

## **Legal Compliance and Transparency of the Tender Procedure for the Granting of an Individual Licence for the Installation, Maintenance and Operation of a Second Nation-wide GSM-Standard Public Mobile Cellular Network in the Republic of Bulgaria**

### **INTRODUCTION**

By the beginning of 2000, Bulgaria had fulfilled the political criteria for accession to the European Union. The 2000 Regular Report from the European Commission noted this progress, but also found a delay in the process of meeting the Copenhagen economic criteria. The criticisms in the report of the expert team of Transparency International Bulgaria basically target the processes of state property restructuring and the creation of a competitive market for the supply of goods and services.

Right from its inception, Transparency International Bulgaria, which is the Bulgarian National Chapter of Transparency International, has concentrated on monitoring the transparency and accountability of the executive branch of government needed for satisfaction of the economic criteria required for the involvement and existence of a functioning market economy in Bulgaria. In this connection, Transparency International Bulgaria has developed and is applying in practice specific transparent practices for analysis of the structural adjustment of the Bulgarian economy and for the fight against corruption.

The Association was the sole independent observer of the Bulgarian Telecommunications Company (BTC) privatisation procedure. In its monitoring report on the transaction, the Association pointed to a number of flaws of the privatisation procedure in Bulgaria and to numerous violations of Bulgarian legislation as a whole. These deficiencies were acknowledged, and the Transformation and Privatisation of State-Owned and Municipal Enterprises Act was accordingly amended at the end of 2000. More mechanisms were created for control and public openness of privatisation procedures.

In early November 2000 Transparency International Bulgaria was invited by the sectoral regulatory agency, the State Telecommunications Commission, to monitor and evaluate the legal compliance and transparency of the sales procedure for a second GSM mobile telephone licence in Bulgaria.

After mutual agreement was reached on the conditions of the monitoring, Transparency International Bulgaria and the State Telecommunications Commission concluded a contract on 8 November 2000 regulating the parties' rights and obligations in connection with the announced sealed-bid public auction for the licensing of a second nation-wide GSM-standard public mobile cellular network in Bulgaria.

Section I, Article 4 of the Contract enjoins Transparency International Bulgaria to monitor **the tender procedure and to record as accurately as possible the degree of transparency, legal compliance and fairness in the**

**public auction held between 15 and 17 December 2000.** In fulfilment of its obligations, the Association formed an expert monitoring team which perused the relevant international legal framework and practice for licensing the installation and operation of GSM cellular networks, tested the tender procedure applied by the Bulgarian State Telecommunications Commission (STC) against the international standards, and evaluated its transparency, fairness, and legal compliance.

**THE TENDER PROCEDURE FOR THE AWARD OF A SECOND GSM OPERATOR LICENCE IN BULGARIA IN VIEW OF THE RELEVANT INTERNATIONAL PRACTICE**

The open multiple round auction method, chosen by the STC, is relatively new to Europe.<sup>1</sup> So far this method has been most successfully applied mainly in the USA. The US regulatory framework and practice is the key point of departure in the evaluation of auction procedures involving open multiple round bidding. The expert team of Transparency International Bulgaria has therefore discussed successively the US procedure and practice in this sphere (1) and the practice of granting radio frequency spectrum licences in the rest of the world (2). This comparative review makes it possible to evaluate the tender procedure, and in particular the procedure employed by the Bulgarian State Telecommunications Commission (STC), in terms of its efficiency, fairness, and transparency (3).

**(1) Multiple Round Auction Procedures and Practice in the US**

The US Federal Communications Commission (FCC) has established detailed rules and procedures for multiple round auctions.

Each licensing auction begins with an evaluation of the technical specifications required for the telecommunication service, the nature of the service subject to competitive bidding, and preparation of the competitive bidding mechanisms. These procedures and terms must conform to the effective US Administrative Procedure Act. Once the substantive and procedural requirements for conduct of the auction are finalised, the FCC entrusts the arrangement and conduct of the procedure to the Wireless Telecommunications Bureau. An express Auction Team is appointed for each auction, consisting of a presiding officer, a legal expert, an economist, an expert analyst and other qualified personnel required by the law.

The procedure formally commences by the issuance of an Initial Public Notice, announcing the date of conduct of the auction and the short-form filing deadline for each applicant.

The Public Notice specifies the type and period of the licence to be awarded, the auction method, the deadline for submission of an upfront payment to the Commission and the amount of this payment, as well as the regulatory provisions and instruments applicable to the auction.

After publication of the Notice, a Bidder Information Package is available to all potential bidders. It provides details about the auction and the envisaged procedures, as well as background information regarding the existing, previously awarded licences for the radio frequency spectrum within

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<sup>1</sup> In Europe, Ireland was the first to use the multiple round auction method when it licensed its second GSM operator.

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whose bands the new licence will be awarded.

After processing the short-form applications as filed but before the deadline for submission of the upfront payment, the FCC announces the applicants whose applications have been accepted or rejected and the applicants whose short-form applications have been found "incomplete," i.e. conforming to the legal requirements but containing errors of fact or deficiencies which do not distort the applicant's will to bid in the auction and may be corrected. Such applicants are given a deadline, established by the law and appointed by the Commission, to correct the defects before the start of the auction.

After expiration of the deadline for submission of the upfront payment in an amount as set forth, the Wireless Telecommunications Bureau makes public the qualified bidders, i.e. the applicants whose short-form applications have been found acceptable for filing and who have submitted an upfront payment.

The purpose of the upfront payment is to confirm that the applicant is willing, serious, financially ready and capable of participating in the auction.

After the auction closes, the auction team deducts the upfront payment from the amount of the winning bid (applicable to the successful bidder for one or several of the licences auctioned) and refunds the remaining upfront payment balances to the rest of the bidders.

A new element in the American procedure is the eligibility of all qualified bidders to participate in a **mock auction**.

The idea is to enable potential bidders to become familiar with the procedure and the auction bidding software (in most cases, the auction is conducted through remote electronic bidding) before the start of the auction event proper. Special confidential login codes and passwords are used in remote electronic bidding.

Bidding is conducted in consecutive rounds. The results of each bidding round are published after its conclusion. The FCC compiles a report covering all bids placed, bids withdrawn, current high bids, and bidder eligibility status. This information is posted on a preannounced Internet site and on the electronic notice board at the FCC Auction Headquarters.

The Commission utilises "activity rules," requiring bidders to bid actively in every round and not wait until the end of the auction before participating. Bidders who do not comply with the activity rules risk disqualification. Each bidder, however, is given a predetermined number of activity rule waivers, allowing him not to meet the activity requirement in one round but keep his current eligibility in the next round.

The auction closes by the placing of the highest bid for the licence on auction. In each round, the applicant who has offered the largest amount is designated **high bidder for the licence** and becomes entitled (and obligated) to purchase the licence unless a higher bid is placed before the end of the auction. A high bidder may withdraw during the course of an ongoing auction but must pay the balance of his withdrawn bid amount and the amount for which the licence ultimately sells to the successful bidder.

The close of the auction is announced by a *Public Notice* specifying the

deadlines and procedures for submission of the full balance of the winning bid. The notice also contains instructions for completion of all documents required for receipt of the licence. When so completed, the documents are subject to control under the Federal Telecommunications Act. Under the law, all interested parties may file a notice of appeal against the competitive bidding procedure and the winning bidder. The Federal Communications Commission is obligated to rule on the validity of these objections.

In compliance with the fundamental market principles in the US, the FCC prioritises ensuring genuine and effective competition in the conduct of auctions. The Commission, therefore, has adopted special rules intended to preclude the possibility of collusion between bidders.

In compliance with these rules, each bidder must disclose all persons with whom he has entered into bidding consortia, joint ventures, joint bidding arrangements and other arrangements which have a direct or indirect bearing on the auction in progress. Bidders must also declare that they are not affiliated or have not entered into any agreement, whether express or implied (verbal, legally non-binding, gentlemen's) with any person other than those identified on their short-form applications as to the amount of their bids, their bidding strategies, and the markets for which they will place bids.

