

# PREVENTION AND DETERRENCE OF BID RIGGING: A LOOK FROM THE NEW EU DIRECTIVE ON PUBLIC PROCUREMENT

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*Summary:* 1. Introduction; Part I - 1. The Apparent Pervasiveness of Bid Rigging Despite Increased Enforcement Efforts; 2. Brief Economic Background; 3. Reflections of Economic Theory in Practice; 3.1. Bid rigging in healthcare markets; 3.2. Bid rigging in public works markets; 3.3. Bid rigging in other markets; 4. Preliminary Conclusion; Part II – 1. Tools to Prevent and Deter Bid Rigging in the New Public Procurement Directive; 2. General Measures: “Collusion-Conscious” (and Pro-Competitive) Tender Design; 3. In Particular, the Issue of Division of Contracts into Lots and Its Impact on Collusion; 4. Exclusion of Competition Law Infringers, and Outline of a Proposal for a Fuller Suspension and Debarment System; 5. Conclusion.

## 1. - INTRODUCTION

As a departing point and before entering the analysis of the new EU Directive 2014/24 on public procurement,<sup>1</sup> it is worth stressing that *the effectiveness of public procurement and its ability to contribute to the proper and most efficient carrying on of public interest obligations is conditional upon the existence of competition in two respects or separate dimensions*. One of them has been expressly recognised for a long time by public procurement regulations, which have tried to foster competition within the specific tender by attracting a relatively large number of participants (or, at least, a sufficient number to ensure effective competition for the given public contract) and by preventing collusion or bid rigging amongst tenderers. *Public procurement rules protect and promote competition—in this narrow sense—as a means to achieve value for money and to ensure the legitimacy of purchasing decisions*. From this perspective, competition is seen as a tool, as an instrument to allow the public purchaser to obtain the benefits of competitive pressure among (participating) bidders, as well as a key instrument to deter favouritism and other corrupt practices and deviations of power.

However, a subtler and stronger dependence of public procurement on competition in the market exists,<sup>2</sup> but it is implicit and has generally been overlooked by most public procurement

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<sup>1</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65. Most of the considerations made in connection with Directive 2014/24 will be equally or analogously applicable to public procurement conducted under the parallel rules of 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L94/1, and of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L91/243.

<sup>2</sup> Office of Fair Trading (OFT) / •econ, *Assessing the Impact of Public Sector Procurement on Competition* (2004) [available at [oft.gov.uk/shared\\_oft/reports/comp\\_policy/oft742c.pdf](http://oft.gov.uk/shared_oft/reports/comp_policy/oft742c.pdf), last accessed 23 January 2012]. See also OFT, *Competition in mixed markets: ensuring competitive neutrality* (2010) [available at [oft.gov.uk/shared\\_oft/economic\\_research/oft1242.pdf](http://oft.gov.uk/shared_oft/economic_research/oft1242.pdf), last accessed 23 January 2012].

studies.<sup>3</sup> *In order to attain value for money and to work as a proper tool for the public sector, public procurement activities need to take place in competitive markets.*<sup>4</sup> Public procurement rules assume that markets are generally competitive—in the broad sense—or, more simply, take as a given their economic structure and competitive dynamics.<sup>5</sup> The existence of competitive intensity in the market is usually taken for granted, or simply disregarded, in public procurement studies. In general terms, this approach is correct in that public procurement is not specifically designed to prevent distortions of competition between undertakings. However, issues regarding competition in the market are not alien to public procurement,<sup>6</sup> and need to receive further attention and a stronger emphasis<sup>7</sup>—as indeed, recently seems to be the case, both in procurement practice<sup>8</sup> and case law.<sup>9</sup> Hence, the study of the interaction between procurement and competition needs to keep an eye open for potential competitive impacts in a broader setting than each tender in itself: *ie* has to (also) focus on general market dynamics.

Nonetheless, and without forgetting the broader implications of the design of procurement rules for market competition, this paper will focus specifically on the issue of collusion in procurement procedures and, more specifically, on the changes and improvements introduced in new EU Directive 2014/24 on public procurement. More specifically, this paper will try to highlight how bid rigging seems pervasive in the public procurement setting across the European Union, despite increased enforcement and advocacy efforts (a situation that should come as no surprise to economists, but that may still puzzle lawyers) (§II). On the basis of such (anecdotal) evidence—which justifies the additional efforts to design collusion-preventing procurement devices—the paper will then proceed to the analysis of two of the instruments and provisions designed to prevent and deter bid rigging that have been included in the new EU Directive on public procurement: the rules on division of contracts into lots (art 46), and the streamlining of rules controlling the disqualification and exclusion of competition law infringers (art 57) [presenting the arguments that would have justified a more developed suspension and debarment regime in the revised version of the Directive] (§III). Some brief

<sup>3</sup> Exceptionally, the relevance of competition in the market (as protected by competition law) for the proper functioning is stressed by P. A. TREPTE, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation*, Oxford, Oxford University Press, 2004, 57, 61 and 122. See also C MUNRO, *Competition Law and Public Procurement: Two Sides of the Same Coin?*, in *Public Procurement Law Review*, 2006, 352. Compare with J. F. BRISSON, *Les fondements juridiques du droit des marchés publics*, Paris, Imprimerie Nationale, 2004, 25; and O. BLACK, *Conceptual Foundations of Antitrust*, Cambridge, Cambridge University Press, 2005, 9.

<sup>4</sup> The case has been made convincingly by R. D. ANDERSON – W. E. KOVACIC, *Competition Policy and International Trade Liberalisation: Essential Complements to Ensure Good Performance in Public Procurement Markets*, *Public Procurement Law Review*, 2009, 67, 70-2. Similarly, stressing the importance to shield public procurement from anticompetitive market practices, see D. E. BRUNK, *Governmental Procurement: “FAR” from a Competitive Process*, in G. Piga - K. V. Thai (eds. by) *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing*, Boca Raton, PrAcademics Press, 2006, 156.

<sup>5</sup> G. PIGA – K. V. THAI, *The Economics of Public Procurement: Preface*, *Rivista di Politica Economica*, 2006, 3; K. V. THAI, *Public Procurement Re-examined*, in *Journal of Public Procurement*, 2001, 9.

<sup>6</sup> See W. SAUTER – H. SCHEPEL, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts*, Cambridge, Cambridge University Press, 2009, 49. Similarly, S. SIMONE - L. ZANETTINI, *Appalti pubblici e concorrenza*, in L. Fiorentino (ed. by) *Lo Stato compratore. L'acquisto di beni e servizi nelle pubbliche amministrazioni*, Bologna, Il Mulino, 2007, 119.

<sup>7</sup> Similarly, see O. DEKEL, *The Legal Theory of Competitive Bidding for Government Contracts*, in *Public Contract Law Journal*, 2008, 237; B. MUKHOPADHYAY, *Evaluating Public Procurement*, in *Review of Market Integration*, 2011, 21; and P. CHIRULLI, *Public Contracts*, in *International Journal of Public Administration*, 2011, 134.

<sup>8</sup> S. TAYLOR, *The challenge of competitive neutrality in public procurement and competition policy: the U.K. health sector as case study*, in *Competition Policy International*, 2011, 7.

<sup>9</sup> G. S. ØLYKKE, *How does the Court of Justice of the European Union pursue competition concerns in a public procurement context?*, in *Public Procurement Law Review*, 2011, 179.

conclusions will be offered on the current situation regarding prevention and deterrence of bid rigging in the EU public procurement rules (§IV).

## PART I

### 1. - THE APPARENT PERVASIVENESS OF BID RIGGING DESPITE INCREASED ENFORCEMENT EFFORTS

As mentioned in passing, restrictions of competition generated by undertakings participating in public procurement—mainly related to bid rigging—have so far attracted most of the attention as regards the intersection of competition law and public procurement,<sup>10</sup> and economics offers good reasons for this. The analysis of the economic theory and its correlation in actual practice will help us understand better the relevance of developing effective tools to prevent, identify and deter bid rigging in public procurement, and will set the framework for the analysis of the new EU Directive on public procurement that we will attempt later (§III).

### 2. - BRIEF ECONOMIC BACKGROUND

It is necessary to stress that, in and by themselves and due to their very intrinsic characteristics; public procurement rules create a (competitive) environment that facilitates collusion. As clearly stressed by the OECD: “[t]he formal rules governing public procurement can make communication among rivals easier, promoting collusion among bidders. While collusion can emerge in both procurement and «ordinary» markets, procurement regulations may facilitate collusive arrangements”.<sup>11</sup> The fact that public procurement rules increase the likelihood of collusion among bidders has been convincingly proven in economic literature<sup>12</sup> and it is out of question that, under most common market conditions, procurement regulations significantly increase the transparency of the market and facilitate collusion among bidders through repeated interaction.<sup>13</sup> However, this key (economic) finding has not generated as strong a legislative reaction as could have been expected—and most public procurement regulations still contain numerous rules that tend to increase transparency and result in competition-restrictive outcomes (such as bid disclosure, pre-bid meetings, restrictions on the issuance of invitations to participate in bidding processes to a relatively pre-defined or stable

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<sup>10</sup> Indeed, this has been the main focus of international efforts, particularly by the OECD, which has recently published detailed guidelines to help design public procurement regulations to prevent collusion; see OECD, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money*, 2009. See also *ibid*, *Public Procurement: The Role of Competition Authorities in Promoting Competition*, 2007. This is also the focus of recent scholarly studies in this field; for instance, C. CABANES – B. NEVEU, *Droit de la concurrence dans les contrats publics. Pratiques anticoncurrentielles, abus de position dominante, controls et sanctions*, Paris, Le Moniteur, 2008; as well as some practitioners’ guidance, see W. E. KOVACIC, *The Antitrust Government Contracts Handbook*, Chicago, ABA Section of Antitrust Law, 1990.

