter from lodging complaints. At the same time, the Polish market appears significantly better endowed with foreign companies that from time to time participate directly—without establishing a local subsidiary—in domestic tenders. Only

[136] PIS: 90

few Bulgarian informants, typically those in the larger cities, report the equivalent experience of foreign participation in tenders. Bulgarian officials speak of problems in competition and non-discrimination as stemming primarily from implementation. This can be interpreted to mean that Bulgarians are still struggling to strike an appropriate balance between different principles and institutional solutions in their legislation.

With regard to *contestability* Polish and Bulgarian public procurement officers respond that their respective national systems already are working fairly well, and that several competitive bids are submitted in most tenders. The impression of Polish officers is on the other hand quite mixed when it comes to whether the present trend is toward more competition or less, with answers going in both directions. A plausible interpretation of this finding is that Poland's procurement market is developing toward fierce competition in some sectors and geographical regions, but toward fewer competitive bids in others. By contrast, Bulgarian procurement officers often tend to complain about lacking competition but to be more upbeat about future tenders, as they at the time of the research perceived an overall rise in competitive bids in recent times. In certain sectors of the economy, interviewees in both countries testify to the problem of insufficient numbers of competitive bids when either project values are low or narrow expertise is required to qualify as bidder in the first place. Examples of the 'narrow expertise' problem can be found in road construction, the health care sector, and in design and construction of special-use facilities and buildings.

Nevertheless, as we turn from empirical generalisations to the theoretical question of whether the EU's public procurement regime has helped bolster institutional integrity, only a cautiously affirmative answer may be offered. If public procurement is a 'tough test' and there is significant progress also here, it appears relatively safe to conclude that EU rules and regulations for the most part have played a positive role and proven 'institutionally sticky' at the expense of the communist legacy. The *acquis communautaire* has contributed in that it mandates actors to develop and solidify boundaries between public procurement institutions over a period of several years. Albeit the evolution has been slow, cumbersome, and riddled with contradictions and occasional setbacks, certain achievements accomplished a decade after the pre-accession process began are undeniable. The stricter requirements of full membership aside, however, even a cursory comparison between the Polish and Bulgarian procurement regimes confirms that Poland finds itself in a much more advanced stage of development.

In the field of public procurement we can clearly observe how relations between institutional subjects developed with new elements being added, as some practices worked and others were not sufficiently 'sticky' to become part of the emerging regime. The overall pattern is that Bulgaria continues to experiment with organizational solutions whereas the basic Polish institutional design has not changed substantively after the 2001 amendments. With respect to boundaries between institutional spheres, the Polish system is similarly more settled, but improvement is gradually occurring in Bulgaria as well. Least developed in either country is a well-functioning partnership between procurement authorities and their clients, whether the latter be defined as citizens or business interests. Typically, bidding procedures are both cumbersome and riddled with excessive paperwork and formalistic requirements. Reflective of the less mature state of its market economy and institutional environment, Bulgaria has a more serious problem in that potential suppliers (and not just the general public) tend to have low expectations as to the reliability and lawfulness of tenders.

What would be interesting to pursue further analytically, however, are indications that that the incorporation of EU rules and regulations in the field of public procurement produced significantly different sets of outcomes in the two countries examined. The relative smoothness with which legal and administrative implementation advanced in Poland, and the often serious irregularities that accompanied the same process in Bulgaria, are probably attributable to a complex set of variables and historical circumstances. Among the variables that might be considered for a more detailed comparative study are the relatively high/low level of administrative and judicial competence, the strength and maturity/weakness and immaturity of domestic procurement markets, and the absence/presence of widespread corruption at the political level of government, in Poland and Bulgaria, respectively. In other words, except for the time lag in Bulgaria's disfavour, Poland also seems to benefit from such higher competence of officials, stronger and relatively mature markets as well as lower levels of non-compliance and corruption in public procurement and areas adjacent to that field. And, to the extent that enforcement relies, at least in part, on the incentives of individual (potential) contractors to monitor tenders, this appears to place the Polish procurement regime ahead of its Bulgarian counterpart.

Lastly, though, we should remind ourselves of the fact that the Union's public procurement regime was not invented for the purpose of reinforcing the integrity of institutions in CEE countries as a dimension of eastwards enlargement, but to pave the way for a Europe-wide market of goods, services and works financed by the public sector. Besides the ancillary objective of helping the new Member States build and reform their institutions, recent legislative innovations in the EU's public procurement regime were foremost intended to advance the overall agenda and key principles of the internal market. Whereas the legacy of post-communist countries by all accounts posed a serious challenge at the outset, the problems of wasteful spending practices, entrenched interests and corruption in fact remain a major impediment to most EU countries in this particular field of institution-building. Given the progress that after all has been achieved in a short space of time, there seems to be no guarantee that, within the next decade or so, some of the old (fifteen) Member States will perform significantly better than Poland, or even Bulgaria, as the latter through adaption of its procurement regime has a chance to catch up.