As from the time of initial submissions and until the winning bidder makes his first payment, any forms of cooperation, discussion and communication between the participants regarding their bids and strategies are prohibited, apart from some exceptions expressly defined by the law.

The FCC investigates thoroughly all allegations of any such irregularities. If the allegations prove to be founded on fact, the offenders may forfeit their upfront payments or the entire amount paid, the licences awarded to them may be revoked, and they may be excluded from participation in future auctions (it is not specified whether exclusion is for a limited period of time and, if so, how long is that period). In case the federal antitrust laws are violated, the Commission must refer the case to the competent antitrust authorities. Such bidders face criminal prosecution if they have committed a federal offence.

## **(2) Radio Frequency Spectrum Auctions in Other Countries**

Outside the US, auctions are conducted according to a similar bidding procedure which, however, is far simpler. Generally, auctions are limited to a single round in which all the participants submit a sealed offer. The design component that varies the most is the method of determining the amount that the winning bidder must pay the national treasury. Some countries require the winning bidder to pay its bid, while others only require it to pay the bid of the second highest bidder. Still other countries require that the second highest bidder match the highest bid if it wanted to obtain the second equivalent license. Some particular case studies are discussed below.

**India.** In August 1995, India held a single round auction for two GSM licences in each of 20 regions. The rules allowed participants to bid in any or all of the regions.

The highest bidder won the first licence in each region and had to pay the amount it bid in an upfront payment and subsequent annual payments. The

second highest bidder had to match the highest bidder if it wanted to receive the second licence. If it declined, the right to the second license fell to the third highest bidder, which had to match the highest bidder in order to receive the licence. If no bidder matched the highest bid, then the second license would be re-auctioned. Over thirty international consortia participated in the auction. Most bidders limited their bids to only a few regions. The wealthier regions received the highest number of bids, while some poorer regions did not receive any. Analysts noted that had the auction been multiple rounds instead of single round, participants would have been able to pursue aggregation strategies more effectively and, ultimately, this would have led to a far more harmonious distribution of bids by region.

**Colombia.** In January 1994, Columbia auctioned a second cellular licence in each of three regions. In a simultaneous single round auction, the highest bidder in a region won the licence. The first licensee in each region was then required to pay 95% of the total amount bid by the second licensee. The government raised over US\$ 1 billion dollars for its treasury. As a result of the auction, one consortium won licences in two of the three regions and initiated service within three months of receiving the licences. Sub-national licensing allowed bidders to value the regions separately, but the single round design of the auction did not allow bidders to change their aggregation strategies during the auction based on the bids of the other bidders. This type of procedure does not provide as much information as a multiple round auction and, in addition, makes bidders face the risk of winning more than they want.

**New Zealand.** In June 1990, New Zealand auctioned three new cellular licences *simultaneously using a sealed offer*. It used a *second price sealed-tender auction*, which meant that the highest bidder won the licence, but only paid the amount bid by the second highest bidder. As a manifestation of one of the principal shortcomings of this design, one winner bid NZ\$ 101 million, but only paid NZ\$ 11 million. Another key problem of these auction rules was that they allowed the current cellular operator, Telecom New Zealand (TCNZ), to participate in the bidding for all three new licences. After the Government of New Zealand reviewed the results, it ruled that TCNZ's ownership of two of the three new licences would hinder the development of a fair competitive sector. In addition, **the choice of a second price sealed-tender auction** reduced total revenue and created additional contentious issues to address during the legal proceedings which followed the auction.

**Greece.** In July 1992, Greece auctioned two national GSM licences. Participants submitted a single bid for one of the licences and the highest bidder won the first licence. The rules stated that if the second highest bidder was within 10% of the highest bid, then it had the sole right to match the highest bid. If it decided not to match the highest bid, then it and the remaining participants could participate in another round of bidding for the second licence. The second highest bidder actually bid 91% of the highest bid and elected to match the highest bid, thus winning the second licence.

**Panama.** In January 1996, Panama held a single round auction for a national cellular licence in which the highest bidder received the licence. The Panamanian authorities pre-qualified applicants based on technical, financial and business criteria before allowing them to submit a single financial bid at a public bid-revealing event. The highest bidder won the licence. The design chosen entirely eliminated competition during the course of the auction. Such

auctions with pre-qualification create serious prerequisites for corruption and lay themselves open to objections as to the fairness in the selection of bidders.

**Belgium.** The Ministry of Communications awarded a second GSM licence in September 1995 after conducting a competitive tender which had several weighted selection criteria: a licence fee (49%), proposed customer tariffs (31%), and quality of service (20%). Five large international consortia submitted bids for the licence. The only major complaints came from the existing GSM licensee, which appealed against the judgement of the EU Court of Justice ordering it to pay the same licence fee for the license it had received for free in 1991. This process was rapid, the weighted point system was publicly disclosed, and it allowed significant foreign participation. These advantages limited the number of complaints about the transparency of the procedure. One negative point, however, was that the Belgian authorities determined and negotiated most of the terms and conditions of the licence *after* the close of the auction with the winner. All participants were thus denied the opportunity of bidding on the same terms and conditions and had to create their own assumptions in their bids. Such a procedure does not satisfy the requirements as to transparency, legal compliance and fairness in international transactions. Negotiating with the successful bidder after the end of the auction is absolutely inadmissible and should be declared legally non-compliant and unfair by the EU Competition Commission.

**Hong Kong.** In early 1992, Hong Kong allocated four new digital licences. It assigned the first three to the existing analogue network operators and held a competitive tender for the fourth. The absence of foreign ownership restrictions encouraged eight consortia to submit proposals. Five made the short list. The principal flaw detected by the monitors of this auction was that the applicants' political connections mattered more as a qualification criterion than their technical and financial strength. No financial component was used in selecting the ultimate winner. At over 11%, today's mobile telephone penetration in Hong Kong is considered high by regional standards. One reason for this is the fact that Hong Kong assigned a fourth licence in order to stimulate competition.

**United Kingdom.** Britain's Office of Telecommunications (OfTel) one of the first regulatory agencies to award mobile licences in 1989. It believed competition between Cellnet and Vodafone in the analogue market was the key factor in the high penetration rate of analogue cell phones, and wanted to repeat this success by awarding three new PCN licences. OfTel used a comparative tender process with no financial component to decide among the eight international consortia. A financial component might have led OfTel to select licensees which could have better survived in a competitive market. Advance studies conducted by OfTel showed that the early assignment of multiple PCN licenses and the non-application of a financial criterion as leading factor in their award was instrumental in creating dynamism and competition on the wireless communications sector in the United Kingdom.

**Ireland.** The Ministry of Energy, Transport and Communication wanted to use an auction to assign the second GSM licence, but the European Commission forced it to limit the amount of the financial bid to US\$ 24 million. The Ministry then decided to include other selection criteria such as tariff regimes, customer benefits, and employment opportunities. Although several major international companies participated, the Ministry awarded the

licence to a little-known consortium. The selection was decided on subsidiary criteria. This award incurred numerous objections and criticisms on the part of the internationally established bidders. Their disappointment was magnified by the government's refusal to divulge its decision methodology after the licence award. One losing consortium appealed the Irish Government's decision to the European Commission. The lack of transparency and public openness were the principal shortcomings of the Irish procedure. Had the government allowed bidders to express their interest with a financial bid, it would have achieved greater success in terms of transparency and public openness, experts observe.