<sup>11</sup> OECD, *Public Procurement: Role of Competition Authorities*, 2007, 7.

<sup>12</sup> For recent references, see G. L. ALBANO et al, *Preventing Collusion in Public Procurement*, in N. Dimitri et al (eds. by), *Handbook of Procurement*, Cambridge, Cambridge University Press, 2006, 347.

<sup>13</sup> For a theoretical framework see R. P. MCAFEE – J. McMILLAN, *Incentives in Government Contracting*, Toronto, Toronto University Press, 1987, and F. NAEGELEN – M. MOUGEOT, *Les marchés publics: règles, stratégies, politiques*, Paris, Economica, 1993. For recent references, see W. E. KOVACIC et al, *Bidding Rings and the Design of Anti-Collusive Measures for Auctions and Procurements*, in N. Dimitri et al (eds), *Handbook of Procurement*, Cambridge, Cambridge University Press, 2006, 381. See also S. TANAKA - S. HAYASHI, *Bid-Rigging in Japanese Public Procurement*, in K. V. Thai (ed. by), *Towards New Horizons in Public Procurement*, Boca Raton, PrAcademics Press, 2010, 150.

group of firms, etc.).<sup>14</sup> In the end, given that public procurement regulations are likely to facilitate collusion amongst bidders, it is not surprising that a large number of cartel cases prosecuted in recent years have taken place in public procurement settings,<sup>15</sup> and that the main focus of the (still limited) antitrust enforcement efforts in the public procurement setting lies with bid rigging and collusion amongst bidders, as the actual case law shows. In the following section, we will look at some cases that clearly indicate that economic theory translates into practice and, consequently, why preventing and deterring bid rigging should rank very high in the list of goals of public procurement regulations and, consequently, attract substantial attention in current procurement regulation reform processes.

### 3. - REFLECTIONS OF ECONOMIC THEORY IN PRACTICE

As already indicated, it is worth highlighting that most competition decisions related to public procurement involve bid rigging by tenderers—which may take several forms, such as bid rotation, submission of cover bids, bid hold-up, submission of excessive bids to force an increase in the expenditure ceiling estimated by the tendering authority, etc. According to the OECD, the several types of bid rigging schemes can be conceptualised, so that a general description of each of these practices could be the following:

*“Cover bidding.* Cover (also called complementary, courtesy, token, or symbolic) bidding is the most frequent way in which bid-rigging schemes are implemented. It occurs when individuals or firms agree to submit bids that involve at least one of the following: (1) a competitor agrees to submit a bid that is higher than the bid of the designated winner, (2) a competitor submits a bid that is known to be too high to be accepted, or (3) a competitor submits a bid that contains special terms that are known to be unacceptable to the purchaser. Cover bidding is designed to give the appearance of genuine competition.

*Bid suppression.* Bid-suppression schemes involve agreements among competitors in which one or more companies agree to refrain from bidding or to withdraw a previously submitted bid so that the designated winner’s bid will be accepted. In essence, bid suppression means that a company does not submit a bid for final consideration.

*Bid rotation.* In bid-rotation schemes, conspiring firms continue to bid, but they agree to take turns being the winning (i.e., lowest qualifying) bidder. The way in which bid-rotation agreements are implemented can vary. For example, conspirators might choose to allocate approximately equal monetary values from a certain group of contracts to each firm or to allocate volumes that correspond to the size of each company.

*Market allocation.* Competitors carve up the market and agree not to compete for certain customers or in certain geographic areas. Competing firms may, for example, allocate specific customers or types of customers to different firms, so that competitors will not bid (or will submit only a cover bid) on contracts offered by a

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<sup>14</sup> However, some contracting authorities do adopt certain anti-collusion measures when designing their procurement processes; see L. CARPINETI et al, *The Variety of Procurement Practice: Evidence from Public Procurement*, in N. Dimitri et al (eds), *Handbook of Procurement*, Cambridge, Cambridge University Press, 2006, 14.

<sup>15</sup> K. L. HABERBUSH, *Limiting the Government’s Exposure to Bid Rigging Schemes: A Critical Look at the Sealed Bidding Regime*, in *Public Contract Law Journal*, 2000–2001, 97, 98; and R. D. ANDERSON - W. E. KOVACIC, *Competition Policy and International Trade Liberalisation*, *cit.*, 67. It will also be relevant to see whether public enforcement can be coupled with a growing trend of private enforcement of competition rules in the area of public procurement; see M. MACI, *Private Enforcement in Bid-Rigging Cases in The European Union*, in *European Competition Journal*, 2012, 211. In general, for recent discussion of these issues, see the videotaping of an interesting exposition by M. CARPAGNANO, *Profili antitrust: I fenomeni di collusione nella partecipazione alle gare pubbliche*, in *Seminari di specializzazione: ‘Il bene concorrenza e le tutele predisposte dall’ordinamento nelle gare pubbliche’* [available at [jus.unitn.it/services/arc/2012/0120/home.html?goback=%2Egde\\_3797103\\_member\\_110211178#a4](http://jus.unitn.it/services/arc/2012/0120/home.html?goback=%2Egde_3797103_member_110211178#a4), last visited 7 May 2012].

certain class of potential customers which are allocated to a specific firm. In return, that competitor will not competitively bid to a designated group of customers allocated to other firms in the agreement”.<sup>16</sup>

As we shall see shortly, anecdotal evidence shows that collusion—in any of the abovementioned forms, or in hybrid manner—is pervasive in almost all economic sectors where procurement takes place, but maybe has a special relevance in markets where the public buyer is the main or sole buyer, such as roads and other public works,<sup>17</sup> healthcare markets, education, environmental protection, or defence markets—where both EU and national competition authorities have been very active and aggressive recently.<sup>18</sup> Some of these cases, however, still show a need for further economic analysis (or a better understanding of the mechanics of bid rigging) on the part not so much of competition authorities, but of review bodies and courts.

### 3.1. - Bid rigging in healthcare markets

On 9 June 2011 the Moldovan Competition Authority (ANPC) established the existence of bid rigging practices at the public tenders organized by the Medicines Agency (AMED) for the purchase of anti-diabetic medicines, since two suppliers of pharmaceuticals were submitting their bids with identical prices.<sup>19</sup> In this particular case, though, it is worth stressing that collusion was being strengthened by the contracting authority (AMED) by selecting both firms as winning bidders and dividing the purchase volumes equally between them, thus leading to the elimination of competition—which rather naturally led the ANCP to recommend to refrain from dividing purchase volumes among the bidders submitting identical price offers.

In a similar case, on 10 December 2010 the Portuguese Competition Authority issued a prohibition decision concerning a retail price fixing agreement established between a supplier and a retailer of hospital equipment (automated medicine dispenser), which eliminated price competition between the two companies in public tenders for hospital equipment.<sup>20</sup> Prior to that, on 7 January 2010 the Lisbon Commerce Court upheld a 2008 decision by the Portuguese Competition Authority imposing a € 13.4 million fine on several pharmaceutical companies for participating in a bid rigging cartel concerning public tenders held by hospitals for the purchase of blood glucose monitoring reagents (test strips).<sup>21</sup>

Also in a similar case, in March 2008 the Romanian Competition Council fined a pharmaceutical producer and three distributors for participation into a market-sharing cartel active on the insulin market. In this case, involving an auction within the Diabetic National Program in 2003, the products of the same manufacturer were offered through the three

<sup>16</sup> Indeed, the most common types of bid rigging practices are well described in the OECD, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping Governments to Obtain Best Value for Money* (2009) [available at [oecd.org/dataoecd/27/19/42851044.pdf](http://oecd.org/dataoecd/27/19/42851044.pdf), last visited 7 May 2012].

<sup>17</sup> For a worrying description of the pervasiveness of bid rigging in construction markets all over the world, see OECD, *Policy Roundtable on the Construction Industry* (2008) [available at [oecd.org/dataoecd/32/55/41765075.pdf](http://oecd.org/dataoecd/32/55/41765075.pdf), last visited 4 October 2011].

<sup>18</sup> On the particular relevance of publicly-dominated markets for the analysis of competition impacts of public procurement, see A. SÁNCHEZ GRAELLS, *Public Procurement and the EU Competition Rules*, Oxford, Hart Publishing, 2011, 37-43.