**France.** The French Government assigned a single national PCN licence using a comparative tender in October 1994. It limited non-European ownership to 20% of the shares of a participating consortium, which led to only three international consortia participating in the tender. Despite the efforts of the General Directorate of Posts and Telecommunications (DGPT) to make the assignment process transparent, the fact that senior politicians became involved in the selection process in the closing weeks led to the appearance that the final decision was influenced by political considerations. The selection criteria cited in a Ministry publication after the award included the financial status of the participating consortia, likelihood to create and maintain competition with the existing cellular operators, creation of employment opportunities in France, and realistic business plan and financing options. Last-minute political involvement, limiting participation mainly to French and European firms, and allocating too few licenses were the major factors lowering the degree of transparency and fairness of the French procedure identified by expert analysts. The limited transparency conclusion is borne out by the fact that the auction entry criteria and, respectively, the winner selection criteria, were announced only after the close of the tender procedure.

### **(3) Efficiency and Transparency of the Auction Procedure Applied in Bulgaria**

The case studies described above invite conclusions regarding the advantages and disadvantages of the multiple round auction design chosen by the Bulgarian State Telecommunications Commission, as well as the manner and efficiency of the tender procedure conduct.

#### **Choice of Licence Award Method**

Historically, the first method used in most countries for the allocation of cellular frequencies has been their automatic granting to incumbent wireline providers.

Later on, the applicable assignment designs were diversified.

In the USA the Federal Communications Commission awarded frequencies through "*comparative hearings*" method, where two or more participants competed in a special "panel" (discussion group in which they set forth the advantages of their bid). The Commission has also used a lottery-like method to select applications to process.

In the former case, the complexity and indefiniteness of the selection criteria applied set precedents for litigation with the process often taking years. The FCC decisions were often appealed both to the full Federal Communications Commission and an administrative law judge and, in some cases, to the US Court of Appeals.

The use of lotteries fuelled speculation in previously awarded FCC licences. This process delayed the initiation of service to the public.

The "*comparative hearings*" method was initially used in some European countries in the design of auction procedures. Essentially, the method requires the conduct of an auction behind closed doors and discussion of the bids placed. A disadvantage is the lack of clear, pre-set criteria for selection of a winner. This major problem explains why the "*comparative hearings*" method was abandoned in Europe soon after its introduction.

The growth of the cellular market in Europe has compelled most of the authorised regulatory agencies to take steps to objectify the selection process and to establish specific selection criteria and procedural rules whose observance is mandatory.

The first stage of this process was the introduction of a financial criterion in the mobile operator licensing procedure. At the same time, an *open tender procedure* was avoided in most cases and a public procurement award procedure was applied instead. The idea was to make a decision on the award of a licence for installation and operation of a cellular network proceeding not only from the financial criterion but also to include additional criteria guaranteeing the public interest. The additional conditions, such as job creation, low rates for end users and investment pledges, thus turned into leading criteria.

The method of GSM licensing through public procurement has a number of disadvantages. One of the key problems with this method is the ability of the participants concealing the lack of available resources for investment, construction and maintenance of a competitive GSM network through job creation or job security pledges whose future honouring is not guaranteed.

In an auction, the licence goes to the bidder who makes the highest financial assessment of the licence and offers to pay for it the largest amount and not to the participant who has made the largest pledges (without furnishing guarantees of their honouring).

Even though an open auction cannot guarantee the attainment of these social objectives, the winner is highly likely to meet them if the government creates the appropriate competitive environment. Hong Kong and Sweden provide excellent examples of the benefits of competition. These countries have focussed on the creation of a strongly competitive market by encouraging investments in domestic infrastructure. In turn, this leads to a lowering of the prices of supplied goods and services and to creation of new jobs.

For these reasons, the expert team of Transparency International arrives at the opinion that the *auction* is the most effective instrument for mobile telephony licensing. It remains to be decided which type of auction is best suited to this purpose.

Single round sealed-bid actions generally raise less revenue. In procedural terms, they lead to complicated bidding strategies, produce inefficient outcomes, and pose "*winner's curse*" problems (i.e. bidders feeling they overbid). According to Peter Cramton, the simultaneous multiple round auction is the best practical design because it minimises *winner's curse*, or bidder regret, allows bidders to pursue backup strategies as prices change, requires relatively simple bidding strategies, and offers the best chance for efficient allocation.



### **Choice of Auction Design**

The bidding rules themselves are of substantial importance. Thus, according to Paul Milgrom, misdesigned procedures usually lead to disappointing (in quantitative and qualitative terms) results of an auction. Summing up the theory and the cited case studies of international practice, the expert team of Transparency International Bulgaria arrived at the following conclusions regarding the degree of transparency and fairness of the various types of bidding procedures:

- **Transparency**

The existence of objective criteria, such as a financial bid, guarantees a high degree of transparency of the bidding procedure and hence better legal consequences. After pre-qualifying the participants, the bodies authorised to license GSM operators in the USA and Colombia successfully used financial bids as the single criteria to select winners, whereas the Belgian regulators indicated the exact percentage weight of three criteria. The objective criteria thus limit the potential for disputes after a decision had been made. In contrast, the use of comparative tenders with subjective criteria, whose nature is sometimes difficult to identify and is unclear, left the assigning authorities in Ireland, Canada and France subject to appeals and formal complaints after the award of their licences. Prerequisites are created for arbitrary selection, for an excessively prolonged licensing procedure and for a delayed exercise of the winner's right to install and operate a GSM network.

- **Wide qualified participation**

Practice shows that bidding procedures with clear conditions and more accommodating eligibility criteria, where a larger number of applicants qualify for entry, are traditionally seen as more successful. In most cases, the large number of bidders is due basically to the application of objective and non-discriminating criteria, as is the case with the USA (30 bidders), Colombia (7), and Belgium (5).

On the other hand, the large number of bidders counterbalances the subjective criteria and, ultimately, leads to best results, as was the case with Hong Kong (8 bidders) and the UK (8). France is an example of negative experience in this respect: it limited participation to mainly European companies and consortia and, as a result, its regulatory bodies received only three proposals in the cellular operator auction. The outcome of the GSM licence auction in New Zealand was apparently unsuccessful, as the existing operator TCNZ was barred from bidding and its only financially capable competitor was the Bell South consortium. The Government of New Zealand admitted as a setback the lack of bidders in the auctions since this held back the creation and development of a competitive market for mobile services in that country.

- **Sub-national licensing**

The use of a GSM licensing method based on a regional or sub-national criterion is not recommended. In the USA and Colombia, this method allowed bidders to make distinctions between regions, both in terms of their aggregation strategies and in terms of price. On balance, the outcome of the auctions in this case can be regarded as ultimately successful. Notably, this method works only in large and/or populous countries. In India, therefore, any other design would be inappropriate. In countries having a small land mass and population like Bulgaria, this method would not prove an effective means of assigning licences.

- **Concurrent assignment of similar licences**

It is a policy for the FCC to assign similar cellular telephony licences concurrently, in a multiple round auction. Hong Kong assigned three GSM licenses to the existing analogue cellular providers, followed quickly by a fourth to a new entrant. Columbia awarded the first cellular licence to the existing wireline operator, and shortly thereafter a second licence of the same type to competitive bidders. In all three cases, no one competitor had a significant time advantage over the others.

In contrast, France assigned only one mobile licence at a time when other countries were auctioning up to six. The Government of Ireland awarded the first GSM licence to the state-owned PTT in 1990, but only awarded a second licence for the same standard in late 1995.

- **Clear rights and responsibilities of bidders and regulators**

The countries which set clear rules for dialogue between the regulatory bodies and the existing telecommunication operators design and apply simpler and more effective bidding procedures. Their application, however, depends not only on clearly established rules of procedure and a legal framework but on domestic political stability as well. A positive example in this respect is set by the USA, where the Federal Communications Commission guarantees consistency in the application of the auction rules. India and Poland could be cited as negative examples: the regulatory framework in the former and the terms and conditions of an already awarded licence in the latter were changed suddenly and unilaterally.

According to the **five factors** of success discussed above, the outcome of the auction held by the STC can be assessed as **successful**.

The use of a pre-qualification test, followed by a financially based criterion in conditions of a public multiple round auction, undoubtedly ranks

the Bulgarian procedure among **the most transparent** ones of the listed types of national procedures.

**Qualified participation**, compared to the case studies described above, was not wide (five applications filed, of which four found acceptable for entry), but considering the scale of the market this is a **satisfactory outcome and demonstrates that the telecommunications market tends to stabilise and develop successfully in future**.

**Sub-national licensing** is unfeasible for the Bulgarian economy, considering the country's land mass and population size.

**Concurrent assignment of similar licences:** Bulgaria's first GSM operator was licensed in 1995 for the amount of US\$ 20,000. An auction for a GSM licence of the same type was not held before 2000, and the second GSM operator will initiate service in 2001. The **incumbent operator has a competitive advantage** of both time and finance over the newly licensed one. The Government of the Republic of Bulgaria and the Bulgarian State Telecommunications Commission (STC) missed the opportunity to mend the irregularity admitted in the past and offer a third GSM operator licence within the same auction or shortly thereafter.

Apart from the economic arguments against such policy, **it also arguably comes into conflict with Community law (EU law)**.

Notably, in a similar situation the Court of Justice of the European Communities ordered the first Belgian GSM operator (which had received its licence for free) to pay the same amount which the government had obtained through auction from the second operator, even though the auction was held several years later. Similar judgements have been rendered against Italy, Austria and Spain. Bulgaria should reckon with the ECJ Case Law because its future accession to the EU requires harmonisation of its legislation and practice to the EU regulatory standards in this sphere. In this aspect, the sealed bid public auction for a second GSM operator licence would have undoubtedly be subject to review by the Court in Luxembourg.

The last requirement under consideration, **clear rights and responsibilities** of both parties, was fully met. It should be borne in mind, however, that this criterion also involves guarantees on the part of the regulatory body of subsequent stability of the legal framework and the agreed terms and conditions, as well as the conduct of adequate and timely dialogue with the industry. Fulfilment of this criterion, therefore, could be objectively evaluated only after several years have passed.

### **General comparative conclusions**

The auction held used the possibly most objective criterion: the financial. In these terms, the Bulgarian procedure was more objective than the one used in Ireland.

Unlike many European countries using the less efficient single round auction design, the STC opted for the American multiple round auction design.

The terms and conditions of the licence were made public in advance, and a possibility for renegotiation was precluded, which significantly underscores the objectivity of the procedure. Unlike Belgium, where the terms and conditions of the licence were finalised only after negotiations between the

winning bidder and the government, Bulgaria used an exceedingly clear and transparent procedure which did not incur any objections from the bidders.

Unlike France, the Bulgarian Government did not discriminate against the bidders on grounds of nationality. The requirement of non-registration in an existing offshore zone does not restrict eligibility for participation in the auction in terms of nationality. This requirement is based on an objective economic criterion and guarantees the applicant's economic and commercial identification. It is not a form of economic or cultural protectionism.

The ineligibility of GSM providers already operating on Bulgarian territory is also an objective restriction, contributing to the integrity of the auction. The application of such a requirement prevented an unsuccessful outcome of the auction similar to the case of New Zealand.

The lack of allegations of political involvement in the selection of the winner also merits a positive evaluation. In this respect, the Bulgarian auction compares favourably with the case studies of France and Hong Kong discussed above.

## **II. ANALYSIS OF THE DEGREE OF TRANSPARENCY OF THE TENDER PROCEDURE USED IN BULGARIA**

The findings of the expert team of the Association have been arrived at in accordance with the international standards for conduct of GSM licensing auctions and the requirements of Bulgarian legislation.

### **1. Arguments for establishment of the transparency of the procedure:**

#### **1.1 Pre-auction activities**

Transparency International Bulgaria arranged a number of advance meetings between the expert team of the Association and STC officials.

**As a result, the STC considered and subsequently accepted a number of proposals of the association concerning matters of organisation and design in respect of the tender procedure.**

Mr Ventsislav Karadjov, Programme Director of the Association, Mr Stanislav Lyutov, legal expert of the Association's team, and Mr Lyubomir Stoichkov, Secretary General of STC, met to discuss questions concerning the tender procedure, and more specifically the custody of the tender documents, a manner of sealing the safe, as well as the mechanisms for receipt and recording of the bids submitted. The Association's ideas about the organisation of the auction were entirely adopted and included in the Instructions for the Procedure and Manner of Conducting the Auction.

Mr Lyubomir Stoichkov, Secretary General of STC, Mr Dimiter Kyumyurdjiev, Deputy Chairman of the Board of Transparency International Bulgaria and Director of the Monitoring and Evaluation Project for the Public Auction of a Second GSM Licence in Bulgaria, Mr Ventsislav Karadjov, Programme Director of Transparency International Bulgaria, and Miss Alexandra Vicheva, legal expert of the Association, conferred on 6 December 2000 in connection with the admission of official representatives of the Association to the auction (number of experts and their identification), as well as the need to provide the team with all tender documents available.

The representatives of the Association **requested** from Mr Stoichkov **receipt** of the STC letters, sent to the participants for removal of irregularities in the tender documents, according to Item 1 of the Regulations on Conducting the Tender.

As a result of this meeting, the Secretary General of STC undertook to present the requests of Transparency International Bulgaria before the Commission formed pursuant to Article 45 of the Telecommunications Act for conduct of the public auction.

In performance of the contract clauses, representatives of the Association **were allowed to attend** the opening of the Tender Documents, which took place at the STC headquarters on 30 November 2000.

At the opening of the tender documents, the Association's team was represented by Mr Ventsislav Karadjov and Mr Ivan Gyurov, member of the Association's expert team. The Chairman of the STC, Mr Ivan Taushanov, assisted by Mr Karadjov, arranged the opening of the safe containing the documents, and they presented the documents to the media.

**In summary the Association concludes that, in terms of transparency, there were no violations of the statutory rules for custody of the tender documents from the time of their receipt until the time of their opening.**

As a result of the above meeting on 6 December 2000, the STC **provided** the representatives of the Association with an **information package** containing a list of the legal entities which had purchased tender documents, part of their correspondence between them and STC, as well as a number of other documents as follows:

Instructions for the Procedure and Manner of Conducting the Bidding in the Auction and of Preparing and Submitting of Bids, Annex to Article 18 (3) of the Rules of Procedure of the Commission pursuant to Article 45 of the Telecommunications Act, appointed by the Prime Minister of the Republic of Bulgaria by Order No. R-89 of 2000;

Rules of Procedure of the Commission pursuant to Article 45 of the Telecommunications Act;

Minutes of the meetings of the Commission pursuant to Article 45 of the Telecommunications Act: No.1 of 28 November 2000, No.2 of 30 November 2000, No.3 of 1 December 2000, No.4 of 6 December 2000, and No.5 of 8 December 2000.

**The familiarisation of the representatives of the Association with the documents listed above was essential for the formation of an independent expert opinion by the official observer of the procedure regarding the transparent organisation of the forthcoming open auction.**

**An opportunity was provided for attendance** by representatives of Transparency International Bulgaria at a regular meeting of the Commission pursuant to Article 45 of the Telecommunications Act,<sup>2</sup> held on 13 December 2000, immediately before the conduct of the auction.

Mrs Katya Hristova-Vulcheva, Executive Director, Miss Alexandra Vicheva, legal expert of Transparency International Bulgaria, and Mr Claude Hovnanian, international expert of Transparency International, attended a meeting of the Commission pursuant to Article 45 of the Telecommunications Act.

Mr Hovnanian set forth to the members of the Commission his views regarding the European standards for conduct of public auctions, and made a formal and reasoned request that the tender documents available by 13 December 2000 be provided to Transparency International Bulgaria. The

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<sup>2</sup> TELECOMMUNICATIONS ACT, Article 45. (1) Within the time limit referred to in Article 44 (1) herein, the Prime Minister shall designate by an order the composition of a commission for the conduct of the comparative tender or auction, which shall mandatorily include members of the State Telecommunications Commission and, depending on the subject of the licence, representatives of the National Council for Radio and Television and of other departments and organisations concerned.