<sup>19</sup> A. SVETLICINI, *The Moldovan Competition Authority finds bid rigging practices in purchases of anti-diabetic medicines (Medicines Agencies)*, in *e-Competitions*, 9 June 2011, n. 37384.

<sup>20</sup> ECN Brief, *The Portuguese Competition Authority punishes resale price maintenance affecting hospitals' public tenders*, in *e-Competitions*, 10 December 2010, n. 35733.

<sup>21</sup> M. MENDES PEREIRA - N. CARROLO DOS SANTOS, *The Lisbon Commerce Court confirms decision against bid-rigging cartel by pharmaceutical companies but substantially reduces fines (Abbott, Menarini and Johnson & Johnson)*, in *e-Competitions*, 7 January 2010, n. 30637.

distributors, each authorized to participate with different products, so that they did not compete against each other in the auction.<sup>22</sup>

There are similar cases in almost every jurisdiction,<sup>23</sup> and their incidence may be difficult to lower, particularly in countries where the retail price for pharmaceuticals is set by the public authority and/or where public buyers must disclose their estimates or maximum expense ceilings. However, precisely due to some of these regulatory restrictions, not all cases of apparent bid rigging in the healthcare sector (or in other markets) end up with the imposition of fines since the analysis of the available data may be complicated and requires detailed and careful appraisal. For instance, the Bulgarian Commission for Protection of Competition recently closed a probe into alleged bid rigging among suppliers of pharmaceuticals without establishing an infringement, particularly in regard to the transparency-enhancing effects of the domestic regulatory environment (which imposed price ceilings).<sup>24</sup> Similarly, the Polish authority also dropped a case after thorough analysis of data that, *prima facie*, indicated potential collusion.<sup>25</sup> In this regard, clear rules on the application and validity of proof by presumptions is very much needed, due to the relatively easy misreading of actual procurement data. In this vein, it is interesting to see cases like the judgment of the Spanish Supreme Court of October 2009, where some indications in this respect were advanced.<sup>26</sup> But a rather different approach can be found in the case law of the Paris Court of Appeals, which sets a strict standard of proof for undertakings to inhibit the existence of indicia of collusion in tendering procedures.<sup>27</sup> Hence, some further guidance by the European Court of Justice on the application of the technique of proof by presumptions may be needed (although this is not exclusive of competition enforcement in the procurement setting, but more generally for cartel enforcement).

### 3.2. - Bid rigging in public works markets

In this area, some of the most well-known bid-rigging schemes have taken place. For instance, it has been widely reported that the European Commission fined members of lifts and escalators cartels over € 990 million, since between at least 1995 and 2004 those companies rigged bids for procurement contracts, fixed prices and allocated projects to each other, shared markets and exchanged commercially important and confidential information.<sup>28</sup> It is also well

<sup>22</sup> G. HARAPCEA, *The Romanian Competition Council fines a pharmaceutical producer and three distributors for participation into a market-sharing cartel active on the insulin market (Eli Lilly Export, A&A Medical, Mediplus Exim and Relad Pharma)*, in *e-Competitions*, 12 March 2008, n. 19850.

<sup>23</sup> For instance, regarding Italy, see L. CROCCO, *An Italian administrative Court confirms that a cartel took place in hospital supplies but slashes down fines (Bristol Myers Squibb)*, in *e-Competitions*, 6 June 2008, n. 23296.

<sup>24</sup> D. FESSENKO, *The Bulgarian Commission for Protection of Competition closes a probe into alleged bid-rigging among suppliers of pharmaceuticals without establishing an infringement (Alta Pharmaceuticals, Roche a.o.)*, in *e-Competitions*, 12 December 2010, n. 34785.

<sup>25</sup> See R. GAGO – P. BOROWIEC, *The Polish competition authority finds pharmaceuticals companies and their distributors not guilty of price fixing and market sharing on the EPO medicines market (Johnson & Johnson, Roche)*, in *e-Competitions*, 14 June 2007, n. 14073.

<sup>26</sup> See J. GARCIA-NIETO - H. AJOUIC, *The Spanish Supreme Court provides guidance on the application of the proof by presumptions test in the context of a bid rigging case in the healthcare sector (Amersham Health)*, in *e-Competitions*, 3 October 2009, n. 31175.

<sup>27</sup> C. SAUMON - P. DE MONTALEMBERT, *The Paris Court of Appeal confirms the fines imposed in a collective boycotting case and its strict case law on standard of proof (Defibrillators)*, in *e-Competitions*, 8 April 2009, n. 26442.

<sup>28</sup> E. POST - A. FONT GALARZA - G. CSEREY - R. PLANK, *The European Commission fines cartel in the elevators and escalators sector (Otis, KONE, Schindler and ThyssenKrupp)*, in *e-Competitions*, 21 February 2007, n. 36176.

known that one of the largest cartels ever prosecuted involved the (whole) construction industry in the Netherlands for at least the period 1992-2006, where firms systematically rigged bids by holding meetings prior to tendering for contracts.<sup>29</sup>

The construction sector piles up a number of bid rigging decisions in other jurisdictions, where massive cartel investigations have followed the Dutch example. For instance, in September 2009 the UK Office of Fair Trading (OFT) imposed £ 129.5 million in fines on construction firms for colluding with competitors after finding that the companies concerned were engaged in illegal and anti-competitive bid rigging activities on at least 199 tenders from 2000 to 2006, mainly by means of 'cover pricing'.<sup>30</sup> However, the fines have been substantially lowered by the UK's Competition Appeal Tribunal (CAT),<sup>31</sup> raising some issues on the accuracy and practicality of such massive cartel investigations and the ensuing fines—the most disturbing is, in my opinion, that the CAT found that the OFT wrongly equated cover pricing to bid-rigging or “*traditional cartel practices*” (para 82), stating that “*Its purpose is not (as in a conventional price fixing cartel) to prevent competition by agreeing the price which it is intended the client should pay*” (para 100). These considerations are difficult to understand, since cover pricing is nothing but a mechanism of (indirect) price fixing in tender procedures, as clearly indicated in recent OECD guidelines: “*long-standing bid-rigging arrangements may employ much more elaborate methods of assigning contract winners, monitoring and apportioning bid-rigging gains over a period of months or years. Bid rigging may also include monetary payments by the designated winning bidder to one or more of the conspirators. This so-called compensation payment is sometimes also associated with firms submitting «cover» (higher) bids*”.<sup>32</sup> Therefore, in my opinion, the disconnection between cover pricing and price fixing or pure bid rigging that the CAT tries to delineate just seems wrong. Moreover, the CAT ruling is particularly disturbing because, as already pointed out by one commentator, the “*divergence in attitude over the seriousness of cover pricing between the OFT and the CAT could lead to further reductions in fines*”,<sup>33</sup> and, hence, could significantly reduce deterrence in a sector where it is strongly needed in view of the longstanding anti-competitive practices.

Similarly, although in a smaller scale, in 2004 the Hungarian Competition Authority fined construction companies for bid rigging in Budapest public construction tenders after the documents seized in dawn raids at the premises of large construction companies indicated that several relevant players in the Hungarian construction sector had been involved in bid rigging in a number of large public procurements.<sup>34</sup> Other, similar cases of sanctions imposed to bid riggers by the Hungarian Competition Authority have however recently been quashed due to insufficient proof of collusion under the theory of the single and continuous infringement.<sup>35</sup>

<sup>29</sup> For a comprehensive explanation of this very outstanding case (due, notably, to the enormous amount of undertakings involved), see the site of the Construction Unit at the Dutch Competition Authority [[nma.nl/en/competition/more\\_industries/construction\\_unit/default.aspx](http://nma.nl/en/competition/more_industries/construction_unit/default.aspx), last visited 4 October 2011].

<sup>30</sup> A. LISTA, *The UK Office of Fair Trading imposed £129.5 million in fines on construction firms for colluding with competitors (Construction Industry Cartel)*, in *e-Competitions*, 22 September 2009, n. 31546.

<sup>31</sup> A. STEPHAN, *The UK Competition Appeal Tribunal cuts fines in the construction cover pricing appeal case (Kier Group and others)*, in *e-Competitions*, 11 March 2011, n. 38585.

<sup>32</sup> OECD, *Guidelines for Fighting Bid Rigging in Public Procurement. Helping governments to obtain best value for money* (2009) [available at [oecd.org/dataoecd/27/19/42851044.pdf](http://oecd.org/dataoecd/27/19/42851044.pdf), last visited 4 October 2011].

<sup>33</sup> S. BARNES, *The UK Competition Appeal Tribunal holds its decision in the construction cover pricing appeal case (Kier Group and others)*, in *e-Competitions*, 11 March 2011, n. 35158.

<sup>34</sup> G. BÁTHORY, *The Hungarian Competition Authority fined construction companies for bid rigging in Budapest public construction tenders (Alterra)*, in *e-Competitions*, 18 March 2004, n. 21785.