(2) The said commission shall be chaired by the Chairman of the State Telecommunications Commission.

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documents in question consisted of the letters sent to the participants within the time limit established by Article 67 of the Telecommunications Act for removal of irregularities in the tender documents, as well as a Minute of the Meeting of the Commission Pursuant to Article 45 of the Telecommunications Act on 12 December 2000 concerning a decision-making by the Commission pursuant to Article 45 of the Telecommunications Act on disqualification of the fifth applicant, the Rumeli-Telsim Consortium of Turkey.

The members of the Commission categorically refused to provide the documents in question prior to the conduct of the auction, invoking commercial secrecy. The Commission ignored the right of the Association, in its capacity as independent observer, to familiarise itself with the documents available prior to the opening of the auction so as to evaluate the legally compliant admission of participants to the bidding, as well as the fact that under the contract signed between Transparency International Bulgaria and STC, the experts of the Association were obliged to sign statements of confidentiality and that only "strictly confidential information" could be withheld from them.

With a view to optimising the procedure for admission of independent observers to auctions and privatisation transactions effected by the government or by other state bodies (in their capacity as regulatory agencies), the Association suggests the adoption of the practice of including framework rules and obligations for both the regulatory agency and for the independent observer, should any such be envisaged in the particular case, in the regulatory procedures for conduct of an auction, a public procurement or a privatisation transaction. This suggestion is intended to eliminate the problems arising between the regulatory agency and the potential bidders or contractors upon inclusion of an independent observer of the procedure. The suggestion also facilitates the relationship between the regulatory agency and the observer because it streamlines the rights and obligations of both parties, which can be specified by contract but still within the framework of the approved procedure for conduct of privatisation transactions, auction procedures or an announced public procurement procedure in which the participation of an independent observer is envisaged.

Such regulation will enhance the public openness and will enjoin the regulatory agency to adhere to such public openness because it will be legally bound to include an independent observer in the procedure and to afford to this observer access for the conduct of an independent evaluation of the overall procedure.

## **1.2. Transparency in the course of the conduct of the bidding procedure**

The monitoring conducted on the part of the expert team of Transparency International Bulgaria invited the following conclusions:

The Regulations on Conducting the Tender, Annex to Item 9 of Decision No.693 dated 25 October 2000 of the Council of Ministers of the Republic of Bulgaria, and the Instructions for the Procedure and Manner of Conducting the Bidding in the Auction and of Preparing and Submitting of Bids, Annex to Article 18 (3) of the Rules of Procedure of the Commission pursuant to Article 45 of the Telecommunications Act, appointed by Order No. R-89 of the Prime Minister of the Republic of Bulgaria for 2000, were strictly observed as follows:

The participants, their representatives and their designated assistants were registered at the beginning of each day of bidding.

Personnel of the administration of the State Telecommunications Commission were expressly authorised to perform this registration.

The registration particulars were recorded in a minute book which, upon completion of the registration, was delivered to the Chairman of the Commission.

The representatives of the participants, their assistants, the observers and the members of the media were issued with identification badges entitling them to access to the premises of the bidding.

The identity of the representatives of the participants in the tender was verified by the Chairman of the Commission.

In case representatives by proxy participated in the bidding, the proxy paper (issued by the authorised person, expressly specifying the purpose of authorisation, and reduced to writing in the Bulgarian language) was filed with the minute book.

All representatives executed specimens of their signatures in the presence of three members of the Commission, and these specimens were filed with the minute book.

The representatives of each one of the participants in the auction made written declarations designating unanimously the representative from among their number who was to sign and submit the bids for the respective day of bidding, and this was noted in the minute book and the declarations were filed with it.

Each participant and their assistants were allocated specific working areas inside the premises of the bidding.

The working areas for participation in the auction were allocated by lots drawn in the order of the participants' registration at the date of their registration prior to their admission on the premises.

The representatives of each participant and their assistants had at their disposal working offices adjoining the premises of the bidding.

At the beginning of the first round, the Chairman of the Commission



provided oral directions detailing the manner of preparation and submission of the bids.

The starting bid of the first round was US\$ 45 million, and the bid increment was US\$ 5 million.

At the beginning of each round, the representatives of each participant were handed by the Chairman of the Commission a blank form containing the particulars of Item 8, Letterae (a) and (b) of the Annex to Item 9 of Council of Ministers Decision No.693, and they acknowledged receipt by signing the minute book. Each blank form was signed in advance by two members of the Commission.

At the beginning of the first day of bidding, when the business name of OTE was misspelled in the course of preparation of the bid, the Chairman of the Commission cancelled the defective blank form in the presence of the legal expert of Transparency International Bulgaria Alexandra Vicheva and handed the participant a new blank form for the relevant round.

The rules for conduct of the auction, drafted by the Commission, required that the bids of each bidder be inserted in opaque envelopes, provided by the Commission in advance and bearing the number of the round. Each of the bidders complied with the pre-established requirements.

A representative of each participants submitted the bid, personally inscribing the envelope with the business name of the participant on behalf of which she/he dropped the envelope into a transparent box placed in front of the Chairman of the Commission.

Submission of the bids commenced on the 40th minute past every astronomical hour and was concluded not later than the 50th minute past the hour.

After all bids were submitted, the Chairman of the Commission retrieved from the box the envelopes containing the bids as submitted, opened the bids as submitted and handed the bids as submitted to the members of the Commission.

The contents of the bids as submitted was inventoried by a member of the Commission in a special book, and the record was attested as true by the signatures of the members of the Commission.

After the close of each day of bidding, the safe containing the tender document was sealed in the presence of all nine members of the Commission pursuant to Article 45 of the Telecommunications Act, representatives of the Association and journalists, and was handed over to the authorised municipal security firm "Egida" for safe keeping until the opening of the next day of bidding.

Bidding was opened on 15 December 2000 and continued until 17 December 2000, while the auction was expected to continue until 19 December.

After the conclusion of bidding, the Chairman of the Commission announced the ranking of bidders according to the price offered by them, as follows: Vodafone Bulgaria S.A., US\$ 75 million; Fintur Holdings B.V., US\$ 120 million; TIM International - US\$ 130 million. The winner of the auction was the highest bidder, the Hellenic Telecommunications Organisation S.A.

(OTE – Greece), US\$ 135 million.

The representatives of the Association were able to establish personal contacts and to interview the participants in the auction after its final close.

After the close of the auction procedure, Mr Claude Hovnanian, international expert of Transparency International, together with the authorised representatives of the Association, interviewed all participants in the auction so that their views regarding their perception of the observance of the terms, procedure and manner of conduct of the bidding could be reflected in the organisation's report.

In the monitoring of the public auction for the assignment of the GSM licence, Transparency International Bulgaria successfully adapted and applied a **methodology**, developed as a result of the monitoring of the BTC privatisation procedure, for direct observation of the tender procedure and surveying the participants' opinion about the legally compliant and transparent conduct of the open auction.

**The purpose of the Association is to obtain additional relevant information required for an expert evaluation of privatisation and other transactions, which is of paramount importance for the formation of an independent opinion on the part of the official observer of the transaction.**

**The observer's independent expert opinion should be based on officially provided information as well as on additional unofficial information, in this case, the information provided by the participants, as well as the overall media coverage of the process observed.**

**All participants were unanimous that the bidding procedure had been conducted in an orderly, legally compliant and transparent manner. They had no critical remarks in this respect.**

**During the course of the auction, there was no opportunity for informal contacts between the members of the Commission pursuant to Article 45 of the Telecommunications Act and the participants in the procedure.**

**One organisational flaw of the auction was the fact that the participants had an opportunity of informal communication among themselves, which created prerequisites for collusion and mutual discrimination but, ultimately, this did not affect the degree of transparency of the procedure.**

### **III. Legal compliance of the bidding procedure**

**In accordance with a contract concluded between Transparency International Bulgaria and the State Telecommunications Commission on 8 November 2000, the expert team of the Association undertook to review all available tender documents with a view to maximising the accuracy of reporting the degree of legal compliance and fairness of the tender procedure.**

**Proceeding from all statutory instruments and documents as provided, the Association finds that the tender procedure was fully compliant with the law, and that it adhered to all legal requirements, the requirements of the Telecommunications Act and of Council of Ministers Decision No.693<sup>3</sup> in terms of the criteria of legal compliance and fairness.**

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<sup>3</sup> Decision No.693 dated 25 October 2000, promulgated in the *Official Gazette* No.88 of 2000.

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**1. Participation of Transparency International Bulgaria in an observation of the criteria of legal compliance of the sealed bid public auction as conducted**

On 12 January 2001, the expert team of Transparency International Bulgaria, an official observer of the procedure conducted for the sale of a licence to install, maintain and operate Bulgaria's second nation-wide GSM-standard public mobile cellular network, was invited by STC, as envisaged in the clauses of the contract concluded between them, **to familiarise itself with the contents of all available tender documents.**

The experts of the Association signed the statements of confidentiality provided to them by the Commission.

**All tender documents were thoroughly examined and reviewed, proceeding from which the expert team found:**

The applicants for entry in the open public auction, scheduled for 15 December 2000, had submitted the tender documents required for entry by the appointed deadline.

The tender documents as submitted were accepted after being checked against an inventory by **authorised officer of the administration** of the State Telecommunications Commission.

On 30 November 2000, at a **regular meeting**, the Commission admitted the tender documents as submitted for participation in a sealed-bid public auction for the granting of an individual licence for the installation, maintenance and operation of a public cellular mobile network according to the GSM standard, for national coverage, and provision of telecommunications services through that network, as follows:

- Hellenic Telecommunications Organisation S.A. joint-stock company, Greece;
  - Fintur Holdings B.V. joint-stock company, Turkey, Finland;
  - Rumeli-Telsim Consortium civil-law company, Turkey;
  - Vodafone Bulgaria S.A. joint-stock company, Bulgaria;
  - TIM International B.V. limited liability company, Netherlands.
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- The tender documents as submitted were opened by the Commission on 1 December 2000 in the presence of representatives of Transparency International Bulgaria and journalists.
  - According to the Rules of Procedure of the Commission pursuant to Article 45 of the Telecommunications Act, the Chairman of the Commission issued an order designating **officers of the STC administration to initial each page of the documents as already submitted.**
  - The documents **were numbered and initialled in the order of**

**submission.**

After the members of the Commission familiarised themselves with the documents presented by the applicants, verified them and discussed their conformity with the requirements of Council of Ministers Decision No.693 dated 25 October 2000, on 1 December 2000 the Commission pursuant to Article 45 of the Telecommunications Act duly dispatched letters via DHL to all applicants concerning removal of irregularities in the documents, thus **complying with the requirements** of the Annex to Item 9 of Decision No.693.

**The Association finds that the Commission duly exercised its powers granted to it by the Council of Ministers Decision. Proceeding from the examination of the documents as conducted, the Association's team found that the additional information requested from each of the applicants fully conformed to the pre-qualifying requirements for entry in the auction.**

The Association also reviewed the **Instructions for the Procedure and Manner of Conducting the Bidding in the Auction and of Preparing and Submitting of Bids by the Participants**, as drawn up by the Commission pursuant to Article 45 of the Telecommunications Act.

The instructions are detailed and comprehensive, and they do not conflict with the international requirements for conduct of a competitive bidding procedure of this type. This opinion was confirmed by Mr Claude Hovnanian, international expert of Transparency International.

The documents regarding the letters dispatched to the applicants for entry in the auction on 2 December 2000 show that their **replies** were received within the time limit established by Article 67 (4) of the Telecommunications Act.<sup>4</sup>

- All candidates sent the **additional information requested by STC, removing the irregularities in the tender documents as already submitted.**
- The additional documents received from the applicants **were opened, signed and numbered by the members of the commission in the order of delivery.**

Having examined the tender documents, the Association's team found that the Commission pursuant to Article 45 of the Telecommunications Act had appropriately requested the necessary additional information from all applicants without breaching the statutory requirements and without prejudicing in any way whatsoever the non-discrimination of the applicants.

**Meeting on 13 December 2000, the Commission admitted the following four applicants for entry in the auction:**

- Hellenic Telecommunications Organisation S.A. joint-stock company, Greece;
- Fintur Holdings B.V. joint-stock company, Turkey, Finland;

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<sup>4</sup> TELECOMMUNICATIONS ACT, Article 67 (4). If the documents referred to in Paragraphs (1) and (2) do not satisfy the requirements, the applicant shall be given a seven-day time limit to remove the irregularities as committed. Should the irregularities be not removed within the named time limit, the applicant shall not be admitted to entry.

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- Vodafone Bulgaria S.A., Bulgaria;
- TIM International B.V. limited liability company, Netherlands.

**The Commission pursuant to Article 45 of the Telecommunications Act disqualified the Turkish consortium Rumeli-Telsim on the following grounds:**

The **applicant** was notified by letter from the Commission pursuant to Article 45 of the Telecommunications Act of irregularities in the documents submitted for entry in the auction. The same letter specified the manner of removal of the irregularities and, in pursuance of Article 67 (4) of the Telecommunications Act, a seven-day time limit, reckoned from the date of receipt, was given for removal of the said irregularities.

The additional documents submitted by the applicant showed that:

- No documents were presented proving that the applicant, **Rumeli-Telsim Consortium, enjoys juristic person status**, whereas it is expressly emphasised that the applicant **is not a juristic person**. Such status is required by virtue of Article 50 of the Telecommunications Act in connection with the subject of the auction: award of an individual licence for installation of a GSM network.

Nominally, the applicant's non-qualifying as juristic person does not conflict with Council of Ministers Decision No.693, but:

**According to the Association's experts, in this case, apart from the relevant provision of Article 50 of the Telecommunications Act,<sup>5</sup> the provisions of the fundamental law regulating the status of commercial corporations and their combinations, viz. the Commercial Code of the Republic of Bulgaria, should also be taken into consideration.**

**The legal form of business organisation in which the applicant identified itself for the purposes of entry in the public auction was consortium.**

**According to Articles 275<sup>6</sup> and 276 of the Commercial Code, the rules applicable to civil law companies or to the association in the form of which the consortium is organised apply to the consortium, *mutatis mutandis*.**

**An interpretation of the provisions of the Commercial Code invites the conclusion that, under Bulgarian commercial law, a consortium need not necessarily be a juristic person. The provision of Article 50 of the Telecommunications Act expressly states that an individual licence may furthermore be granted to sole-trader natural persons.**

**The wording of Council of Ministers Decision No.693 does not expressly oblige the applicant for entry in the auction for the granting of a**

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<sup>5</sup> TELECOMMUNICATIONS ACT,

Article 50. Individual licences shall be granted to sole-trader natural persons and to juristic persons. Individual licences for private self-contained networks using the radio frequency spectrum may furthermore be granted to natural persons.

<sup>6</sup> COMMERCIAL CODE,

Article 275. A consortium shall be a combination agreed by merchants for the purpose of carrying into effect a definite business.

Article 276. The rules applicable to civil law companies or to the association in the form whereof a consortium is organised shall apply, *mutatis mutandis*, to the said consortium.

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second GSM operator licence to enjoy the legal status of a juristic person for the purposes of Bulgarian legislation at the time of submission of an application for entry in the auction.

On the one hand, the Council of Ministers and the State Telecommunications Commission committed a substantial regulatory omission by failing to establish possession of juristic person qualifications as a mandatory pre-qualifying condition for participation in the bidding procedure. This requirement is not contained in Council of Ministers Decision No.693.

On the other hand, the wording of Decision No.693 does not make reference to Article 50 of the Telecommunications Act, which expressly regulates the legal status of persons eligible to receive individual licences, which results in an ambiguity and may be misleading to potential bidders.