<sup>35</sup> Z. NÉMETH, *A Hungarian Court annuls the decision of the Competition Office having found guilty construction companies of bid rigging taking into account lack of proof of single and continuous infringement (Heves – Nógrád county tenders)*, in *e-Competitions*, 19 April 2011, n. 35772.

Even if the companies had been held by the authority to be involved in at least 11 instances of bid rigging between 2002 and 2006, the reviewing court found that not all of them had been involved in every instance (since some of them did not participate in some of the tenders) and, hence, could not be charged and sanctioned under the theory of the single and continuous infringement—therefore, mandating the reopening of the case and the setting of new fines in view of the data supporting actual involvement by each company. This ruling is also troubling, in my view, due the fact that *bid hold-up* is a text book example of bid rigging practice, as also indicated in OECD guidelines: “*Bid-rigging schemes often include mechanisms to apportion and distribute the additional profits obtained as a result of the higher final contracted price among the conspirators. For example, competitors who agree not to bid or to submit a losing bid may receive subcontracts or supply contracts from the designated winning bidder in order to divide the proceeds from the illegally obtained higher priced bid among them*”.<sup>36</sup> Hence, requiring proof of actual participation (*ie* submission of a bid) generates a safe harbour for some of the companies involved in this type of collusion.

### 3.3. - Bid rigging in other markets

Recent decisions regarding bid rigging in other procurement markets are also worth noting, particularly in those jurisdictions where bid rigging is a criminal offence, such as Germany. Recently, in July 2011, the German Federal Cartel Office imposed fines on manufacturers of fire fighting vehicles and turntable ladders that had been rigging bids for a rather lengthy time period of around 10 years.<sup>37</sup> In this case, the colluding undertakings used the external help of an independent accountant (resembling other cases of illegal exchanges of information, such as the well-known *John Deere* case law),<sup>38</sup> which may raise awareness on the part of competition authorities as to new trends in bid rigging practices.

Not only markets for supplies or works are affected by bid rigging through exchange of information. Services markets have also been the object of recent decisions. For instance, the French Competition Authority fined 14 companies with almost € 10 million for having shared almost all public markets for the restoration of historic monuments. In this case, undertakings organized «roundtables» where they divided the regional restoration building markets in view of the annual schedule prepared and published by the relevant contracting authority. In this case, it is plain to see that an excessive transparency on the part of the contracting authority made collusion simple and easy to monitor. Companies also used cover bids for outside regions where they placed bids for contracts in order to ‘inflate numbers’ in the appearance of high levels of competition and then exchanged their services.<sup>39</sup>

Shortly after this and also in the services industry, in its decision of 24 February 2011, the French Competition Authority considered that four companies had concluded anticompetitive arrangements between 2005 and 2006 by fixing their prices to respond to procurements launched in the painting services sector for naval equipment and engineering structures, which

<sup>36</sup> OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*.

<sup>37</sup> J. BAIER, *The German Federal Cartel Office imposes fines on manufacturers of firefighting vehicles and turntable ladders*, 27 February 2011, e-Competitions, n. 38335.

<sup>38</sup> On the ECJ case law related to information exchange, see C. ROQUES, *L'échange d'informations en droit communautaire de la concurrence: Degré d'incertitude et jeu répété*, in *Concurrences*, N° 3-2009, n. 26897.

<sup>39</sup> M. PUJDAK – A. DHALIWAL, *The French competition authority fines 14 companies 9 803 590 M € for having shared almost all public markets for the restoration of historic monuments*, in e-Competitions, 26 January 2011, n. 35150.



covered, in particular, the renovation of quays, cranes and locks in several harbours.<sup>40</sup> The French Authority found that the colluding companies had exchanged with each other the prices they intended to offer to the contracting entities and agreed to submit sham bids aimed at creating an impression of genuine competition. It is worth stressing that, in both of the mentioned cases, the French Authority understood the gravity of cover pricing and imposed rather heavy fines—which, however, were reduced in some case in regard of the weak financial situation of some of the companies (an issue that would merit separate analysis).

Almost contemporarily, on 25 March 2011, a Danish District Court convicted two environmental laboratories for bid rigging and imposed fines on each of the two companies and their directors<sup>41</sup>. The court found that the two directors intentionally had coordinated prices and agreed to share the bids between them, so that only one company would submit a bid in each of the two open tenders. The companies tried to defend alleging they had formed a consortium to bid jointly in both tenders, which the court dismissed easily, since there was no proof of consortium and the bids had been presented under the name of only one company in each of the procedures.

#### 4. - PRELIMINARY CONCLUSION

Therefore, in view of the anecdotal evidence offered the abovementioned recent cases, no doubt can be harboured as to the pervasiveness of bid rigging in almost any economic sector where the public buyer sources goods, works and services—therefore, justifying the increasing efforts of competition authorities to prosecute and sanction bid rigging in procurement markets. However, as has also evaporated from some of the judgments by appeal courts in those same cases, *there may be a need for additional backing up of the competition authorities at review level, for which a more economic approach (or a better understanding of the working of collusion in the public procurement setting) may be required*<sup>42</sup>. In any case, the relevance and extension of bid rigging strongly supports not only the prosecution of infringers on the basis of competition law, but also the development of engrained or built-in anti-collusion mechanisms in public procurement law. It is plain to see that any actions aimed at preventing and deterring bid rigging in the arena of public procurement rules and their enforcement will be a valuable complement to any further developments on the competition law enforcement front. Therefore, we will now turn to the analysis of the tools that the European Commission is proposing to introduce or improve in the current revision of the EU Directive on public procurement.

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<sup>40</sup> C. SAUMON – I. FOSSATI-KOTZ, *The French Competition Authority fines four companies for bid rigging in the painting services sector for naval equipment and engineering structures (Philippe Lassarat, Prezioso-Technilor, Grivetto, Sorespi Bretagne)*, in *e-Competitions*, 24 February 2011, n. 35148.

<sup>41</sup> J. BORUM, *A Danish court imposes fines on two environmental laboratories and their directors for bid rigging (Environmental Laboratory and Milana)*, in *e-Competitions*, 25 March 2011, n. 35708.

<sup>42</sup> See, amongst others, the insightful analysis of R. C. MARSHAL and L. M. MARX, *The Economics of Collusion. Cartels and Bidding Rings* (Cambridge, MIT Press, 2012). See also S. E. WEISHAAR, *Cartels, Competition and Public Procurement. Law and Economics Approaches to Bid Rigging*, New Horizons in Competition Law and Economics (Cheltenham, Edward Elgar, 2013)

## PART II

## 1. - TOOLS TO PREVENT AND DETER BID RIGGING IN THE NEW PUBLIC PROCUREMENT DIRECTIVE

As has already evaporated from the analysis in Part I, and given that public procurement strongly relies on competitive markets, there is a strong need to ensure that the design of public procurement rules and administrative practices are fit and appropriate to promote competition and, particularly, to avoid instances of bid rigging. This has been recently emphasized (although in still relatively obscure terms) in the framework of the revision of the 2004 EU public procurement rules—which stresses, for instance, that “[w]hilst greater use of repetitive purchasing techniques should have overall positive benefits for [contracting authorities], there are some concerns about market closure and the longer-term access of firms to such tools. This would have to be addressed to ensure transparency and non-discrimination and prevent a restriction of competition”.<sup>43</sup> Indeed, “[t]he first objective [of this revision process] is to increase the efficiency of public spending. This includes on the one hand, the search for best possible procurement outcomes (best value for money). To reach this aim, it is vital to generate the strongest possible competition for public contracts awarded in the internal market. **Bidders must be given the opportunity to compete on a level-playing field and distortions of competition must be avoided. At the same time, it is crucial to increase the efficiency of procurement procedures as such**”.<sup>44</sup> Even if only in relation with centralised procurement, the recitals of the 2011 Proposal for a new Directive on Procurement expressly mentioned the risk of collusion, in the following terms: “... the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises” [recital (20); emphasis added].

Indeed, all this seems to be significantly in line the general trend underlying this latest revision of the EU procurement Directives (together with modernization and procedural simplification). It is worth stressing that **Article 18 of the new Directive 2014/24 on procurement, entitled “Principles of procurement” consolidates the relevance of undistorted competition (or competitive neutrality) by clearly emphasizing that: “The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.”** In my view, this provision agglutinates the pro-competitive orientation present in the EU procurement Directives from their initial design in the 1970s, and brings to light the underlying principle of competition embedded in their 2004 version<sup>45</sup>—which could be defined or phrased in these terms: public procurement rules have to be interpreted and applied in a pro-competitive way, so that they do not hinder, limit, or distort competition. Contracting entities must refrain from implementing any procurement practices that prevent, restrict or distort competition. Therefore, *it seems clear to me that the revision new EU public procurement rules have a clear orientation towards safeguarding (or, at least,*

<sup>43</sup> EU Commission, *Executive Summary of the Impact Assessment Accompanying the Proposal for a Directive on Public Procurement*, SEC(2011) 1586 final [available at [ec.europa.eu/internal\\_market/publicprocurement/docs/modernising\\_rules/SEC2011\\_1586\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/SEC2011_1586_en.pdf), last accessed 23 January 2012].