Considering the established international practice for conduct of GSM licensing auctions with international participants, the Association's team believes that even at the time of purchase of the tender documents, detailed explanations should have been provided regarding the overall legal framework of the tender procedure, as the international participants are under an obligation to comply with legal requirements which are actually not clearly stated.

One substantial omission in the organisation of the public auction that merits notice is the circumstance that the State Telecommunications Commission did not show initiative for comprehensive and exhaustive elucidation of the legal requirements as to the eligibility of the applicants for entry in the auction.

Undoubtedly, as from the time of purchase of tender documents by 42 applicants and until the time of submission of the tender documents by the five participants, correspondence was conducted with the STC regarding the matters as to the manner and terms for participation in the auction, but this dialogue was initiated by the potential bidders and not by STC.

According to the Association, after conclusion of the stage of purchase of tender documents, STC should have organised a pre-auction meeting to be attended by authorised representatives of the interested parties and representatives of the STC administration and legal experts of the Commission, who should have familiarised the potential bidders with the general and specific legal requirements for entry in the public auction (Council of Ministers Decision No.693 dated 25 October 2000). Such an explanatory pre-auction procedure ("auction seminar") is applied by the US Federal Communications Commission (FCC), and this largely facilitates a better organisation and transparency in the conduct of the auction procedure. The Federal Commission familiarises the applicants for entry in the auction with the peculiarities of the software and its use, should such be envisaged for the correct conduct of the auction.

Application of such a procedure would have helped avoid ensuing ambiguities involved in the presentation of the tender documents in whole and, in particular, the notarisation, translation and legalisation of the documents and the manner of authorisation. The regulatory bodies in Bulgaria must take such action because, in practice, as is the case in point, the subsequent stage of removal of irregularities in the tender documents as

submitted was limited to a short seven-day period as fixed by Article 67 (4) of the Telecommunications Act. This period may not always be sufficient, and this may lead to disqualification of a potential bidder and complication of the bidding procedure by pursuit of judicial remedy.

The opinion of the Association takes into account the world practice of holding international auctions, which shows that a large part of the bidders are international corporations with complex organisational structure and world-wide operations, whose managerial decision-making conforms to specific terms and procedure.

As a result of the ambiguity of the legal framework, indicated above, Rumeli-Telsim Consortium was identified as a civil law company for entry in the auction which, in turn, led to its disqualification and subsequent appeal before the Supreme Administrative Court of the Republic of Bulgaria.

On the whole, however, the Association believes that the Decision of the Commission pursuant to Article 45 of the Telecommunications Act to disqualify the applicant Rumeli-Telsim was correct and legally compliant on the following grounds:

1. There exists case law regulating the legal status of the consortium as a combination. According to Supreme Court Judgement No.47 dated 14 July 1993, the choice to organise a consortium in the form of a civil law company or a commercial corporation depends on whether the purpose of the consortium can be attained without raising tangible assets or whether its purpose requires such assets. (Article 276 of the Commercial Code admits the formation of a consortium in the form of any type of commercial corporation, although in practice the purpose of this type of business associations, where requiring property separate from the associates, could be attained primarily by a stock corporation).

To be able to install, maintain and operate a GSM network, an applicant which enters the auction in the form of a consortium as business organisation must possess tangible assets and raise the capital needed for attainment of its purpose, which in turn requires its organisation in the form of a commercial corporation. This conclusion follows directly from Supreme Court Judgement No.47 dated 14 July 1993.

Considering the above, the Association's expert team arrives at the opinion that Rumeli-Telsim was disqualified in connection with its legal status as a consortium in the form of a civil law company. The fact of disqualification conforms to the substantive law framework and the case law in the Republic of Bulgaria.

According to the Association, there are also some other legally relevant circumstances disqualifying Rumeli-Telsim, and *viz.*:

- The documents authorising the person acting as representative of both companies are non-conforming (apart from the forename and surname of the authorised person, other required identification particulars such as full name as entered in the passport, address, and passport number are omitted.)

- In connection with Article 38 (1)<sup>7</sup> of the Obligations and Contracts Act, Telsim Mobil Telekombnikasyon Hizmetleri A.S. has not provided a duly executed written ratification of the acts performed by the authorised representative upon the contractual creation of the consortium.
- The applicant does not fulfil the requirement specified in Item 6, Littera (d) of Council of Ministers Decision No.693, *viz.* that it be an active GSM operator on the territory of more than two countries, because both companies forming the consortium operate within a single country.
- The applicant does not fulfil the requirement specified in Item 6, Littera (e) of Council of Ministers Decision No.693, *viz.* that its GSM networks should have at least 2 million subscribers, because it did not prove beyond reasonable doubt the existence of such number of subscribers.

**An appeal against the decision of the commission pursuant to article 45 of the Telecommunications Act, made at the meeting on 13 December 2000**, came as a consequence of the Turkish consortium's disqualification.

The Supreme Administration Court issued a **determination** dated 10 January 2001, whereby the Turks' appeal **was not admitted for consideration as unentertainable on procedural grounds**.

In its reasoning on the procedural unentertainability of the appeal, the Court notes that the Commission pursuant to Article 45 is not a state administrative authority, nor it is a public or a business organisation empowered to issue administrative acts within the meaning of Article 2 (2) of the Administrative Procedure Act, because it is formed and operates **on a single occasion for a particular purpose**.

The established view in the statutory framework and case law is that judicial review as to legal compliance applies to individual administrative acts completing a process and not to the actions of subsidiary bodies preparing the issuing of such acts.

Transparency International Bulgaria fully concurs with the opinion of the Court. The fundamental concepts enshrined in Bulgarian administrative law should be interpreted in the proceeding according to the procedure established by Article 12<sup>8</sup> of the Supreme Administrative Court Act.

The **Administrative Procedure Act** regulates the procedures for the issuance, appeal against, and execution of individual administrative acts.

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<sup>7</sup> OBLIGATIONS AND CONTRACTS ACT, Article 38. (1) An agent may not negotiate on behalf of the principal thereof either with himself or with another person likewise represented by the said agent, unless the said principal has assented thereto.

<sup>8</sup> SUPREME ADMINISTRATIVE COURT ACT, Article 12. Administrative acts shall be reversible on the grounds of:

1. incompetence;
  2. non-execution in the established form;
  3. substantive breaches of the rules of administrative procedure;
  4. conflict with provisions of substantive law;
  5. non-conformity to the purpose of the law.
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According to Article 2 (1) of the **Administrative Procedure Act**, "individual administrative acts shall be the acts issued by heads of department, by municipality mayors, by mayoralty mayors and ward mayors and by other municipal executive officers, as well as by other duly empowered authorities, whereby rights or duties are created or rights or legitimate interests of individual citizens or organisations are affected, as well as the refusals to issue any such acts."

A commission formed pursuant to Article 45 of the Telecommunications Act **is not a body of authoritative power** but a **subsidiary body of experts**. The actions of the Commission pursuant to Article 45 of the Telecommunications Act have no independent relevance outside the Council of Ministers decision adopted in pursuance of Article 48 (1)<sup>9</sup> of the **Telecommunications Act**, which is why these actions **do not create rights and duties**, nor do they affect legitimate rights and interests of individual citizens or organisations. These actions constitute stages preparatory to the adoption of the Council of Ministers decision. (Within one month, the Council of Ministers adopts a reasoned decision designating the person to which a licence is granted and entrusting the State Telecommunications Commission with granting the licence. Any such decision must be gazetted.)

Rumeli-Telsim, therefore, should have appealed the Council of Ministers Decision<sup>10</sup> (Decision No.911 dated 28 December 2000, issued in pursuance of Article 48 (1) of the Telecommunications Act) designating the person to which the licence shall be granted rather than the Decision of the Commission pursuant to Article 45 of the Telecommunications Act, as recorded in Item 2 of Minute No.7 dated 13 December 2000.