<sup>44</sup> EU Commission, *Green Paper on the modernization of EU public procurement policy—Towards a more efficient European Procurement Market*, available at [eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:DKEY=556316:EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:DKEY=556316:EN:NOT), last accessed 23 January 2012.

<sup>45</sup> A. SÁNCHEZ GRAELLS, *The Principle of Competition Embedded in EC Public Procurement Directives*, Working Paper, University of Nottingham, 2009, available at [ssrn.com/abstract=1928724](http://ssrn.com/abstract=1928724), last accessed 23 January 2012.

*promoting) competitive neutrality as a booster for enhanced competition and, in the end, increased value for money through better procurement efficiency.* Therefore, it should be expected that the new Directive contains some rules and instruments oriented towards the prevention and deterrence of bid rigging—which we will analyse below.

As I said elsewhere,<sup>46</sup> with the inclusion of Article 18 in the new Directive, it is getting clearer and clearer that market integration in procurement must go hand in hand with promoting and protecting effective competition for public contracts, and the drafting of Article 18 of the new Directive finally overcomes some difficulties in the development of EU procurement rules—which still suffered the problem of being excessively focused on preventing discrimination based on nationality (which has overshadowed other discrimination problems, protectionist policies and competition restrictions and distortions in European public procurement)<sup>47</sup>—although a broader objective of fostering competition on the basis of fair and open access to procurement (not only for bidders from different Member States) can already be identified in Directive 2004/18 and is further reinforced in the new procurement Directive.

The introduction of the general principle of competition must be welcomed as a very positive development in EU public procurement law. Surely, the drafting will generate some enforcement difficulties (particularly in view of the insertion of an element of intention that may complicate the extraction of the proper consequences from the principle). However, in my view, this express recognition of the principle will strengthen the push towards a more competition-oriented public procurement system and, in due course, will boost some of the interpretative proposals that seek to maximise participation in procurement and to minimise the anticompetitive effects of the activities of the public buyer.

## 2. - GENERAL MEASURES: “COLLUSION-CONSCIOUS” (AND PRO-COMPETITIVE) TENDER DESIGN

In general, as can be extracted from the OECD guidelines on the prevention of bid rigging in public procurement, there is a number of measures that contracting authorities can adopt to try to minimise pro-collusive features of their tenders, such as:<sup>48</sup> 1) defining their requirements clearly and avoiding predictability in procurement; 2) designing the tender process to effectively reduce communication among bidders; 3) carefully choosing evaluation and award criteria; or 4) raising staff awareness about the risks of bid rigging in procurement. Even if it is true that the EU Directives do not contain specific requirements in any of these areas, the rules of the Directives allow for contracting authorities to exercise discretion in regard to all those factors—and, consequently, I think it is safe to assume that the legal framework is well aligned for the design of “collusion-conscious” tender procedures. In this regard, the inclusion of the general principle of competition in Article 18 of the new Directive should raise awareness of contracting authorities on competition implications of procurement rules and tender documents and decisions, and should spur the development of a more competition-oriented public procurement practice.

<sup>46</sup> A. SÁNCHEZ GRAELLS, *Are the Procurement Rules a Barrier for Cross-Border Trade within the European Market? A View on Proposals to Lower that Barrier and Spur Growth*, in C. Tvarnø, G. S. Ølykke & C. Risvig Hansen, *EU Public Procurement: Modernisation, Growth and Innovation*, Copenhagen, DJØF, 2012, 107-133, available at [ssrn.com/abstract=1986114](http://ssrn.com/abstract=1986114), accessed 5 November 2012.

<sup>47</sup> A. SÁNCHEZ GRAELLS, *Public Procurement and the EU Competition Rules*, Oxford, Hart Publishing, 2011, 108-110 and 212-219.

<sup>48</sup> OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*.

### 3. - IN PARTICULAR, THE ISSUE OF DIVISION OF CONTRACTS INTO LOTS AND ITS IMPACT ON COLLUSION

One of the aspects that can have a major impact on collusion incentives **is the potential division of the contractual object into lots**. Under their 2004 version, EU public procurement Directives regulated neither the division of contracts into lots, nor the bundling of those lots or the aggregation of contracts by the public buyer. The only rules regarding division of contracts into lots aimed at establishing specific criteria for the calculation of the value of the tendered contracts for the purpose of determining the applicability of the EU public procurement regime (art 9 dir 2004/18)—and, more specifically, with the purpose of preventing the circumvention of EU rules by the artificial division of contracts into lots whose value remained below the thresholds that triggered their application.<sup>49</sup> Other than that, reference to the division of contracts into lots, their bundling or aggregation was only made in relation to contract notices—which, where the contracts were subdivided into lots, must indicate ‘*the possibility of tendering for one, for several or for all the lots*’ (Annex VII A of Directive 2004/18).

Therefore, Member States currently seemed to hold substantial discretion to set domestic public procurement rules on the division of contracts into lots, the bundling or aggregation of lots and contracts to be tendered together, the establishment of rules allowing or not for multiple and/or conditional tendering for different lots in a given tender procedure, etc. However, as mentioned already, it should be stressed that the bundling of requirements into a single contract or the division of that same contractual object into several lots, as well as the rules imposing the minimum or maximum number of lots a single tenderer can bid for, allowing or excluding conditional or ‘package’ bidding and so on, can generate significant effects on competition for those contracts and in the market concerned.<sup>50</sup>

Indeed, the bundling of independent requirements into a single contract (or the aggregation of otherwise independent contracts) by one or several public buyers may restrict the number of potential bidders and, therefore, generate anticompetitive effects,<sup>51</sup> and alter the structure of the markets.<sup>52</sup> **Put otherwise, dividing contracts into several lots may in most instances increase competition,<sup>53</sup> not only for the specific public contract but also for future contracts,<sup>54</sup>** and in more general terms, in the market from which the public buyer is procuring goods and services.

<sup>49</sup> This has been an issue that has generated substantial litigation, even if the treatment of the division of contracts into lots for jurisdictional purposes in the EU directives is relatively straightforward. See ECJ, Case C-323/96 *Commission v Belgium* [1998] ECR I-5063; ECJ, Case C-16/98 *Commission v France* [2000] ECR I-675; ECJ, Case C-385/02 *Commission v Italy* [2004] ECR I-8121; ECJ, Case C-241/06 *Lämmerzahl* [2007] ECR I-8415; and ECJ, Case C-412/04 *Commission v Italy* [2008] ECR I-619.

<sup>50</sup> For a review of bundling and its effect on competition in the US, see D. D. PANGBURN, *The Impact of Contract Bundling and Variable-Quantity Contracts on Competition and Small Business*, in *Public Contract Law Journal*, 1995-1996, 69; I. AKYUZ, *Bundling into the Millenium: Analyzing the Current State of Contract Bundling*, *Public Contract Law Journal*, 2000-2001, 123.

<sup>51</sup> See J.-Y. CHEROT, *Droit public économique*, Paris, Economica, 2nd edn, 2007, 728. For a position against contract aggregation see E. S. SAVAS, *Privatization and Public-Private Partnerships*, New York, Chatham House, 2000, 186. See also OFT, *Assessing the Impact of Public Sector Procurement on Competition*, 2004, 16-20 and 110-125.

<sup>52</sup> At least in those cases where bundling of different goods or services induces vertical integration amongst previously independent public contractors; see OFT, *Assessing the Impact of Public Sector Procurement on Competition*, 2004, 89-91 and 118.

<sup>53</sup> R. P. MCAFEE – J. MCMILLAN, *Incentives in Government Contracting*, *cit.*, 57-60; and V. GRIMM et al, *Division into Lots and Competition in Procurement*, in N Dimitri et al (eds. by), *Handbook of Procurement*, Cambridge, Cambridge University Press, 2006, 168 and 175.

<sup>54</sup> L. CARPINETI et al, *The Variety of Procurement Practice: Evidence from Public Procurement*, in N Dimitri et al (eds. by), *Handbook of Procurement*, Cambridge, Cambridge University Press, 2006, 14 and 23-24.

The (sub)division of contracts into lots can particularly promote participation by SMEs<sup>55</sup>—thereby broadening competition to the benefit of contracting authorities, as well as reducing the need to resort to more restrictive ‘secondary policies’ aimed at encouraging SME participation (such as set-asides). Therefore, in general terms, dividing contracts into lots or avoiding the aggregation of otherwise independent requirements into a single contract can have significant pro-competitive effects both on the tender and the market.

Nonetheless, *the division of contracts into lots also presents some difficulties or undesirable effects and can generate some additional costs.*<sup>56</sup> Firstly, division of a given contract into lots may not be feasible in the light of the respective works, supplies and services. Therefore, rules regulating the division of contracts into lots should allow for sufficient flexibility so as not to artificially impose the fractioning of the contractual object where it is technically or economically unfeasible, or where it would substantially impair the effectiveness of the procurement process or raise the procurement costs disproportionately. On the other hand, public procurement rules should restrict the ability of contracting authorities to artificially bundle or aggregate otherwise independent needs or requirements if doing so generates a competitive distortion—*ie* if it excludes potential tenderers with a more limited capacity of supply, not integrated vertically, or otherwise not able to meet the bundled requirements, while they would be able to meet some of the requirements if unbundled or not aggregated. Therefore, public procurement rules should encourage lot division, unless it proves to be inadequate or disproportionate to the nature and amount of works, supplies and services concerned.

Secondly, *economic theory has stressed that the division of the contract into lots might yield pro- or anti-competitive results depending on the relationship between the number of lots and the number of interested bidders.* One of the potentially negative effects of the division of the contract into lots is the facilitation of collusion.<sup>57</sup> Therefore, setting a number of lots that generates difficulties for coordination and allocation of lots amongst potentially colluding tenderers is highly desirable.<sup>58</sup> In this regard, economic theory seems to provide two general criteria: *the number of lots should be smaller than the expected number of participants (so that the impossibility of allocating lots to all interested tenderers diminishes the stability of collusion and forces it to spread over several tenders, thereby increasing the likelihood of detection), and the number of lots should exceed the number of incumbent contracts by at least one (implicitly reserving at least the additional lot for a new entrant or new contractor)*<sup>59</sup>. Therefore, it also seems undesirable to adopt rigid rules setting a specific number of lots into which the contract should be automatically divided, since it could easily fall outside the desirable range for specific contracts and tendering procedures.

<sup>55</sup> See Commission staff working document—European code of best practices facilitating access by SMEs to public procurement contracts [SEC(2008) 2193] at 6-7. Also C. BOVIS, *EC Public Procurement Law*, London, Longman, 1997, 117; L. CARPINETI et al, *The Variety of Procurement Practice*, *cit.*, 23-24; and M. BURGI, *Small and Medium-Sized Enterprises and Procurement Law—European Legal Framework and German Experiences*, in *Public Procurement Law Review*, 2007, 284 and 293-4.

<sup>56</sup> See R. P. MCAFEE – J. MCMILLAN, *Incentives in Government Contracting*, *cit.*, 57-60.

<sup>57</sup> Division of contracts into lots allows for accommodation; P. R. MILGROM, *Putting Auction Theory to Work*, Cambridge, Cambridge University Press, 2004, 234-239; and increasing the frequency of bidding increases the likelihood of collusion (*ie* more smaller tenders, or more tenders divided into lots, might give rise to increased opportunities for collusion); see OECD, *Competition in Bidding Markets* (2006) 35. See also V. GRIMM et al, *Division into Lots and Competition in Procurement*, *cit.*, 168.

<sup>58</sup> See OECD, *Guidelines for Fighting Bid Rigging in Public Procurement*, 2009, 4.

<sup>59</sup> See V. GRIMM et al, *Division into Lots and Competition in Procurement*, *cit.*, 168-169; and K. BINMORE – P. KLEMPERER, *The Biggest Auction Ever: The Sale of the British 3G Telecom Licenses*, *Economic Journal*, 2002, C74.

Finally, another important issue in the design of rules regarding lot division is to determine whether bidders can engage in multiple or ‘package’ bidding—and, if so, what are the minimum and maximum number of lots for which they can bid—and if conditional bidding is allowed, thus permitting bidders to offer varying conditions dependent upon the number and mix of lots awarded to them. In this regard, economic theory again stresses the importance of setting flexible rules that allow for a trade-off between fostering competition by smaller bidders and allowing larger bidders to exploit economies of scale, as well as for independent decisions to be made by tenderers—since multiple or package bidding will encourage bidders to submit more competitive offers for given packages than they would for independent lots or for all the lots.<sup>60</sup> In this regard, it has been stressed that contracting authorities should not limit the number of lots tenderers can bid for in a way which would impair the conditions for fair competition,<sup>61</sup> with maybe the only restriction of setting a relatively low maximum number of lots that a single bidder can be awarded at one time<sup>62</sup> (which constitutes a specific case of awarding constraint).<sup>63</sup> Therefore, it seems desirable to adopt rules so that the public buyer can reduce the minimum size of contracts/lots, and thereby maximize the number of smaller suppliers otherwise excluded, without hindering the ability of larger suppliers to bid for large sets of contracts in the event of their being characterized by positive complementarities.<sup>64</sup>

To sum up, economic theory seems to support the finding that public procurement rules should be designed so as to encourage the division of contracts into lots whenever this is technically and economically feasible, and to allow the contracting authority to set the specific number of lots according to the circumstances of the tender. Similarly, contracting authorities should be able to restrict the maximum number of lots that a single tenderer can be awarded—if awarding the entire contract to a single contractor can generate a negative impact on competition; and particularly when ensuring that one or more lots are available for non-incumbent contractors is relevant to preventing distortions of competition in future contracts and/or in the market concerned. Finally, conditional and ‘package’ bidding should be allowed, in order to minimise the potential inefficiencies that lot division could generate.

The general criterion, in my view, should then be that in the exercise of this discretion as regards the division or aggregation of requirements, the fixing of the number of lots tendered, and the rules for conditional and ‘package’ bidding, contracting authorities must ensure that competition in the market is not distorted and, where possible and feasible, promote competition for the contract—particularly by avoiding the configuration of contracts which result in potentially interested competitors being excluded. As a default rule, division into a large number of lots will be preferable to a division into an insufficient number of exceedingly large lots, since tenderers could compensate for such an ‘excessive fragmentation’ of the object

<sup>60</sup> N DIMITRI et al, *Multi-Contract Tendering Procedures and Package Bidding in Procurement* in *ibid* (eds. by), *Handbook of Procurement*, Cambridge, Cambridge University Press, 2006, 193, 194-215. Basically, the flexibility advanced tries to avoid second-guessing by the public buyer on the value of the lots or bundles, which the bidders are prepared to appraise independently. On the issue of the different values of bundles and its effect on competition, see M. M. LINTHORST et al, *Buying Bundles: The Effects of Bundle Attributes on the Value of Bundling*, in G Piga and KV Thai (eds. by) *International Public Procurement Conference Proceedings—Enhancing Best Practices in Public Procurement*, 2008, 513.

<sup>61</sup> EU Commission, staff working document, *European code of best practices facilitating access by SMEs to public procurement contracts*, SEC(2008) 2193, 6-7.

<sup>62</sup> E. S. SAVAS, *Privatization and Public-Private Partnerships*, *cit.*, 186.

<sup>63</sup> See L. CARPINETI et al, *The Variety of Procurement Practice*, *cit.*, 36.

<sup>64</sup> N. DIMITRI et al, *Multi-Contract Tendering Procedures and Package Bidding in Procurement*, *cit.*, 215. This option might not be optimal in all types of (dynamic) auctions, though (*ibid* at 206); and also L. M. AUSUBEL – P. CRAMTON, *Dynamic Auctions in Procurement*, in N. Dimitri et al (eds), *Handbook of Procurement*, Cambridge, Cambridge University Press, 2006, 220 and 226-227.

of the contract by submitting bundled offers—while an insufficient division of the object of the contract cannot be compensated by tenderers submitting partial offers or offers for amounts smaller than the object of the tender (as those bids would be considered non-compliant and, hence, rejected).

Arguably, in order to be effective, the rules and decisions on lot division will need to be complemented with clear award criteria as regards the comparability of offers for a different number of lots, as well as with rules applicable in case the offers submitted do not cover all the lots tendered. In this case, asking bidders to submit offers for the entire contract, for each individual lot and for the packages of lots that they would like to be awarded (with different prices and conditions) would arguably eliminate all the benefits of lot division, since tenderers that could not bid for the entire contract (even under less favourable conditions than they could offer for a given lot or group of lots) would be excluded anyway. Therefore, a preferable rule seems to be to allow the submission of bids for independent or grouped lots, without mandatory requirements regarding the entire contractual object. In case one or various lots could not be covered in the initial tendering, the contracting authority could then engage in re-tendering the pending lots by following a subsequent negotiated procedure with all the participating tenderers [by analogy with art 31(1)(a) dir 2004/18 and now art 32(2)(a) dir 2014/24], or a new open or restricted procedure, depending on the circumstances. Under exceptional circumstances, the option should also be available to the contracting authority not to award any of the lots for which it has received offers if it is clear that this would jeopardize the effectiveness of the follow-up tenders for the remaining lots—which should then be retendered in a single contract. However, if the design of the lots was properly conducted in the first place—*ie* if lots had been designed according to sensible functional and economic criteria, and an effort had been made to ensure their balance—this situation should be largely marginal.

Therefore, as a preliminary conclusion, in my opinion, contracting authorities should resort to division of contracts into lots whenever it is not unfeasible technically or economically, and should set rules that ensure that, while still giving tenderers the largest possible flexibility to submit package and conditional bids, competition is not distorted by undue contract division or aggregation. Rules on contract division should be complemented and reinforced by consistent award criteria and rules on the retendering of unawarded lots.