Representatives of Transparency International Bulgaria **attended** the public hearing of the Supreme Administrative Court, held on 28 December 2000, at which matters of procedure concerning the constitution of the parties to the case were discussed. The Court did not proceed with the case because the authorised representative of Rumeli-Telsim was absent. Sitting in camera, the Supreme Administrative Court delivered a determination regarding the entertainability of the appeal.

Meeting on 13 December 2000, the Commission pursuant to Article 45 of the Telecommunications Act made a decision whereby Fintur B.V., Vodafone Bulgaria S.A., TIM International B.V. and OTE S.A. **were admitted to entry** in the sealed-bid open auction, determining that the documents submitted by these applicants conform to the requirements of Council of Ministers Decision No.693 and to State Telecommunications Commission Decision No.929 dated 26 October 2000, issued in connection with the former decision and in

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<sup>9</sup> Telecommunications Act, Article 48. (1) Within one month the Council of Ministers shall adopt a reasoned decision designating the person whereto a licence is granted and entrusting the State Telecommunications Commission with the granting of the said licence. Any such decision shall be promulgated in the *Official Gazette*.

(2) Any such decision shall be appealable according to the procedure established by the Supreme Administrative Court Act.

<sup>10</sup> Council of Ministers Decision No.911 dated 28 December 2000 designating the person which has won the sealed-bid public auction for the award of an individual licence for the installation, maintenance and operation of a public cellular mobile network according to the GSM standard, for national coverage, and provision of telecommunications services through that network for a period of 15 Years, promulgated in the *Official Gazette* No.2 of 5 January 2001.

pursuance to Article 46 of the Telecommunications Act. The admitted applicants were notified by means of telephone, facsimile transmission and mail communications.

On 12 January 2001, the legal experts of the team of Transparency International Bulgaria Mr Ventsislav Karadjov, Programme Director of the Association, and Miss Alexandra Vicheva, were invited by the State Telecommunications Commission to familiarise themselves with all available tender documents, provided to them by permission of the Chairman of STC, Mr Ivan Taushanov.

The said experts of the Association were allocated a special room. The documents were examined in the presence of the STC legal expert, Mr Alexander Pachamanov, authorised by STC to assist the representatives of the Association during the course of their work.

**Having familiarised themselves in detail with the documents presented by all applicants, the expert team of arrived at the opinion that these documents were fully conforming with the requirements of Item 6 of Council of Ministers Decision No.693, The Telecommunications Act, State Telecommunications Commission Decision No.929, as well as with all other statutory instruments of Bulgarian commercial legislation.**

**The discretion of the commission pursuant to Article 45 of the Telecommunications Act to admit the above-mentioned four applicants to entry in the auction was entirely compliant with the law and correct.**

**The representatives of the Association found:**

**All documents presented were notarised and enclosed their official translations into the Bulgarian language as legalised by an authorised translation and legalisation agency.**

**The four qualified applicants presented a duly executed and exhaustive set of documents in respect of their registration as juristic persons, i.e. they proved their eligibility to enter the open auction for the granting of a GSM network licence.**

**The applicants presented Documents showing: the amount of capital of the juristic person, and the distribution of this capital among the members or shareholders.**

**The applicants documented their manner of management and representation, and presented duly executed documents expressly authorising their representatives to act for them and in their name, place and stead in dealings with STC, the Commission pursuant to Article 45 of the Telecommunications Act, and the Bulgarian authorities, for the limited purpose of participation in the open auction for the granting of a licence for the installation, maintenance and operation of a second GSM network on the territory of the Republic of Bulgaria.**

**The applicants presented declarations that they are not registered in an off-shore zone.**

**The applicants presented declarations that they are not active GSM operators on the territory of the Republic of Bulgaria.**

**Three of the applicants presented declarations of intent to register a Bulgarian juristic person in the event of receiving a licence to install and maintain a GSM network on the territory of the Republic of Bulgaria.**

The fourth participant, "Vodafone Bulgaria "S.A., was registered under Bulgarian legislation at the time of submission of the tender documents.

All applicants presented their **latest commercial reports and financial statements**, showing conformity with the requirement of Item 6 of Council of Ministers Decision No.693 dated 25 October 2000, as well as their marketing and market capacity.

All applicants removed the irregularities in their tender documents within the time limit established by Article 67 of the Telecommunications Act.

*In summary, proceeding from the above, Transparency International determines that, on the whole, the Commission pursuant to Article 45 of the Telecommunications Act exercised a correct and reasoned discretion in admitting the four applicants, reckoning with the specifics of the applicants' legal status, their national legislation, market position and, last but not least, the requirements of Bulgarian legislation regulating the subject matter of the auction.*

#### **IV. CONCLUSIONS AND RECOMMENDATIONS**

- 1. The public auction for the granting of an individual licence for the installation, maintenance and operation of a public cellular mobile network according to the GSM standard for national coverage of the Republic of Bulgaria, conducted in pursuance of Article 44 in reference to Article 46 of the Telecommunications Act, satisfies the requirements established by the legislation of the Republic of Bulgaria.**
- 2. The auction conduct procedure was made public in advance and was regulated by statutory instruments. All participants in the auction had sufficient time and genuine opportunities to familiarise themselves with the terms and conditions of the auction, and the body pursuant to Article 45 of the Telecommunications Act provided, to the extent practicable, the necessary clarifications in conformity with Council of Ministers Decision No.693 dated 25 October 2000.**
- 3. No discriminatory restrictions were found on the admission or entry in the bidding during the course of the procedure on grounds of nationality, capitalisation etc.**

**The ineligibility of off-shore companies and of incumbent GSM operators on the territory of the Republic of Bulgaria is reasoned and fair with a view to the preset conditions to seek a strategic investor as a GSM operator, as well as with the case law of the European Court of Justice regarding the organisation and conduct of international telecommunication auctions, which was reviewed by the team of Transparency International.**

- 4. The auction commission strictly adhered to the procedure as regulated and announced in advance, and did not admit preferential treatment of any of the participants.**
- 5. Political or corporate interventions materially affecting the choice of the GSM operator were not established whether before, during or after the procedure.**
- 6. The legal framework of the auction lacks an express anti-collusion clause. Such prohibitions should have been drafted and explained both at the time of submission of the documents for entry and at the time of qualification of applicants. The documents presented do not show whether the applicants for entry in the auction had presented declarations on possible connections with other enterprises and consortia, on their mutual non-affiliation and on non-disclosure of their bidding strategies. During the course of the auction event proper, the representatives of the four companies were allocated adjacent offices for preparation and participation in the successive bidding session. They used the same lobby, refreshment bar and electronic consoles. In this context, the extremely fast withdrawal of two of the participants could possibly be seen as indicative of an arrangement or another type of collusive behaviour in the auction.**
- 7. It is recommendable that in future members of the public and of the**

media be provided with broader opportunities to exercise direct public control during the course of conduct of public auctions regulated by the national legislation of the Republic of Bulgaria.

When an auction is designated open, this presupposes the presence of the local public and journalists not only as providers of public information regarding the auction but during the course of the conduct of the auction event itself (on expressly arranged premises).

A possible inclusion of non-governmental organisation experts in the auction commission, pledged to confidentiality, would also contribute to greater transparency and public confidence in auctions of this kind.

As a result of the observation of the tender procedure for the sale of a second GSM licence in Bulgaria, the Association finds in summary that in the current conditions of economic transition in Bulgaria, the process of revision of telecommunications legislation is making positive progress in terms of enhancement of transparency and internationally required legal compliance and fairness.

This creates a favourable climate for foreign investors desiring to pursue business in this country.

Legislation is being revised in harmony with the requirements set by the European Commission in connection with the ongoing accession negotiations with Bulgaria on the *Telecommunications and Information Technologies* Chapter, facilitating the successful closing of this chapter and the ultimate integration of Bulgaria into the structures of the European Union.