These thoughts seem to have a relatively easy accommodation within the *new provisions on division of contracts into lots included in article 46 of the new EU Directive on public procurement*. However, it is worth stressing that the final text is much less prescriptive than initially thought and that Member States have shown a reluctance to accept the more aggressive policy promoted by the European Commission in its initial 2011 proposal, which clearly aimed towards the mandatory division of contract requirements in lots by the adoption of a principle of “divide or explain” for contracts above 500.000 Euro, according to which “Where the contracting authority [...] decides against an award in the form of separate lots, the procurement documents or the individual report [...] shall include an indication of the main reasons for the contracting authority’s decision.” [art 44(1) 2011 Proposal, as amended by the July 2012 Compromise Text<sup>65</sup>]. This would have been in line with the proposal that public procurement rules should encourage lot division, unless it proves to be inadequate or

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<sup>65</sup> Please note that the initial wording of Article 44 of the 2011 Proposal was more oriented towards lot division: “where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons”. Arguably, the July 2012 Compromise text watered down the possibilities for judicial review of such a decision not to split the contract into lots.

disproportionate to the nature and amount of works, supplies and services concerned.<sup>66</sup> Nonetheless, the final wording of article 46 of Directive 2014/24 is more open-ended and leaves it to the discretion of the Member States to create an effective obligation to divide contracts into lots. According to the final wording: ‘1. Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots. Contracting authorities shall, except in respect of contracts whose division has been made mandatory pursuant to paragraph 4 of this Article, provide an indication of the main reasons for their decision not to subdivide into lots, which shall be included in the procurement documents or the individual report referred to in Article 84’. In paragraph 4, it is established that ‘Member States may [...] render] it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law’. It will be interesting to see how Member States decide to shape their domestic policies on mandatory lot division.

Similarly, allowing for the flexibility supported by economic theory, the rest of article 46 of the new EU Directive on public procurement sets sensible rules for contract division into lots. On the one hand, it is proposed that contracting authorities may, even where the possibility to tender for all lots has been indicated, limit the number of lots that may be awarded to a tenderer, provided that the maximum number is stated in the contract notice or in the invitation to confirm interest—that is, article 46(2) of Directive 2014/24 allows for the capping of the total number of lots that one single supplier can be awarded (and this is an awarding constraint recommended by economists). In that case, contracting authorities shall determine and indicate in the procurement documents the objective and non-discriminatory criteria or rules for awarding the different lots where the application of the chosen award criteria would result in the award to one tenderer of more lots than the maximum number.

The new Directive also includes an interesting rule for the evaluation of independent, partial and bundled offers for a contract divided into lots. According to article 46(3) of Directive 2014/24, contracting authorities shall first determine the tenders fulfilling best the award criteria for each individual lot. As a result of the evaluation, though, they may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria are better fulfilled with regard to all the lots covered by that contract (*ie*, in case the bundled offer is superior to the aggregation of offers for single lots, or partial offers in other bundled offers). Indeed, Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined. In any case, in order to prevent manipulation, contracting authorities shall specify the methods they intend to use for such comparison in the procurement documents—which shall be transparent, objective and non-discriminatory.

In general, then, the rules on contract division and tendering for lots included in the proposal for a new EU Directive on public procurement seem well oriented and substantially aligned with economic theory and, consequently, should contribute to prevent collusion in procurement.

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<sup>66</sup> A. SÁNCHEZ GRAELLS, *Public Procurement and the EU Competition Rules*, *cit.*, 286-290.



#### 4. - EXCLUSION OF COMPETITION LAW INFRINGERS, AND OUTLINE OF A PROPOSAL FOR A FULLER SUSPENSION AND DEBARMENT SYSTEM

Another important instrument in the prevention and deterrence of bid rigging in public procurement can be found in the rules controlling the disqualification of competition law offenders (in particular, members of a previously discovered cartel). If contracting authorities could exclude potential tenderers that have breached competition law in previous occasions—either in a particular instance or, more permanently, by suspending or debarring them from future participation—the (financial) interests at stake for any undertaking to participate in bid rigging would raise significantly. In case an effective exclusion, suspension and debarment system is in place, cartelists know that they risk not only competition law prosecution, but also losing all chances to secure public contracts for a significant period of time, or even permanently. That risk of being excluded of a significant tranche of the market (particularly in sectors where public buyers accumulate a significant volume of purchases) seems a powerful tool that has, so far, being used only in a limited manner in EU law. If so, the largeness of the potential (economic) losses should significantly increase the incentive of tenderers to refrain from colluding.<sup>67</sup>

In this regard, it is interesting to see that, as a complement to other measures oriented at reducing red tape and fostering participation by SMEs<sup>68</sup>—an in order to strengthen competition (*ie* to make the competitive tension between bidders more intense)—the new Directive also includes a specific provision that tries to clarify the rules on disqualification of competition law infringers and, consequently, aims to prevent, deter and punish instances of collusion on public procurement.

To be sure, the 2004 EU procurement rules already contained provisions that would allow contracting authorities or entities to disqualify infringers of competition law, given that breaches of competition law should always be considered instances of grave professional misbehaviour [in particular, under art 45(2)(c) and (d) of Directive 2004/18].<sup>69</sup> This seems clearly established in recital 101 of the new Directive: “Contracting authorities should further be given the possibility to exclude economic operators which have proven unreliable, for instance because of violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights”. However, some further clarification and a streamlining of the disqualification procedure would be welcome.

As indicated in the explanatory memorandum of the 2011 Proposal for a new EU Directive, it “contain[ed] a specific provision against illicit behaviour by candidates and tenderers, such as [...] entering into agreements with other participants to manipulate the outcome of the procedure [which] have to be excluded from the procedure. Such illicit activities violate basic principles of European Union and can result in serious distortions of competition”. More specifically, Article 22 of the 2011 Proposal for a new EU Directive required that, at the beginning of the procedure, tenderers “provide a declaration on honour that they have not undertaken and will not undertake to: [...] (b) enter into agreements with other candidates and

<sup>67</sup> Implicitly, identifying similar risks of economic loss that would generate anti-collusion incentives (in that case, entry) see R. P. MCAFEE – J. McMILLAN, *Incentives in Government Contracting*, cit., 21, 111 and 150.

<sup>68</sup> On those measures, see A. SÁNCHEZ GRAELLS, *Are the Procurement Rules a Barrier for Cross-border Trade within the European Market? A view on proposals to lower that barrier and spur growth*, in C. D. Tvarnø, G. S. Ølykke and C. R. Hansen (eds.), *EU Public Procurement. Modernisation, Growth and Innovation*, Copenhagen, DJØF, 2012, 107.

<sup>69</sup> See A. SÁNCHEZ GRAELLS, *Public Procurement and the EU Competition Rules*, cit., 253-255; *contra*, C. BOVIS, *EC Public Procurement: Case Law and Regulation*, Oxford, Oxford University Press, 2006, 16.

*tenderers aimed at distorting competition*”. Further, in accordance with Article 68 of the 2011 Proposal, regulating impediments to award, “[c]ontracting authorities shall not award the contract to the tenderer submitting the best tender where [...] (b) the declaration provided by the tenderer pursuant to Article 22 is false”. Therefore, if the contracting authority became aware of any illicit, anticompetitive behaviour on the part of tenderers, it was required to disqualify them by applying the impediment to award in art 68(b) of the 2011 Proposal. However, I found that solution partial and that it required further thought.

The final text of Directive 2014/24 has suppressed Articles 22 and 68 of the 2011 Proposal and derived the issue to the new drafting of the grounds for the exclusion of tenderers in Article 57. In that regard, it is worth stressing that, according to Article 57(4)(d) “Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: [...] (d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition”. Moreover, it must be highlighted that, according to Article 57(5), “At any time during the procedure, contracting authorities may exclude or may be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4”. Interestingly, Article 57(6) of the new Directive also generates room for self-cleaning actions: “Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure”.

Some of the relevant aspects of the disqualification regime will still need to be designed at national level, though, since Article 55(7) foresees that ‘By law, regulation or administrative provision and having regard to Union law, Member States shall specify the implementing conditions for this Article. They shall, in particular, determine the maximum period of exclusion if no measures as specified in paragraph 6 are taken by the economic operator to demonstrate its reliability. Where the period of exclusion has not been set by final judgment, that period shall not exceed five years from the date of the conviction by final judgment in the cases referred to in paragraph 1 and three years from the date of the relevant event in the cases referred to in paragraph 4’. Overall, the new text overcomes some of the difficulties in the initial disqualification system foreseen in Articles 22 and 68 of the 2011 Proposal.

Indeed, the disqualification system envisaged in arts 22 and 68 of the 2011 Directive fell short from ensuring that infringers of competition law do not participate in public procurement—mainly, due to two considerations. On the one hand, it only allowed for disqualification prior to award of the contract. However, it can be foreseen that most instances of bid rigging will only be discovered later and, maybe even after the execution of the contract is complete (when the remedy of the impediment to award will be absolutely ineffective) (this is remedied by art 57(4) of the new version). On the other hand, it could generate some doubts as to the possibility to apply art 45(2)(c) and (d) [renumbered as art 55(3)(c) and (d) of the 2011 Proposal] in relation with violations of competition that are not connected with the tender at hand (which is now expressly excluded by the wording of Article 57(4)(d), in what is in my opinion a criticisable restriction of the disqualification mechanism). In my view, even if the

new Directive increases legal certainty in some cases, there is still a need for a further developed suspension and debarment system in EU public procurement rules<sup>70</sup>.

Given the optional terms in which Article 57 of the new rules is drafted, such open regulation at EU level can give rise to different regimes across different Member States and, consequently, might facilitate strategic behaviour by infringing undertakings—thereby reducing deterrence. In my view, a stricter and uniform system of suspension and debarment of competition law infringers would contribute to strengthening the pro-competitive orientation of the public procurement system and to limiting privately-created distortions of competition<sup>71</sup>.

From a comparative perspective, it seems important to highlight that the United States' Federal Acquisitions Regulation (US FAR) establishes a clearer regime of suspension and debarment of competition infringers. At the very least, it is remarkable that a '*violation of Federal or State antitrust statutes relating to the submission of offers*' constitutes both a cause for suspension [US FAR 9.407-2(a)(2)] and for debarment [US FAR 9.406-2(a)(2)] of the offending contractor. Thus, the infringer can be suspended for a temporary period pending the completion of investigation and any ensuing legal proceedings [US FAR 9.407-4(a)] and, eventually, debarred (*ie* prevented from participating in all public tenders) for a period commensurate with the seriousness of the cause, and generally of up to three years [US FAR 9.406-4(a)(1)]. The decisions on suspension and debarment are not taken by the contracting authority itself, but by a previously designated suspension and debarment official [US FAR 9.406-3(a) and US FAR 9.407-3(a)]. Generally, debarment will exclude the contractor from all public tenders conducted during its extension, unless it is restricted to certain types of contracts or certain contracting authorities [US FAR 9.406-3(e)(1)(iv) in relation with US FAR 9.406-1(c)]. It is worth noting that suspension and debarment decisions are not meant to punish contractors, but to protect the public interest in the proper functioning of the procurement system [US FAR 9.402(b)].

In a nutshell, the general features of the regime established in the US FAR make it seem superior to the current EU public procurement rules in that the decision on the exclusion of the affected tenderer is not discretionary for the specific contracting authority (which might have a conflict of interest, particularly if the competition infringer is a well-known or an incumbent contractor), but adopted by a previously designated authority within the same agency.

Therefore, in light of the US regime, it is my opinion that it is desirable to strengthen the rules contained in the new Directive by adopting a rule whereby competition infringers could be suspended and/or debarred by an authority different from the contracting authority—and, subject to Member States' internal organization, the best alternative seems to be the competition authority or, eventually, the courts. Suspension and debarment should be triggered particularly by mandatory reporting of competition law breaches, but should also be available as a self-standing sanction in case the investigation is initiated by any other means—particularly, competition authorities should be empowered to adopt debarment decisions as a complement of any other competition sanctions and remedies (such as criminal sentences, fines and damages awards).

Such a regime should apply to all breaches of substantive competition law rules (not only collusion in public procurement processes), unless it can be proven that they are irrelevant in the public procurement setting (which seems unlikely): *ie* they should not be automatically limited to cases of bid rigging, and the (high) burden of proving the irrelevance of the anticompetitive practices in the public procurement setting should rest with the infringers.

<sup>70</sup> A. SÁNCHEZ GRAELLS, *Public Procurement and the EU Competition Rules*, *cit.*, 382-385.

<sup>71</sup> Which, however, would not be without cost; see G. L. ALBANO et al., *Preventing Collusion in Public Procurement*, in N. Dimitri et al. (eds. by), *Handbook of Procurement*, *cit.*, 347-380.

However, in the case of violations of competition law other than collusion in public procurement contracts, the duration and scope of the debarment could be more limited than in the case of the former, and clearly aimed at protecting the public interest in the proper functioning of procurement procedures—*ie* not as an additional or substitutive competition sanction.

An exception to the suspension and debarment regime could be created to avoid reducing disproportionately or completely eliminating competition in highly concentrated markets (US FAR 9.405)<sup>72</sup>—where the exclusion of a potential contractor would render the procurement procedure largely ineffective. However, in these highly exceptional cases, a waiver of suspension or debarment should only be granted at the request of the affected contracting authorities (which should advance sufficient reasons in the public interest associated to the participation of the suspended or debarred tenderer) and, in any case, it should be substituted with an alternative sanction, such as the imposition of substitute fines or a deferral or extension of the debarment period after market conditions allow for the development of competition (if this is plausible).

Moreover, the provisions related to ‘self-cleaning’ included in art 57(6) of the new EU Directive on procurement could help mitigate the effects of suspension or debarment when tenderers actually adopted effective measures to prevent further violations of competition law. In this regard, it should be noted that, under the latter provision, any candidate or tenderer that is in one situation that could trigger exclusion may provide the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion. For this purpose, the candidate or tenderer shall prove that it has compensated any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personal measures that are appropriate to prevent further criminal offences or misconduct. In such cases, contracting authorities shall evaluate the measures taken by the candidates and tenderers taking into account the gravity and particular circumstances of the criminal offence or misconduct; and, where the contracting authority considers the measures to be insufficient, it shall state the reasons for its decision. Therefore, this is an area where the development of effective competition compliance manuals can gain significant relevance in the future.<sup>73</sup>

To sum up, even if the new Directive does improve upon the rules on the exclusion of tenderers for violations of competition law currently included in the EU public procurement directives, the new system can still be smartened up because it grants full discretion to contracting authorities (which may be in a conflict of interest). After briefly considering the system applicable in the US, it seems desirable to prompt Member States to implement the new EU rules by granting the competence to suspend and debar infringers to an authority other than the contracting authority (and, preferably, to the competition authority), and to make suspension and debarment decisions mandatorily enforceable by contracting authorities. Suspension and debarment should not only be triggered by mandatory reports of suspected competition violations, but should also be configured as self-standing competition remedies aimed at

<sup>72</sup> R. E. KRAMER, *Awarding Contracts to Suspended and Debarred Firms: Are Stricter Rules Necessary?*, in *Public Contract Law Journal*, 2004, 539; and J. S. ZUCKER, *The Boeing Suspension: Has Increased Consolidation Tied the United States Department of Defence’s Hands?*, *Public Procurement Law Review*, 2004, 260.

<sup>73</sup> In general, on competition compliance and the adoption of an effective policy (including self-cleaning measures), see the guidance offered by the EU Commission, in [ec.europa.eu/competition/antitrust/compliance/index\\_en.html](http://ec.europa.eu/competition/antitrust/compliance/index_en.html), accessed 7 May 2012, and the Office of Fair Trading, in [oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/](http://oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance/), accessed 7 May 2012.

protecting the public interest in the proper functioning of the procurement system. Limited waivers of the suspension and debarment regime could be introduced to avoid situations in which competition for public contracts might be excessively restricted—subject to adequate substitutive measures.

## 5. - CONCLUSIONS

This contribution has shown how instances of collusion in the public procurement setting are numerous. In view of such rampant bid rigging activities, it is only natural to try to identify measures aimed at making collusion more difficult and to create procurement-specific sanctions for competition law infringers. The analysis conducted here has not been comprehensive, as there are many issues that can be explored as mechanisms aimed at reducing collusion (especially in relation with evaluation processes and award criteria). However, the contribution has focused on two specific tools that I think could make a substantial difference in the prevention and dissuasion of bid rigging.

In that regard, it has first described how the general rules—and, in particular, the rules included in article 46 of the new EU Directive on public procurement—create the appropriate, flexible framework for contracting authorities to design tender procedures in a “collusion-conscious” or pro-competitive manner. To be sure, capacity building, training and market intelligence mechanisms are necessary complements to this legal framework, and the actual adoption of a more competition-oriented procurement practice will crucially depend on how contracting authorities exercise their (increased) discretion—both now and after the revision of the EU procurement rules.

As a complementary mechanism, the paper has then explored the rules on exclusion of competition law infringers and advanced some ideas for the development of a more comprehensive (US-inspired) system of suspension and debarment for cartelists beyond the solutions adopted in the Article 57 of the new Directive—particularly oriented at increasing the (financial) costs of getting involved in instances of *bid rigging*, as well as a mechanism to (indirectly) prevent recidivism in this area. Again, the identification of instances of collusion and the commitment to an actual push for exclusion (suspension, and debarment) of competition law infringers is highly dependent on how contracting authorities exercise their (increased) discretion.

As a general conclusion, hence, I think that it is important to stress that the *OECD guidelines for Fighting Bid Rigging in Public Procurement* contain relevant, practical recommendations for contracting authorities to follow in the design, running and oversight of their procurement procedures—and that their implementation is already possible within the 2004 EU rules on procurement and may be even easier in the future under the new EU Directive 2014/24 on public procurement.